Study on the enforcement of State aid rules and decisions by national courts

Annex 3 – Country reports

Table of Contents

Introduction

This annex contains the following documents for each Member State:

1. A country report;
2. Case summaries of a selected sample of rulings;[1]
3. A list of relevant rulings.[2]

Each country report sets forth the state of play regarding State aid enforcement by national courts in the respective Member State. It contains both general information regarding the relevant courts and procedures, as well as findings based on the case summaries, and assessments of the application of State aid rules.

The case summaries provide information on the selected sample of rulings. Each case summary includes case identifiers, information on the parties, substance and outcome of the case, as well as any other relevant elements of the ruling.

Lastly, the relevant rulings with regard to State aid enforcement are provided for each Member State.[3] For ease of reference, the selected rulings have been highlighted in these lists. Moreover, the rulings have been categorised firstly by type of enforcement (private and public enforcement respectively) and secondly by date (oldest to newest). The remedies provided include both the remedies granted as well as any issues assessment by the court with regard to public enforcement.[4]

Please note that throughout this annex, several well-known and general terms have been abbreviated in order to facilitate readability. These terms are as follows: Treaty of the Functioning of the European Union ('TFEU'), Treaty establishing the European Community ('EC Treaty'), European Union ('EU'), Member States of the European Union ('Member States'), the European Commission ('Commission'), the Court of Justice of the European Union ('CJEU').

[1] A sample of rulings was selected on the basis of their legal relevance and novelty within the respective Member States and at EU level. 'Legal relevance' is described in the Tender Specifications of this Study as: "those rulings which decide on main legal issues of State aid enforcement, mere repetition of settled case-law is to be excluded."
[2] Relevant rulings are defined in the Tender Specifications of this Study as: "those rulings which bring about a significant development of State aid rules and enforcement of those rules either in the Member State or at Union level."
[3] Please note no relevant rulings were identified for Luxembourg.
[4] Please note that the hyperlinks to the rulings were taken out of the lists. These can be found in Annex 2.

1. Austria

1.1 Country report

Name national legal expert

PD Dr Dr Alexander Egger

Date

01/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

In Austria, there are no specialised courts for the enforcement of State aid rules.

Public enforcement cases are dealt with either by the Federal Financial Court or by administrative courts, and at last instance by the Supreme Administrative Court (*Verwaltungsgerichtshof)*. However, there are strict rules on the admissibility of a case before the Supreme Administrative Court.

The administrative courts are constructed according to the so-called '9 + 2 model'. There is a State administrative court for each region (*Land*) and there are two administrative courts for the Federal State (*Federation/Bund*; Republic of Austria). The two administrative courts for the Federal State are the Federal Administrative Court and the Federal Finance Court. The last instance court in administrative cases is the Supreme Administrative Court. Hence, there are two instances of administrative courts in Austria.

In theory, State aid cases can also be dealt with by the Constitutional Court. This is the case when a decision by an administrative court is challenged as a last resort on grounds of constitutional issues.

A description of the procedural framework applicable in public enforcement of State aid rules

There are no special procedural rules for the recovery of State aid.

Therefore, rules of the General Administrative Procedural Act (*Allgemeines Verwaltungsverfahrensgesetz*) apply. According to Section 68(4)(4) of the Act, the authority of next instance is entitled to declare void an administrative act. Such a declaration has no retroactive effect (*ex nunc*).

In cases regarding State aid rules, however, there are two major differences: First, the authority is bound to take such a decision; second, such a decision has an *ex tunc* effect.

Ad hoc legislation is passed by the Parliament only where there is no legislative basis under current law. Similarly, the Parliament can also adopt constitutional amendments to create the legal basis for recovery.

In public enforcement cases, it is difficult for competitors as they are not recognised as a party enjoying *locus standi*. This is due to principles of administrative law according to which only the authority and the (legal) person starting the administrative proceedings are parties to those proceedings. This applies also to review proceedings before administrative courts. With regard to those proceedings, competitors are only third persons. As no specific rules exist for State aid cases, the same rules apply to State aid cases.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The competence for private enforcement lies with the ordinary judiciary, that is, civil courts of all instances.

Rulings delivered by one of the courts of first instance can be appealed against before a court of appeal (the territory of Austria is divided into four zones; the courts of appeal have their seats are in Vienna, Graz, Linz and Innsbruck).

Depending mainly on the amount of money (aid) in dispute, the case can be brought before the Supreme Court of Justice (*Oberster Gerichshof*). However, there are strict rules on the admissibility of a case before the Supreme Court of Justice.

A description of the procedural framework applicable in private enforcement of State aid rules

There are no specific rules for private enforcement. Thus, provisions of civil law apply.

Consequently, the general rules of the Civil Procedural Code (*Zivilprozessordnung*) apply. The rules specify the competence of the courts and determine the procedure *stricto sensu* (*locus standi*, delays, form of written observations, means of proof, hearings, etc.).

Besides, it seems impossible to bring successful action against legislative acts granting State aid that has not been notified. This results from the general case law on public liability, which allows only actions against acts by administrative and judicial organs of last instance (*Amtshaftungsgesetz*). However, legislative acts may be challenged before the Constitutional Court on constitutional grounds. Therefore, in theory, one could argue that an act laying down a State aid regime or granting individual aid violates the Constitution (*i.e.* the principle of equality or proportionality).

Main findings based on the case summaries

Type of action

Apart from rare recovery cases and tax cases, most proceedings concern private enforcement.

In the majority of the cases, the following remedies were sought:

- Suspension of the aid to be granted;
- Declaration that the contested contract is void;
- Repeal of the contested contract;
- Prohibition on acceptance of the aid being granted (e.g. prohibition on the use of the advantage being granted);

- Continuance of the payment of the aid;
- Reversal of a recovery order; or
- Annulment of a decision granting or refusing aid.

Sectors
Nearly all cases before administrative courts concern taxes (*e.g.* Supreme Administrative Court, 10.2.2016 - 2015/15/0001 (AT1)), in particular energy taxes (Supreme Administrative Court, 30.1.2007 - 2004/17/0078; Supreme Administrative Court, 22.8.2012 - 2012/17/0175; several Federal Finance Court rulings).

Many cases stem from privatisation of land or of public undertakings (*e.g.* ruling ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000 (AT2); ruling ECLI:AT:OGH0002:2014:0040OB00209.13H.0325.000 (AT4)). Some cases concern banks (*e.g.* ruling ECLI:AT:OGH0002:2014:0040OB00209.13H.0325.000 (AT4); ruling ECLI:AT:LG00729:2012:RKL0000141), which are to be privatised or are enjoying a State guarantee. One of the selected cases concerns the infrastructure sector (ruling ECLI:AT:OGH0002:2011:0040OB00040.11B.0621.000 (AT3)).

Main actors
The main actors in private enforcement are competitors of aid beneficiaries as plaintiffs, and State aid granting entities or aid beneficiaries as defendants.

In some proceedings, the parties include a State authority and a company having a contract with that State authority.

In recovery proceedings, the plaintiff at first instance is often the aid beneficiary, and at second and last instance, it is the party who lost the case at first instance.

In proceedings before administrative courts, one of the main actors is often the Tax Authority.

Qualitative assessment of the average time of court proceedings

The average duration of proceedings in public enforcement cases and in private enforcement cases is about three years (in a case where there were proceedings for annulment of a Commission decision before the GC and the ECJ: eight years); in case of a reference for a preliminary ruling, the duration is about five years.

According to the website of the Federal Ministry of Justice (*Bundesministerium für Verfassung, Reformen, Deregulierung und Justiz*), the average duration of civil cases in 2016 was six months at the district courts and thirteen months at the regional courts. Around half of the approximately 45,300 disputed civil proceedings at the district courts took less than six months. Only 2.3% of the contested proceedings lasted more than three years.[5]

The Federal Ministry of Justice does not provide similar data for administrative cases. However, according to the website of the Federal Administrative Court, in 2017, the average duration of proceedings in the Federal Administrative Court was 4.6 months.[6]

According to the data from the webpage of the Supreme Court of Justice, in Austria, the average duration of the proceedings is 3.4 months (from the time the case arrives at the Supreme Court of Justice (last instance) until it delivers its final decision).[7] In contrast, the duration of the proceedings under scrutiny was five to six months (Supreme Court of Justice, 21.6.2011 - 4 Ob 40/11b; Supreme Court of Justice, 19.1.2010 - 4 Ob 154/09i) or up to six years (Supreme Court of Justice, 25.3.2014 - 4 Ob 209/13h, including appeal proceedings against a Commission decision).

Against this background it can be said that the duration of State aid cases are not considerably shorter or longer. For instance, in ruling ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000 (AT2), the appeal judgment was issued on 9.7.2009 and the Supreme Court of Justice ruled on 19.1.2010. While it is not clear from the judgment when exactly the case was lodged in the Supreme Court of Justice, given that six months elapsed between the two judgments, the proceedings before the Supreme Court could not have lasted more than six months. Similarly, in the ruling ECLI:AT:OGH0002:2011:0040OB00040.11B.0621.000 (AT3), the appellate court issued its judgment on 19.1.2011 and the Supreme Court of Justice on 21.6.2011. This also means that the proceedings could not have lasted longer than five months.

There are no statistics with regard to the average duration of State aid cases, because there is not even an official complete list of all State aid cases.

The following relevant factors for the duration of court proceedings have been identified:
- Complexity of the case as far as the substance is concerned;
- Necessity of expert opinion (in lower courts proceedings where the court needs technical or economic advice it mandates an independent expert; the elaboration of such a written analysis takes time; in addition, there are organised oral hearings where those experts have to explain and defend the methods and results of their analysis);
- Number of instances involved (or even referred back to first instance);
- Reference for a preliminary ruling (*e.g.* Supreme Administrative Court, 10.2.2016 - 2015/15/0001 (AT1));
- Annulment proceedings before the Union Courts against a Commission decision (in such cases, the civil courts suspend the proceedings and await the outcome of the Union Court's decision; in case there is an appeal against the GC's judgment, it takes even longer); and
- Workload in cases ruled by a single judge in civil courts (delays between start of proceedings and hearing of the case and delays between hearings).

Qualitative assessment of the remedies awarded by national courts

The strict rules on the admissibility of a case before the Supreme Administrative Court as well as before the Supreme Court of Justice, requiring either the admission of a revision by the lower court or fulfilling strict conditions for an extraordinary revision, limit the access to the last instance. Such a revision (final complaint) is admissible only if there is a decisive legal question of essential importance. This is the case in particular when (i) the ruling departs from the case law of the Supreme Administrative Court; (ii) such case law does

[5] https://www.justiz.gv.at/web2013/home/justiz/daten-und-fakten/verfahrensdauer~8ab4a8a422985de30122a93207ad63cc.de.html (last accessed on 4 February 2019).

[6] Österreichischer Verwaltungsgerichtshof, „Tätigkeitsbericht für das Jahr 2017", 2018, p. 5.

[7] http://www.ogh.gv.at/service/fragen-antworten/ (last accessed on 4 February 2019).

not exist; (iii) or the legal question to be resolved has not been answered in a uniform manner by the previous case law of the Supreme Administrative Court.

In principle, both branches of the high judiciary (civil and administrative) are known for their openness in acknowledging the primacy of Union law over national law. This includes granting remedies, even against recovery orders, or against granting State aid. However, these judicial organs limit the remedy to the minimum required and do not award remedies going beyond what is necessary under Union law. Therefore, although they recognise the position of competitors of aid beneficiaries, they avoid significantly changing the Austrian legal tradition. They remain strict in relation to awarding remedies that seek to prohibit activities of State authorities or public undertakings qualified as the party granting State aid on the ground that the conditions under national law (Unfair Competition Act) are not fulfilled (Supreme Court of Justice, 21.6.2011 - 4 Ob 40/11b; Supreme Court of Justice, 25.3.2014 - 4 Ob 209/13h).

This explains the low number of remedies granted. However, the low number is also due to the fact that such remedies are sought in very rare cases. State aid rules, in particular private enforcement with regard to their violation, is an area of law not belonging to the core knowledge of the Austrian legal world. It is still an area for specialists. Therefore, the existence of such remedies is unknown to many.

The reason for the low number is not caused by the lack of legal reasoning on the part of the plaintiffs although they often try to get more than that provided for by the legal order. This may be seen in the practice where all sorts of remedies are requested (most of them alternatively, (see, *e.g.* ruling ECLI:AT:OGH0002:2014:0040OB00209.13H.0325.000 (AT4)), to be awarded at least one of them.

Equally, the lack of jurisprudence of the national courts on remedies cannot be seen as a reason for the low number of remedies, at least in relation to the courts of last instance because they refer even to legal academic writing and the case law of the German Federal Court of Justice (*Bundesgerichtshof*).

Even assuming that lower courts tend to have a more restrictive approach — which is not proven — in the end such cases are brought before the highest instance.

Finally, a State-friendly approach, defending the activities of State authorities or public undertakings, has not been established.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

References to the *acquis* are frequent and concern the following:

- Case law: in all selected rulings of the Supreme Administrative Court and the Supreme Court of Justice, the case law was referred to; the references concern rulings on procedural aspects as well as rulings on the substance (notion of State aid);
- Guidelines: sometimes referred to by the Supreme Administrative Court, less by the civil courts;
- General Block Exemption Regulation (GBER): often referred to by the Supreme Administrative Court (in decisions concerning a reference for a preliminary ruling), once even by the Constitutional Court; and
- *De minimis*: there were some references by the Supreme Administrative Court, less by the Supreme Court of Justice and by the Federal Administrative Court, none by the lower administrative courts.

The conclusions with regard to references for a preliminary ruling:

- The frequency is relatively high with ten references for a preliminary ruling filed since Austria's accession to the EU (five new cases registered between 2007 and 2017); and
- The content of those five references concerned only tax cases, especially energy tax.

Qualitative assessment of any other relevant trends in State aid enforcement

As far as other relevant trends in private enforcement are concerned, it is settled case law (*e.g.* ruling ECLI:AT:OGH0002:2011:0040OB00040.11B.0621.000 (AT3); ruling ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000 (AT2)) that competitors can rely on the Unfair Competition Act. That Act lays down the legal basis for remedies concerning the violation of competition in general. It provides the legal basis even with regard to State aid rules. As the Unfair Competition Act prohibits unfair competition, a competitor of an aid beneficiary may invoke unfair competition because aid was granted and base its claim on the violation of Section 1 of the Act. It is possible to request a decision according to which a potential aid beneficiary is prohibited from accepting State aid and the State is prohibited from granting aid. In this regard, potential competition should be sufficient.

Interim injunctions are possible to withdraw State aid already granted and, in advance, to prevent State aid from being granted.

Besides, the award of damages seems to be possible but subject to strict conditions, especially when demanding damages from an aid beneficiary. For such actions, the aid beneficiary's contribution to the State's activity is required. In theory, the lack of notification of State aid could be regarded as violation of Article 108(3) TFEU. This could be the legal basis for damages. In fact, the Austrian courts have not yet applied that approach (qualify that violation as a violation of protective rights (*Schutzgesetz)*), which has already been taken by German courts (*e.g.* Federal Court, 10.2.2011 - I ZR 136/09), even though the relevant provisions of private law are very similar. In particular, Sections 1295 *et seq*. of the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch* (ABGB)) contain provisions similar to the German Civil Code (*Bürgerliches Gesetzbuch*). Another problem could arise when determining the amount of damages; calculating damages is already very complex in 'normal' litigation cases.

Similar difficulties arise when proving that damage occurred (see ruling ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000 (AT2)) and its amount by means of an action based on the Unfair Competition Act.[8]

The Austrian courts do not declare acts granting State aid void (even if advocated by legal academic writing). This is because nullity of acts granting State aid results directly from

[8] For further information: Rabl Th., Mrvošević, L., "Private enforcement im Beihilferecht: eine Standortbestimmung", *Zeitschrift für Beihilfenrecht: BRZ*, Nr.2, 2018, p. 59, 62 *et seq*.

the violation of Article 108(3) TFEU; therefore, there is no need to obtain another declaration of nullity.

With regard to the nullity of contracts granting State aid, in legal academic writing the prevailing opinion is that such a contract is provisionally invalid until approved by the Commission. Moreover, the prevailing doctrine supports nullity of contracts violating Article 108(3) TFEU; for a rather negative approach see ruling ECLI:AT:OGH0002:2014:0040OB00209.13H.0325.000 (AT4).

Many cases stem from privatisation of land or of public undertakings (*e.g.* ruling ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000 (AT2)).

Finally, the cases considered by courts, both civil and administrative, demonstrate that the courts have become more familiar and regularly refer to case law of the Union Courts and academic writing (mainly well-known commentaries and articles in reviews).

In general, the Austrian courts have become more familiar with State aid issues: procedural and substantive. The quality of decisions has improved, as far as the higher courts are concerned.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

In general, Austria's highest courts deal with the notion of State aid carefully. The challenges are linked to factual aspects rather than to legal reasoning.

As far as the notion of State aid is concerned, the courts openly address that issue referring to State aid rules (i.e. *de minimis*), decisions by the Commission (especially in cases concerning the same State aid regime; Supreme Court of Justice 25.3.2014 - 4 Ob 209/13h; Civil Court Klagenfurt, 27.4.2012 - 27 Cg 113/11p; Supreme Administrative Court, 6.4.2016 - Ro 2015/03/0014 (AT6)), to case law of the Union Courts and to guidelines and doctrine. In some cases, the courts assess whether all criteria are fulfilled or decide that there is no State aid if one condition (*e.g.* selectivity) is not met.

On rare occasions, the courts may still disregard the Commission's written observations in Union Court proceedings as well as the CJEU's ruling and follow instead the Advocate General's opinion (*e.g.* Supreme Administrative Court, 10.2.2016 - 2015/15/0001 (AT1)).

The main difficulty arises when courts are called upon to calculate the amount of aid. Even if problems occur, there is the tendency not to refer such a case for a preliminary ruling as the problem is of an economic nature rather than a difficulty of a legal nature.

Any other relevant comments or findings

In many cases decided by the second instance courts or the Supreme Court of Justice in private enforcement cases, the courts referred the case back to the court of first instance to complete the facts or even to assess the facts legally, in particular, in the light of State aid rules.

As far as public enforcement is concerned, most cases dealt with tax issues, mainly energy tax, and the refund provided for in the energy tax legislation.

Finally, as the number of experts in State aid rules is rather small, private enforcement does not play the role it could do.

1.2 Case summaries

Case summary AT1

Date

08/01/2019

Case identifiers

Member State

Austria

Court which adopted the ruling (national language)

Verwaltungsgerichtshof

Court which adopted the ruling (English)

Supreme Administrative Court

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

German

Hyperlink to ruling

https://www.ris.bka.gv.at/JudikaturEntscheidung.wxe?Abfrage=Vwgh&Dokumentnummer=JWR_2015150001_20160210X06

Case reference

2015/15/0001

Procedural context of the case

The Supreme Administrative Court (Verwaltungsgerichtshof) acted in this case as the court of second instance after the Unabhängiger Finanzsenat (tribunal within the meaning of Article 6 ECHR).

The Supreme Administrative Court, in its ruling of 30 January 2014, 2013/15/0186, made a request for a preliminary ruling to the CJEU.

The CJEU adopted a ruling on 6 October 2015 in the case of Finanzamt Linz v Bundesfinanzgericht (C-66/14).

Type of action

Private enforcement

Delivery date of the ruling

10/02/2016

Language

German

Headnote

In this ruling, the Court underlined that national courts must protect the rights of individuals and prevent public authorities from breaching the prohibition on the implementation of State aid before the adoption of a Commission decision authorising it (the 'standstill obligation').

Parties

Names of the parties to the action

Finanzamt Linz in 4020 Linz, Bahnhofplatz 7

Interested parties to the proceedings were I AG; I GmbH, both in T. (anonymised)

Versus

Unabhängiger Finanzsenat, Außenstelle Linz

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

K - Financial and insurance activities

Company taxation / goodwill amortisation

The type of State aid measure challenged in the court proceedings

Other

A decision of the Unabhangiger Finanzsenat declaring that the depreciation of goodwill had to be extended to holdings in companies that are resident in another Member State.

Substance of the case

Facts and parties' main arguments in the case

According to the order for reference, IFN Beteiligungs GmbH ('IFN') holds 99.71% of the share capital in IFN-Holding AG ('IFN-Holding'), which in turn has majority holdings in a number of companies which have limited or unlimited tax liability. In 2006 and 2007, IFN-Holdings held 100% of the shares of CEE Holding GmbH ('CEE'). In 2005, CEE acquired 100% of the shares in HSF s.r.o. Slowakei ('HSF'), a company established in Slovakia. CEE and HSF, in 2005 and 2006 respectively, became members of a group of companies within the meaning of paragraph 9 of the Law on Corporation Tax of 1988 (Koerpreschaftsteuergesetz, KStG). Following a merger between IFN-Holding and CEE, which took effect on 31 December 2007, IFN Holding assumed all of CEE's rights and obligations in law, including its holding in HSF.

In their corporate tax returns for the years 2006 to 2010, first CEE and subsequently IFN-Holding claimed depreciation of the goodwill in respect of that holding for the purposes of paragraph 9(7) of the Law on Corporation Tax of 1988, equivalent in each case to a thirtieth of the purchase price of the shares (namely, EUR 5.5 million). In an annex to their corporate tax return, they stated that the restriction of the depreciation of goodwill to domestic holdings in resident companies, under paragraph 9(7) of the Law on Corporation Tax of 1988, was at odds with the freedom of establishment and hence contrary to Union law.

In its tax notices, the Finance Office (Finanzamt), as the fiscal authority of first instance, refused to allow depreciation of goodwill on the ground that, under paragraph 9(7) of the Law on Corporation Tax of 1988, only holdings in companies with unlimited tax liability were entitled to depreciation of that nature.

Following actions brought by IFN-Holding and IFN against those notices, the Unabhängiger Finanzsenat, Außenstelle Linz (second instance tax authority), by decision of 16 April 2013, annulled the decision of the Tax Office. The Unabhängiger Finanzsenat considered that the restriction of the depreciation of goodwill to holdings in companies with unlimited tax liability under paragraph 9(7) of the Law on Corporation Tax of 1988 was at odds with the freedom of establishment and could not be justified by any overriding reasons in the general interest. It further considered that, in order to ensure conformity with Union law, the depreciation of goodwill had to be extended to holdings in companies that are resident in another Member State.

The Tax Office appealed against this decision before the court, applying for the annulment of the decision from the Unabhängiger Finanzsenat inter alia due to an alleged violation of State aid rules.

Remedy(ies) sought

Other remedy sought

The annulment of the decision of the higher instance public authority

Outcome of the case

Conclusions adopted by the national court

The Supreme Administrative Court (the 'national court') decided to request a preliminary ruling from the CJEU, asking a series of questions. Inter alia, the national court asked whether the depreciation of goodwill provided for under paragraph 9(7) of the Law on Corporation Tax of 1988 is compatible with Articles 107 TFEU and 108(3) TFEU. The national court considered that the depreciation created an advantage for the beneficiary but questioned whether that advantage must be regarded as favouring certain undertakings or the production of certain goods. More specifically, the national court asked the CJEU whether Article 107 TFEU in conjunction with Article 108(3) TFEU precludes a national measure which, in the context of the taxation of a group of companies, allows for a depreciation of goodwill in the case where a shareholding is acquired in a domestic company, thereby reducing the basis of assessment for tax purposes, and hence the tax burden, whilst at the same time such a depreciation of goodwill on the acquisition of a shareholding was not permissible in other cases of income and corporation tax.

The CJEU held that it was "manifestly clear" that the first question (i.e. whether Article 107 TFEU in conjunction with Article 108(3) TFEU precludes a national measure which, in the context of the taxation of a group of companies, allows for a depreciation of goodwill in the case where a shareholding is acquired in a domestic company, thereby reducing the basis of assessment for tax purposes, and hence the tax burden, whilst at the same time such a depreciation of goodwill on the acquisition of a shareholding was not permissible in other cases of income and corporation tax) bore no relation to the subject-matter of the main proceedings and therefore refused to answer the question. Hence, when rendering its judgment in this case, the national court relied upon the opinion of the Advocate General who provided an answer to the first question.

The Advocate General held that a provision such as the second sentence of paragraph 9(7) of the Law on Corporation Tax of 1988, concerning the amortisation of goodwill in the context of group taxation, cannot, therefore, be classified as aid within the meaning of Article 107(1) TFEU, since it is not selective. The Advocate General held that in the present case, the limitation of goodwill amortisation to the acquisition of domestic shareholdings does not constitute treatment favourable to 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU. More specifically, the Advocate General found that the fact that legal persons alone are able to avail themselves of the amortisation of goodwill whilst natural persons are not, does not constitute selective favourable treatment of legal persons for the purposes of Article 107(1) TFEU. Furthermore, the provision on the amortisation of goodwill at issue here cannot be classified as selective on the ground that the tax advantage is only available to companies that are subject to group taxation.

The CJEU also reiterated that national courts must protect the rights of individuals and prevent public authorities from breaching the prohibition on the implementation of aid before the adoption of a Commission decision authorising it (the 'standstill obligation'). The national court must also take full account of the Community interest. In particular, the national court must avoid taking measures which would only lead to an expansion of the group of beneficiaries. The principle of effectiveness requires all consequences of an infringement of Article 108(3) TFEU to be taken into account.

Following the Advocate General's opinion, the national court did not rule that the goodwill amortisation in question constituted State aid within the meaning of Article 107 TFEU. The Court therefore rejected the appeal and decided upon the costs of the case.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-66/14, Finanzamt Linz v Bundesfinanzgericht, Außenstelle Linz (2015) ECLI:EU:C:2015:661
- C-368/04, Transalpine Olleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644
- C-393/04, and C-41/05, Air Liquide Industries Belgium SA v Ville de Seraing (C-393/04) and Province de Liège (C-41/05) (2006) ECLI:EU:C:2006:403
- C-505/14, Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen (2015) ECLI:EU:C:2015:742
- C-384/07, Wienstrom GmbH v Bundesminister für Wirtschaft und Arbeit (2008) ECLI:EU:C:2008:747
- C-172/03, Wolfgang Heiser v Finanzamt Innsbruck (2005) ECLI:EU:C:2005:130

√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

C-66/14 Finanzamt Linz v Bundesfinanzgericht, Außenstelle Linz (2015) ECLI:EU:C:2015:661 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-66/14)

Any other comments (optional)

No other comments

Case summary AT2

Date

08/01/2019

Case identifiers

Member State

Austria

Court which adopted the ruling (national language)

Der Oberste Gerichtshof

Court which adopted the ruling (English)

Supreme Court of Justice

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

German

Hyperlink to ruling

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20100119_OGH0002_0040OB00154_09I0000_000

Case reference

ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000; 4Ob154/09i

Procedural context of the case

Previous instances:
- Appeal judgment: Court of Appeal (Oberlandesgericht Linz), judgment of 09/07/2009), (GZ 2 R 17/09x-21);
- First instance judgment: Regional Court of Linz (Landesgericht Linz), judgment of 11/12/2008 (GZ 5 Cg 87/08a-16);
- The outcome of the proceedings after the OGH's ruling is not publicly accessible.

Type of action

Private enforcement

Delivery date of the ruling

19/01/2010

Language

German

Headnote

In this ruling, the Court discussed the State aid aspects of privatisation by a public undertaking (shares indirectly held by a region).

Parties

Names of the parties to the action

O***** L*****, Forstwirt, ***** (anonymised); 2. F***** M*****, Landwirt, ***** (anonymised); E***** M*****, Landwirtin, ***** (anonymised); W***** H*****, Landwirt, ***** (anonymised); U***** H*****, Forstwirt, ***** (anonymised)

Versus

Partei L***** GmbH, ***** (anonymised)

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Other

Public undertaking

Sector relating to the State aid argument

O - Public administration and defence; compulsory social security

Privatisation / sale of public land

The type of State aid measure challenged in the court proceedings

Concession/privatisation of State-owned land/property at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The plaintiffs argued that the sale of shares was not carried out according to State aid rules. The plaintiffs were of the opinion that the defendant neither conducted an unconditional bidding procedure offering to sell to the highest bidder nor obtained an independent appraisal report. The plaintiffs had offered EUR 800,000 more than the other bidding consortium, which is why the plaintiffs argued their bid should have been successful. Therefore, the plaintiffs argued that the authorised sale constituted an unlawful State aid measure within the meaning of Article 107(1) TFEU. The plaintiffs further argued that the aid was not notified to the Commission, in breach of Article 108(3) TFEU.

The plaintiffs considered that the infringement of Article 108(3) TFEU should have led to the nullity of the contract of sale. Consequently, the sale itself should have been prohibited. The plaintiffs argued that the defendant had knowingly infringed Union law in two previous cases, leading to further concerns justifying the suspension of the aid sought by the plaintiffs until the Commission decision is issued .

The defendant objected the plaintiffs' arguments saying that the purchase price offered by the regional group was in line with the appraisal report last issued by employees of the Regional Forestry Directorate who were 'independent experts'. The regional consortium to which the contract was awarded was an association of regional farmers, whose existence was secured by the sale offered to them. Moreover, the offer made by this consortium was in line with tourism objectives of the region, while in the case of the offer made by the plaintiffs 'regional acceptance' was not guaranteed. Furthermore, the defendant argued that the activities likely to be carried out by the regional group in the case of acquisition of property did not have a cross-border effect and, therefore, trade between Member States would not be affected in any way by the proposed sale. Furthermore, there was a lack of competition between the regional group and the plaintiffs. The defendant therefore concluded that there was no unlawful aid within the meaning of Article 107(1) TFEU.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid; Other remedy sought (below)

To declare that:
- The planned sale is in violation of Articles 107 and 108 TFEU and of the Commission Communication on State aid elements in sales of land and buildings by public authorities;
- That all acts are void;
- To suspend the granting of aid until such time that the Commission issued a decision on the lawfulness and compatibility of the aid.

Outcome of the case

Conclusions adopted by the national court

The Court decided that the plaintiffs had the legal standing: the plaintiffs had submitted a better offer and consequently had a legal interest in proving that the defendant had infringed mandatory EU competition rules and therefore that the sale was void under the national Civil Code rules.

The proposed sale constituted State aid within the meaning of Article 107(1) TFEU. This term covered not only positive measures, but all measures that lift the burdens that a company would have otherwise had to bear. This includes, in particular, the provision of goods or services at non-market conditions, in particular selling properties below the market price.

Therefore, according to the current state of the procedure, there was no doubt that the regional consortium to which the sale was awarded would benefit from a sale not conforming to market conditions. The 'regional acceptance' cited by the defendant and the "sustainable safeguarding of the existence of twenty-two regional farms" mentioned in the submission of the regional government were not criteria on which the private seller based their decision. The security for small businesses is a typical target of state subsidies. According to their unsubstantiated arguments, the plaintiffs were (also) farmers or foresters. Therefore, it was not apparent why the fundamental rights assessment should be different for them as compared with the members of the regional consortium.

The intended sale was attributable to the Land of Upper Austria (Oberösterreich) and thus a 'State' measure within the meaning of Article 107(1) TFEU.

The prohibition of sale of the forest district until a Commission decision was provided, which was sought in point 2 of the application, referred only to the sale to the regional group, as approved by the Landtag, and not to the sale to any other (possibly market-compliant) conditions.

Finally, the Court ruled that point 3 of the application was too broad. A prohibition order had to be oriented in its scope to the specific violation. The order cannot be applied generally to require lawful behaviour – it needs to be tailored to a specific breach. In the case at hand, the plaintiffs argued the defendant shall be prohibited from any sale that is contrary to the rules on State aid under the Union law. However, the prohibition would have needed to be linked to the actual threat of an infringement, even if expressed in a more general form going beyond the actual intended sale.

The claim aimed at declaring that all acts are void was rejected due to lack of national requirements for such declaratory reliefs.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The outcome of the proceedings after the OGH's ruling is not publicly accessible.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- Obiter dicta in C 6-64, Flaminio Costa v E.N.E.L (1964) ECLI:EU:C:1964:66
- C 120-73, Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz (1973) ECLI:EU:C:1973:152
- Judgment of the Court (First Chamber) of 13 January 2005
- C-174/02, Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën (2005) ECLI:EU:C:2005:10
- C-368/04, Transalpine Olleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644
- C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic (1991) ECLI:EU:C:1991:440
- C-39/94, Syndicat français de l'Express international (SFEI) and others v La Poste and others (1996) ECLI:EU:C:1996:285
- C-261/01 and C-262/01, Belgische Staat v Eugène van Calster and Felix Cleeren (C-261/01) and Openbaar Slachthuis NV (C-262/01) (2003) ECLI:EU:C:2003:571
- C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79
- C-126/01, Ministre de l'Économie, des Finances et de l'Industrie v GEMO SA (2003) ECLI:EU:C:2003:622
- T-127/99, T-129/99 and T-148/99, Territorio Histórico de Álava - Diputación Foral de Álava (T-127/99), Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra, SA (T-129/99) and Daewoo Electronics Manufacturing España, SA (T-148/99) v Commission of the European Communities (2002) ECLI:EU:T:2002:59
- C-72/91 and C-73/91, Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG (1993) ECLI:EU:C:1993:97
- C-379/98, PreussenElektra AG v Schhleswag AG (2001) ECLI:EU:C:2001:160
- C-303/88, Italian Republic v Commission of the European Communities (1991) ECLI:EU:C:1991:136
- C-261/89, Italian Republic v Commission of the European Communities, (1991) ECLI:EU:C:1991:367
- C-305/89, Italian Republic v Commission of the European Communities (1991) ECLI:EU:C:1991:142
- C-482/99, French Republic v Commission of the European Communities (2002) ECLI:EU:C:2002:294
- C-156/98, Federal Republic of Germany v Commission of the European Communities (2000) ECLI:EU:C:2000:467
- C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (2003) ECLI:EU:C:2003:415
- C-172/03, Wolfgang Heiser v Finanzamt Innsbruck (2005) ECLI:EU:C:2005:130
- C-521/06, Athinaiki Techniki AE v Commission of the European Communities (2008) ECLI:EU:C:2008:422

National case law:
- 4 Ob 133/08z-Bank Burgenland, 15/12/2008, ECLI:AT:OGH0002:2008:0040OB00133.08Z.1215.000
- 4 Ob 53/07h ÖBA 200, 24/04/2007, ECLI:AT:OGH0002:2007:0040OB00053.07H.0424.000
- 4 Ob 151/07w ecolex 02/10/2007, ECLI:AT:OGH0002:2007:0040OB00151.07W.1002.000
- 10 ObS 99/08v; 27.01.2009, ECLI:AT:OGH0002:2009:010OBS00099.08V.0127.000

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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 (*de minimis* Regulation)
- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006
- Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the sector of agricultural production, OJ L 337, 21.12.2007
- Commission Communication on State aid elements in sales of land and buildings by public authorities, 97/C 209/03, OJ C 209, 10.7.1997 (currently replaced by 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 C/2016/2946, OJ C 262, 19.7.2016)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary AT3

Date

08/01/2019

Case identifiers

Member State

Austria

Court which adopted the ruling (national language)

Der Oberste Gerichtshof

Court which adopted the ruling (English)

Supreme Court of Justice

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

German

Hyperlink to ruling

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20110621_OGH0002_0040OB00040_11B0000_000

Case reference

ECLI:AT:OGH0002:2011:0040OB00040.11B.0621.000

Procedural context of the case

Lower instances:

- Court of Appeal in Graz (Oberlandesgericht Graz), judgment of 19/01/2011, (GZ 5 R 143/10d-24);
- Regional Court for Civil Matters (Landesgericht für Zivilrechtssachen Graz), judgment of 29/07/2010, (GZ 10 Cg 32/08d-18).

Type of action

Private enforcement

Delivery date of the ruling

21/06/2011

Language

German

Headnote

In this ruling, the Court discussed the notion of State aid, in particular, the criterion of 'selectivity', referring to the CJEU case law.

Parties

Names of the parties to the action

D***** GmbH (anonymised); E***** GmbH (anonymised); H***** GmbH (anonymised); P***** GmbH (anonymised); V***** GmbH, alle ***** (anonymised)

Versus

M*****-gesmbH, ***** (anonymised);G*****gesellschaft mbH (nunmehr G***** GmbH), ***** (anonymised)

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Beneficiary; Other (Public undertaking as granting entity)

Sector relating to the State aid argument

F - Construction

Construction

The type of State aid measure challenged in the court proceedings

Other

Sale at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The plaintiffs applied for an injunctive relief in this case. They argued that while the City of Graz was normally opposed to the shopping centers of the plaintiffs (the 'Shopping City Seiersberg') located near Graz, it supported the shopping center of the first defendant using public funds. The plaintiffs pointed out that the defendant built the Park and Ride (P+R) facility, which in fact served only the customers of the shopping center – at least in 'peak periods' they were used by these customers. According to the plaintiffs, this was the intention of both defendants. Furthermore, the plaintiffs underlined that the second defendant had acquired the property at an excessive purchase price and accepted contractual provisions that favoured the first defendant. The plaintiffs indicated that the P+R facility could not be run profitably because of the high construction costs and the low user charges. The second defendant, therefore, granted an injunction to the first defendants by using public funds. In addition, there was a breach of State aid rules as the defendants had granted (second defendant) or accepted (first defendant) State aid incompatible with the internal market.

The defendants stated that the P+R system constituted a transport planning measure. According to the defendants, it served to relieve road traffic and thus the prevent fine dust. The infrastructural development of the area, by binding to the feeder road and the public traffic and streetcar network, were decisive when choosing the location. Economic interests of the first defendant were not considered when choosing the location. The P+R system was legally, economically and physically separated from the shopping center. The shopping center had plenty of parking spaces which, unlike those of the P+R facility, could be used free of charge and would also be closer to the shopping center. Target groups of the P+R facility were commuters exclusively. The defendants further argued that, even if 'theoretically' customers of the shopping center should use the system, this would not have been a violation of the fair competition; this would have only been a minor side effect. The agreement of non-competition clauses was as common, for reasons of securing a location, as the agreement of a repurchase right and a prohibition on advertising for competing companies. The restrictions on the tariff structure had ensured that no customers of the first defendants parked in the P+R system and vice versa. The purchase price was reasonable. There was no infringement of the prohibition of unlawful State aid under Union law because of the lack of Community relevance. Moreover, the construction of a P+R system was not aid but a service of general economic interest within the meaning of Article 86(2) EC.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid; Other remedy sought (below)

The plaintiffs requested that the first defendant be prohibited from using the second defendant's P+R facility as part of the operation of its shopping center and/or to allow visitors, in particular customers, to use this shopping center.

Furthermore, the plaintiffs requested that the second defendant be prevented from promoting the business of the first defendant by providing the first defendant and/or visitors, in particular customers, with parking spaces in the P+R facility operated by the first defendant and/or in any similar way.

Moreover, the plaintiff requested an order requiring the second defendant to demolish or, alternatively, to close the P+R installation.

Outcome of the case

Conclusions adopted by the national court

The Court decided that, while the review of the lower instance court judgment ('extraordinary review') was admissible, it was not justified. Therefore, the only remedies granted by this court were related to the process costs.

When explaining why no grounds for review were present, the Court interpreted the notion of State aid, in particular the criterion of 'selectivity', referring to Case Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten (C-143/99). The Court excluded a selective advantage where the measure was available for all potential users without discrimination. The Court decided that the P+R system in place would be of interest not only to the defendant. The advantage resulting from the P+R site was merely a side effect of the measure which mainly serves public policy objectives (transport). Rather, the Court was of the opinion that it was a general infrastructure measure which primarily served transport policy purposes and also indirectly benefited the first defendants and other businesses in the area. Therefore, the Court did not find a violation of Article 108(3) TFEU.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-143/99, Adria-Wien-Pipeline, Wietersdorfer und Peggauer Zementwerke GmbH v Finanzlandesdirektion fuer Kaernten (2001) ECLI:EU:C:2001:598

National case law:
- 4 Ob 177/07v = ÖBl 2008, 287 [Gamerith]
- 4 Ob 225/07b = ÖBl 2008
- 4 Ob 225/07b = ÖBl 2008
- 4 Ob 154/09i = MR 2010
- BGH I ZR 136/09, GRUR 2011, 444 - Flughafen Frankfurt Hahn (a case from the German Supreme Court)

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary AT4

Date

08/01/2019

Case identifiers

Member State

Austria

Court which adopted the ruling (national language)

Oberster Gerichtshof

Court which adopted the ruling (English)

Supreme Court of Justice

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

German

Hyperlink to ruling

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20140325_OGH0002_0040OB00209_13H0000_000

Case reference

ECLI:AT:OGH0002:2014:0040OB00209.13H.0325.000

Procedural context of the case

Lower instances:
- Court of Appeal of Vienna (Oberlandesgericht Wien) Court of Appeal of Vienna, judgment of 19/02/2008(GZ 2 R 9/08w-74);
- Regional Court of Eisenstadt (Landesgericht Eisenstadt) judgment of 18/09/2007, (GZ 27 Cg 90/06p-69).

The Supreme Court released the defendants' response to the appeal and, by a ruling of 15 December 2008, AZ 4 Ob 133 / 08z, suspended the proceedings until the judgment was made by the CJEU on the defendants' claim in relation to the annulment of the Commission decision (of 30 April 2008). Following the judgment of the CJEU, the Supreme Court, at the request of the plaintiffs, decided to continue the proceedings and granted the parties a period of four weeks to issue their comments on the judgment of the CJEU and its consequences. In the explanatory statement, the Supreme Court stated that, contrary to the preliminary assessment, the Court considered a final settlement possible.

Type of action

Private enforcement

Delivery date of the ruling

25/03/2014

Language

German

Headnote

In this ruling, the Court held that a violation of Article 108(3) TFEU does not automatically entail nullity or an obligation to reverse a contract.

Parties

Names of the parties to the action

S***** AG (anonymised); S***** GmbH (anonymised)

Versus

Land B*****, vertreten durch Herbst Kinsky Rechtsanwälte GmbH in Wien (anonymised); G***** AG, *****, vertreten durch Schönherr Rechtsanwälte GmbH in Wien (anonymised); G*****-GmbH, ***** (anonymised)

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Beneficiary; Other (Public body granting the alleged State aid)

Sector relating to the State aid argument

K - Financial and insurance activities

Banking sector

The type of State aid measure challenged in the court proceedings

Other

Sale of bank shares at a price more favourable than the market conditions

Substance of the case

Facts and parties' main arguments in the case

The plaintiffs were not involved in banking at the time, but had applied for the grant of an Austrian banking license. The second defendant, an insurance company, was involved in two banks. The third defendant's business area involved the acquisition and management of shareholdings.

The first defendant was the sole shareholder of Hypo-Bank B ***** AG (hereinafter Bank B *****). During the privatisation of this bank, the two plaintiffs, as well as the second and third defendants, appeared as interested parties.

In the present proceedings, the plaintiffs sought the repeal of the share purchase agreement of 10 March 2006, or, alternatively, the repayment of the purchase price to the second and third defendants and the transfer of the shares to the first defendant. Again alternatively, they sought the finding that the share purchase agreement concluded between the defendants was void or that the share purchase agreement was in breach of State aid rules. The difference between their offer and the purchase price agreed with the second and third defendants was a subsidy granted by the first defendant. Contrary to Article 108(3) TFEU, the State aid contained in the share purchase agreement had not been notified to the Commission, and as a result the share purchase agreement, according to the plaintiffs, should be rendered void. There was a competitive relationship between the parties to the dispute because the first plaintiff was the parent company of one bank and the second defendant held interests in two banks. In addition, a reference was made to the banking license already applied for in Austria. The plaintiffs claimed to have a right to a fair remedy by way of repayment of the (void) share purchase agreement both to the first defendant as State aid granting authority and to the second and third defendants as State aid recipients.

The defendants contended in the first instance that, for reasons explained above, there was no State aid granted within the meaning of Article 108 TFEU. Furthermore, the defendants claimed there was no competitive relationship between the parties.

In their statement, the plaintiffs submit that their competitive disadvantage was not that the second and third defendants were enriched by the acquisition of Bank B *****, but that the surcharge was unlawfully brought on to them (the plaintiffs). As a result, they could not have been active in the EU. The payment of an additional charge by the second and third defendants could not remedy that continuing competitive disadvantage. If the Supreme Court considered that the sanction imposed by Union law precludes a right of remission based on national law, the plaintiffs would request the initiation of a preliminary ruling procedure.

By contrast, the defendants argued, with varying degrees of emphasis, that the aid decision (only) aimed at compensating for the difference in purchase prices and therefore precludes the repayment sought by the plaintiffs and the total nullity of the share purchase

agreement which they had assumed. The second and third defendants also claimed that they were not the addressees of the ban requested by the plaintiffs. They were also not liable as accomplices or assistants of the first defendant. The CJEU found the State aid to be unlawful due to the fact that, in assessing the tenders, the Region (Land) took account of the default liability it had adopted by law. The Region had not acted in business dealings with this assumption of liability. In addition, it was argued that the second and the third defendant had deposited the purchase price difference on a trust account to which they would have had access only with the consent of the first defendants. However, that consent could not be granted by the first defendant as a result of the State aid decision, so that the state of emergency created by the unlawful grant of the aid had already been eliminated.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid; Other remedy sought (below)

Repeal of the share purchase agreement; the repayment of the purchase price; the transfer of the shares; the finding that the share purchase agreement is void or that the share purchase agreement is in breach of State aid rules.

Outcome of the case

Conclusions adopted by the national court

The infringement of the standstill obligation under Article 108(3) TFEU was an unfair act within the meaning the Austrian Law on the Prohibition of Unfair Competition (Bundesgesetz gegen den unlauteren Wettbewerb – UWG) and therefore may have justified an injunctive relief from competitors of the beneficiary. This injunction, however, was aimed at a sale below the market value only against a given/defined sale process, not against a sale at other (possibly market-compliant) conditions. Therefore, before the conclusion of the contract, the first defendant region (Land) could only have been prohibited from selling the shares of Bank B ***** under the price offered by the plaintiffs to the second and third defendants.

Therefore, even the right to clean-up could only be directed to a corresponding correction of the purchase price. Yet this claim is based on general principles that a competitor who violated the law remains at fault as long as this state is not eliminated. The reason for the disturbance was to be deduced from the transgressive norm, in this case from the standstill obligation under Article 108(3) TFEU. In this specific case, the disturbance of the fair competition derives from the fact that the second and third defendants were able to acquire the shares of Bank B ***** below the market value. Only this state of disturbance had to be eliminated (also) in the interests of the competitors. A reversal would have gone beyond that objective and would have also been in conflict with the limited scope of an injunctive relief prior to the implementation of the aid. In general, the elimination claim could usually not go beyond the claim for injunctive relief.

Therefore, the plaintiffs' arguments were unfounded. It may be true that the defendants' behaviour effectively prevented the plaintiffs from acting within the Union. However, such an activity was not the purpose of the prohibition of State aid under the Union law. In addition, the reversal sought by the plaintiffs did not mean that they would have been able to benefit and been active within the EU. Rather, the defendants would have been free to conclude a contract again for market-conforming conditions.

The final decision of the Commission does not imply that the purchase contract between the defendants was void. The Union law only required the recovery of the unlawfully granted State aid. The plaintiffs therefore lacked the legal interest to find any nullity. In addition to the fact that the defendant was free to conclude a new contract at market conditions, the plaintiffs' legal status did not change as a result of such a finding.

Furthermore, the Court underlined that according to the settled case law, it is inadmissible for the plaintiff to obtain a finding by the Court on how a case should be legally classified. Therefore, the alternative request that the contract concluded by the defendants is in breach of Union law was not possible. Moreover, the plaintiffs also lacked the legal interest (locus standi) in so far as the unlawfulness of the State aid was concerned.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-268/08 and T-281/08, Land Burgenland (Autriche) (T-268/08) and Republic of Austria (T-281/08) v European Commission (2012) ECLI:EU:T:2012:90
- T-282/08, Grazer Wechselseitige Versicherung AG v Commission (2012) ECLI:EU:T:2012:91
- C-214/12 P, C-215/12 P and C-223/12 P, Land Burgenland (C-214/12 P), Grazer Wechselseitige Versicherung AG (C-215/12 P) and Republic of Austria (C-223/12 P) v Commission (2013) ECLI:EU:C:2013:682

National case law:
- 4 Ob 133/08z
- 4 Ob 341/78 = SZ 51/171; RIS-Justiz RS0077512
- 4 Ob 154/09i - Landesforstrevier L
- 4 Ob 415/77 = ÖBl 1978, 28; RIS-Justiz RS0079560)
- 17 Ob 13/07x = SZ 2007/152 – amade at III

√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission decision of 30 April 2008

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

The ruling demonstrated the limits of private enforcement after an unlawful act has already been adopted (here: the purchase of shares). A violation of Article 108(3) TFEU did not automatically entail nullity or an obligation to reverse a contract.

Case summary AT5

Date

08/01/2019

Case identifiers

Member State

Austria

Court which adopted the ruling (national language)

Landesgericht Klagenfurt

Court which adopted the ruling (English)

Regional Court of Klagenfurt

Instance court which adopted the ruling

Lower court (civil/commercial)

Official language of the court

German

Hyperlink to ruling

https://www.ris.bka.gv.at/JustizEntscheidung.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20120427_LG00729_0270CG00113_11P0000_000&IncludeSelf=True&ShowPrintPreview=True

Case reference

ECLI:AT:LG00729:2012:0270CG00113.11P.0427.000

Procedural context of the case

No ruling was issued on this case by a lower court preceding the case at hand. Moreover, no subsequent ruling is available.

Type of action

Private enforcement

Delivery date of the ruling

27/04/2012

Language

German

Headnote

In this ruling, the Court discussed the validity of a contract which was challenged on the grounds that the contract violated State aid rules.

Parties

Names of the parties to the action

Land K***** (anonymised)

Versus

H***** A*****-A*****-BANK I***** AG, ***** (anonymised); H***** A*****-A*****-BANK AG, ***** (anonymised)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

K - Financial and insurance activities

Privatisation of banks / banking sector

The type of State aid measure challenged in the court proceedings

Guarantee at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

In its decision of 30 April 2003 (C(2003)1329fin), the Commission stated that, in Austria, currently seven mortgage banks and about 27 savings banks would have benefited from a state guarantee (liability for loss of income). The default liability could be understood as a 'guarantee obligation', it included the obligation of the state (federal, state or local authorities) to intervene in the event of insolvency or liquidation of the credit institution. It created a direct claim for the creditors of the credit institutions against the guarantor, who was only obliged to pay if the assets of the credit institutions were insufficient to meet the claims of the creditors. The liability for default was neither limited in time nor limited to a certain amount. In principle, all state mortgage banks would have paid a liability fee. According to the Commission, the liability for default constituted State aid within the meaning of Article 107(1) TFEU, but could be classified as existing aid. The Commission had adopted a decision introducing a transitional rule that on 2 April 2003, the existing liabilities were covered by the default guarantee until the end of their term. The transitional period ended on 1 April 2007 and during this period the liability for default for new liabilities was maintained, provided the duration of these liabilities did not exceed 30 September 2017.

The plaintiffs claimed that they should have been paid the annual liability fees by the defendant.

The plaintiff claimed they were entitled to an annual liability fee of EUR 1 per thousand of the assessment basis both vis-à-vis the first defendant and the second defendant. With an additional agreement dated 10 December 2004, the advance payment of the liability commission for the financial years 2005 to 2010 was agreed.

Based on the figures provided by the defendant parties themselves, the liable party should have incurred a liability commission of EUR 17,947,000 on the basis of the assessment basis of EUR 17.947 million, of which EUR 13,000,000 was already paid as a result of the additional agreement. Therefore, a liability commission of EUR 4,947,000 remained to be paid, according to the first defendant. Based on the assessment basis of EUR 1.263 million, the second defendant would have incurred a liability commission of EUR 1,263,000 for the year 2010, whereby no advance payment was made.

The defendants denied the claim in full, requested that the Court to dismiss the claim in its entirety, and argued they had not entered into liabilities for which the plaintiff had demanded payments.

Remedy(ies) sought

Recovery order in relation to unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court held that the national law did not expressly regulate the question of remuneration or gratuitous liability for the existing liabilities. The wording of the national law shows that the purpose of this provision was, above all, the protection of the region (Land), in particular also in relation to the default guarantee claims. The law namely contained information on the Region's (Land's) rights of inspection and examination, a unilateral right of termination by the Region (Land) as well as the rights of the Region (Land) concerning claims for compensation of costs in the event of the actual use of the liability. Therefore, the conditions set out here were not exhaustive, but were to be regarded as minimum requirements for the assumption of liability or for the maintenance of the liability of the plaintiff. This should have prevented the Region (Land) K ***** from assuming further liability where these conditions, which are

primarily for the protection of Land, were not (fully) fulfilled. The legal limits set out in the national law were therefore to be interpreted in accordance with the purpose of the standard as minimum requirements, which were complied with in the litigation decision of 10 December 2004 and in the supplementary agreement by the plaintiff.

The Court further confirmed the Land legislature would be responsible for the implementation of the decision of the Commission of 30 April 2003 (C (2003) 1329fin), in relation to the issue of remuneration.

From the amendment of the regional law it was clear that the Region (Land) aimed to leave the previous regulation regime for old liabilities unchanged (with the introduced amendment), as suggested by the Commission in their decision, and only change the assumption of liability for new debt. The Land also intended to introduce the transitional arrangements established by the Commission.

Furthermore, it was assumed that the question of payment of the liability for old obligations was not explicitly regulated by the regional legislator. Therefore, it was possible for the plaintiff to conclude the liability commission agreement. As a result, the agreement did not infringe the principle of legality, or misuse its legal form, or disregard the minimum barriers imposed by law. The liability commission agreement expressly stated that liability as provided by law was governed by the regional law.

The plaintiff was therefore free to agree upon a commission for the assumption of liability in the form of a private law agreement and also to settle the liability for the defendant parties which would confirm existing benefits such as better credit, cheaper refinancing, better access to the international capital markets and ensuring more efficient creditor protection.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The defendants were ordered to pay the claimed amount the plaintiff (including interest) and were jointly liable to pay to the plaintiff the legal costs. The issue of the unlawful State aid was considered under the broader headline of 'breach of the legality principle'. The Court decided that no such breach occurred in the end, hence that no unlawful State aid was granted in this case.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

National case law:
- Constitutional Court 7717; 13.12.1975
- Constitutional Court 7716; 13.12.1975
- Constitutional Court 8320; 22.06.1978

References by the court to other relevant aspect of the EU acquis

- Commission Decision C(2003)1329fin

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary AT6

Date

08/01/2019

Case identifiers

Member State

Austria

Court which adopted the ruling (national language)

Verwaltungsgerichtshof

Court which adopted the ruling (English)

Supreme Administrative Court

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

German

Hyperlink to ruling

https://www.ris.bka.gv.at/JudikaturEntscheidung.wxe?Abfrage=Vwgh&Dokumentnummer=JWT_2015030014_20160406J00

Case reference

Ro 2015/03/0014

Procedural context of the case

The Supreme Administrative Court was acting in this case as the Court of both second and last instance after the Federal Communication Senate issued a decision (tribunal within the meaning of Article 6 ECHR).

An earlier Commission decision in State aid enforcement procedure E 2/2008 of 28 October 2009 (K(2009)8113) was relied upon in this case. This decision was implemented in the national legal order by amending the domestic law to introduce the notion of the 'limits of the public service mission', on which the Communication Office based its decision, challenged in this court case.

Type of action

Public enforcement

Date of the Commission decision

28/11/2012

Delivery date of the ruling

06/04/2016

Language

German

Headnote

In this ruling, the Court held that calculating the amount of unlawfully granted State aid to be recovered fell within the competence of national courts (the Court referred to the CJEU Case C-69/13).

Parties

Names of the parties to the action

Österreichischer Rundfunk in Wien

Versus

Bundeskommunikationssenat (Kommunikationsbehörde Austria)

Also party to the proceedings was Bundesminister für Kunst und Kultur, Verfassung und Medien

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

Public broadcasting

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

By decision of 28 November 2012, the Communication Office of Austria (Kommunikationsbehörde Austria - KommAustria) ordered, as a result of the live broadcasts of the matches involving the Austrian national team at the IIHF Ice Hockey A-World Championships 2011 in Slovakia in the SPF Sports division program, that the income from program fees or funds should have been compensated in the amount of EUR 153,768.15. This was due to the fact that this income exceeded the limit of the public remit under the national law (Section 38a (1) (1) Public Broadcasting Law (Bundesgesetz über den Österreichischen Rundfunk ORF Gesetz, BGBl 379/1984) as amended by Federal Law Gazette I 15/2012, hereinafter: ORF-G), pursuant to the decision of the Federal Communications Senate of 23 May 2012. According to section 38a (2) ORF-G, the public broadcaster (ORF) was requested recover the funds within ten weeks of the legal validity of the decision, directing the refund to the blocked account according to section 39c ORF-G.

The Communication Office further explained that the above decisions which declared that the public broadcasting of the national Ice Hockey Games violated domestic law were in conformity with the Commission view on the matter. Indeed, the domestic law was amended to introduce the notion of the 'limits of the public service mission', on which Communication Office based its decision in order to implement an earlier Commission decision in State aid enforcement procedure E 2/2008 (, K(2009)8113).

In the decision, the Commission criticised the fact that, according to the previous legal situation, it would have been unclear to what extent premium sports content could be broadcast in the ORF SPORT PLUS category program. According to the measure introduced at national level as a result of this decision, sporting events that enjoyed much wider coverage in the Austrian media (premium sports) may not have been broadcast by ORF SPORT PLUS in the future. A list was created, naming sports competitions which should have been considered premium sports. Under the condition of compliance with the prohibition to broadcast such sporting events, the ORF sports division program was granted State aid. In the case at hand, KommAustria therefore assumed that the ORF sports division channel breached the prohibition of broadcasting premium sports competitions as set out in the national law. According to the Communication Office this was a typical case of 'demarcating' the public service mission within the meaning of Section 38a (1) Z 1 ORF-G. Exceeding these limits by the live broadcasting of the games of the Ice Hockey A-World Cup 2011 with participation of the Austrian national team therefore resulted in a levy according to Section 38a Abs. 1 Z 1 ORF-G, according to the Communications Office.

The ORF invoked the 'protection of legitimate expectations' to the effect that they had led the Ice Hockey World Championship in the context of the offer concept for ORF SPORT PLUS and this offer concept would not have been prohibited by KommAustria. Therefore, a levy was now inadmissible.

The ORF took note that, based on the hockey games in question, an infringement had been legally established. Nevertheless, in its opinion this could not mean that the funds used for this purpose are exhausted. Since the offer proposal of ORF SPORT PLUS ORF was

not questioned by Communications Office Austria, the ORF assumed they could broadcast the content in question (Ice Hockey Championship). The Ice Hockey World Cup 2011 had started at the end of April 2011, i.e. at a time when the offer concept for ORF SPORT PLUS had already been submitted. In its appendix, this offer concept also expressly referred to the transfer of the "Ice Hockey World Cup with Austrian participation". Although KommAustria had requested a supplement by letter of 4 May 2011, it did not refer to the planned sports competitions and their 'premium quality'.

For the calculation of the sums to be used, the ORF pointed out that the use of gross costs disregarded the 'nature' of the levy procedure in terms of state aid. If no State aid was used for any activity because it was 'financed' by commercial proceeds, there could have been no case of recovering State aid. Commercial revenues generated solely on the basis of (possibly prohibited) activity and directly attributable should therefore have reduced the amount to be recovered. The calculation on the basis of full costs was also wrong, because the 'common costs' and 'overheads' that were included should, in any case, be financed by ORF and should therefore be excluded. For the ORF it was also not clear why livestreams on the Internet were not included in the calculation. On the basis of ORF's incorrectly assumed purpose, in particular of Section 31 ORF-G, the supervisory authorities finally assumed, erroneously, that the so-called 'stand-alone' commercial revenues should not have been taken into account. But that is certainly the case, because it was up to the ORF to use it within the limits of the ORF-G also to finance activities on ORF SPORT PLUS.

Remedy(ies) sought

Other remedy sought

Reversal of the order of State aid recovery

Outcome of the case

Conclusions adopted by the national court

The Supreme Administrative Court rejected the revision of the ruling of the Federal Communications Senate and confirmed the administrative decision of first instance.

The Supreme Court confirmed the breach of law which occurred as a consequence of ORF's broadcasting of the Ice Hockey games. The Court referred to the genesis of the norm prohibiting broadcasting of 'premium sports', as described above) in the national legal order and to the decision of the Commission against Austria, concerning the financing of the ORF State aid scheme E 2/2008. In this procedure, the Commission (among others) qualified the financing of the Sport-Specialties channel as existing aid and at the same time complained about the public-law remit for ORF SPORT PLUS as too inaccurate. In addition, the introduction of ORF SPORT PLUS in addition to the sports offer of other channels of the ORF may have been a cause for concern as this increase in broadcasting capacity allows the ORF to effectively buy the Austrian premium rights market. The Court underlined that ORF SPORT Plus broadcasts most sports and competitions held or organised in Austria or in which Austrian athletes or teams participate. Sports competitions, which in the Austrian media coverage is broader (premium sports) should not be broadcasted by ORF SPORT PLUS. The Austrian assurances were accepted by the Commission and the unlawful State aid procedure was terminated (see the Commission decision of 28 October 2009 (C (2009) 8113 final)).

The requirements resulting from the agreement with the Commission in the State aid procedure were the same as those with the introduced with the amendment BGBl I No. 50/2010 – the provision introduced in the national law, paragraph 4b ORF-G. The Court ruled that the ORF violated this provision by conducting the live broadcast of the Ice Hockey Competition in Slovakia in 2011. Hence, the ORF breached a norm that served to justify and redefine the limits of its public service mission and distort competition by lowering the impact of using public funds for a sports sector channel.

The violation of Section 4b (4) ORF-G was therefore one that exceeded the limits of the public-law remit. The conditions for a levy according to Section 38a paragraph 1 ORF-G were therefore present in this case.

The Court dismissed the ORF's argument that KommAustria had not questioned the broadcasting plan submitted by ORF SPORT PLUS to broadcast the competition. The Court decided that the fact that the submitted plan was not rejected did not change anything and did not create any rights for the ORF. The Court concluded it was sufficient to point out that the violation of Section 4b (4) ORF-G was legally binding

Even though the ORF may have acted in good faith (in relation to the plan not being rejected by KommAustria), broadcasting the disputed Competition was not entitled to a levy according to Section 38a ORF-G, because the actual intention of the ORF did not change the fact that the violation of the law took place.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-69/13, Mediaset SpA v Ministero dello Sviluppo economico (2014) ECLI:EU:C:2014:71

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Decision C (2009) K(2009)8113 of 28 October 2009 to propose appropriate measures pursuant to Article 88(1) of the EC Treaty where the Member State concerned has accepted those measures
- Communication from the Commission on the application of State aid rules to public service broadcasting, adopted by the Commission on 2 July 2009, OJ C 257 of 29/10/2009, p. 1-14

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

1.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Verwaltungsgerichtshof	Supreme Administrative Court	Last instance court (administrative)	2002/17/0356	08/01/2007	Private enforcement	None - Claim rejected	No aid could be granted in this case as it would constitute unlawful State aid. The ECJ (current CJEU) stated in the Transalpine Ölleitung judgment that it would not be in the EU's interest to order reimbursement in favour of other establishments in the event of a partial refund of a tax which constituted an unlawful aid measure because it was granted in breach of the notification requirement. An extension of the group of beneficiaries reinforces rather than eliminates the effects of State aid. The ECJ (current CJEU) also made it clear that the Commission decision on the compatibility of the measure with the 'common market' had no retroactive effect in the sense that the prohibition on implementation related to claims regarding periods prior to the Commission decision, and could no longer be considered. This meant that, despite the Commission decision on the compatibility of the measure with the 'common market', the effectiveness of the ban had not changed. As it is clear from the judgment that the ECJ (current CJEU) considered the partial refund to be a State aid measure, it follows from the obligation to further observe the prohibition on implementation that applications from undertakings which would be entitled to the refund under the national scheme would not have to be made. Even if the complainant, whose application for reimbursement of an energy tax was dismissed for the years 1997 to 2001 by the contested decision, was mainly active in the field of manufacturing physical assets, it would not have been able to comply with its request.		This is the national level judgment following the ECJ (current CJEU) preliminary ruling C-368/04 (Transalpine Ölleitung).
Verwaltungsgerichtshof	Supreme Administrative Court	Last instance court (administrative)	JWR_2004170078_20070130X01	30/01/2007	Private enforcement	None - Claim rejected	This case concerned a request for aid which was not granted. The complainant was ordered to reimburse the State's costs within two weeks. The complainant did not agree and argued against the Commission decision identifying incompatible State aid. However, the Court agreed with the Commission decision. The energy tax rebate, as a result of the selectivity of the 0.35% ceiling in Article 1(1) EAG, constitutes State aid in the sense of Article 88(3) EC (current Article 108(3) TFEU) (see Article 1 and Commission decision of 9 March 2004, 2005/565, OJ No L 190, 22/07/2005, page 0013 to 0021, and paragraphs 70-74 and 90 of the Opinion of Advocate General Francis G. Jacobs, November 2005 in case C-368/04, Transalpine oil pipeline). The energy tax rebate for 2002 was in breach of Article 88(3) of the EC Treaty (current Article 108(3) TFEU) in the absence of authorisation by the Commission (see Recital 68 of the Commission decision of 9 March 2004). The complaining party requested the fixing of the energy tax rebate for the year 2002. By decision of 16 March 2004 (delivered on 26 March 2004), the complainant party was granted (only) the energy tax rebate for the year 2002.		The Supreme Administrative Court was acting as a first and last instance court here, hence no decision of a lower instance court is described.
Handelsgericht Wien	Commercial Court of Vienna	Lower court (civil/commercial)	GZ 10 Cg 145/06p-19	04/04/2007	Private enforcement	None - Claim rejected	The Court held that according to the national law, the defendant was obliged to produce and publish the 'Wiener Zeitung' (the newspaper in relation to which the suspicion of unlawful State aid arose). The law also set maximum charges for obligatory publications. The fact that the fees for compulsory engagements should only serve to finance the official newspaper, cannot be inferred from the law. The Court decided therefore that the defendant behaved in accordance with the law. The creation of the legal basis does not represent any action in the commercial context and therefore cannot be considered a violation of the Unfair Competition Law. Hence, there was no State aid within the meaning of Article 87(1) of the EC Treaty (current Article 107(1) TFEU); the State has no influence on the fees for the compulsory engagements and their use.		
Landesgericht Klagenfurt	Regional Court Klagenfurt	Lower court (civil/commercial)	GZ 29 Cg 9/06a-34	30/07/2007	Private enforcement	None - Claim rejected	In this case, the plaintiffs brought an action against a municipality based on a regional regulation with regard to waste management. Tariffs paid by undertakings covered only a part of the costs. The Court ruled that the difference between the part to be paid by undertakings and the tariffs had to be paid by the State. However, this difference constituted *de minimis* aid and therefore was not in breach of Union law. The Court ruled that the municipalities are not obliged to pay because they are not 'causing' the waste. The costs have to be paid by the Land (Carinthia region).		This is the first instance judgment. The appeal judgment in this case was issued by the Oberlandesgericht Graz on 20 November 2007 (GZ 5 R 177/07z-41), and then the Supreme Court judgment followed on 8 July 2008 (4Ob54/08g).
Verwaltungsgerichtshof	Supreme Administrative Court	Last instance court (administrative)	JWR_2004050274_20070731X01	31/07/2007	Private enforcement	Other remedy imposed	The Court formulated the questions below and addressed them to the ECJ (current CJEU) and did not rule directly in the case at hand. 1) Does the last sentence of Article 88(3) of the EC Treaty (current Article 108(3) TFEU) require that the national court should refuse further grants of State aid to a beneficiary of aid who under national law is in principle entitled to aid, although the Commission, while regretting the lack of notification of the aid, has not adopted either a decision under Article 4(2) of Council Regulation No. 659/1999 of 22 March 1999 or a measure under Article 14 of that Regulation, and the case file does not reveal any infringement of the rights of third parties? 2) Does the prohibition under Article 88(3) of the EC Treaty (current Article 108(3) TFEU) on putting State aid into effect preclude the application of a provision of national law, if: such application is based on the new version of that law (held by		The Court decided to await the ruling of the ECJ (current CJEU) prior to rendering the judgment in this case. The Supreme Administrative Court was acting as a first and last instance court here.

							the Commission as compatible with the 'common market') although it concerns periods of time before that new version and the amendments which were decisive for the declaration of compatibility were not yet applicable to that period, and the case file does not reveal any infringement of the rights of third parties?		
Landesgericht Eisenstadt	Regional Court Eisenstadt	Lower court (civil/commercial)	GZ 27 Cg 90/06p-69	18/09/2007	Private enforcement	None - Claim rejected	The Court rejected both the main claim aimed at reversing the purchase agreement and the subsidiary claim aimed at paying back the purchase price to the second and third defendant, and transferring the shares to the first defendant. The Court also stated that the share purchase agreement is null and void and violates State aid rules.		First instance case, in which the second and the last instance judgments are described in ruling GZ 2 R 9/08w-74.
Oberlandesgericht Graz	Civil Court of Appeal Graz	Second to last instance court (civil/commercial)	GZ 5 R 177/07z-41	20/11/2007	Private enforcement	Case sent back to the lower court for re-assessment; Other remedy imposed	The judgment of the lower court was overturned because it was based on the wrong legal basis. Even if the municipality did not conclude a written contract, it is obliged to pay for the services rendered concerning the waste deposited at collection points (not for the other services provided) - that resulted in a contractual relationship. As the amount deposited has not yet been quantified, the first instance shall determine that part of the services provided.		Final ruling from the Supreme Court of Justice: ECLI:AT:OGH0002:2008:0040OB00054.08G.0708.000.
Oberlandesgericht Wien	Civil Court of Appeal Vienna	Second to last instance court (civil/commercial)	GZ 4 R 115/07x-25	23/11/2007	Private enforcement	None - Claim rejected	The Court of Appeal upheld the judgment of the first instance court (Judgment of the Commercial Court of Vienna, 4 April 2007, GZ 10 Cg 145/06p-19).		This is a second instance court, in which the first instance court judgment is ruling GZ 10 Cg 145/06p-19, 4 April 2007 of the Commercial Court of Vienna. This case was then brought to the Supreme Court of Justice, which rendered the judgment on 10 June 2008, 4Ob41/08w).
Oberlandesgericht Wien	Civil Court of Appeal in Vienna	Second to last instance court (civil/commercial)	GZ 2 R 9/08w-74	19/02/2008	Private enforcement	None - Claim rejected	The Court of Appeal upheld the judgment of the court of first instance (GZ 27 Cg 90/06p-69) and stated that the value of the subject matter of the decision exceeded EUR 20,000 and the ordinary review was inadmissible due to lack of substantive legal issues.		This is the second to last instance judgment - the last instance judgment rendered in ruling ECLI:AT:OGH0002:2008:0040OB00133.08Z.1215.000.
Oberster Gerichtshof	Supreme Court of Justice	Last instance court (civil/commercial)	ECLI:AT:OGH0002:2008:0040OB00041.08W.0610.000	10/06/2008	Private enforcement	None - Claim rejected	The Supreme Court rejected the review as inadmissible, resulting in the Court of Appeal's ruling becoming legally binding/final. The case concerned the means of financing the press, and had a strong State aid element considered by the Court. The Supreme Court was of the view that any direct or indirect benefit which may be classified as State aid within the meaning of Article 87 of the EC Treaty (current Article 107 TFEU) can only be admissible as long as it preceded the accession of Austria to the EU; was not declared by the Commission as incompatible with the 'common market'; and was reasonably justifiable. The publication of the 'Wiener Zeitung' as a combination of a daily paper and a publication organ with financing from selling price and publication fees started long before the Austrian accession to the EU, and there was no inadmissibility decision by the Commission. Therefore, the aid does not violate State aid rules.		This is a Supreme Court judgment in an ordinary review procedure.
Oberster Gerichtshof	Supreme Court of Justice	Last instance court (civil/commercial)	ECLI:AT:OGH0002:2008:0040OB00054.08G.0708.000	08/07/2008	Private enforcement	Other remedy imposed	In this case, the plaintiffs brought an action against a municipality based on a regional regulation with regard to waste management. Tariffs paid by undertakings covered only a part of the costs. The Court ruled that the difference between the part to be paid by undertakings and the tariffs had to be paid by the State. However, this difference constituted *de minimis* aid and therefore was not in breach of Union law. However, as the regulation could be in breach of national law, a request for constitutional review was sent to the Constitutional Court, and the proceedings were temporarily suspended.		This is a Supreme Court judgment in an ordinary review procedure. The first judgment in this case was issued in the ruling GZ 29 Cg 9/06a-34.
Landesgericht Linz	Regional Court Linz	Lower court (civil/commercial)	GZ 5 Cg 87/08a-16	11/12/2008	Private enforcement	None - Claim rejected	The Court rejected the claim as there was no public tender. Therefore, the defendant was not obliged to accept the higher offer and accepting the other offer did not constitute State aid. Consequently, a recovery decision has no influence on the plaintiffs' legal position since the plaintiffs are not in a situation to demand the contract is signed with them.		First instance case, in which the second and the last instance judgments are described in ruling GZ 2 R 17/09x-21.
Oberster Gerichtshof	Supreme Court of Justice	Last instance court (civil/commercial)	National reference: 4Ob133/08z ECLI number: ECLI:AT:OGH0002:2008:0040OB00133.08Z.1215.000	15/12/2008	Private enforcement	Other remedy imposed	The extraordinary review procedure in the case at hand was suspended pending the final judgment of the ECJ (current CJEU).	The Court commented here on its cooperation with the Commission. It reiterated that national courts must interpret and apply the notion of aid under Article 87(1) of the EC Treaty (current Article 107(1) TFEU) in relevant disputes in order to clarify whether a given State measure would have to be subject to the preliminary examination procedure under Article 88(3) of the EC Treaty (current Article 108(3) TFEU). On the other hand, they are not responsible for examining whether certain State aid is compatible with the 'common market'. In that respect, it is the exclusive competence of the Commission, under the control of the Union Courts, to assess the compatibility of a State aid measure or scheme with the 'common market'.	Austria and the companies concerned lodged separate claims in the CFI (current GC) to render the Commission decision void (cases T-281/08, T-282/08; afterwards appealed before the ECJ). The Court here decided to await the judgment prior to deciding on the case.
Oberlandesgericht Linz	Civil Court of Appeal in Linz	Second to last instance court (civil/commercial)	GZ 2 R 17/09x-21	09/07/2009	Private enforcement	None - Claim rejected	The Court states that Article 88(3) of the EC Treaty (current Article 108(3) TFEU) has direct effect, but actions (claims) have to fulfil conditions laid down in national procedural law. As the plaintiffs sought to get a statement on the unlawfulness of the planned situation rather than an actual situation, the claim had to be rejected. The plaintiffs have no right to demand that the contract is concluded with them. The defendants have no obligation vis-à-vis the plaintiffs.		This is the second to last instance judgment - the last instance judgment rendered in ruling ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000.

Oberster Gerichtshof	Supreme Court of Justice	Last instance court (civil/commercial)	ECLI:AT:OGH0002:2010:0040OB00154.09I.0119.000	19/01/2010	Private enforcement	Case sent back to the lower court for re-assessment	In this case, the ordinary review by the Supreme Court is partially allowed. The lower instance court judgment is partially confirmed. In relation to this part, the decision on the costs of the proceedings of all three instances remains unchanged. For the remaining issues (the claim for injunctive relief and the costs), the rulings of the lower courts are annulled, and the case is returned to the court of first instance for a new ruling following a procedural amendment. The costs of the appeal procedure relating to this part of the dispute are further procedural costs.	According to the Austrian Law Against Unfair Competition (of November 2007), a breach of the stand still obligation laid down in Article 108(3) TFEU (resulting in the fostering of external competition) constitutes another unfair act within the meaning of Section 1(1)(1) Law Against Unfair Competition. The case concerned the privatisation of a public undertaking (shares indirectly held by a region).	The outcome of the proceedings after the OGH's ruling is not publicly accessible. This might be due to the fact that in some cases parties come to an informal agreement not to continue the proceedings, the plaintiff abstains unilaterally from continuing the case, or there is a formal settlement. In such cases, the decision remains confidential and the confidentiality of the outcome is very often the purpose of such agreements and withdrawals. This is a case in which a final second instance judgment was questioned in an 'extraordinary review procedure'.
Landesgericht für Zivilrechtssachen Graz	Regional Court for Civil Matters Graz	Lower court (civil/commercial)	GZ 10 Cg 32/08d-18	29/07/2010	Private enforcement	None - Claim rejected	The Court ruled that the aid in question was not classified as unlawful State aid.		First instance case, in which the second and the last instance judgments are mentioned in ruling GZ 5 R 143/10d-24.
Oberlandesgericht Graz	Civil Court of Appeal in Graz	Second to last instance court (civil/commercial)	GZ 5 R 143/10d-24	19/01/2011	Private enforcement	None - Claim rejected	The Court ruled that the aid in question was not to be classified as unlawful State aid. Ordinary revision was not granted.		This is the second to last instance judgment - the last instance judgment rendered in ruling ECLI:AT:OGH0002:2011:0040OB00040.11B.0621.000.
Oberster Gerichtshof	Supreme Court of Justice	Last instance court (civil/commercial)	ECLI:AT:OGH0002:2011:0040OB00040.11B.0621.000	21/06/2011	Private enforcement	None - Claim rejected	The Court decided there were no grounds for review of the lower instance court judgment ('extraordinary review'). Therefore, the only remedies granted by this Court are related to the process costs. After considering the issue of State aid here, the Court decided that the park-and-ride system in place would not only be of interest to the defendant. Rather, the Court was of the opinion that it was a general infrastructure measure which primarily served transport policy purposes and also indirectly benefitted the first defendants and other businesses in the area. Article 108(3) TFEU is therefore not applicable.		This is a case in which a final second instance judgment was questioned in an 'extraordinary review procedure'. The Supreme Court declared the review admissible but unfounded.
Landesgericht Klagenfurt	Regional Court of Klagenfurt	Lower court (civil/commercial)	ECLI:AT:LG00729:2012:0270CG00113.11P.0427.000	27/04/2012	Private enforcement	Other remedy imposed	The validity of a contract was questioned on the grounds that the contract violated State aid rules. The defendants were ordered to pay the plaintiff (including interest) and were jointly liable to pay to the plaintiff's legal costs. The issue of the unlawful State aid was considered under the broader heading of 'breach of the legality principle'. The Court decided that no such breach occurred in the end, hence that no unlawful State aid was granted in this case.	In its decision of 30 April 2003, C (2003) 1329fin, the Commission stated that seven mortgage banks and about 27 savings banks in Austria benefited from a State guarantee (liability for loss of income). The default liability could be understood as a 'guarantee obligation': it included the obligation of the State (national or local authorities) to intervene in the event of insolvency or liquidation of the credit institution. It creates a direct claim for the creditors against the guarantor, who is only obliged to pay if the assets of the credit institutions are insufficient to meet the claims of the creditors. In principle, all State mortgage banks would pay a liability fee. According to the Commission, the liability for default constitutes State aid within the meaning of Article 87(1) of the EC Treaty (current Article 107(1) TFEU), but can be classified as existing aid. It is incompatible with the internal market and must be annulled. The Commission adopted a provision establishing the provisional application of the rule that liabilities existing on 2 April 2003 are covered by the default guarantee until the end of their term, the transitional period runs until 1 April 2007 and during this period the liability for default for new liabilities is maintained, provided the duration of these liabilities does not go beyond 30 September 2017.	
Bundesfinanzgericht	Federal Finance Court	Lower court (finance)	RV/1701-W/12	16/08/2012	Private enforcement	Recovery order in relation to unlawful aid	Under Article 9(1) of Regulation 800/1998, Member States are required to inform the Commission, within 20 days of its entry into force, of measures in relation to which Member States seek to benefit from the GBER. For the period of January 2011, there was neither an exemption from the notification requirement to the Commission under the GBER, nor was there permission under Article 108(3) TFEU, hence the State aid granted for this period was covered by a non-retroactively sanctioned implementation ban and was as such unlawful. The determination of the advance compensation amount must be based on the same periods of time, as in the determination of the energy tax rebate amount.	This is one of the cases regarding the lawfulness of State aid in the energy tax compensation, decided by the Financial Court.	
Verwaltungsgerichtshof	Supreme Administrative Court	Last instance court (administrative)	JWR_20121701 75_20120822X01	22/08/2012	Private enforcement	None - Claim rejected	According to the Official Journal of the European Union of 30 September 2011, the restriction of Section 2 EAG to production companies constitutes aid based on the General Block Exemption Regulation concerning the compatibility of certain categories of aid with the internal market in application of Articles 87 and 88 of the		The Supreme Administrative Court was the second instance court in this case, as the appeal court from the decision of a financial tribunal.

							EC (Commission Regulation (EC) No 800/2008 of 6 August, OJ L 214, 9.08.2008). The application of the GBER allows a Member State to grant aid without requiring prior notification to the Commission; the Member State must notify the Commission of the aid within 20 working days of the entry into force of the aid, in a fact sheet. According to the information sheet sent to the Commission in this case, the aid scheme has a duration of "1 February 2011 - 31 December 2013". Therefore, an approval by the Commission within the meaning of Section 4(7) EAG could only refer to this timeframe. However, that clearly fails to fulfil the reservation within the meaning of paragraph 4(7) EAG for the month of January 2011, which is why the appeal was followed to that extent. According to the applicable law, in order for the State aid to be lawful, both the notification to the Commission and a subsequent Commission decision declaring the aid compatible are required. However, such a decision is not available for the period up to 1 February 2011 due to the notification being made to the Commission after 1 February 2011.		
Oberster Gerichtshof	Supreme Court of Justice	Last instance court (civil/commercial)	ECLI:AT:OGH0002:2014:0040OB00209.13H.0325.000	25/03/2014	Private enforcement	None - Claim rejected	The Court decided there were no grounds for review of the lower instance court judgment ('extraordinary revision'). Therefore, the only remedies granted by this Court related to the process costs. In this ruling, the Court held that a violation of Article 108(3) TFEU does not automatically entail nullity or an obligation to reverse a contract.	On 4 April 2006, the plaintiffs lodged a complaint with the Commission, alleging infringement of Article 87 of the EC Treaty (current Article 107 TFEU). The plaintiffs were of the opinion that the State aid was not notified to the Commission, in breach of Article 88(3) EC Treaty (current Article 108 TFEU). On 30 April 2008, the Commission ruled that the first defendants, when selling their shares in the bank, gave the second and third defendants an unlawful competitive advantage equivalent to unlawful State aid. This case is related to the national follow-up case: ECLI:AT:OGH0002:2017:0040OB00236.16H.0503.000.	This is a case in which a final second instance judgment was questioned in an 'extraordinary review procedure'. Even though it was accepted by the Court as a review case, the judgments of the earlier instances were not changed, hence no remedies were granted.
Verwaltungsgerichtshof	Supreme Administrative Court	Last instance court (administrative)	2012/08/0168	17/12/2014	Private enforcement	Other remedy imposed	This is not predominantly a State aid case, hence no State aid remedy was imposed. Nonetheless, the case is included here as the Court elaborates on the notion of State aid. Article 107 TFEU seeks to prevent trade between Member States from being affected by benefits granted by public authorities which, in a variety of ways, distort or threaten to distort competition by favouring certain undertakings or branches of production. The precondition for qualifying a national measure as State aid is the financing of that measure by the State or through State resources, the existence of an advantage for an undertaking, the selectivity of that measure, and the effect on trade between Member States and the resulting distortion of competition (see CJEU 15 June 2006, C-393/04 and C-41/05, Air Liquide). In its submission, the complainant does not show that the provisions of Union law are comparable with the multiple-scheme arrangements under the statutory social security scheme. Finally, it is not clear to what extent the social security contributions in question fulfil the concept of aid within the meaning of Article 107(1) TFEU.	This is not predominantly a State aid case. However, the case is included here as the Court interprets the notion of State aid.	
Bundesverwaltungsgericht	Federal Administrative Court	Lower court (administrative)	W118 2009491-1	16/02/2015	Private enforcement	Other remedy imposed	This is not predominantly a State aid case hence no State aid remedy was imposed. A levy can (only) be regarded as part of a State aid measure if there is a necessary connection between the levy and the aid in the sense that the tax revenue is necessarily used to finance the aid. The conditions required by the case law of the CJEU for compulsory use have already been regarded as not met with regard to agricultural marketing contributions in the information cited in the decision at hand. The collection of agricultural marketing contributions is thus not covered by State aid rules.	This is not predominantly a State aid case. However, the case is included here as the Court interprets the notion of State aid.	
Verwaltungsgericht Wien	Regional Administrative Court of Vienna	Second to last instance court (administrative)	ECLI:AT:LVWGWI:2015:VGW.123.074.3881.2015	12/05/2015	Private enforcement	None - Claim rejected	The application to annul the plaintiff's award decision is dismissed. The Court's examination was not primarily concerned with the question of whether the prices offered by the presumptive successful tenderer were economically explainable and comprehensible. In the opinion of the Court, such an examination would not have been sufficient to establish the lawfulness of the contested decision. Rather, it was necessary to show that, in the course of the award procedure, the defendant had reasonably ascertained the price difference of the presumptive tenderer's bid and had reached the conclusion that the calculation of the prices by the presumptive successful tenderer were economically explainable and comprehensible. In this context, a mere plausibility check on the part of the client was sufficient.	The Court stated that if the contracting authority determines that an offer price is abnormally low in relation to the service because the bidder has received State aid, the offer needs to be withdrawn if within a specified period of time it cannot be proved that the aid was lawfully granted. If a bidder withdraws an offer for this reason, they need to notify the Commission through the Federal Minister of Economy, Family and Youth.	This is a case of the Regional Administrative Court, which is a court of first instance for administrative cases, but also constitutes the second-to-last instance court.
Landesgericht Eisenstadt	Regional Court Eisenstadt	Lower court (civil/commercial)	GZ 2 Cg 26/09x-42	18/08/2015	Private enforcement	None - Claim rejected	The claim for compensation was rejected by the Court. The Court confirmed that a breach of Article 108(3) TFEU (i.e. a breach of standstill obligation) occurred as the State aid was granted before the approval of the aid by the Commission. However, there was no claim for compensation / costs and expenses asserted in this process because in the end the granted State aid was not found unlawful by the Commission.		
Verwaltungsgerichtshof	Supreme Administrative Court	Last instance court (administrative)	2015/15/0001	10/02/2016	Private enforcement	None - Claim rejected	The Court decided that no unlawful State aid was granted. The Court also significantly elaborated on the notion of State aid.	A State aid measure within the meaning of Article 107 TFEU, which is implemented in breach of the obligations	

								under Article 108(3) TFEU, is unlawful. In that regard, national courts must protect the rights of individuals and prevent public authorities from breaching the prohibition on the implementation of aid before the adoption of a Commission decision authorising it. The national court must also take full account of the EU's interest. In particular, the national court must avoid taking a measure which would only lead to an expansion of the group of beneficiaries. The principle of effectiveness requires all consequences of an infringement of Article 108(3) TFEU to be taken into account. In this case, the Court referred to the CJEU preliminary ruling C-368/04 (Transalpine Ölleitung).	
Verwaltungsgerichtshof	Supreme Administrative Court	Last instance court (administrative)	JWT_20151 50001_201 60210X00	10/02/2016	Private enforcement	None - Claim rejected	The Finance Office brought an action to annul the decision taken by the Independent Finance Senate (court of first instance in financial matters). The Court decided it was not a State aid case and the State had to return the trial costs to the defendants. This case concerned tax issues but is included here as the Court did consider whether or not the subject matter should be classified as State aid.	The Supreme Administrative Court decided to refer questions to the CJEU. It followed the Opinion rendered by Advocate General Kokott in case C-66/14 that the national measure under which goodwill is to be amortised in the case where a shareholding is acquired in a domestic company — thereby reducing the tax burden — is not permissible in other cases of income and corporation tax is not to be considered State aid.	The Supreme Administrative Court was acting as a first and last instance court here, hence no decision of a lower instance court is described.
Oberster Gerichtshof	Supreme Court of Justice	Last instance court (civil/commercial)	AT:OGH000 2:2017:006 0OB00235.1 6A.0329.00 0	29/03/2017	Private enforcement	None - Claim rejected	The payment which the plaintiff demanded was rejected by all instances due to the fact that, even though it would constitute State aid, it was not notified to the Commission and therefore was unlawful.		This is a Supreme Court judgment in an ordinary review procedure.
Handelsgericht Wien	Commercial Court of Vienna	Lower court (civil/commercial)	GZ 23 Cg 14/15g-55	18/08/2017	Private enforcement	None - Claim rejected	The case is about a measure taken under a general State aid regime (a federal legislative act). The question was whether the measure fulfils the criteria laid down in that regime. At first instance, the main point concerned the analysis of the statement issued by the Federal Ministry of Finance stating that there is a situation in which liability arises. The Court comes to the conclusion that there is a new legal basis for a guarantee created by way of a contract (afterwards denied by the second instance). The court of first instance does not assess whether certain conditions of the hedging instrument were fulfilled, in particular whether the undertaking had a sound economic basis. It can be derived from the decision delivered by the second instance that the court of first instance did not assess the case in light of State aid rules. The Court rejected the argument that the guarantees were invalid due to violation of Article 107(1) TFEU.		
Verwaltungsgerichtshof	Supreme Administrative Court	Last instance court (administrative)	JWR_20161 50041_201 70914J01	14/09/2017	Private enforcement	Other remedy imposed	The Court formulated the questions below to the CJEU and did not rule directly on the case at hand. 1) In a situation such as that in the present case, does an amendment to an approved aid scheme whereby a Member State elects to no longer use the approval of that aid in connection with a particular (separable) group of beneficiaries, and thus simply reduces the level of aid granted under an existing aid measure, constitute an alteration of an aid scheme which is subject (in principle) to the obligation to notify laid down in Article 108(3) TFEU? 2) In the event of a formal error in the application of Commission Regulation (EC) No 800/2008 of 6 August 2008 (General Block Exemption Regulation), is the standstill obligation laid down in Article 108(3) TFEU capable of rendering a restriction of an approved aid scheme inapplicable, with the result that the standstill obligation has the effect of compelling the Member State to pay aid to particular beneficiaries ('implementation obligation')? 3a) Does an energy tax rebate scheme such as that at issue here, under which the amount of the energy tax rebate is clearly determined by law on the basis of a calculation formula, fulfil the conditions laid down in 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 TFEU? 3b) Does Article 58(1) of Commission Regulation (EU) No 651/2014 have the effect of exempting such an energy tax rebate scheme for the period from January 2011 onwards?		The Court decided to await the ruling of the CJEU prior to rendering a judgment in this case.
Oberlandesgericht Wien	Civil Court of Appeal Vienna	Second to last instance court (civil/commercial)	ECLI:AT:OLG0009:2018:00100R00163.17Y.0226.000	26/02/2018	Private enforcement	Case sent back to the lower court for re-assessment	The case concerned the claim of several banks against the Republic of Austria with regard to guarantees granted during the financial crisis (Term Loan Facility Agreement). The Court ordered the first instance court to check if the guarantees were in violation of State aid rules, in particular if there had been a violation of Article 108(3) TFEU, who the beneficiary was (it could be either the bank and/or the State as the Court explained), and the amount of aid.		The subsequent ruling from the lower court is not yet available.
Verwaltungsgerichtshof	Supreme Administrative Court	Last instance court (administrative)	2008/05/02 77	24/06/2009	Public enforcement	Other remedy imposed	The electricity company applied to the State for the reimbursement of costs in relation to a heat and power plant. While it was granted, the amounted granted was less than the company requested. Therefore, the company applied for the annulment of the decision. According to Section 13(1) of the Green Electricity Act,		The Supreme Administrative Court continued the suspended proceedings after the ECJ (current CJEU) had rendered its judgment (C-384/07).

							operators of existing and modernised combined heat and power plants were compensated for the maintenance and business costs in an annual amount to be determined by the Federal Minister of Economics and Labour. In the case of modernised plants, an appropriate return on capital employed was taken into account in the cost calculation. The classification of the facility in question as a modernised plant within the meaning of the law is not contested. The claimed acquisition costs of the modernised plant, amounting to EUR 117,480,000, are also not disputed. In the contested decision, the authority determined the amount of State aid for the year 2005. In point II of the decision, the authority set the appropriate return on capital employed at the amount of EUR 5,688,703.47. The authority used the estimated the purchase price of EUR 96,092,986.55 (it reduced the actual purchase price by the estimated amount of depreciation, assuming the usual 20 years utility of the plant) as the basis for assessment and assumed a return rate of 5.92%. The contested elements of the decision included the sum of the deduction for the depreciation and the amount of the estimated return. The contested decision is set aside in its point II due to a breach of procedural rules. The Court also rules on the costs and obliges the State to reimburse the plaintiff for the costs of proceedings; reconfirming that it is up to the national courts to rule on the costs - also in cases in which the ECJ (current CJEU) was involved in a preliminary ruling.		The Supreme Administrative Court was acting as a first and last instance court here.
Oberlandesgericht Wien	Civil Court of Appeal in Vienna	Second to last instance court (civil/commercial)	GZ 14 R 16 5/15k-46	10/03/2016	Public enforcement	None - Claim rejected	The Court of Appeal upheld the judgment of the lower instance court. The Court ruled that there is no claim for damages because the plaintiff's alleged expenses were not intended to prevent the defendant from repaying the unlawful State aid, and thus to compensate for the anti-competitive advantage. Therefore, they would not be covered by the protective purpose of the infringed standard (Article 108 TFEU), which means that there is no liability for damages.		The case was referred to the Court of Appeal from the Landesgericht Eisenstadt (ruling GZ 2 Cg 26/09x-42).
Verwaltungsgerichtshof	Supreme Administrative Court	Last instance court (administrative)	Ro 2015/03/0014	06/04/2016	Public enforcement	Recovery order of the unlawful/incompatible aid	The ORF needs to pay back the income from program fees or equivalent funds. This was the decision of the Austrian Communication Office (KommAustria) which was not altered by the Federal Communication Senate (Bundeskommunikationssenat). The ORF appealed to the Supreme Administrative Court in a revision procedure. This revision was rejected as unfounded. If the ORF uses funds granted to it from programming fees (or revenue to be maintained) for non-public-sector purposes, this constitutes a misappropriation of the fees and as a result is not a valid justification for granting benefits under Union law.		The Supreme Administrative Court was acting as last instance court here (after a tribunal as court of first instance).
Oberster Gerichtshof	Supreme Court of Justice	Last instance court (civil/commercial)	National reference: 4Ob236/16h ECLI:AT:OGH0002:2017:0040OB00236.16H.0503.000	03/05/2017	Public enforcement	None - Claim rejected	The Supreme Court of Justice here declared the review inadmissible, hence the ruling of the lower instance court remains in force. Following a complaint by the plaintiff, the Commission stated that the defendant, in selling its shares in the bank, granted unlawful State aid to buyers in breach of Article 108(3) TFEU. Therefore, Austria was ordered to reclaim the difference in the purchase price from the buyers. The Republic of Austria, the defendant and the buyer fought this decision unsuccessfully at the CJEU; the appeal against its decisions was rejected by judgment of 24 April 2013 in C-214 / 12P, C-215 / 12P and C-223 / 12P. Moreover, the plaintiff sought the reversal of the purchase agreement. However, the Court decided that the consequence of the existence of unlawful aid under Union law is only the obligation on the Republic of Austria to recover the aid from the party, which can be executed through an additional payment by the purchaser to the seller.		The case was referred to the Supreme Court from the Court of Appeal (Oberlandesgericht Wien).

2. Belgium

2.1 Country report

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A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

There are no specialised courts with jurisdiction to hear cases concerning the public enforcement of State aid rules, nor is there a court that *de facto* hears a considerable number or the majority of cases involving the public enforcement of State aid rules.

The public entity or undertaking that has granted unlawful and incompatible aid will have to seise the competent court to request an enforcement order to recover the aid, when the aid beneficiary does not repay the aid voluntarily.

For a more detailed description of the courts and their competences, please see the overview provided below in relation to private enforcement.

A description of the procedural framework applicable in public enforcement of State aid rules

The public entity or undertaking that granted the aid is in charge of its recovery following a recovery decision. This could be the Federal State, the regions, communities, municipalities or public undertakings.

Formally, the aid beneficiary has a debt towards the State, which can be claimed by letter of formal notice. If the beneficiary is reluctant to repay the aid, the public authority or undertaking will have to seise the competent court and request an enforcement order against the aid beneficiary.

Belgian law currently does not provide a comprehensive set of rules governing the recovery of unlawful State aid declared incompatible with the internal market in a uniform and structured manner. As a result, the public entity has recourse to ordinary civil or administrative law and, in particular, to the provisions governing the specific aid measure.

In some cases, the act granting the aid may foresee specific recovery procedures in case the measure or its execution does not comply with State aid (or other) rules.

The Belgian authorities may create a legal framework for the recovery of the aid by adopting *ad hoc* legislation. This can be appropriate in cases where recovery on the basis of ordinary law would be too complex. *Ad hoc* legislation was, among others, adopted in the *Plastuni* case,[9] in which the Belgian Law on Social Security of 29 June 1981 was modified to specify that the aid had to be repaid and from whom it had to be recovered. Another example is the *Excess Profit Ruling* case.[10]

In tax cases, the calculation of the aid to be repaid can be rather complex, requiring *ad hoc* legislation. Under the Commission's control, Belgium adopted, on 25 December 2016, a Programme law,[11] to recover the unlawful State aid following the recovery decision on 11 January 2016 with regard to the Belgian excess profit provision based on Article 185(2) of the Belgian Income Tax Code 1992.[12] The implementation of this law triggered a request by the Brussels Tribunal of First Instance for a preliminary ruling from the CJEU. (The application was lodged on 11 May 2018 and does not fall within the scope of the present Study.)

The aid beneficiary may challenge the validity of the national recovery order enforcing a recovery decision before the Council of State if the national recovery order was adopted by an administration. The aid beneficiary may also challenge *ad hoc* legislation implementing the recovery order before the Constitutional Court.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

There are no specialised courts with jurisdiction to hear State aid cases in Belgium. The competent court depends on the act that is being contested.

Indeed, to challenge a statute that is the legal basis of an aid measure, one must apply to the Constitutional Court. The Constitutional Court oversees the application of the Constitution by the competent lawmakers in Belgium. The Constitutional Court has the power to annul, to declare unconstitutional and to suspend legislative acts infringing the rules laying down the division of powers between the State, the communities and the regions, as well as those acts infringing the fundamental rights and liberties guaranteed in Section II of the Constitution, the principle of legality of taxation, the principle of non-discrimination in fiscal matters and the protection of foreign nationals.

If the legal basis of an aid measure is an administrative act, the Council of State is competent. The Council of State has the power to suspend and to annul administrative

[9] Labour Court of Appeal, 3.6.2010 - 2003AB043888.
[10] Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667, JO L 260, 27.9.2016, p. 61-103.
[11] Belgian Official Gazette, Programme Law of 25 December 2016, 29.12.2016, No. 2016021100, p. 90879.
[12] The Commission was consulted throughout the legislative procedure.

acts (individual and statutory) that are contrary to the legal rules in force. The Council of State is also the Administrative Supreme Court. As a cassation court, it reviews the external and internal legality of the decisions of lower administrative courts.

Finally, the judiciary (commercial and civil) courts can be seised. In Belgium, these would be the tribunals of first instance (*Tribunal de première instance*/*Rechtbank van eerste aanleg*), tribunals of commerce courts (*Tribunal de l'entreprises*/*Ondernemingsrechtbank*) and the labour courts of first (*Tribunal du travail*/*Arbeidsrechtbank*), and second instance (*Cour du travail*/*Arbeidshof*), and the five courts of appeal (*Cour d'appel*/*Hof van Beroep*).

Litigation between private parties may be brought before the judiciary courts. In particular, the commercial courts are competent for all disputes between companies, regardless of the value of the dispute. An action by a private individual against a company can also be brought before a commercial court.

Litigation between private parties and the State, when the action does not seek to annul a particular State measure for which the Council of State would be competent, may be brought before the judiciary courts. Civil courts also have the jurisdiction to hear actions for damages and rule on the State's liability.

A description of the procedural framework applicable in private enforcement of State aid rules

Belgian law currently does not provide a specific set of procedural rules governing the private enforcement of State aid rules. The general Code of Judicial Procedure applies to these matters.

Without claiming to be exhaustive, the following elements of the procedural framework applicable in private enforcement of State aid rules can be highlighted.

Since the direct effect of Article 108(3) TFEU imposes the obligation of notification of all projects offering aid, third parties may seek the suspension and/or repayment of the aid (based on the direct effect of the standstill obligation established by Article 108(3) TFEU). Those legal actions are quite rare, but they do occur in Belgium and may be effective if they are well-founded. Belgian law does not provide specific rules in the case of unlawful aid that has been declared compatible with the internal market by the Commission. According to the case law of the Union Courts, a national judge may, in that case, only impose interest on the aid amount for the period of unlawfulness between the grant of the aid and the decision of the Commission on the compatibility of the aid.

Under Belgian law, the plaintiff can seek interim measures from the courts, for instance, to prevent the grant of the aid. Interim relief is granted on the same conditions as other measures. The plaintiff must demonstrate that its case is *prima facie* well-founded and that there is a reason of emergency and a risk of damage that would be difficult to amend. Competitors may also turn to the President of the Tribunal of Commerce for an injunction, since benefiting from unlawful aid may constitute an unfair commercial practice. This action is generally efficient and quick (between four and six months).

Under Belgian law, a third party can bring an action for damages against the State for having granted unlawful and incompatible aid in accordance with the rules that apply to classic liability actions. A third party can also bring an action for damages against the aid beneficiary for having benefited from unlawful and incompatible aid in accordance with the rules that apply to classic liability actions.

A party must show sufficient interest in order to bring a claim. Additionally, to be able to challenge local, regional and federal government measures in court for constituting allegedly unlawful State aid, a third party must demonstrate that it has an interest in challenging the aid measure and therefore that it is directly affected by the unlawful State aid, putting it at a competitive disadvantage. However, it is important to note that this rule — and any other national rules — may not undermine the effectiveness of the prohibition on the implementation of State aid.

Under Belgian procedural rules, which also apply in State aid cases, the burden of proof is on the plaintiff. Accordingly, the plaintiff must establish the existence of unlawful State aid and provide evidence. Belgium does not have a discovery procedure, but the judge may order the production of certain documents when there are serious grounds to believe that a (third) party is in possession of a document establishing a relevant fact.

There is no provision in Belgian law preventing an individual from bringing State aid proceedings in the national courts concurrently with an investigation by the Commission. In practice, a plaintiff will generally opt to file a complaint with the Commission or commence national proceedings, but not both at the same time.

No specific limitation period applies for a party invoking unlawfulness under State aid rules before the national court. In *Agence Bruxelles Propreté,*[13] to assess the limitation period regarding a public guarantee granted in 2003, the Tribunal of First Instance referred to Article 17 of Council Regulation (EU) 2015/1589 of 13 July 2015.[14]

National judgments on State aid matters can be appealed. A judgment of the Tribunal of First Instance or the Tribunal of Commerce may be appealed before the Court of Appeal on legal and factual grounds (inadmissibility of the claim, lack of competence, errors of law, errors of fact, lack of motivation, etc.). The Supreme Court is competent to hear appeals against judgments of the Council of State. Judgments of the Constitutional Court may not be appealed.

An appeal, in principle, does not suspend a judgment. A judgment ordering the recovery of aid must be executed unless the suspension has been explicitly requested and motivated by the aid beneficiary and granted by the tribunal.

Main findings based on the case summaries

The main litigation at national level concerned the legality of tax measures or levies imposed by law; the litigation was generally dealt with by the former Court of Arbitration (now the Constitutional Court). An example of this type of litigation is case Brussels Court

[13] Tribunal of First Instance, 4.5.2018 - 109/04/18.

[14] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, OJ L 248, 24.9.2015, p. 9-29.

of Appeal, 27.4.2009 - 2008AR1094 (BE1), where the reimbursement of compulsory contributions under an aid scheme was requested and obtained, after the Commission found it was found unlawful and incompatible with the internal market. This case was brought before the regular judiciary courts, ending up before the Court of Appeal, because the Commission had already decided that the scheme was incompatible with the internal market.

The judiciary courts essentially focused on claims regarding the recovery of aid initiated by public entities enforcing recovery decisions or on claims by aid beneficiaries trying to suspend the recovery process while they were in the process of challenging a decision of the Commission before the CJEU (such as the Brussels South Airport Company in a case before the Namur Tribunal of First instance, judgment of 11 October 2016).

Currently, Belgium is witnessing an increase in national litigation regarding State aid before the judiciary courts, as State aid becomes a legal 'weapon' between competitors. However, it should be noted that actions concerning State aid are still not very frequent, despite a noticeable increase.[15] The majority of State aid cases are private enforcement cases. The case summaries show that competitors actively seek the suspension and annulment of unlawful aid, including the enforcement of the standstill obligation under Article 108(3) TFEU (Bruges Tribunal of Commerce, 12.2.2009 - 00886/08 (BE3); Council of State, 26.6.2015 - 231.76 (BE2); Constitutional Court, 7.11.2013 - 145/2013 (BE4)).

The sectors related to the selected rulings on State aid enforcement are very diverse. The authors of this report did not identify any particular patterns.

Qualitative assessment of the average time of court proceedings

Although the College of courts and tribunals assembles statistics on the number of cases that are pending, introduced and closed, these statistics do not monitor the duration of court proceedings.[16] Indeed, studies on the average duration of court proceedings are not publicly available.

However, on average, it can be said that court proceedings in Belgium tend to be very long. The duration of proceedings seems to be ever increasing due to a considerable judicial backlog, in spite of recent legislative initiatives to make court proceedings quicker and more efficient. In terms of private enforcement, for example, in ruling Council of State, 26.6.2015 - 231.76 (BE2), there was almost five years between the initial request for an injunction and the ruling of the Council of State. In ruling Brussels Court of Appeal, 1.12.2011 - 2005/AR/2457 (BE7), which concerns public enforcement, more than six years elapsed between the first ruling of the Brussels Tribunal of First Instance and the ruling on the case by the Brussels Court of Appeal.

Since there are no particular competent courts or procedures relating to the enforcement of State aid rules, no comparison can be made between State aid cases and other proceedings.

The judiciary courts are not bound by strict time-limits, with the exception of certain expedited procedures, such as requests for interim measures. As mentioned, competitors may request an injunction before the President of the Tribunal of Commerce since benefiting from unlawful aid may constitute an unfair commercial practice. This action generally takes between four and six months.

The annulment procedure before the Council of State is also quite lengthy. However, an urgent procedure is available before the Council of State for the suspension of a challenged act, in which case the Council of State delivers its decision within 45 days. There is also an extremely urgent procedure, reducing the duration of the suspension procedure to one or a few days. Recourse to this procedure is not uncommon in certain areas of law such as public procurement procedures, and requires extreme urgency, as well as a *prima facie* successful plea.

Qualitative assessment of the remedies awarded by national courts

The number of remedies granted in comparison with the overall number of cases decided by national courts is low. This is mainly due to the fact that in many cases the competent court ruled that no State aid was granted. In some cases, the court found that the claim was not well-founded or that the aid constituted existing aid. For instance, the Council of State decided that the aid granted to the public broadcasting organisation for Belgium's French-speaking community (R.T.B.F.) constituted existing aid and that no substantial alterations of the aid had been made, in spite of the renewal of the aid and the extension to online services (Council of State, 231.17).

In case interim measures are requested, the condition of urgency is rarely met (*e.g.* the *Brussels South Airport Company* case before the Namur Tribunal of First instance, judgment of 11 October 2016).

Qualitative assessment of the application of the State aid *acquis*; preliminary references

The Belgian national courts do not hesitate to refer questions regarding the interpretation of State aid rules to the CJEU for preliminary rulings.

In 2015, for instance, the Constitutional Court submitted six questions to the CJEU in the *Arco* case.[17] As mentioned above, in May 2018, the Brussels Tribunal of First Instance submitted three questions to the CJEU, concerning the recovery of fiscal aid from Tekelec International in the context of the Belgian *Excess Profit* tax scheme case.[18]

With regard to the application of the EU *acquis*, the national courts, in particular the Brussels courts, refer quite often to CJEU case law, as did the Brussels Court of Appeal in a case concerning the recovery of undue contributions to an incompatible aid scheme (Brussels Court of Appeal, 27.4.2009 - 2008AR1094 (BE1)). Reference was made to CJEU

[15] This statement is based on the authors' professional knowledge and expertise, and on the findings of a previous Study carried out for the Commission, namely, the 2009 update of the 2006 Study on the enforcement of State aid rules at national level.

[16] https://www.rechtbanken-tribunaux.be/nl/rechterlijke-orde/beheer-en-ondersteuning/college-van-hoven-en-rechtbanken/statistieken (last accessed on 10 January 2019).

[17] Case C-76/15, *Vervloet* (2016) ECLI:EU:C:2016:975.

[18] Case C-318/18, *Oracle Belgium* (case in progress).

case law concerning public and private enforcement, as well as the principle of effectiveness. The Brussels Court of Appeal held that a national limitation period to bring claims of five years would not render recovery "practically impossible".

The Constitutional Court in case Constitutional Court, 7.11.2013 - 145/2013 (BE4), following a CJEU judgment on a reference for a preliminary ruling, annulled a law imposing a social charge because the scheme constituted unlawful and incompatible aid. Despite the relatively low amounts involved, the Constitutional Court held that the *de minimis* Regulation could not be applied because no verification of the actual amount of aid due to cumulation of aid was in place. As it could not be established that the ceilings to benefit from the *de minimis* Regulation were respected, the law was annulled.

Qualitative assessment of any other relevant trends in State aid enforcement

Generally, Belgian judges are becoming more aware of State aid rules, especially the courts that hear more cases, such as the Council of State and the Constitutional Court. Moreover, in case of uncertainty, these courts do not hesitate to submit questions to the CJEU for a preliminary ruling.

The quality of the judgments issued by the tribunals of commerce has improved despite the complexity of the issues that need to be addressed.

Tribunals of first instance still have difficulties in apprehending cases relating to State aid. They tend to adopt a pragmatic approach, which is not always in line with the legal and economic principles applying to State aid.

Qualitative assessment of whether the notion of State aid was conducted well or not;

In some former cases, national judges misinterpreted the scope of Article 107(1) TFEU (notion of aid) and Article 108(3) TFEU (procedure). For instance, in the *Breda* case,[19] the President of the Tribunal of Commerce of Brussels referred to the term 'incompatible aid' although the decision concerned the unlawfulness of an aid measure based on the infringement of Article 108(3) TFEU (Article 88(3) EC Treaty at that time). Although this was probably an error in wording, nowadays, judges tend to carry out a more accurate assessment of State aid rules.

Moreover, in the past, Belgian courts were at times not very accurate in assessing the concept of existing aid. For instance, in the case *Namur-Les Assurances du credit-Office National du Ducroire*, the Court of Arbitration (which was later replaced by the Constitutional Court) concluded on the existence of existing aid on the basis that the Commission had closed an investigation, although the Commission had not explicitly taken a position on the qualification of the contested measure. Nowadays, the distinction between new aid and existing aid does not raise any specific difficulties for courts in Belgium. In 2003, the Court of Arbitration (now the Constitutional Court) assessed a tax exemption granted to Belgacom (former Belgian monopolistic telecommunications operator). As the measure had been enacted in 1930, the Court concluded that it was an existing aid and only the Commission could declare the aid incompatible with the internal market. In the *Agence Bruxelles Propreté* case (of 2018, and therefore out of the scope of the present Study),[20] the Tribunal of First Instance assessed the concept of existing aid in the context of a guarantee granted formally in 2003 and qualified it accordingly.

Any other relevant comments or findings

Over the last ten years, Belgium has been the object of an increased number of investigations of the Commission on allegedly unlawful aid measures.[21] This may provoke an uptick in the public enforcement of State aid rules.

Furthermore, State aid rules are increasingly invoked in private enforcement, with competitors becoming more aware of this legal weapon.

In Belgium, it is not the number of cases relating to State aid that is striking but the variety of judicial procedures that may apply to such cases.

[19] "President of Commercial Court of Brussels, Judgment of 13 February 1995, Breda Fucine Meridionali v Manoir Industries", *JTDE*, 1995, p. 72.
[20] Tribunal of First Instance, 14.5.2018, *op.cit.*

[21] This statement is the result of a comparison between the findings of the present Study and the previous Study on State aid rules, namely, the 2009 update of the 2006 Study on the enforcement of State aid rules at national level.

2.2 Case summaries

Case summary BE1

Date

05/01/2019

Case identifiers

Member State

Belgium

Court which adopted the ruling (national language)

Hof van Beroep te Brussel / Cour d'appel de Bruxelles

Court which adopted the ruling (English)

Brussels Court of Appeal

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

Dutch

Hyperlink to ruling

https://lex.be/en/doc/be/case-law-juridatlocationbrussel/juridatjuridictionhof-van-beroep-arret-27-april-2009-bejc_200904273_nl

Case reference

2008AR1094

Procedural context of the case

On 16 June 2005, Marx, G.H.L. and Detry filed a claim before the Brussels Tribunal of First Instance against the Municipality of Aubel and the Belgian State. The original plaintiffs sought the reimbursement of compulsory contributions paid between 1 January 1988 and 8 August 1996 to the Fund for the Health and Production of Animals, plus interest.

The contested judgment of the Tribunal of First Instance of 7 January 2008 (case reference not available) declared the claim admissible and well-founded. The Tribunal ordered the Belgian State and the Municipality of Aubel to reimburse, in solidum, Marx, G.H.L. and Detry, for their contributions (including interest). Moreover, the Belgian State was ordered to indemnify the Municipality of Aubel for all amounts it would have to pay to these plaintiffs in execution of the award.

The ruling summarised here is the appeal to this ruling.

Type of action

Private enforcement

Delivery date of the ruling

27/04/2009

Language

Dutch

Headnote

In this ruling, the Court considered the limitation period of the reimbursement of obligatory contributions used to finance State aid.

Parties

Names of the parties to the action

De Belgische Staat

Versus

Pierre Marx; G.H.L; Dentry; gemeente Aubel

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Public authority; Other (Contributor towards the measure)

Sector relating to the State aid argument

I - Accommodation and food service activities

Health and production of animals

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

According to the Animal Health Law of 24 March 1987, payments had to be made to a government fund by slaughterhouses and exporters per animal. This measure was not notified to the Commission in accordance with Article 88(3) of the EC Treaty (current Article 108(3)). However, the Commission initiated an investigation and by Commission Decision 91/538/EEC of 7 May 1991, found that the Belgian scheme constituted aid within the meaning of Article 87 of the EC Treaty (current Article 107 TFEU), and declared it incompatible with the 'common market'. Moreover, the Court mentioned that by judgment of 16 December 1992 (Joined Cases Gilbert Demoor en Zonen NV and others v Belgian State C-144/91 and C-145/91), the CJEU had ruled that the Belgian legislation introduced an incompatible State aid.

Through the Act of 23 March 1998, the 1987 Animal Health Law and government fund were annulled with retroactive effect and replaced by a new scheme. The draft Act was notified to the Commission and the new scheme was declared compatible with 'common market' by the Commission decision of 9 August 1996 on aid measure N366 / 96.

Marx, G.H.L. and Detry were companies that had contributed to the Municipality of Aubel and the Belgium State in line with Belgian legislation on animal health, and sought the reimbursement of the compulsory contributions paid between 1 January 1988 and 8 August 1996, plus interest. Following the ruling of the Tribunal of First Instance , the Belgian State appealed to the Brussels Court of Appeal, requesting for the ruling of the Tribunal to be annulled. Marx, G.H.L. and Detry, as well as the Municipality of Aubel (which was to be indemnified by the Belgian State under the ruling of the tribunal of first instance), claimed that the appeal was unfounded.

The plaintiff (the Belgian State) argued that the claims for reimbursement of the compulsory contributions paid by Marx, G.H.L. and Detry would lapse after a five year period from the first of January of the financial year in which the payments of the compulsory contributions were made, pursuant to a Royal Decree on the coordination of the laws on State accounting. According to the plaintiff, the Royal Decree and thereby the five year period, applied since the claims against the State were based on either an error or negligence, or an undue payment.

Marx and associates, however, claimed that the national legislation on the limitation of claims against the Belgian State could not be raised in the event of the reimbursement of contributions that were paid unduly as a result of a violation of Union law by the Belgian State. They claimed that adhering to the national rules laying down a time limit for reimbursement would prevent the application of Union law, which would be contrary to the principle of supremacy of international law. The parties, in order to support this claim, relied on the 1997 CJEU ruling Land Rheinland-Pfalz v Alcan Deutschland GmbH (C-24/95), in which it was ruled that "in principle the recovery of aid must take place in accordance with the relevant procedural provisions of national law, subject however to the proviso that those provisions are to be applied in such a way that the recovery required by Union law is not rendered practically impossible."

Remedy(ies) sought

Other remedy sought

Annulment of the reimbursement of compulsory contributions

Outcome of the case

Conclusions adopted by the national court

The Court could not conclude that the application of a limitation period of five years after the right to repayment of the unlawful aid had arisen would have made the reimbursement of the contributions "practically impossible". It found that the lodging of a claim for repayment of the contributions made by Marx, G.H.L. and Detry within the five-year period beginning on the first day of January 1996 was not "practically impossible".

Additionally that, in the light of more recent judgments of the CJEU on national limitation periods (although the Court does not specify which judgments it is referring to specifically), the application of a limitation period after five years did not make the repayment "impossible or excessively difficult". The Court, therefore, decided that the claim of the defendants, which was lodged on 16 June 2005, was time-barred in so far as it was directed against the Belgian State.

However, the Court found that insofar as the original claim of the companies was directed against the Municipality of Aubel, on the basis of the doctrine of the undue payment, the claim was not time-barred. After all, the Royal Decree on State accounting did not apply with regard to claims against Municipalities. The Court also found that the claim of indemnification of the Municipality of Aubel against the Belgian State was not time-barred. It concerned a claim for indemnity and the debt only arose upon the main claim of the companies.

Remedy(ies) granted – including assessment public enforcement issues

Reimbursement of the taxes paid for financing an unlawful aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-17/91, Lornoy and Others v Belgian State (1992) ECLI:EU:C:1992:514
- C-261/01, van Calster en Cleeren (2003) ECLI:EU:C:2003:571
- C-24/95, Land Rheinland-Pfalz v Alcan Deutschland (1997) ECLI:EU:C:1997:163 (relied on by the parties)

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Decision 91/538/EEC of 7 May 1991 on the animal health and production fund in Belgium, OJ L 294, 25.10.1991
- Council Decision 96/366/EC of 11 June 1996 on the implementation of Article 8 of the Agreement in the form of an Exchange of Letters between the European Economic Community and the Principality of Andorra, OJ L 145, 19.6.1996

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary BE2

Date

17/12/2018

Case identifiers

Member State

Belgium

Court which adopted the ruling (national language)

Raad van State / Conseil d'Etat

Court which adopted the ruling (English)

Council of State

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

http://www.raadvst-consetat.be/Arrets/231000/700/231760.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=28477&Index=c%3a%5csoftware%5cdtsearch%5cindex%5carrets_fr%5c&HitCount=35&hits=853+8ee+22f2+27fe+3810+3872+3890+38b9+38c0+38e0+3914+392b+39ef+3b02+3b7a+3ba6+3bbe+3bd2+3c1e+3c4e+3c6e+3c90+3cb8+3cd4+3cfe+3d20+3d73+3da3+3df6+3e38+3ec9+3ef1+3ff4+4184+4234+&010495620181817

Case reference

231.76

Procedural context of the case

On 8 September 2010, the plaintiffs sought an injunction against RTBF before the Tribunal de Commerce de Charleroi (TCC). In the first judgment on 24 November 2010 (case reference not available), the TCC rejected the request. On 17 February 2011, the plaintiffs submitted a complaint to the Commission concerning the financing of the activity of 'written press online'. By a second judgment on the 9 August 2011, the TCC postponed the case to 19 October 2011 (case reference not available) to allow the parties to respond to a number of questions. On 30 December 2011, in a third ruling (RG n° A/10/01837), the TCC deemed that it was not competent in relation to the issue concerning State aid rules. On 21 December 2012, the Government of the French Community renewed the contract with RTBF. On 28 March 2013, the plaintiffs appealed against the second and third judgments of the TCC. On 20 January 2014, the appeal was rejected. The Court of Cassation (judgment of 29 January 2016, C.14.0251.F) overruled the Court of Appeal's judgment, referring the case back to the Court of Appeal. However, the plaintiffs have never activated this procedure.

On 30 April 2013, the plaintiffs introduced the proceedings at the Conseil d'Etat (the present proceedings). By a Commission decision of 7 May 2014 ((C(2014) 2634)), the Commission proposed and the Belgian State accepted appropriate measures under Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. The Commission also reminded the Belgian State to notify the Commission of the final legal framework (decree amending the statutory decree, decree of the Government of the French Community setting the terms and conditions for reimbursement of any possible overcompensation and modified management contract), once it is adopted.

Type of action

Private enforcement

Delivery date of the ruling

26/06/2015

Language

French

Headnote

In this ruling, the Court held that a subsidy for a public television station, which was extended to its online presence, did not constitute 'new aid' but was 'existing aid', due to the lack of a substantial alteration.

Parties

Names of the parties to the action

La s.c.r.l. Les journaux francophone belges; la s.a. Rossel et Cie; la s.a. IPM Group; la s.a. Editions de l'Avenir; la s.a. Sud Presse

Versus

La Communauté française, représentée par son Gouvernement; la Radio télévision belge de la Communauté française (R.T.B.F.)

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Beneficiary; Public authority

Sector relating to the State aid argument

J - Information and communication

Online publishing

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

R.T.B.F. benefited from a public subsidy on the basis of a management contract. The new management contract at issue in this case extended the subsidy to online content. The plaintiffs claimed that this constituted new aid, which was notifiable.

The plaintiffs argued that the renewal of the contract between the Communauté française and R.T.B.F. entailed new aid which needed to be notified to the Commission for a decision on compatibility with the internal market. The defendants argued that the contract was not a regulation susceptible to the action for annulment sought by the plaintiffs since it is not generally applicable, but only applies to R.T.B.F. The defendants also argued that the plaintiffs had no direct and individual interest in having the contact annulled.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid; Other remedy sought (Annulment of the contract granting aid)

Outcome of the case

Conclusions adopted by the national court

R.T.B.F. benefited from a public subsidy on the basis of a management contract. The new management contract at issue in this case extended the subsidy to online content. The plaintiffs claimed this to be new aid, which was notifiable. However, the Court referred to the Commission Decision (C(2014) 2634) on the issue, where it stated that the utilisation of new technologies did not give rise to a substantial alteration of the existing aid legal basis, meaning that notification was not necessary. The use of new technologies did not alter the objective pursued, provided that the public broadcasting mandate and the funding base for the activities remained unchanged. Thus, as it did not concern new aid, the Court rejected the plaintiffs' case.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission Decision SA.32635 (2012/E) – Financement de la RTBF Belgique (C(2014) 2634) of 7 May 2014

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary BE3

Date

17/12/2018

Case identifiers

Member State

Belgium

Court which adopted the ruling (national language)

Rechtbank van Koophandel te Brugge / Tribunal de Commerce de Bruges

Court which adopted the ruling (English)

Bruges Tribunal of Commerce

Instance court which adopted the ruling

Specialised court

Official language of the court

Dutch

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

00886/08

Procedural context of the case

The case at hand constitutes a first instance judgment, and there is no appeal following this judgment. Following the ruling summarised here, the Commission adopted a recovery decision on 27 April 2010.

Type of action

Private enforcement

Delivery date of the ruling

12/02/2009

Language

Dutch

Headnote

In this ruling, the Court held that continuing to receive State aid even though the Commission has launched a formal investigation, constitutes an infringement of the standstill obligation imposed by Article 88(3) of the EC Treaty (current Article 108(3)).

Parties

Names of the parties to the action

Zeebrugse Visveiling NV

Versus

Exploitatie Vismijn Oostende NV (EVO); Pakhuizen Oostende NV (PH)

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

G - Wholesale and retail trade; repair of motor vehicles and motorcycles

Fish auction

The type of State aid measure challenged in the court proceedings

Grant / subsidy; Guarantee at more favourable terms than market conditions; Tax break/rebate; Concession/privatisation of State-owned land/property at more favourable terms than market conditions; Other (Provision of staff)

Substance of the case

Facts and parties' main arguments in the case

The case concerns aid measures granted by the City of Ostend and an autonomous municipal entity (Autonoom Gemeentelijke Vismijn Oostende or 'AGVO'), in favour of two subsidiaries of AGVO: the operator of the Ostend auction, Exploitatie Vismijn Oostende ('EVO'), and the property infrastructure manager, Pakhuizen ('PH').

The plaintiff claimed that the defendants, in breach of the provision of Article 88(3) of the EC Treaty (current Article 108(3) TFEU), did not suspend the State aid they received until the formal investigation by the Commission concerning this unlawful State aid had been completed. As examples of the State aid received by the defendants, the plaintiff lists the provision of start-up capital; the provision of guarantees for commercial loans; the implementation of capital increases; donating property ownership (including a long-term lease agreement); and the provision of staff.

The plaintiff requested (i) that the financial resources made available had to be placed in a separate blocked account; (ii) that the defendants would be prohibited from using the buildings in the Ostend fishing port for commercial purposes; (iii) that a ban would be imposed on EVO to grant loans to shipowners under non-competitive conditions (including the condition that the fish be delivered and auctioned at the Ostend fish auction), and that existing contractual obligations that shipowners entered into (namely that their fish must be delivered and auctioned at the Ostend fish auction) when concluding their loan agreement with EVO are declared inapplicable; (iv) that the payment of all or part of the transport costs from all destinations in Europe on the condition that shipowners use the Ostend fish auction be banned; and (v) that making free water and electricity available on condition that shipowners use the Ostend fish auction be banned.

According to the plaintiff, despite the standstill obligation, the defendants continued to benefit from this State aid by offering their services at lower prices to shipowners who use the Ostend fish auction. Doing so gave them an unauthorised advantage over their competitors, and especially the plaintiff, as the nearest fish market.

The defendants disputed the claim. They underlined that the Commission had not yet taken a decision on the merits of the case and the State aid in question. According to them, initiating a formal investigation is only a preliminary decision. Moreover, Article 88 of the EC Treaty (current Article 108 TFEU) was addressed only to the Member States and only entailed obligations on their part. Article 88 of the EC Treaty (current Article 108 TFEU) did not impose obligations on the legal subjects of the Member States. Only the Belgian State, which was not a party here, could therefore have infringed Article 88 of the EC Treaty (current Article 108 TFEU). According to the defendants, they were not committing unlawful commercial practices by receiving the alleged aid and by using it if it has not yet been established that it constituted prohibited State aid.

Moreover, the defendants disputed that the four conditions under Article 88 of the EC Treaty (current Article 108 TFEU) were fulfilled. In particular, they disputed that they would have received an economic advantage because of the capital contribution, guarantee and free access to the premises of the Ostend fish auction.

The defendants also argued that the plaintiff's professional interests were not adversely affected by the contested aid measures. Any proof of any damage or disadvantage was missing. Lastly, they pointed out that the financial support had ceased since 2007.

Remedy(ies) sought

Recovery order in relation to unlawful aid; Interim measures to suspend the implementation of an unlawful aid; Other remedy sought (For the funds made available to the beneficiary to be put in a blocked account)

Outcome of the case

Conclusions adopted by the national court

The Tribunal of Commerce found that the defendants had acquired an economic advantage because the AGVO provided the risk capital for EVO. The Tribunal noted that no private investors were willing to invest money in EVO (the Ostend fish market was not prospering well). If the Government did not provide capital, there would have been no exploitation of the Ostend fish auction, hence the funding from the Government constituted an economic advantage.

Furthermore, the Tribunal ruled the defendants were unable to counterargue that they did not acquire the buildings and land on exceptional terms, as EVO obtained the use of the buildings free of charge. The fact that they would bear the costs of maintenance and renovation did not mean they benefited from use consistent with normal market conditions. Likewise, it was not customary in commercial relations that the guarantees were provided free of charge.

According to the Tribunal , there was thus an undeniable economic advantage in the provision of State support to the Ostend fish auction.

The Tribunal stated that whether this State aid constituted an infringement of the Community rules and was therefore a prohibited State aid could not be assessed by the Tribunal, but would be decided at the end of the formal investigation of the Commission. However, according to Article 88(3) of the EC Treaty (current Article 108 TFEU), this State aid should have been suspended until the Commission had completed its investigation.

The Tribunal also ruled that the defendants could not rely on the argument that the standstill obligation only applied to the Belgian State and did not concern them. The plaintiff rightly accused the defendants of still "enjoying" the State aid knowing that this aid was unlawful. The Tribunal thus observed that the defendants were, in fact, accepting unlawful State aid in breach of the duty to suspend as imposed by Article 88(3) of the EC Treaty (current Article 108 TFEU).

The Tribunal rejected the argument that the professional interests of plaintiff would not have been infringed. Indeed, if the defendants could keep their services cheaper for users by enjoying government support, it implied a form of unfair competition with the other fish auction, which did not benefit from the same government support. It also doubted the claim that the provision of State aid had already ceased.

The Tribunal rejected a request to place the financial means which had been placed at the disposition of the beneficiaries into a separate blocked account, because that would go beyond the suspension of the contested measures. Moreover, the Tribunal found that ruling on any refunds would imply, at least implicitly, that it would consider the aid measures to be unlawful, which was not within its competence to rule on. However, it could suspend any future support measures that constituted State aid within the meaning of Article 88 of the EC Treaty (current Article 108 TFEU) for the duration of the formal investigation into the lawfulness and compatibility of the State aid.

The Tribunal ordered the immediate cessation of the State aid until the Commission's formal investigation into State aid to the Ostend fish auction was concluded.

Remedy(ies) granted – including assessment public enforcement issues

Interim measures to suspend the implementation of an unlawful aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary BE4

Date

17/12/2018

Case identifiers

Member State

Belgium

Court which adopted the ruling (national language)

Grondwettelijk Hof / Cour Constitutionnelle

Court which adopted the ruling (English)

Constitutional Court

Instance court which adopted the ruling

Constitutional Court

Official language of the court

French

Hyperlink to ruling

http://www.const-court.be/public/f/2013/2013-145f.pdf

Case reference

145/2013

Procedural context of the case

The application to the Court was submitted on 16 November 2009. On 6 April 2011, the Court referred certain questions to the CJEU (Ruling No. 50/2011).

On 8 May 2013, the CJEU responded to the questions (Case Eric Libert, Christian Van Eycken, Max Bleeckx, Syndicat national des propriétaires et copropriétaires ASBL, Olivier de Clippele v Gouvernement flamand; and All Projects & Developments NV and Others, v Vlaamse Regering C-203/11). The CJEU noted that, while the measures were liable to constitute State aid, it was up to the referring court to decide whether the conditions relating to the existence of State aid are met.

On 7 November 2013, the Court issued its final judgment in the present case.

Type of action

Private enforcement

Delivery date of the ruling

07/11/2013

Language

French

Headnote

In this ruling, the Court held that the *de minimis* exemption was not applicable to the legislation in question, on the basis that there was nothing preventing the relevant measures being applied cumulatively, so that altogether these measures would exceed the *de minimis* ceiling.

Parties

Names of the parties to the action

All Projects & Developments; Bouw- en Coördinatiekantoor Andries; Belgische Gronden Reserve; Bouwonderneming Ooms; Bouwwerken Taelman; Brummo, Cordeel Zetel Temse; DMI Vastgoed; Dumobil; Durabrik, Eijssen; Elbeko, Entro, Extensa; Flanders Immo JB; Green Corner; Huysman Bouw; Imano; Immpact Ontwikkeling, Invest Group Dewaele; Invimmo; Kwadraat, Liburni; Lotinvest, Matexi; Novus, Plan & Bouw; 7Senses Real Estate; Sibomat, Tradiplan; Uma Invest; Versluys Bouwgroep; Villabouw F. B. (anonymised); Willemen General Contractor; Wilma Project Development; Woningbureau P. H. (anonymised)

Versus

No defendant

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Not applicable (see other comments)

Sector relating to the State aid argument

L - Real estate activities

Real estate development

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The case concerned compensation granted to real estate developers to cover the 'social charge' they bear because of social housing obligations in real estate projects.

The plaintiffs challenged the law before the Constitutional Court, arguing that it constituted State aid. The plaintiffs argued that, given that the measure applies to large construction projects, the possibility of falling below the *de minimis* ceiling would be excluded (neither under Regulation 1998/2006 nor under Regulation 360/2012). Nor could the measure be considered compensation for providing services of general economic interest, as there was no objective calculation of the social charge. Furthermore, there was no clearly-defined obligation on the provider to provide the services of general economic interest.

The plaintiffs argued that the third Altmark case (Case Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht C-280/00) condition was not satisfied. It could not be established with certainty that the compensation was not higher than necessary to cover the costs of the service of general economic interest. Nor, they argued, was the fourth condition satisfied. The contested measure did not permit the verification if the measures are based on costs of a reasonably well-run company.

The Flemish Government submitted that the Constitutional Court (which had made a reference to the CJEU) had already ruled in its ruling No. 50/2011 that the measure could not be classed as State aid as it qualified as *de minimis* aid. It argued that, as the measure served to finance local services, it could not involve a negative impact on trade between Member States. Furthermore, the Flemish Government argued that the measures would fall below the *de minimis* ceiling. It argued that the parameters for calculation were described in a transparent and objective manner, and did not go beyond what was necessary.

The Flemish Government argued that the measures were exempted from notification to the Commission on the basis of the SGEI decision. The aid measures fulfilled the conditions of that decision, given that they complied with the Altmark conditions.

Remedy(ies) sought

Other remedy sought

Annulment of the legal provisions granting State aid

Outcome of the case

As this case was a constitutional challenge, there is not strictly speaking any defendant. However, the Flemish Government made submissions in favour of the measure.

Conclusions adopted by the national court

The Court noted that it had already ruled (in case 50/2011) that the measures did not constitute unlawful State aid if the amounts granted fell below the *de minimis* ceiling set out in *de minimis* Regulation. The Court noted that the cumulation of the four measures contested in the case would amount to an average sum of EUR 71,475 per dwelling. Thus, it could not be excluded that certain construction companies could benefit from financing which surpassed the limit in Regulation 360/2012 and Regulation 1998/2006. Furthermore, certain measures (those in Article 4.1.20(3)) could not be exempted from notification to the Commission by virtue of Commission Decision 2005/842/EC, because the compensation is not based on the real costs of execution, making it difficult to determine whether or not there is overcompensation.

Given that the aid measures were notifiable and had not been notified prior to being put into force, the legal provisions granting them should be annulled.

It should be noted that the case involved several measures. Some (those in Articles 3.1.3 and 3.1.10 of the law) were regarded as falling below the *de minimis* ceiling, because the amounts were very small.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

Annulment of the legal provisions granting State aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (2003) ECLI:EU:C:2003:415

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- 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 (*de minimis* Regulation)
- Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005
- Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006
- 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

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-203/11 Eric Libert, Christian Van Eycken, Max Bleeckx, Syndicat national des propriétaires et copropriétaires ASBL, Olivier de Clippele v Gouvernement flamand; and All Projects & Developments NV and Others, v Vlaamse Regering (2013) ECLI:EU:C:2013:288 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=137306&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11525)

Any other comments (optional)

Case summary BE5

Date

08/01/2019

Case identifiers

Member State

Belgium

Court which adopted the ruling (national language)

Hof van Cassatie / Cour de Cassation

Court which adopted the ruling (English)

Court of Cassation

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Dutch

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

C.08/0450.N.

Procedural context of the case

The plaintiff had been in receipt of State aid in the form of reductions in the tax burden on social security contributions for the period 1993-1997 (meant to promote the employment of manual workers). The Court notes that the Belgian State had first received a 'letter of warning' from the Commission (dated 17 August 1993), and by the Commission Decision 97/239/EC of 4 December 1996, the aid was declared incompatible with the 'common market'. The Court also considered that the CJEU, by the judgment of 17 June 1999 (C-75/97) found the scheme to be incompatible with EU norms and principles. In 2001, the CJEU also found the Belgian State in 2001 had failed to recover the aid.

The plaintiff's argument was rejected in first instance by the Dendermonde Tribunal of First Instance (31 December 2004). The Tribunal's ruling was confirmed by the Gent Court of Appeal (8 November 2007). This was appealed to the Court of Cassation (the present case).

The Court overturned the ruling of the lower court and sent the case back to the Antwerp Court of Appeal (the ruling of this Court is not available).

Type of action

Private enforcement

Delivery date of the ruling

17/09/2009

Language

Dutch

Headnote

In this ruling, the Court held that the primacy and autonomy of Union law did not prevent an action against the State concerning the negligent behaviour of its authorities with regard to the recovery of unlawful State aid.

Parties

Names of the parties to the action

Rob Montagebedrijf

Versus

Belgische Staat

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

M - Professional, scientific and technical activities

Employment of manual workers

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The plaintiff sought damages from the State for its negligent handling of the situation, claiming that the Belgian State (the defendant) had violated EU norms and also the general obligation of diligence. According to the plaintiff, due to the State's actions, it had charged incorrect prices, which caused damages. The plaintiff denied that the actual recovery constituted the damage.

Remedy(ies) sought

Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

The Court overturned the ruling of the Ghent Court of Appeal, which had held that the primacy of Union law did not allow a company to claim damages from the State in relation to negligence in relation to its execution of the recovery of aid. The Court of Cassation held that the Ghent Court of Appeal had not responded to the arguments of the plaintiff that the fault of the State was not in the simple restitution of State aid but resided in the negligent behaviour of the State.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The Court overturned the ruling of the lower court and sent the case back to the Court of Appeal of Antwerp (this ruling is not available).

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-75/97, Belgium v Commission (1999) ECLI:EU:C:1999:311

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission decision of 4 December 1996
- Letter of warning from the Commission from 17 August 1993

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary BE6

Date

06/01/2019

Case identifiers

Member State

Belgium

Court which adopted the ruling (national language)

Arbeidshof te Brussel / Cour du Travail de Bruxelles

Court which adopted the ruling (English)

Brussels Labour Court

Instance court which adopted the ruling

Specialised court

Official language of the court

Dutch

Hyperlink to ruling

http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20100603-9

Case reference

2003/AB/43888

Procedural context of the case

Commission Decision 97/239/EC of 4 December 1996 regarded the Maribel bis/ter schemes as unlawful and incompatible State aid and imposed on the Belgian State the obligation to recover it. By judgment of 17 June 1999 (Belgium v Commission C-75/97), the ECJ (current CJEU) rejected the appeal of the Belgian State against the decision of the Commission as unfounded.

The Brussels Labour Tribunal, by judgment of 8 November 2002 (A.R. 6550/01), rejected the claim of the plaintiff, which then filed an appeal against this ruling. By judgment of 30 November 2006, Brussels Labour Court (court of appeal) declared the appeal admissible but, before ruling on the merits of the case, ordered the reopening of the debate in order to allow the parties to conclude further on the opportunity of referring a request for a preliminary ruling to the ECJ (current CJEU).

Type of action

Public enforcement

Date of the Commission decision

04/12/1996

Delivery date of the ruling

03/06/2010

Language

Dutch

Headnote

In this ruling, the Court considered the effective recovery of State aid in the context of the re-structuring of an undertaking.

Parties

Names of the parties to the action

Plastuni Operations NV

Versus

Rijksdienst voor Sociale Zekerheid

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

M - Professional, scientific and technical activities

Employment of manual workers

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

Plastuni (limited company) – which has since been dissolved and liquidated – enjoyed a reduction in social security contributions in 1993 on the basis of the so-called Maribel schemes. However, the decision of the Commission of 4 December 1996, deemed the Maribel bis/ter schemes as unlawful and incompatible State aid and imposed on the Belgian State the obligation to recover. By judgment of 17 June 1999 (C-75/97 - Belgium v Commission), the ECJ (current CJEU) rejected the appeal of the Belgian State against the decision of the Commission as unfounded.

The relevant Belgian law on social security of 29 June 1981 was thus changed to require repayment of the aid. More specifically, Article 37(2) was added, which quantified the reduction of contributions that had to be repaid by the employers who had enjoyed it. Moreover, this provision specified that in the event of a merger, division, conversion or the transfer of existing activities, the recovery will be made against the new employer (with the amount to be recovered from the new employer being proportionate to the total debt taken over).

Plastuni entered into a reorganisation agreement with Guifra (limited company) on 30 January 1998. The parties agreed to set up a new company; Plastuni Operations (limited company). On 19 February 1998, Plastuni was placed into liquidation and changed its name to Plast Real Estate (limited company). On the same date, Plastuni Operations was founded with Plast Real Estate as a founder. Plast Real Estate sold its shares to Guifra immediately after its incorporation.

By letter of 18 February 2000, Plastuni Operations was informed of the change in the law and ordered to repay an amount of EUR 102,915.82. Plastuni Operations immediately disputed this claim, but proceeded to pay the amount claimed through quarterly payments.

The Brussels Labour Tribunal, by judgment of 8 November 2002, declared the claim of Plastuni Operations that it was not obliged to repay the sum and that the deposits it had already made should be repaid unfounded. Plastuni Operations filed an appeal against the verdict of the Labour Tribunal. By judgment of 30 November 2006, the Brussels Labour Court (court of appeal) declared the appeal of Plastuni Operations admissible but, before ruling on the merits of the case, ordered the reopening of the debate in order to allow the parties to conclude further on the opportunity of referring a request of a preliminary ruling to the CJEU.

Plastuni Operations, in its appeal, disputed that – unlike the lower instance court had ruled – at the time of its incorporation and contribution, it was agreed that the new company would pay all the debts of the former company vis-à-vis the National Social Security Office. It referred to the fact that, at the time the agreement was concluded, it was not aware of the claim of the National Social Security Office (and that in fact there was no claim at that time on the part of the National Social Security Office).

Plastuni Operations further pointed out that the recovery against it could not take place on the basis of Article 37 bis paragraph 2 of the Act of 29 June 1981, because the contribution that took place was not a contribution of a 'generality' or of an industry.

Plastuni Operations further argued that the recovery was contrary to the case law of the CJEU, which provided that unlawful State aid can generally only be recovered from the recipient company, which in the present case would be the company Plast Real Estate.

The National Social Security Office, on the other hand, claimed that there was indeed a conventional takeover of all Plastuni's debts. It stated that, at the time of the contribution and the takeover, the repayment of the aid received under the Maribel scheme was indeed already an existing debt. Moreover, it claimed that the takeover of the activities of the Plastuni falls within the scope of the last paragraph of Article 37 bis paragraph 2. The National Social Security Office accused the Plastuni Operations of deliberately setting up the construction in order to escape the reimbursement of the aid received unlawfully.

Remedy(ies) sought

Other remedy sought

Annulment of the recovery; repayment of deposits already made

Outcome of the case

Conclusions adopted by the national court

The Court found – based on several documents regarding the founding of Plastuni Operations – that the takeover of the debts with the National Social Security Office was limited to a number of detailed debts, as they were known at the time of the transfer and contribution, and that the debts which were not expressly introduced continued to lie with the transferring company. It also stated that it was the intention of the parties to only take into account the debts with the National Social Security Office known at that time. According to the Court, it also appeared that by no means, at the time of the contribution, did Plastuni Operations have knowledge of the obligation to repay the Maribel subsidy received.

The Court ruled that Plastuni Operations was not obliged to repay on the basis of Article 37 bis of the law of 29 June 1981, as it did not fall within the definition provided. It also found it unlikely that the restructuring was intended to escape the reimbursement of the Maribel aid.

From the expert investigation ordered by the Court, it appeared that the price paid by Guifra for the acquisition of the shares of Plast Real Estate in the Plastuni Operations corresponded to the market price of these shares. It follows that, according to the settled CJEU case law, the aid received must be deemed to have been included in the purchase price paid, and that no financial resources have been withdrawn from the assets of the recipient company.

In light of all these elements, the Court ruled that the National Social Security Office did not in any way make plausible that an advantage was granted to Plastuni Operations in the same way it was to Plastuni before the acquisition. On the other hand, the negative effects on free competition between companies had been eliminated by the fact that the Plast Real Estate was immediately put into liquidation.

Based on these considerations, the Court ruled that the National Social Security Office ought to be ordered to repay the recovery sums unduly paid-back (including interest), and reformed the contested judgment.

Remedy(ies) granted – including assessment public enforcement issues

Quantification of the aid to be recovered; Identification of the aid beneficiary; Liquidation of the aid beneficiary – i.e. aid recovery in the context of insolvency proceedings; Other remedy imposed (Repayment of the recovery sums unduly paid-back)

Difficulties referred to by the national court in deciding the case (optional)

In view of the complexity of the case, the Court twice ordered a reopening of the debates and ordered an expert investigation, with the result that the case was pleaded four times before the Court.

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-390/98, H.J. Banks & Co. Ltd v The Coal Authority and Secretary of State for Trade and Industry (2001) ECLI:EU:C:2001:456
- C-328/99 and C-399/00, Italy and SIM 2 Multimedia v Commission (2003), ECLI:EU:C:2003:252
- C-277/00, Germany v Commission (2004) ECLI:EU:C:2004:238
- Case 70-72, Commission of the European Communities v Federal Republic of Germany (1973) ECLI:EU:C:1973:87
- Case C-350/93, Commission of the European Communities v Italian Republic (1995) ECLI:EU:C:1995:96
- Case C-303/88, Italian Republic v Commission of the European Communities (1991), ECLI:EU:C:1991:136

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission decision of 4 December 1996

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary BE7

Date

17/12/2018

Case identifiers

Member State

Belgium

Court which adopted the ruling (national language)

Hof van Beroep te Brussel / Cour d'Appel de Bruxelles

Court which adopted the ruling (English)

Brussels Court of Appeal

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

French

Hyperlink to ruling

https://lex.be/en/doc/be/case-law-juridatlocationbruxelles/juridatjuridictioncour-d-appel-arret-1-december-2011-bejc_2011120112_fr

Case reference

2005/AR/2457

Procedural context of the case

This case is an appeal of a ruling of the Brussels Tribunal of First Instance, handed down on 23 March 2005 (case reference not available).

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

01/12/2011

Language

French

Headnote

In this ruling, the Court held that once aid has been granted, it is the beneficiary of the aid and not third parties, that are bound by the conditions to the payment of the aid, and they cannot discharge their liability onto subcontractors or co-contractors that were freely chosen.

Parties

Names of the parties to the action

SA BHA BELGIUM

Versus

La SA Ets MAMY; La Société de droit public B.I.R.B.; La SA PREMIX INVE Belgique; La SA DUMOULIN; venant aux droits et obligations de la SA CARNIPOR

The relationship of the plaintiff to the measure

Other

Customer of the beneficiary

The relationship of the defendant to the measure

Third party; Beneficiary; Public authority

Sector relating to the State aid argument

C - Manufacturing

Manufacturing of agricultural feed

The type of State aid measure challenged in the court proceedings

Other

Credit note

Substance of the case

Facts and parties' main arguments in the case

Pursuant to Regulation 1725/79/EEC on the rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves, SA Ets MAMY received aid in the context of work ordered by the plaintiff, which itself was active in the sector. The aid was assigned to the plaintiff in the form of a credit note, which the plaintiff in turn passed onto PREMIX. The aid was conditional upon the skimmed milk being used as feed and possessing certain characteristics (e.g. between 60-70kg per 100kg finished product).

Upon inspection, it was discovered that PREMIX had reworked and transformed the product so that the product no longer satisfied the conditions upon which the grant of aid depended. B.I.R.B. sought to recover the aid from SA Ets MAMY, which in turn alleged that the non-compliance was not imputable to it, joining the plaintiff to the action. The plaintiff sought to join PREMIX to the action, on the basis that it was the one responsible for the non-compliance with the regulation.

Remedy(ies) sought

Other remedy sought

Making a different entity liable for the repayment

Outcome of the case

Conclusions adopted by the national court

In the first instance, the judge had ordered the plaintiff to pay SA Ets MAMY the sum of EUR 82,590.48 plus compensatory interest, for breach of its duty of loyalty and good faith by failing to inform PREMIX that the products sold were subject to the aid scheme. However, the Court of First Instance held that Regulation 1725/79/EEC did not apply to PREMIX, and that it had not committed any breach of duty or acted in bad faith.

On appeal (the present judgment), the Court held that the Regulation did not apply to third parties such as PREMIX. The Court ruled that it was the beneficiary of the aid (SA Ets MAMY), and once the aid is passed on, its beneficiaries, which were required to comply with the conditions subject to which the payment of the aid was made and who, in the absence of any restriction on the sale of the finished product by the said beneficiary, as in the present case, ought to ensure by binding contractual measures that its prospective purchasers or sub-purchasers would not disregard the composition of the product or its destination. The Court held that the case law

of the CJEU supported this analysis that the undertaking covered by the Regulation remains responsible for proper performance of each and every obligation, without being able, for whatever reason, to discharge its responsibility vis-à-vis the public body seeking recovery onto subcontractors or co-contractors that it freely chose. If it wanted to avoid a situation where it was liable for the actions of a sub-contractor, it should deal with this by way of a clause in the sub-contract stating that the product was not to be reworked in a manner so as to make it non-compliant with the Regulation.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

The Court noted that the case law of the CJEU supported its analysis that the economic operator covered by the Regulation remained responsible for proper performance of each and every obligation, without being able, for whatever reason, to discharge its responsibility vis-à-vis the public body seeking recovery onto subcontractors or co-contractors that it freely chose. However, the judgment did not cite any specific case law.

References by the court to other relevant aspect of the EU acquis

- Commission Regulation (EU) 1725/79/EEC of 26 July 1979 on the rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves, OJ L 199, 7.8.1979

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary BE8

Date

02/01/2019

Case identifiers

Member State

Belgium

Court which adopted the ruling (national language)

Rechtbank van eerste aanleg te Namen / Tribunal de première instance de Namur

Court which adopted the ruling (English)

Namur Tribunal of First Instance

Instance court which adopted the ruling

Lower court (civil/commercial)

Official language of the court

French

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

11/10/2016

Procedural context of the case

The Commission examined the concession contract between SOWAER, the public owner of the Charleroi airport infrastructure and Brussels South Charleroi Airport (hereafter 'BSCA'), the airport manager. On 1 October 2014, the Commission concluded in Commission Decision (EU) 2016/2069, that the concession fee did not correspond to the market price. It authorised the functioning aid in favour of BSCA until the 4 April 2014 and as of that date declared the aid unlawful and incompatible with the internal market. On 30 October 2014, the Walloon Region put BSCA on notice to comply with the Commission decision and notified it that SA SOWAER had been invited to take steps against it. SOWAER put BSCA on notice. BCSA challenged the Commission decision before the GC (Brussels South Charleroi Airport (BSCA) v European Commission T-818/14) and lodged a referee procedure and a procedure on the merit to try to obtain a stay on the implementation of the Commission decision.

Type of action

Public enforcement

Date of the Commission decision

01/10/2014

Delivery date of the ruling

11/10/2016

Language

French

Headnote

In this ruling, the Court considered an application for interim relief to prevent the recovery of State aid pending an appeal at the GC, but the Court was not satisfied that the criterion of urgency had been met.

Parties

Names of the parties to the action

La SA Brussels South Charleroi Airport

Versus

La Region Wallonne and La SA Societe Wallonne des Aeroports (SOWAER)

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Aviation

The type of State aid measure challenged in the court proceedings

Concession/privatisation of State-owned land/property at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The plaintiff was in receipt of a concession from the defendants. The Commission held in a decision of 1 October 2014 that the concession fee did not conform to normal market conditions. The functioning aid in favour of BSCA was declared compatible aid until 4 April 2014. The aid granted after that date constituted unlawful and incompatible aid. The defendants took steps to recover the aid. Meanwhile, the plaintiff challenged the Commission decision before the GC (Case (Brussels South Charleroi Airport (BSCA) v European Commission T-818/14), and sought interim relief in the present case to stop the recovery of the aid pending the outcome of the case before the GC.

Remedy(ies) sought

Other remedy sought

Interim relief to suspend the recovery of the aid

Outcome of the case

Conclusions adopted by the national court

The Court considered the conditions for granting interim relief and held that the plaintiff had not satisfied the urgency criterion. The Court had regard to the fact that the case was placed on the Court list. When the case was reintroduced, the parties had amicably agreed on a court calendar taking 13 months. Furthermore, BSCA had not demonstrated that it was suffering from an irreparable damage. Thus, the claim was rejected.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission decision of 1 October 2014

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

2.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Hof van Cassatie / Cour de Cassation	Court of Cassation	Last instance court (civil/commercial)	F.06.30048.F	09/11/2007	Private enforcement	None - Claim rejected	The Court held that the measure did not constitute new State aid. The Court considered that the argument according to which a tax exemption that continued to be granted to an enterprise (which had a monopoly) after the liberalisation of the market for telecommunications (in line with Directive 90/388/EEC and Directive 90/387/EEC) was new aid has no legal grounds.	The Court stated that existing aid could not be considered incompatible with the 'common market' as long as the Commission has not issued a recovery decision.	
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	53/2008	13/03/2008	Private enforcement	None - Claim rejected	A measure qualified as State aid cannot be considered a priori as incompatible with the 'common market' without a decision by the Commission. In this case, it appears from the preparatory work that the Commission was informed of the provisions of the draft law after it was submitted.		
Raad van State / Conseil d'Etat	Council of State	Last instance court (administrative)	182.326	24/04/2008	Private enforcement	None - Claim rejected	The Council of State rejected the State aid argument by stating that it is not the responsibility of the contracting authority to examine the lawfulness of the support to a sheltered employment scheme, let alone to assess its recoverability. This is the responsibility of the Flemish Government and there is a presumption of legitimacy with respect to the Government's decisions.	The Court specified there is a presumption of legitimacy in respect of Government decisions.	
Hof van Beroep te Brussel / Cour d'appel de Bruxelles	Brussels Court of Appeal	Second to last instance court (administrative)	2008/KR/350	12/12/2008	Private enforcement	Other remedy imposed	The Court of Appeal stated that the disputed agreement had not yet been implemented at the date of the judgment and was subject to a condition precedent which included prior notification to the Commission.		
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	No.6/2009	15/01/2009	Private enforcement	None - Claim rejected	The Court ruled that the measure did not constitute State aid. The Court rejected the argument of the plaintiff based on State aid, on the grounds that the costs in question were not disproportionate to those incurred by other operators, nor unreasonable, and that the differences between the different categories of operators could not be interpreted in such a way as to be regarded as favouring certain undertakings within the meaning of Article 87(1) of the EC Treaty (current Article 107(1) TFEU). The Court therefore concluded that the alleged underestimation of costs for nuclear reactor operators in relation to the costs incurred by other operators, did not constitute State aid.		
Rechtbank van Koophandel te Brugge / Tribunal de Commerce de Bruges	Bruges Tribunal of Commerce	Specialised court	00886/08	12/02/2009	Private enforcement	Interim measures to suspend the implementation of an unlawful aid	The Court held that the measure entailed unlawful State aid. The Court ordered suspension of the aid until the Commission's investigation was completed.	The Court applied the standstill obligation under Article 88 of the EC Treaty (current Article 108(3) TFEU) and ordered the suspension of an aid measure until there was a final decision from the Commission (the procedure was initiated following complaints).	
Hof van Beroep te Brussel / Cour d'appel de Bruxelles	Brussels Court of Appeal	Second to last instance court (administrative)	2008AR1094	27/04/2009	Private enforcement	Reimbursement of the taxes paid for financing an unlawful aid	Insofar as the claim of the plaintiffs is directed against the municipality, on the basis of the doctrine of undue payment, the claim is found not to be time-barred.	The Court considered that the application of a national limitation period does not make the recovery of unlawful aid practically impossible.	
Hof van Cassatie / Cour de Cassation	Court of Cassation	Last instance court (civil/commercial)	C.08/0450.N.	17/09/2009	Private enforcement	Other remedy imposed	The Court overturned the ruling of the Court of Appeal of Gent, holding that the primacy of Union law does not prevent an action against the Belgian State concerning the negligent behaviour of its authorities. The Court of Appeal of Gent had held that the company could not seek damages for the conduct of the Belgian authorities in recovering the aid, as this would diminish the effectiveness of State aid rules (if the State recovered it on the one hand but paid it back in damages on the other).	The case concerns negligent behaviour by the State in the recovery of State aid.	
Raad van State / Conseil d'Etat	Council of State	Last instance court (administrative)	198.787	10/12/2009	Private enforcement	None - Claim rejected	The Court ruled that the measure did not constitute State aid (due to the applicability of an exemption). The Council of State analysed the subsidies to a social housing undertaking under the State aid rules on SGEI. The argument that they benefitted from unlawful aid was not accepted. The scope of the Commission decision of 28 November 2005 on compensations for SGEI (2005/842) was, contrary to what was argued by the requesting party, not limited to compensation to undertakings in charge of social housing, providing housing for disadvantaged citizens or socially less advantaged groups, which were unable to obtain housing at market conditions. Article 2(1)(b) in conjunction with Article 3 of the 2005/842 decision envisages the possibility to offer compensation to social housing undertakings carrying out activities which qualify as SGEI without notification if all the conditions mentioned in the decision are met. With regard to the four Altmark criteria which are mentioned in the decision, the Council of State concluded that the requesting party did not adequately demonstrate that these provisions were not fulfilled.	The Court analyses the subsidies to a social housing undertaking under the State aid rules on SGEI.	
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	29/2010	18/03/2010	Private enforcement	None - Claim rejected	The Court ruled that the measure did not constitute State aid. The plea was unfounded because when a mission of general interest is entrusted to		

							a public institution, the financing of that institution cannot be interpreted as a mechanism which would be contrary to the prohibition laid down by State aid rules.		
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	135/2010	09/12/2010	Private enforcement	None - Claim rejected	The Court ruled that the measure did not constitute State aid. The pleas in law were unfounded because not every subsidy that may be granted by the Government falls within the scope of Article 107(1) TFEU.	The Court further elaborated that the subsidy in question may only be granted to legal persons governed by public law or to legal persons governed by private law which are not-for-profit, which carry out activities that are not subject to competition and therefore cannot have an effect on trade between Member States.	
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	50/2011	06/04/2011	Private enforcement	None - Claim rejected	The Court was not competent to decide on one of the pleas; it ruled that the contested measure did not constitute State aid. The argument concerning the applicability of Article 107(1) TFEU was unfounded as the Court did not have the power to rule on the first argument. The second argument (Article 3(1)(2) of the Land and Property Decree) was unfounded since Article 2 of Commission Regulation (EC) No 1998/2006 of 15 December 2006 excluded *de minimis* aid from the notion of State aid. The Court ruled that the authorisation granted by the Decree of the Flemish Government could be regarded as State aid.		
Raad van State / Conseil d'Etat	Council of State	Last instance court (administrative)	221.374	13/11/2012	Private enforcement	None - Claim rejected	The Court ruled that the measure did not constitute State aid. The Council of State did not accept the unlawful State aid argument as the measure concerned (the Flemish green electricity certificate system) was notified to the Commission by the Flemish Government and was considered not to constitute State aid. It further ruled that even if it were to constitute State aid, it would be compatible with the internal market in line with Article 107(3) TFEU, since it met the conditions under the EU Guidelines on State aid for environmental protection and energy. Moreover, the Council of State did not see how Article 18 of the challenged decision which limits the free distribution of green electricity could offer an advantage which consisted in the direct or indirect granting of State resources to green electricity producers.		
Hof van Beroep te Luik / Cour d'appel de Liège	Liège Court of Appeal	Second to last instance court (administrative)	2011/RG/185	22/02/2013	Private enforcement	None - Claim rejected	The Court ruled that the measure did not constitute State aid. The Court observed that the measures in question did not selectively favour certain undertakings and therefore did not result in a selective improvement in the economic or financial position of any one company.	The Court stated that it had the competence to verify, at the request of individuals, whether there has been a breach of the obligation to notify aid to the Commission as referred to in Article 108 TFEU in order to determine the unlawfulness of the aid.	
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	145/2013	07/11/2013	Private enforcement	Other remedy imposed	The Constitutional Court annulled the provisions of the decree in question. The Court concluded that the measures adopted constituted State aid within the meaning of Article 107(1) TFEU, since certain criteria identified in the Altmark judgment had not been met. Then, the Court concluded that no exemption from the obligation to notify to the Commission referred to in Article 108(3) TFEU applied. The Court refers to *de minimis* aid as a justification for exempting aid from the notification obligation. It notes that each of the measures in question falls under the *de minimis* aid ceiling, but seems to hold that, because the law in question does not prevent an undertaking from benefiting cumulatively from all the measures, it should be notified. After considering the remaining facts, the Court found no other reason to exempt the aid from notification.	The Court considers the *de minimis* rule exempting certain aid from the notification obligation to the Commission, and how it applies to cumulative measures.	
Raad van State / Conseil d'Etat	Council of State	Last instance court (administrative)	255.728	05/12/2013	Private enforcement	None - Claim rejected	The Court ruled that the measure did not constitute State aid. Interim measures to suspend the implementation of a public contract on the basis that the company received unlawful aid were not granted, as the existence of State aid was not established.		
Hof van Beroep te Bergen / Cour d'appel de Mons	Mons Court of Appeal	Second to last instance court (administrative)	2012/RB/293	20/01/2014	Private enforcement	None - Claim rejected	The Court was not competent; the contested measure did not constitute new State aid. The Court stated that the activity carried out online did not constitute a new activity within the meaning of the TFEU. The financing cannot be qualified as new aid requiring prior notification to the Commission under Article 108(3) TFEU. Therefore, only the question of the compatibility of the existing State aid granted remained, which falls within the exclusive competence of the Commission.		
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	106/2014	17/07/2014	Private enforcement	None - Claim rejected	The Court ruled that the measure did not constitute State aid. The contested provisions did not satisfy the selectivity criterion within the meaning of Article 107(1) TFEU.	The Court decided that the basic distribution contribution and the additional distribution contribution did not constitute State aid within the meaning of that provision and thus did not have to be notified to the Commission pursuant to Article 108(3) TFEU.	
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	144/2014	09/10/2014	Private enforcement	None - Claim rejected	The argument was not well-founded. The plaintiff confined itself to mentioning the existence of 'hidden State aid' without sufficiently explaining the scope of their complaint.		

Raad van State / Conseil d'Etat	Council of State	Last instance court (administrative)	231.76	26/06/2015	Private enforcement	None - Claim rejected	The Court found that the measure did not entail new, but rather existing State aid. The subsidy to a public television station was challenged, where the subsidy was extended also to its online presence. The Court found that there was no new aid and that it was rather existing aid. In order for it to have been considered new aid, there would need to have been a substantial alteration.	The Court considers the question of what constitutes a substantial alteration of an existing aid.	
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	114/2015	13/09/2015	Private enforcement	None - Claim rejected	The measure does not constitute State aid. The measures on basic distributional contribution and complementary distributional contribution could not be regarded as State aid as they do not meet the selectivity requirement.	The Court recalls the principle of selectivity. More specifically, the Court notes that the assessment of the selectivity criterion requires a determination of whether, under a particular statutory scheme, a national measure is likely to favour certain undertakings or the production of certain goods compared with others in a similar legal and factual situation.	
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	114/2015	17/09/2015	Private enforcement	None - Claim rejected	The Court ruled that the measure did not constitute State aid. The basic distribution contribution and the additional distribution contribution did not constitute State aid and therefore did not have to be notified to the Commission pursuant to Article 108(3) TFEU.		
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	159/2015	04/11/2015	Private enforcement	None - Claim rejected	The Court was not competent. The Court may examine whether the provision in question must be considered contrary to Article 108(3) TFEU on the ground that it constitutes the implementation of State aid which has not previously been notified to the Commission. In the present case, however, the plaintiffs did not claim that the contested provision infringed the obligation of prior notification to the Commission. On the contrary, they disputed the compatibility of the alleged State aid with the internal market, which did not fall within the jurisdiction of the Court.	In this case, the Court clearly outlined in which cases regarding State aid the national courts are competent, and which cases / questions need to be decided by the Commission.	
Rechtbank van eerste aanleg te Brussel / Tribunal de première instance de Bruxelles	Brussels Tribunal of First Instance	Lower court (civil/commercial)	2013/3148/A	12/02/2016	Private enforcement	None - Claim rejected	The plaintiff claims to suffer a competitive disadvantage as a result of a measure which qualified as unlawful State aid. The Court rejected the claim, ruling that State aid was not granted, and thus recovery was not needed.		
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	70/2017	15/06/2017	Private enforcement	Other remedy imposed	The remedy imposed was a declaration that the legislative act was unconstitutional. The Court stated that the authorisation in question should have been, in order to comply with Article 108(3) TFEU, notified 'in good time' to the Commission so that it could have assessed whether the such State aid could have been considered compatible with the internal market in the light of Article 107(3) TFEU. The Court concluded that the measure satisfied the requirements of State aid, and thus should have been notified to the Commission with sufficient notice to assess it under Article 108(3) TFEU (it had been notified to the EC on the same date that the request for aid was accepted at national level, which made the Commission's 'preventive control' illusory). However, the Court's conclusion was not just that this means the aid has been granted in contravention of State aid rules (although it does State that it was a contravention of State aid rules) but that the fact that the aid has been granted in contravention of State aid rules means that there has been a violation of the principles of equality and non-discrimination, guaranteed by the Belgian constitution. The Court continued by declaring that the law of 1998 (on the basis of which the guarantee was based) was unconstitutional.	The Court considers the timing of notification to the Commission under Article 108(3) TFEU.	
Raad van State / Conseil d'Etat	Council of State	Last instance court (administrative)	239.056	12/09/2017	Private enforcement	None - Claim rejected	The case was a challenge to a procurement procedure, claiming that the local authority did not follow all the necessary steps, with the losing party seeking to have the winning bidder excluded. However, the claim was rejected, and the winning bidder was not excluded.	The Court notably clarifies that the national legal provisions put forward, as well as the TFEU, do not compel the contracting party to exclude a participating enterprise in the public market transaction, in the event of the opening of a State aid examination procedure by the Commission. Although this is primarily a procurement case, it has been included here on the basis that it concerns the application of State aid rules to a disputed procurement proceeding.	
Arbeidshof te Brussel / Cour du Travail de Bruxelles	Brussels Labour Court	Specialised court	2003/AB/43888	03/06/2010	Public enforcement	None - Claim rejected	The case concerned State aid granted to a company which was later re-structured. By the time the Belgian State wanted to recover the aid, the company had been split in two, with one entity having been wound up and an operational arm still in existence. The operational arm challenged the legitimacy of recovering the aid from them. The Court held that the aid is to be recovered from the effective beneficiary, even if it is not the initial beneficiary. The Court thus rejected the argument of the company that the latter should not have to pay back the aid due to it not being the initial beneficiary, and held that what was important was remedying the distortion to the internal market, which meant that the effective beneficiary had to reimburse the aid.	In this case, the Court considers the effective recovery of State aid in the context of a re-structuring of an undertaking.	

Hof van Beroep te Brussel / Cour d'appel de Bruxelles	Brussels Court of Appeal	Second to last instance court (administrative)	2005/AR/2457	01/12/2011	Public enforcement	None - Claim rejected	The Brussels Court of Appeal ruled that once the aid has been granted, the person concerned is the beneficiary of the aid. Consequently, it is the beneficiary of the aid and not third parties, which is bound by the conditions attached to the payment of the aid. Thus, the beneficiary of the aid cannot discharge liability towards subcontractors or co-contractors that were freely chosen.	The Court held that it is up to the beneficiary of the aid to ensure that the aid is properly used. If this depends on the actions of third parties, the beneficiary should ensure that there are contractual constraints preventing the third party from misusing the aid.	
Hof van Beroep te Brussel / Cour d'appel de Bruxelles	Brussels Court of Appeal	Second to last instance court (administrative)	2017/AR/3139	19/10/2012	Public enforcement	None - Claim rejected	Measure does not constitute State aid. During the insolvency proceedings, the two banks which granted the loans, sought to register their claims (the loans were guaranteed by mortgages over properties of the insolvent entity, as well as the State guarantee). The liquidators sought to resist these claims on the basis that the State guarantee was incompatible State aid. However, the Court ruled that the corresponding loans would also have been granted without the State guarantee and referred to the fact that the Commission had only qualified the guarantee itself as incompatible aid - the Court states that the loans themselves were never considered as State aid by the Commission.	The case concerned two loans which were granted to an entity (which later became insolvent). The loans were guaranteed by the State. The Commission decided that such State measures (guarantees) in favour of the entity constituted State aid, and that they were not compatible with the internal market, and so were prohibited. The State was ordered to annul the aid measures and recover all aid already paid along with interest from the date of payment.	
Grondwettelijk Hof / Cour Constitutionnelle	Constitutional Court	Constitutional Court	15/2015	05/02/2015	Public enforcement	Indirect challenge against Commission decision *via* CJEU preliminary ruling	Questions are referred to the Constitutional Court by the Council of State in order to assess whether the provisions of a legislative act are contrary to the provisions of the Constitution which are to some extent analogous to the TFEU's provisions on State aid. Hence, the Constitutional Court referred six questions to the CJEU for a preliminary ruling, in particular regarding the Commission decision qualifying the Belgian system to grant State guarantees for individual shareholders as State aid.		
Raad van State / Conseil d'Etat	Council of State	Last instance court (administrative)	233.057	27/11/2015	Public enforcement	None - Claim rejected	The Court is not competent. The Council of State considers that the real object of the appeal is the existence and consistency of a pecuniary obligation resulting from a decision of the Commission. The Council of State states that it is for the Union Courts to assess the legality of the Commission decision on the quantification of the aid to be recovered.		
Raad van State / Conseil d'Etat	Council of State	Last instance court (administrative)	233.059	27/11/2015	Public enforcement	None - Claim rejected	The Court is not competent. The Court considers that the State's decision which the party requests to be annulled is nothing more than a simple execution of the Commission decision. The defendant did not exercise its unilateral decision-making power. Therefore, the Court is not competent.		
Rechtbank van eerste aanleg te Namen / Tribunal de première instance de Namur	Namur Tribunal of First Instance	Lower court (civil/commercial)	11/10/2016	11/10/2016	Public enforcement	None - Claim rejected	The Court found that the requirement of urgency was not met. The Commission held that the concession constituted State aid, which meant the Walloon Region had to recover the aid. Meanwhile, the plaintiffs challenged the Commission decision at the CJEU. This particular case involves them applying for an interim measure to stop the recovery of the aid pending the case at the CJEU. The Court noted that a necessary prerequisite for the plaintiffs, in order to obtain the interim measure, was to demonstrate urgency. The Court looked at the timeline and found that the plaintiffs themselves had waited for 13 months to go to the Court. Therefore, their claim was rejected.		

3. Bulgaria

3.1 Country report

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04/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Pursuant to the State Aid Act[22] (promulgated State Gazette issue 86 of 24 October 2006, in force until 28 October 2017): administrative courts are courts of first instance (there are 28 administrative courts established in every regional capital city, following the administrative and territorial division of the country); the Supreme Administrative Court is the court of second and last instance.

The new State Aid Act[23] (promulgated State Gazette, issue 85 of 24 October 2017, entered into force on 27 October 2017) refers to the general rules of administrative procedure of the Tax and Social Security Procedure Code and the Administrative Procedure Code.[24] In this sense, competent courts are: the administrative courts as courts of first instance (there are 28 administrative courts established in every regional capital city, following the administrative and territorial division of the country), and the Supreme Administrative Court as the court of second and last instance.

In specific cases where the act for the establishment of 'public-law debt' (generally defined as a monetary debt to the State, such as tax or social security obligations, unlawfully granted State aid is also explicitly listed in national law as a 'public-law debt') is issued by a minister acting as an administrator of State aid, the competent court of first instance will be the Supreme Administrative Court, sitting with three judges, while the court of second and last instance will be the Supreme Administrative Court, sitting with five judges.

A description of the procedural framework applicable in public enforcement of State aid rules

Pursuant to the State Aid Act, following a recovery decision of the Commission, the Minister of Finance (or if the aid concerns State aid in the agriculture and fishery sectors, the Minister of Agriculture, Food and Forestry) requires the competent State aid administrator to take necessary action in order to recover the aid. A 'State aid administrator' is any person who plans, develops, manages, notifies and reports the granting of State aid and *de minimis* aid.[25] The aid is recovered in the manner provided for by the decision of the Commission. Therefore, challenging the recovery of the aid would in fact require challenging the decision of the Commission before the CJEU. Not appealing the decision of the Commission before the CJEU or having the CJEU confirm the recovery decision would mean that it would not be possible to challenge the recovery procedure before national courts in relation to any or all of its material aspects (aspects related to the material law rather than procedural law). National courts would however be able to review cases where procedural errors of national authorities have been committed.

Repealed national State aid legislation did contain a specific procedural framework regarding State aid recovery, other than what is already described above, and the general rules for recovery of 'public-law debts' under the Bulgarian Tax and Social Security Procedure Code[26] applied to State aid as well. Following and based on the recovery decision of the Commission and the requirement of the Minister of Finance that the competent State aid administrator take action on it, the State aid administrator would have to issue an act for the establishment of the 'public-law debt'. It would have to be based entirely on the recovery decision with regard to both the manner of recovery (including terms) and amounts.[27] The act for the establishment of the 'public-law debt' could be challenged within 14 days of its service but (as mentioned above) only in terms of procedural errors. After the act's entry into force the aid beneficiary could voluntarily comply with it. Otherwise, the matter was forwarded to the competent public enforcement agency.

The State Aid Act (new) stipulates that State aid recovery may be based either on a recovery decision by the Commission or on an act for the establishment of 'public-law debt'

[22] State Aid Act (repealed), promulgated State Gazette issue 86 of 24 October 2006, in force until 28.10.2017; consolidated text available at: https://www.lex.bg/laws/ldoc/2135536537 (Bulgarian only) (last accessed on 4 January 2019). Accordingly to Article 14, para. 2 of the State Aid Act (repealed): where the Commission adopts a decision for the recovery of unlawfully granted State aid, the Minister of Finance shall require the State aid administrator to take action for the recovery of the State aid. The aid is recovered in accordance with the decision of the Commission. The beneficiary of the aid shall also be liable for the interest accrued throughout the period from the date on which the unlawful aid was at the disposal of the beneficiary until the date of recovery of the aid. The amount of the interest shall be determined by the Commission. Pursuant to the next paragraph, Article 14, para. 3, where the Commission adopts a decision for termination of State aid or for recovery of unlawfully granted State aid in the agriculture and fishery sectors, the Minister of Agriculture, Food and Forestry shall take action for the execution of the decision or the State Fund Agriculture shall take action for the recovery of the unlawfully granted State aid within a seven-day period.

[23] State Aid Act (new), promulgated State Gazette, issue 85 of 24 October 2017, entered into force on 27 October 2017; consolidated text available at: https://lex.bg/bg/laws/ldoc/2137177456 (Bulgarian only) (last accessed on 4 January 2019).

[24] Administrative Procedure Code; promulgated State Gazette issue 39 of 11 April 2006, last amended State Gazette issue 77 of 18 September 2018, consolidated text available at: https://lex.bg/bg/laws/ldoc/2135521015 (Bulgarian only) (last accessed on 4 January 2019).

[25] Pursuant to Section 1, item 4 of the Additional Provisions to the State Aid Act (repealed).

[26] Promulgated State Gazette issue 105 of 29 December 2005, last amended and supplemented State Gazette issue 98 of 27 November 2018; consolidated text available at: https://www.lex.bg/laws/ldoc/2135514513 (Bulgarian only) (last accessed on 4 January 2019).

[27] In case the Commission issues a recovery decision lacking conditions relating to terms and amounts, a Bulgarian State aid administrator cannot issue a valid act for the establishment of "public-law debt". Any such act of the national authorities could be challenged before the national court and since national authorities do not have the competence to determine such elements (as these are within the discretion of the Commission), it is probable that the court would declare the act invalid. The same applies with respect to discrepancies between terms and amounts prescribed by the recovery decision of the Commission and terms and amounts determined in the national authority's act for the establishment of "public-law debt". The old State Aid Act did not contain provisions dealing with such hypotheses and therefore these matters would have to be resolved following the general rules applicable to administrative procedure (*i.e.* on the basis of the Administrative Procedure Code). There are no known cases where such situations occurred and there is no available case law of the national courts on such matters.

issued by competent Bulgarian authorities (State aid administrators, Article 38(1) of the State Aid Act (new)).

According to Article 38(2) of the State Aid Act (new), recovery decisions of the Commission are enforced following the provisions of the Tax and Social Security Procedure Code. The Minister of Finance (or the Minister of Agriculture, Food and Forestry, in case the aid concerns State aid in the agriculture and fishery sectors) informs the competent State aid administrator of the recovery decision (Article 38(5) of the State Aid Act (new)). Whenever the decision of the Commission does not individualise the aid beneficiaries and/or does not determine aid amounts, the State aid administrator issues an act for the establishment of 'public-law debt' pursuant to the Administrative Procedure Code. In these cases, the State aid administrator has to identify the State aid beneficiaries and has to determine the individual State aid amounts received by them (Article 38(6) of the State Aid Act (new). The State aid amounts are determined on the basis of available information with the administrator or on the basis of an assessment, adopted by the administrator. Recovery interest (for the period between the receipt of the unlawful aid and its complete recovery) is added to the determined aid amount. The assessment (determining the State aid amounts) is done by an independent assessor, appointed by the State aid administrator, following the terms and conditions stipulated in the recovery decision.[28] A second assessment may be carried out in case the administrator does not adopt the initial one. The act for the establishment of 'public-law debt' has to contain a reference to the recovery decision. A copy of the act for the establishment of 'public-law debt' and a copy of the Commission decision are served on the aid beneficiary. If the beneficiary is under an insolvency procedure, the act is served through the insolvency court.

The recovery of claims relating to incompatible/unlawful State aid is done by the National Revenue Agency.

Within the recovery deadline set out in the recovery decision, and in case the decision does not stipulate a deadline, within two months of its issuance, the State aid administrator must inform the Minister of Finance of: (i) the identity of State aid beneficiaries, (ii) the amount of State aid to be recovered (principal sum and interest), (iii) the measures undertaken and planned for enforcement of the Commission decision, (iv) the acts for the establishment of public-law debt that have been issued and (v) the acts for the establishment of 'public-law debt' that have been appealed. Within the same deadline, the National Revenue Agency must inform the Minister of Finance of the recovery activities that have been undertaken with respect to insolvency procedures and other measures for the enforcement of the Commission decision. The Minister of Finance (or the Minister of Agriculture, Food and Forestry) may request additional information or evidence from the State aid administrator and the National Revenue Agency. All information gathered in this manner is then sent to the Commission by the Minister of Finance.

Whenever recovery of State aid is not possible, the administrator or the National Revenue Agency is obliged to immediately inform the Commission through the Minister of Finance.

Pursuant to the State Aid Act (new), and following general administrative procedural rules of the Tax and Social Security Procedure Code and the Administrative Procedure Code, an act for the establishment of 'public-law debt' can be contested before the head of the authority that has issued it. In case the administrative contestation of the act is unsuccessful, the concerned State aid beneficiary may challenge the act before the administrative court. However, challenging the recovery of the aid would in fact require challenging the recovery decision before the CJEU, when the Commission decision defines the recovery deadline and conditions for the recovery, as well as the amounts to be recovered. Not appealing the decision of the Commission before the CJEU or having the CJEU confirm the recovery decision would mean that it would not be possible to challenge the recovery procedure before national courts in its material aspects. Pursuant to Article 38(2) of the State Aid Act (new) the decision of the Commission is itself enforceable without additional acts of national authorities whenever aid beneficiaries, amounts and recovery terms and conditions are stipulated in the decision. In such cases, national authorities, namely the aid administrator, are engaged with the notification of affected persons. Therefore, the subject of an appeal before national courts can only relate to the notification competences of national authorities.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

Bulgarian national law, in force until the adoption of the new State Aid Act, did not provide for the necessary legal basis for competitors of the aid beneficiary to start an action in a national court in order to ask for recovery of State aid.

Such legal framework was introduced with the adoption of the new State Aid Act. Pursuant to the provisions of Article 54(1) of the State Aid Act (new), the competent courts now are: administrative courts as courts of first instance (there are 28 administrative courts established in every regional capital city, following the administrative and territorial division of the country), and the Supreme Administrative Court as the court of second and last instance.

In specific cases where the recovery decision is issued (or is yet to be issued) by a minister acting as an administrator of State aid, the competent court of first instance will be the Supreme Administrative Court, sitting with three judges, while the court of second and last instance will be the Supreme Administrative Court, sitting with five judges.

A description of the procedural framework applicable in private enforcement of State aid rules

Bulgarian national law, in force until the adoption of the new State Aid Act, did not provide the necessary legal basis for competitors of the aid beneficiary to start an action in a national court in order to ask for the recovery of State aid.

The national legal framework relating to private enforcement of State aid was recently introduced with the adoption of the new State Aid Act, which explicitly states (Article 54)

[28] Relevant national law does not provide what is the scope of the "terms and conditions" of the recovery decision. Article 38 of the State Aid Act (new) only provides that the provisions of Commission decisions must be observed with respect to the recovery process.

that any interested person may contest an act granting State aid or *de minimis* aid and by doing so may seek: (i) prevention of the granting of the State aid or the payment of the State aid; (ii) a remedy for an infringement of the standstill obligation; (iii) full recovery of the State aid; (iv) a remedy for damage suffered by the aid beneficiary's competition or third parties as a result of the unlawfully granted aid; and/or (v) recovery of State aid that was not recovered on the basis of a Commission decision, regardless of whether an act for the establishment of a 'public-law debt' was issued or not.

Claims contesting an act granting State aid or *de minimis* aid have to be addressed to the competent administrative court, that is, the matter can only be resolved following a judicial review.

Actions seeking (i) prevention of the granting of the State aid or the payment of the State aid; (ii) a remedy for an infringement of the standstill obligation; (iii) a remedy for damage suffered by the aid beneficiary's competition or third parties as a result of the unlawfully granted aid; and/or (iv) recovery of State aid that was not recovered on the basis of a Commission decision must be brought against the State aid administrator (Article 55(1) of the State Aid Act (new)). If in any of these cases the State aid has already been paid, the action must be brought against the State aid beneficiary as well (Article 55(2) of the State Aid Act (new)). Actions relating to requests for full recovery of the State aid must be brought against the State aid beneficiary.

Bringing an action before the court does not stop or suspend an on-going procedure for the granting of State aid (Article 54(5) of the State Aid Act (new)). Pursuant to Article 56 of the State Aid Act (new), the court reviews the claim regardless of whether a State aid measure is under review by the Commission for the purpose of establishing its compatibility with the internal market. Furthermore, the court is explicitly obliged to take into account relevant CJEU case law and practice of the Commission (Article 56(2) of the State Aid Act (new)).

According to Article 57(1) of the State Aid Act (new), the court may request for an opinion from the Commission on the compatibility of a State aid measure. (The new State Aid Act does not define the legal nature and effects of any such opinions, and does not refer to Council Regulation (EU) 2015/1589 of 13 July 2015 in that regard,[29] but considering the general framework of Union law, such opinions do not have binding force.) Or the court may request the Commission to issue a decision on establishing the compatibility of the State aid with the internal market. The court may not rule on the compatibility of the State aid by itself (Article 56(1) of the State Aid Act (new)). Pursuant to Article 57(2) of the State Aid Act (new), the court may request assistance from the Commission with respect to information related to the reviewed matter (to be provided by the Commission), including information regarding on-going State aid procedures, unpublished documents, statistical information, market surveys, etc., and may also request the position of the Commission on the application of State aid rules and regulations.

Regardless of the above, the court may refer a request to the CJEU for a preliminary ruling on the interpretation of EU *acquis* or an interpretation on the validity of acts by EU authorities, which are of relevance to the case (Article 58 of the State Aid Act (new)).

In cases where the court has requested the assistance of the Commission or a preliminary ruling by the CJEU, the court temporarily suspends the recovery proceedings.

As a result of the proceedings, the court may: (i) repeal the act granting the State aid; (ii) suspend the payment of the State aid; (iii) grant a remedy for an infringement of the standstill obligation; (iv) order the recovery of the granted State aid (including interest); (v) grant a remedy for damage suffered by the aid beneficiary's competition or third parties as a result of the unlawfully granted aid; (vi) order the recovery of State aid that was not recovered on the basis of a decision of the Commission, regardless of whether an act for the establishment of a public-law debt was issued or not; and/or (vii) prohibit any actions related to payment of unlawful State aid.

Whenever the court rules in favour of State aid recovery it also determines the amount of the 'illegality interest' to be paid by the beneficiary. If by the date of the court's ruling, the Commission has decided that the State aid is compatible with the market, the court will not order full recovery of the aid, but will instead determine an 'illegality interest' payable from the date of receipt of the unlawful State aid until the date of the decision of the Commission. If the amount of the 'illegality interest' was determined by the Commission, the court will order payment of the determined amount.

The court may rule in favour of claimed damages if any such damage was proven by the plaintiff and (cumulatively): (i) if the act granting the aid violates a law and this violation is substantive and (ii) if granting the aid has led to favourable market conditions for the aid beneficiary, as compared to the beneficiary's competition, or has resulted in material damage to third persons. When determining remedies, the court has to take into account any: (i) incurred loss of profit relating to non-realisation of goods or services on the market; (ii) incurred loss of assets or inability to acquire assets; (iii) incurred loss of market share; (iv) cessation of activities or insolvency; and (v) other actions or inactions of the aid beneficiary, which have caused damage to the plaintiff and have resulted in a competitive advantage of the beneficiary.

Main findings based on the case summaries

Relevant researched court practice deals with taxation as well as excise duty issues within the context of State aid, but it does not cover enforcement of State aid rules *per se.* This can be attributed to the fact that national State aid rules were not the direct subject to court proceedings, since the regulations were focused on inter-authority relations and relations between the Bulgarian State (represented by the Minister of Finance or the Minister of Agriculture, Food and Forestry) and the Commission (as stated in the description of the procedural framework applicable to the public enforcement of State aid rules).

The issues at the heart of the case summaries relate to taxation and excise duty and can be considered more of a secondary expression of State aid rules but still related to their enforcement nonetheless. As a result, there are no national court rulings that are pure 'public enforcement' cases, in the sense that they are the result of a recovery decision

[29] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*

adopted by the Commission, ordering the recovery of unlawful/incompatible State aid. The relevant court practice dealt with establishing whether there was an existing State aid scheme as well as whether a party to the case was an eligible aid beneficiary under the State aid scheme, in order to determine whether the party would qualify for certain tax or excise duty exemptions. Therefore, the State aid matters in the summarised rulings, although of substantive importance, were dealt with on an *ad hoc* basis within tax and excise duties related cases. This conclusion seems to be applicable to the majority of cases reviewed by Bulgarian courts where State aid rules came into play and can be attributed to the peculiarities of the legislative framework where State aid aspects are mostly intertwined (sometimes in a not so obvious manner — *e.g.* Supreme Administrative Court, 18.8.2011 - 11158/18.08.2011 (BG3)) with tax and excise duty legislation.

In two of the relevant cases (Supreme Administrative Court, 28.4.2015 - 4774/28.04.2015 (BG1) and Supreme Administrative Court, 5.7.2017 - 8706/05.07.2017 (the latter is not part of the sample), parties to the cases were private entities engaged in the agriculture sector. In one (Supreme Administrative Court, 18.8.2011 - 11158/18.08.2011 (BG3)), the private entity was a company engaged in production, storing and distribution of biofuels (biodiesel); and in the other (Supreme Administrative Court, 28.5.2013 - 7227/28.05.2013 (BG2)), the private entity was engaged in the railroad transportation sector.

In terms of main actors — public authorities, all cases concerned revenue authorities — competent regional offices of either the National Revenue Agency (tax retention (assignment) or the Customs Agency (excise duty recovery).

Qualitative assessment of the average time of court proceedings

The duration of first instance court proceedings (from the date of bringing the action and initiation to the date the administrative court adopts its ruling), in relation to the reviewed cases, is four to five months.

The average duration of court proceedings (from the date of bringing the action and initiation to the date the Supreme Administrative Court adopts its ruling), in relation to the reviewed cases, is 11 to 12 months.

There is no publicly available official information (statistical, judicial or governmental reports) on the average duration of administrative court or Supreme Administrative Court proceedings per subject matter of the case that would allow us to estimate whether the abovementioned durations are 'longer' or 'shorter' than the average (for administrative cases).

If compared to other cases, State aid related matters are generally resolved by administrative courts as well as by the Supreme Administrative Court close to the average duration (for administrative cases).[30]

Qualitative assessment of the remedies awarded by national courts

It is a fact that only a small number of Bulgarian court rulings reviewed throughout the Study resulted in the award of remedies that might constitute recovery of unlawful/incompatible State aid. However, a definitive opinion on the low number of awarded remedies in comparison with the overall number of cases decided by national courts would be rather inaccurate and therefore incorrect, since each case has its own peculiarities and specifics.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

In the cases where State aid *acquis* was involved in resolving the matter, it was correctly applied by national courts.[31] However, State aid rules were interpreted rather formally and without an in-depth interpretation of their context and historical development. This conclusion is drawn from the observation that when EU *acquis* had to be discussed, the court simply cited or referred to relevant provisions without providing any or little interpretation on the matter. Meanwhile reasoning originating from national law of relevance to the respective cases seems to have been elaborated on with more depth and intensity. The summarised cases contained no references to CJEU case law, nor were any references made to the GBER. Furthermore, none of the cases referred a request to the CJEU for a preliminary ruling.

The above can generally be attributed (i) to the national courts' lack of specialisation in State aid related matters (especially in the first years following the accession of Bulgaria to the EU) and (ii) to the fact that the cases primarily related to matters of taxation and excise duties.

Qualitative assessment of any other relevant trends in State aid enforcement

The most significant trend for the 2007–2017 period is that it seems that national courts have become much more comfortable and competent in dealing with State aid issues and seem to have started to review cases brought before them in-depth and with better understanding of Union and national legislation.

However, the adoption of a new State aid legal framework in Bulgaria (a new State Aid Act, promulgated State Gazette, issue 85 of 24 October 2017 and new Regulations on the Application of the State Aid Act, promulgated State Gazette issue 72 of 31 August 2018) has introduced a more comprehensive national legal framework that details national procedures with respect to notifications under Article 108(3) TFEU and gives way to private enforcement on a national level, which was not discussed in the repealed State Aid Act. However, we are yet to see and assess the results of this new national law.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

The main challenge before national courts in terms of the enforcement of State aid rules is that these matters were always entangled with other country specific issues (in terms of taxation and excise duties legislation). In this sense, on occasion, national legislation was

[30] This statement is based on the authors' professional knowledge and expertise.
[31] *Idem*.

lagging behind the *acquis*, EU legislation was improperly transposed or there was a lack of coordination between competent national authorities.[32] An example of improper transposition is the case with Supreme Administrative Court, 18.8.2011 - 11158/18.08.2011 (BG3): although a State aid scheme (State Aid No. 607/2008 – Bulgaria, tax reductions for biofuels) was not applicable to the reviewed period (1.1.2007 to 31.10.2008), the plaintiff was not found liable for the excise duties, because applicable national tax law was not updated, and was allowed a zero rate excise duty for biodiesel. An example of a case that shows a lack of coordination between competent national authorities is Supreme Administrative Court, 28.5.2013 - 7227/28.05.2013 (BG2), where the Bulgarian authorities did not notify the Commission of a State aid scheme allowing the possibility for the recovery of excise duties for electrical power by railway carriers thus rendering this possibility provided by the national Excise Duties and Excise Warehouses Act inapplicable. In some cases, inter-related State aid and taxation matters were not properly synchronised, which led to loopholes and a legal vacuum. Regardless, the notion of State aid was conducted well by national courts in all the reviewed cases.

Any other relevant comments or findings

Not applicable

[32] This statements reflects the authors' personal opinion.

3.2 Case summaries

Case summary BG1

Date

04/01/2019

Case identifiers

Member State

Bulgaria

Court which adopted the ruling (national language)

Върховен административен съд

Court which adopted the ruling (English)

Supreme Administrative Court

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Bulgarian

Hyperlink to ruling

http://www.sac.justice.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/c8fa772454ff2553c2257e350021fbc9?OpenDocument

Case reference

4774/28.04.2015

Procedural context of the case

The proceedings were initiated before the Court of First Instance (Administrative Court - Varna) by a person registered as a 'farmer' against a decision (tax assessment notice) of the Bulgarian revenue authorities (the National Revenue Agency). The farmer relied upon the Corporate Tax Act scheme providing tax exemptions for farmers. This scheme had been approved by the Commission decision of 11 February 2011 (C(2011) 863).

The Court of First Instance declared the claim admissible and well-founded (ruling ECLI:BG:AD705:2014:20130704435.001) which lead to an appeal by the revenue authorities before the Supreme Administrative Court.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

28/04/2015

Language

Bulgarian

Headnote

In this ruling, the Court held that State aid in the form of tax exemptions to farmers was granted automatically and did not require an application to the revenue authorities. It was up to registered farmers, who complied with the requirements, to decide whether to make use of the exemption through the submission of their annual tax return.

Parties

Names of the parties to the action

Директор на Дирекция „ОДОП" на НАП – Варна

Versus

Н. Х. П. С [фирма] (N.H.P.); Anonymised

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

A - Agriculture, forestry and fishing

Agriculture

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The dispute concerned a decision of the revenue authorities (the Director of 'Appeals and Tax and Social Security' Directorate of the National Revenue Agency Regional Office in Varna) (the plaintiff) establishing undeclared revenue and unpaid income tax with regard to a person registered as a 'farmer' (the defendant). The defendant relied on a scheme under the Corporate Income Tax Act that provided special tax exemptions that applied to persons registered as farmers (agricultural holdings). The scheme had been approved by the Commission decision of 11 February 2011 (C(2011) 863). The scheme applied automatically and did not require submission of an application to the revenue authorities. Registered farmers who complied with the requirements could make use of the exemption through the submission of their annual tax return, which the defendant had done.

Before the Supreme Administrative Court, the plaintiff argued that it had considered that the general requirements under the Corporate Income Tax Act related to the retention (assignment) of corporate income tax and VAT did not exist in the case of the defendant (the defendant had tax liabilities towards the Municipal and State budget) and therefore the defendant had no right to take advantage of the tax exemption.

The defendant relied on Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 ('the Regulation') which allowed tax exemption as a form of State aid irrespective of national law. The defendant reasoned that, due to the direct application of Commission Regulation (EC) No 1857/2006 and with respect to the Commission decision of 11 February 2011 approving the State aid scheme (C (2011) 863), it was eligible for tax relief under the State aid scheme by means of retention (assignment) of corporate income tax, since it complied with the requirements under Article 4, paragraph 4 of Commission Regulation (EC) No 1857/2006.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

The Supreme Administrative Court found the arguments of the defendant well-founded in that a tax exemption applied on the basis of Commission Regulation (EC) No 1857/2006. According to the Court, the reasoning of the revenue authorities that the requirements the Corporate Income Tax Act needed to be complied with for tax relief measures under Commission Regulation (EC) No 1857/2006 to be applicable, was incorrect and was in contradiction with Article 4, paragraph 4 of the Regulation and Commission Decision C (2011) 863. Furthermore, the Court ruled that State aid in the form of tax exemptions to farmers was granted automatically and did not require an application to the revenue authorities. Registered farmers who complied with the requirements, could rely on the tax exemption through the submission of their annual tax return.

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

Commission Decision C(2011) 863 of 11 February 2011

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary BG2

Date

04/01/2019

Case identifiers

Member State

Bulgaria

Court which adopted the ruling (national language)

Върховен административен съд

Court which adopted the ruling (English)

Supreme Administrative Court

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Bulgarian

Hyperlink to ruling

http://www.sac.justice.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/2a16483448e2b96dc2257b2f0046e0bb?OpenDocument

Case reference

7227/28.05.2013

Procedural context of the case

The proceedings were initiated before the court of first instance (Administrative Court of Sofia) by the plaintiff. The Administrative Court ruled in favour of the defendant (ruling ECLI:BG:AD701:2012:20110710444.001). The plaintiff subsequently appealed to the Supreme Administrative Court. The plaintiff relied upon Commission Decision C (2010) 9423 whereby the Commission had decided not to raise objections to measures by the Bulgarian Government relating to the provision of rescue aid to the 'Bulgarian State Railways'.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

28/05/2013

Language

Bulgarian

Headnote

In this ruling, the Court held that a ruling to reimburse already paid excise duties would concern a form of tax exemption which in turn could constitute State aid within the meaning of Article 107 TFEU. Furthermore, an ongoing notification procedure under Article 108(3) TFEU could not by itself serve as grounds for granting State aid.

Parties

Names of the parties to the action

фирма; Anonymised

Versus

Директор на агенция „Митници"

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Railway transportation

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The dispute concerns the decision (amended assessment / tax assessment notice) of the revenue authorities (the Bulgarian Customs Agency) to dismiss a request from the plaintiff (a Bulgarian railway company) for reimbursement of paid excise duties for electrical power. The Administrative Court of Sofia ruled in favour of the revenue authorities by confirming the decision, due to the fact that the plaintiff did not qualify for the relevant existing and approved State aid schemes.

Before the Supreme Administrative Court, the plaintiff argued that it had the right to excise duty reimbursement on the basis of an existing and approved State aid scheme, namely tax relief, in accordance with Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity. Additionally, the plaintiff argued that its rights to excise duty reimbursement were based on the approved State aid scheme, regardless of the fact that the specific scheme concerns a different company ('Bulgarian State Railways' EAD / ('Holding BDZ' EAD). Additionally, the plaintiff claimed that the recovery of the excise duty would be lawful based on Commission Decision C (2010) 9423 with which the Commission decided not to raise objections to measures by the Bulgarian Government relating to the provision of rescue aid to the 'Bulgarian State Railways' EAD ('Holding BDZ' EAD), part of which concerned the recovery of excise duties for electrical power.

The defendant (the Director of the Customs Agency) argued that Council Directive 2003/96/EC did not apply to the plaintiff. The case at hand concerned a tax exemption with refund (reimbursement) of tax paid rather than the mandatory excise duties exemptions under the Directive. In this sense the requested tax refund could have constituted State Aid. This meant that under Article 108(3) TFEU, such refund could not be applied without prior notification to the Commission. However, there was no decision declaring the aid compatible with respect to the approval of a State aid scheme that would allow the application of Council Directive 2003/96/EC or Article 24a, paragraph 1, item 3 of the Excise Duties and Excise Warehouses Act. Therefore, no legal grounds existed for the approval of excise duties recovery. Although it was correct that on 17 September 2010 a notification procedure which included recovery of excise duties within the meaning of Article 24a, paragraph 1, item 3 of the Excise Duties and Excise Warehouses Act, had been initiated by Bulgarian authorities, on 13 October 2011 this notification was withdrawn in the part which concerned the recovery of excise duties for electrical power. Furthermore, the notification concerned a different beneficiary – a different company ('Holding BDZ' EAD) and was irrelevant to the case at hand.

Remedy(ies) sought

Other remedy sought

Reimbursement of paid excise duties for electrical power

Outcome of the case

Conclusions adopted by the national court

The Supreme Administrative Court adopted the reasoning of the Court of First Instance and the arguments of the defendant in their entirety. Although there was a previous decision of the Commission with regard to the same type of State aid scheme that the plaintiff relied on, it did not directly apply to the plaintiff but was issued with respect to a different entity (namely the 'Holding BDZ' EAD). A decision to reimburse already paid excise duties represents a form of tax exemption which in turn could constitute potential State aid within the meaning of Article 108 TFEU [sic]. Furthermore, an ongoing notification procedure (relating to the provision of rescue aid to the 'Bulgarian State Railways' EAD ('Holding BDZ' EAD) under Article 108(3) TFEU, cannot by itself serve as grounds for granting State aid. In order to grant the State aid, there had to be a decision issued by the Commission declaring the aid compatible.

Furthermore the Court ruled that the possibility for total or partial exemptions or reductions in the level of taxation to energy products and electricity under Council Directive 2003/96/EC is to be considered as potential State aid which meant that under Article 108 TFEU an interested Member State cannot commence with the application of the respective measures prior to a Commission decision declaring the aid compatible. Based on the above, the fact that there is no decision of the Commission allowing the reimbursement of excise duties for electrical power either based on the measures allowed under Council Directive 2003/96/EC as well as under Article 24a, paragraph 1, item 3 of the Excise Duties and Excise Warehouses Act, means that the decision of the defendant (the revenue authorities) to deny the requested excise duty recovery was lawful.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission Decision C (2010) 9423 (State Aid N402/2010)
- Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31.10.2003

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary BG3

Date

04/01/2019

Case identifiers

Member State

Bulgaria

Court which adopted the ruling (national language)

Върховен административен съд

Court which adopted the ruling (English)

Supreme Administrative Court

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Bulgarian

Hyperlink to ruling

http://www.sac.justice.bg/court22A.nsf/d6397429a99ee2afc225661e00383a86/c22583660052f5ecc22578e6003e0445?OpenDocument

Case reference

11158/18.08.2011

Procedural context of the case

The proceedings were initiated by a Bulgarian company before the Administrative Court of Plovdiv (Court of First Instance) against a decision of the revenue authorities (Customs house Plovdiv). In its ruling (ECLI:BG:AD718:2010:20090701317.001), the lower Administrative Court upheld the appeal as well-founded upon which the revenue authorities brought an action before the Supreme Administrative Court.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

18/08/2011

Language

Bulgarian

Headnote

In this ruling, the Court held that the disputed tax exemption should be defined as 'new' State aid which had to be notified to the Commission. However, national law did not provide for an alternative taxation mechanism of the related products applicable to the period leading up to the decision of the Commission and therefore, there were no legal grounds to levy any amount of duty.

Parties

Names of the parties to the action

Началник на митница Пловдив

Versus

[фирма] гр. Ст. З. (Town of St. Z. (anonymised))

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Production, storage and distribution of biofuels

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The dispute concerned a decision (amended assessment / tax assessment notice) of the Bulgarian revenue authorities (the Customs Agency) which established additional amounts of excise duties owed by a company (the plaintiff) engaged in the production, storage and distribution of biofuels. The plaintiff (the Chief of Customs House Plovdiv) had been audited by the Customs Agency between June 2007 and October 2008. As part of the audit, the authorities established that on occasions the biodiesel produced by the plaintiff had been diluted with gas oil. Therefore, according to the revenue authorities, the plaintiff should have applied the excise duty rate for gas oil (amounting to 600 BGN for 1,000 litres) instead of the rate for biodiesel (amounting to 0 BGN for 1,000 litres). This led to the issuance of the amended assessment establishing that the company owed an additional amount of excise duty for distributed fuels. This amended assessment was the subject of review by the court of first instance.

The plaintiff argued that, following an audit by the revenue authorities, it had been established that during the audited timeframe the defendant, holder of a licence to produce/store biofuels (biodiesel with Combined Nomenclature code 38249099), had produced and released for consumption on the market biodiesel applying an excise duty rate of 0 BGN for 1,000 litres. The plaintiff held that this zero-excise duty rate, allowed under the Act on Excise Duties an Excise Warehouses, constituted State aid in the form of tax exemption, which could be applied only after a decision by the Commission declaring the aid compatible. Since during the time of the audit there was no such decision, the zero rate that was applied was unlawful and the excise duty rates concerning gas oil should have been levied by analogy.

The defendant argued that (i) there were no legal grounds to charge excise duty rates other than the discussed zero rate for biodiesel with Combined Nomenclature code 38249099 released for consumption throughout the audited timeframe; (ii) the zero rate cited in the Act on Excise Duties an Excise Warehouses represented existing State aid; (iii) the conclusion of the revenue authorities that with respect to biodiesel with Combined Nomenclature code 38249099, the excise duty rates for gas oil had to be applied by analogy, contradicted Article 60 of the Constitution which established the principle of legality of tax liabilities. It was not within the competences of revenue / customs authorities to either terminate, modify or repeal granted existing State aid.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

The Supreme Administrative Court ruled that regardless of (i) the fact that legislation applicable to excise duties provided that certain fuels (in this case: biodiesel) were exempted of duties; and (ii) the fact that the relevant legislation had been in force since prior to

the accession of the Republic of Bulgaria to the EU and had not been amended, this exemption could be regarded as 'existing' State aid. Such an exemption had to be treated as 'new' State aid, which has to be approved by the Commission, following a notification on behalf of the Bulgarian authorities. A decision of the Commission approving a State aid scheme was indeed issued (Commission Decision C(2009)9407 of 23 November 2009), however it did not have retroactive effect, hence it did not apply to the period of time following the accession of Bulgaria to the EU and the date of the decision. However, national law did not provide for an alternative taxation mechanism of the specific products until the decision of the Commission. Therefore, there were no legal grounds to levy any amount of duty (as if the products were not taxed at all) and therefore the plaintiff's appeal was rejected.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

3.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Върховен административен съд	Supreme Administrative Court	Last instance court (administrative)	No. 11158/18.08.2011	18/08/2011	Public enforcement	None - Claim rejected	The proceedings were initiated by a Bulgarian company against an amended assessment by revenue authorities with respect to the recovery of unpaid excise duties. The plaintiff argued that the requested recovery was unlawful due to the fact that the specific type of products with respect to which the excise duties were levied, were exempt from taxation by classifying it as 'existing' State aid. Pursuant to applicable legislation, the lower instance court (Administrative Court - Plovdiv) found that the reviewed case was related to a tax exemption which could only be defined as 'new' State aid which had to be approved by the Commission. However, national law did not provide for an alternative taxation mechanism for the products until the decision of the Commission. Therefore, there were no legal grounds to levy any amount of duty (as the products were not taxed at all). The Supreme Administrative Court adopted the conclusions and the argumentation of the court of first instance (ECLI:BG:AD718:2010:20090701317.001) and confirmed its ruling.		The proceedings were initiated by Bulgarian revenue authorities, appealing the ruling of the court of first instance (ECLI:BG:AD718:2010:20090701317.001).
Върховен административен съд	Supreme Administrative Court	Last instance court (administrative)	No. 7227/28.05.2013	28/05/2013	Public enforcement	None - Claim rejected	The proceedings were initiated by The Bulgarian Railways Company (State owned company) with respect to a rejected request for reimbursement of paid excise duties for electrical power. The plaintiff argued that it had the right to excise duty reimbursement on the basis of an existing and approved State aid scheme. However, this State aid scheme did not concern the plaintiff, but its parent company The Bulgarian Railways Holding. The lower instance court (Administrative Court - Sofia City) ruled in favour of the revenue authorities by confirming the rejected request for recovery of excise duties. The case concerned a rejected request for reimbursement of excise duties paid - the plaintiff's request for reimbursement by revenue authorities was rejected by the lower court due to the fact that the plaintiff did not qualify under existing and approved State aid schemes of relevance (the State aid scheme concerned the parent company of the plaintiff). The plaintiff argued that its right to excise duty reimbursement originated from an approved State aid scheme, regardless of the fact that the specific scheme concerned a different entity. The lower court responded by stating that a previous decision of the Commission approving State aid concerning the same type of State aid scheme, but with respect to a different entity, does not affect the plaintiff since it was not included in the notification. No remedies were granted since the case concerned a rejected request for reimbursement of paid excise duties - the plaintiff's request for reimbursement by revenue authorities was rejected due to the fact that the plaintiff did not qualify under existing and approved State aid schemes of relevance (the State aid scheme concerned the parent company of the plaintiff). The Supreme Administrative Court adopted the conclusions and the argumentation of the court of first instance (ECLI:BG:AD701:2012:20110710444.001) and confirmed its ruling.		The proceedings were initiated by the plaintiff against the ruling of the first instance court (ECLI:BG:AD701:2012:20110710444.001).
Върховен административен съд	Supreme Administrative Court	Last instance court (administrative)	No. 4774/28.04.2015	28/04/2015	Public enforcement	None - Claim rejected	The proceedings were initiated by a person registered as a 'farmer' against an amended assessment by revenue authorities which established the existence of undeclared revenue as well as undeclared and unpaid income tax amounts. The lower instance court (Administrative Court - Варна) declared the action admissible and well-founded. The lower instance court stipulated that with respect to tax exemptions regarding persons registered as farmers (agricultural holdings) - exemptions represent State aid within the meaning of Articles 107 TFEU (approved by means of decision C (2011) 863 of 11 February 2011 of the Commission) - applicable requirements do not concern the legal form of the farmer, but the specific business activities carried out. This State aid in the form of tax exemptions to farmers is granted automatically and does not require persons to apply to the revenue authorities. It is left to registered farmers, who comply with respective requirements, to decide on whether to take advantage of the exemption, and this decision is carried out through the submission of the annual tax return. The Supreme Administrative Court adopted the conclusions and the argumentation of the court of first instance (ECLI:BG:AD705:2014:20130704435.001) and confirmed its ruling.		The ruling is one of the first of a series of similar cases brought before Bulgarian courts. Proceedings were initiated by farmers against amended assessments by revenue authorities and in all of these, the rulings were in favour of the farmers. The proceedings were initiated by the plaintiff against the ruling of the first instance court (ECLI:BG:AD705:2014:20130704435.001).
Върховен административен съд	Supreme Administrative Court	Last instance court (administrative)	No. 8706/05.07.2017	05/07/2017	Public enforcement	Recovery order of the unlawful/incompatible aid	The proceedings were initiated by a person registered as a 'farmer' against an amended assessment by revenue authorities which established the existence of undeclared revenue as well as undeclared and unpaid income tax amounts. The lower instance court (Administrative Court Bugas) rejected the action as unfounded.	The Court stipulated that State aid of the type reviewed - tax exemptions for farmers (agricultural holdings) - under a State aid scheme (approved by means of decision C(2011) 863 of 11 February 2011 of the Commission; and decision	The proceedings were initiated by the plaintiff against the ruling of the first instance court (ECLI:BG:AD704:2017:20170700016.001).

							According to the lower court, the plaintiff did not qualify under the national requirements for a tax exemption under the State aid scheme (Commission Regulation (EC) No 1857/2006 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001). The specific amounts to be recovered by the plaintiff were not disputed throughout the proceedings and therefore were determined by means of the amended assessment of revenue authorities. The Supreme Administrative Court adopted the conclusions and the argumentation of the court of first instance (ECLI:BG:AD704:2017:20170700016.001) and confirmed its ruling. The specific amounts to be recovered from the plaintiff were not disputed throughout the proceedings and therefore were determined by means of the amended assessment of revenue authorities.	C(2013) 3186 of 05 June 2013 of the Commission) may be provided only in relation to activities or services after the scheme is set up and published and following the approval of the Commission confirming compatibility with the TFEU. In this sense, if the State aid scheme allows for an automatic grant of the aid (without interaction with the respective administrative body by means of a specific application), the aid can be provided only after the State aid scheme has been established and it has been approved by the Commission. Additionally, the fact that a State scheme is adopted in compliance with EU rules (in the specific case Commission Regulation (EC) No 1857/2006 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001) which sets certain preconditions for the provision of the aid, does not exclude the possibility of defining additional national specific aid provision criteria, as long as these national specific criteria are included in the notification to the Commission by the State.	

4. Croatia

4.1 Country report

Name national legal expert

Marko Kapetanović

Date

07/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Competent courts in cases concerning public enforcement of State aid rules are administrative courts, which are specialised courts and which in general review the legality of decisions of Croatian public administrative bodies (*e.g.* State administrative bodies and other State bodies or bodies of local and regional self-government). According to the Courts Act,[33] courts in Croatia are divided into ordinary and specialised courts. Ordinary courts are the municipal (generally second-to-last instance) and county courts (generally last instance), whilst specialised courts include commercial and administrative courts etc. As a general rule, ordinary courts adjudicate in cases over which competence is not given to one of the specialised courts.

These include four administrative courts (*Upravni sud*) as second-to-last instance administrative courts located in Zagreb, Split, Rijeka and Osijek and the High Administrative Court of the Republic of Croatia (*Visoki upravni sud Republike Hrvatske*) as the last instance administrative court.

Judgments of the High Administrative Court of the Republic of Croatia may be subject to a request for an extraordinary review of legality (*Zahtjev za izvanredno preispitivanje zakonitosti pravomoćne presude*) before the Supreme Court of the Republic of Croatia (*Vrhovni sud Republike Hrvatske*) (further information provided below).

A description of the procedural framework applicable in public enforcement of State aid rules

The public enforcement of State aid rules is of an administrative nature. Pursuant to Article 13(1) of the State Aid Act,[34] following a recovery decision, the Ministry of Finance shall immediately notify the State aid granting authority to carry out the recovery. There is no indication in Croatian law that suggests recovery decisions have a direct effect. According to Article 13(3) of the State Aid Act, recovery of State aid is carried out in accordance with national legislation regulating the legal granting of the State aid, that is, in accordance with norms of the legal act based on which State aid was granted to a beneficiary. This is usually an administrative relationship between the public administrative body and the State aid beneficiary. For example: a public authority makes a decision by which it grants State aid. This decision (or act) will usually contain provisions regarding recovery. If it comes to recovery, the public authority will render a resolution on recovery. The beneficiary may, in general, challenge the resolution before the administrative body or court. Decisions of the public administrative bodies are subject to the provisions of the General Administrative Procedure Act,[35] according to which, as a rule, parties may file an appeal against the decision of the first instance public administrative body before the second instance public administrative body.

Pursuant to Article 12 of the General Administrative Procedure Act, a party has the right to an appeal against a first instance decision, unless otherwise provided by law. Pursuant to Article 112(1) General Administrative Procedure Act, an appeal has a suspensive effect on an administrative decision, unless otherwise provided by law. A public administrative body may, in exceptional cases, for the protection of public interest, or in case of urgency (eliminating damage), decide that an appeal does not have a suspensive effect. An administrative court proceeding against a second instance decision or against a first instance decision against which an appeal is not allowed (when an appeal is excluded by law in exceptional cases or when there is no second instance public administrative body) can be initiated by way of a lawsuit before one of the four administrative courts, depending on their territorial jurisdiction. Also, the law may provide for the administrative court proceedings to be brought exclusively before the High Administrative Court as the last instance administrative court: this is due to the fact that such proceedings are relatively often initiated against the decisions of the State agencies. Pursuant to Article 26 of the Administrative Court Proceedings Act,[36] a lawsuit does not have a suspensive effect, unless otherwise provided by law. However, an administrative court may decide that the lawsuit has a suspensive effect if it finds that enforcement would cause harm to a plaintiff, which would be difficult to rectify, if the law does not prescribe that an appeal (in the administrative procedure against the decision of the public administrative body) does not suspend enforcement of the decision and suspension is not against the public interest.

Pursuant to Article 66 of the Administrative Court Proceedings Act, an appeal against a judgment of the competent administrative court may be filed before the High Administrative Court of the Republic of Croatia, as the last instance administrative court.

Decisions of the High Administrative Court of the Republic of Croatia may be the subject of a request for an extraordinary review of legality pursuant to Article 78 of the Administrative Court Proceedings Act. An extraordinary review of legality constitutes a remedy for a violation of law. The parties to an administrative court proceeding may propose to the State Attorney that a request for an extraordinary review of legality of a final judgment be filed before the Supreme Court of the Republic of Croatia. The State Attorney has exclusive competence to decide whether to file such a request, depending on whether the State Attorney finds that there is a valid reason for it.

It should be noted that, following Croatia's accession to the EU and consequential changes to the Croatian legal framework, no court proceedings were initiated before the Croatian courts relating to State aid.

[33] *Zakon o sudovima*; Official Gazette no 28/13, 33/15, 82/15, 82/16, 67/18.
[34] *Zakon o državnim potporama*; Official Gazette no 47/14, 69/17.
[35] *Zakon o općem upravnom postupku*; Official Gazette no 47/09.
[36] *Zakon o upravnim sporovima*; Official Gazette no 20/10, 143/12, 152/14, 94/16, 29/17.

Prior to Croatia's accession to the EU, the Croatian Competition Agency (CCA) acted as the State aid granting and supervisory authority and it was also authorised to order the recovery of unlawful State aid. The Administrative Court of the Republic of Croatia (as the only administrative court at the time) was the competent court to review CCA decisions. However, from 2012 onwards, the High Administrative Court (which became the last instance court in administrative disputes, while four administrative courts as second-to-last instance courts were established) became competent to review CCA decisions. In 2014, following the changes in the regulation (caused by Croatia's accession to the EU), the Ministry of Finance became the national State aid supervisory authority.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The State Aid Act is silent on private enforcement of State aid rules. Therefore, general rules on court jurisdiction should apply.

According to the Civil Procedure Act,[37] commercial courts adjudicate, *inter alia*, on disputes arising from acts of unfair market competition, monopolistic agreements and disruption of equality on the Croatian market. Therefore, as a rule, one should be able to initiate private enforcement proceedings before the competent commercial court (*Trgovački sud*).

An appeal against a judgment of the commercial court may be filed before the High Commercial Court (*Visoki trgovački sud*). An appeal has a suspensive effect.

Depending on the circumstances a request for an extraordinary remedy may be filed against a judgment of the High Commercial Court before the Supreme Court of the Republic of Croatia.

Besides the protection of the commercial courts, there is a possibility that a third party might also seek private enforcement remedies (such as interim measures to suspend the implementation of an unlawful State aid measure) before the competent administrative courts by acting as an interested party and challenging the decision whereby State aid is granted to a beneficiary. In such a case, the third party would initiate administrative proceedings before an administrative court, challenging the decision to grant State aid (for more information, please see the answers provided above).

However, it should be noted that hitherto there is no court practice relating to private enforcement of State aid rules available and it would be interesting to see how the courts assess their own competence regarding the private enforcement of State aid rules.

A description of the procedural framework applicable in private enforcement of State aid rules

Please refer to the answer provided above.

Main findings based on the case summaries

There are no special findings to share due to an overall lack of court practice relating to the enforcement of State aid rules, especially post Croatia's accession to the EU, which practice is non-existent. Also, in the two available judgments, administrative courts did not consider State aid rules, but only referred to former national law that applied before Croatia's accession to the EU.

Qualitative assessment of the average time of court proceedings

Due to the overall lack of relevant court practice it is not possible to provide a qualitative assessment of the average duration of court proceedings relating to State aid. Especially given that out of the two available State aid decisions, one originates from the period when there was only one administrative court (Administrative Court of the Republic of Croatia) (Administrative Court of the Republic of Croatia, 3.11.2010 - Us-5362/2007-10, the case was not summarised for this Study as it concerned procedural matters), while the second one is from the period when administrative courts had an unfavourable promptness rate (2013–2015), which has significantly improved in the meantime (High Administrative Court of the Republic of Croatia, 7.5.2015 - UsII-62/13-3 (HR1), the case was summarised for this Study). The improvement may be attributed to the fact that four first instance administrative courts were established in 2012.

However, by way of comparison, it may be noted that the average duration of administrative court proceedings before the four administrative courts is around eight months. More specifically, the average duration of administrative court proceedings at the Administrative Court in Zagreb is twelve months, while before the High Administrative Court around four months.[38]

Qualitative assessment of the remedies awarded by national courts

Due to overall lack of court practice it is not possible to provide a qualitative assessment of the remedies awarded by national courts. Out of the two available judgments rendered by the administrative courts (regarding contestation of the recovery order), one challenge against the recovery decision was accepted due to procedural issues of the recovery order (Administrative Court of the Republic of Croatia, 3.11.2010 - Us-5362/2007-10), while the second one was rejected on grounds of not being well-founded (High Administrative Court of the Republic of Croatia, 7.5.2015 - UsII-62/13-3 (HR1)).

Qualitative assessment of the application of the State aid *acquis*; preliminary references

In the court practice until now (two proceedings, see above), courts have not referred to the State aid *acquis,* but have instead referred only to Croatian law. It should be noted that both proceedings were initiated before Croatia's accession to the EU.

Qualitative assessment of any other relevant trends in State aid enforcement

[37] *Zakon o parničnom postupku*; Official Gazette no SFRJ 4/77, 36/77, 36/80, 6/80, 69/82, 43/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, 53/91, 91/92, 112/99, 129/00, 88/01, 117/03, 88/05, 2/07, 96/08, 84/08, 123/08, 57/11, 25/13, 89/14.

[38] Statistical review for 2017 prepared by the Ministry of Justice, available at: https://pravosudje.gov.hr/UserDocsImages/dokumenti/Pravo%20na%20pristup%20informacijama/Izvje%C5%A1%C4%87a/Statisti%C4%8Dko_izvjesce_2017.PDF (last accessed on 7 January 2019).

Due to the overall lack of court practice, it is not possible to provide a qualitative assessment of relevant trends for the enforcement of State aid rules.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

Due to the overall lack of court practice it is not possible to provide a qualitative assessment on whether the notion of State aid was conducted well or not by the Croatian courts.

Any other relevant comments or findings

Enforcement of State aid rules by national courts is practically non-existent in the Republic of Croatia. This might be because of Croatia's relatively late accession to the EU, Croatia's relatively late replacement of the planned economy with market economy and the interweaving of politics and State aid (*i.e.* aid beneficiaries often have a political background or political connections). Therefore, it might be especially nonviable for third parties to initiate private enforcement proceedings given the questionable knowledge of the courts regarding private enforcement of State aid rules, as well as, in general, the lengthy duration of court proceedings in Croatia.

4.2 Case summaries

Case summary HR1

Date

04/01/2019

Case identifiers

Member State

Croatia

Court which adopted the ruling (national language)

Visoki upravni sud Republike Hrvatske

Court which adopted the ruling (English)

High Administrative Court of the Republic of Croatia

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Croatian

Hyperlink to ruling

https://narodne-novine.nn.hr/clanci/sluzbeni/2015_05_57_1135.html

Case reference

UsII-62/13-3

Procedural context of the case

SLAVONIJA modna konfekcija d.d. ('SMK', the plaintiff) filed a lawsuit before the High Administrative Court of the Republic of Croatia against a decision of the Croatian Competition Agency (Agencija za zaštitu tržišnog natjecanja, 'CCA', the defendant).

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

07/05/2015

Language

Croatian

Headnote

In this ruling, the Court held that State aid, which was granted to an undertaking in the form of a debt to equity swap, may still be recovered regardless of the expiry of the statute of limitation deadlines for the payment of initial taxes and social security contributions.

Parties

Names of the parties to the action

SLAVONIJA modna konfekcija d.d.

Versus

Agencija za zaštitu tržišnog natjecanja

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

C - Manufacturing

Textile manufacturing

The type of State aid measure challenged in the court proceedings

Other

Debt-to-equity swap

Substance of the case

Facts and parties' main arguments in the case

By decision of 20 October 2005 the CCA approved a proposal of the Ministry of Economy to grant SMK State aid in the amount of 11,104,090.70 HRK, by way of the Republic of Croatia's debt-to-equity swap in SMK's equity. The debt stemmed from unpaid taxes and social security contributions to the Republic of Croatia. By the same resolution SMK was obliged to implement restructuring measures, while both SMK and the Ministry of Economy were obliged to notify the CCA annually about the status of the implementation of the restructuring measures. CCA ex officio carried out supervision of the State aid during which it determined that SMK had not implemented all restructuring measures. CCA provided the Ministry of Economy and SMK with an instruction to remedy the irregularities, which they failed to do within the provided period of three months. By decision of 28 March 2013 the CCA ordered the Ministry of Economy to recover the granted State aid, increased by the base reference rate (i.e. the interest rate determined each year by the CCA) and 100 basis points, from the plaintiff, due to failure to remedy the aforementioned irregularities in the application of State aid.

The plaintiff requested that the Court nullified the recovery order of the CCA. It argued that because the aid consisted of a debt to equity swap, the Ministry of Finance had settled its claim by way of receiving shares in the plaintiff of an equivalent value. The plaintiff argued that recovery of the aid would mean that the plaintiff would pay the same debt twice, which would represent unjust enrichment. Furthermore, the plaintiff argued that the aid also represented a type of tax settlement and that on the basis of the General Tax Act the absolute statute of limitations for the payment of taxes is six years, whereas such period expired before CCA's decision.

The CCA argued that the debt-to-equity swap constituted State aid and that it was the State aid that was the subject of the recovery, that no tax was due anymore and that therefore the statute of limitations period pursuant to the General Tax Act could not be applied in the case at hand.

Remedy(ies) sought

Other remedy sought

Invalidation of the recovery order

Outcome of the case

Conclusions adopted by the national court

The High Administrative Court considered that the Ministry of Economy and the plaintiff had not remedied irregularities within the provided deadline of three months and therefore found that the CCA acted lawfully when it ordered recovery of the State aid granted to SMK, increased by the base reference rate and the 100 base points. Recovery would be in accordance with Article 15 of the State Aid Act which prescribed that if the State aid granting authority and/or State aid beneficiary do not remedy irregularities within the provided deadline, CCA shall order State aid granting authority and/or State aid beneficiary to recover amount of state aid to which founded irregularity relates to, increased by the amount of base reference rate and 100 base points.

The Court concluded that it was indisputable that the plaintiff had failed to implement restructuring measures and failed to become self-sustainable and that therefore the CCA had acted lawfully when it rendered its resolution.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

4.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Visoki upravni sud Republike Hrvatske	High Administrative Court of the Republic of Croatia	Last instance court (administrative)	UsII-62/13-3	07/05/2015	Public enforcement	None - Claim rejected	The Court upheld the decision of the Croatian Competition Authority (CCA) by which it ordered the authority which granted the State aid to recover the unlawful State aid. The CCA ordered the recovery because of irregularities regarding the usage of the State aid provided, which were not eliminated by the deadline provided.		State aid, which was granted to an undertaking in the form of a debt (taxes and contributions) to equity swap, may still be recovered (due to non-compliance with the conditions of the resolution by which State aid was granted) regardless of the expiry of the statute of limitation deadlines for the initial taxes and contributions.

5. Cyprus

5.1 Country report

Name national legal expert

Metaxas and Associates Law Firm

Date

04/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

In Cyprus there is no specialised court to hear State aid cases specifically.

Until 2016, the Supreme Court (Review of Administrative Decisions) had the exclusive competence to rule on complaints against any kind of decision of any administration authority, and was competent to hear — among others — State aid cases. In the selected cases, the plaintiffs brought their claims before the Supreme Court as a first instance court.

Since 2016, administrative courts have been established in Cyprus, which are competent to hear State aid cases in the following two circumstances:
(i) When an action is filed against a decision of the administrative authority suspending the grant of State aid, following an opinion by the Commissioner of State aid Control;[39] or
(ii) When the Commissioner of State aid Control has issued a decision for recovery of unlawful State aid, and the decision designates the State authority that is competent and responsible for the recovery of the aid.

In such cases, an action can be brought before the administrative courts against the abovementioned decisions. An appeal against the decisions of an administrative court of first instance can be filed before the Supreme Court of Cyprus (Articles 11 and 13 of the Law regarding the establishment and operation of the administrative courts (131(I)/2015)).

The administrative courts are competent to hear cases filed against a decision of an administrative authority suspending the grant of State aid, following an opinion by the Commissioner for State aid control, or against a decision for recovery of unlawful State aid by the Commissioner, or against administrative actions for the recovery of State aid following a decision by the Commission. Although the administrative courts are competent to hear these cases, they are not specialised in State aid cases.

At the same time, in cases concerning the recovery of State aid, it is the civil courts that are competent in the first instance, according to the Law of Civil Procedure of Cyprus (Chapter 6).[40] Appeals against judgments of district courts fall under the competence of the Supreme Court of Cyprus.

A description of the procedural framework applicable in public enforcement of State aid rules

In the event that the Commission issues a recovery decision, the Commissioner for State aid Control has the supervisory control for the efficient enforcement of that decision, based on Article 18B of Public Aid Control Law 30(I)/2001.

The Commissioner for State aid Control is an independent government official. The competences and responsibilities of the Commissioner, as stipulated in Article 9A of Public Aid Control Law 30(I)/2001 are, among others:

- To examine and issue legally binding decisions on the compatibility with State aid rules of draft aid measures granted on the basis of the General Block Exemption Regulation (*e.g.* aid for small and medium-sized enterprises, employment and training). These decisions are binding on the State organs that are competent to grant State aid, and thus affect the entities that are entitled to receive aid.
- To carry out a preliminary assessment and issue non-binding reasoned opinions on the compatibility with State aid rules of all other draft aid measures. All State organs that may grant State aid can request such opinions from the Commissioner of State aid Control as the law (Public Aid Control Law 30(I)/2001) does not limit the right to request such opinions to any specific organs. It is compulsory for the State organs to request opinions from the Commissioner in case a measure entailing State aid is to be adopted.
- To apply the provisions of Council Regulation (EU) 2015/1589 of 13 July 2015,[41] and the implementing provisions adopted by the Commission according to Article 27 of the Regulation.
- To monitor the implementation and the final impact of all aid granted.
- To collect progress reports from all aid granting authorities in order to monitor the implementation and the final impact of all aid granted.
- To submit to the Commission all information required, including information regarding State aid granted in Cyprus.
- To collect, compile and monitor all information concerning State aid.
- To prepare and keep an up-to-date inventory of all State aid schemes or *ad hoc* measures, as well as an up-to-date central inventory on *de minimis* aid.
- To train all aid granting authorities and other parties involved in State aid matters.
- To prepare and submit to the President of the Republic an annual report on the exercise of his duties and responsibilities, with comments and suggestions, as well as an annual statistical survey regarding all State aid granted in Cyprus.
- To represent the Republic of Cyprus in the EU Advisory Committee on State aid as well as in any other committees and working groups dealing with the development or the implementation of State aid policy taking place in Cyprus or abroad.
- To supervise the recovery procedure in case a recovery decision has been issued by the Commission, and to determine the authority that is responsible for the recovery,

[39] The Office of the Commissioner for State aid is an independent authority. The Commissioner is not allowed to hold any other public position.
[40] [Ο περί Πολιτικής Δικονομίας Νόμος (ΚΕΦ. 6)] / The Law of Civil Procedure of Cyprus (Chapter 6).
[41] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*

which is the authority that had granted the State aid (Article 18B of Public Aid Control Law 30(I)/2001).

In the event of a State aid recovery procedure, the authority sends a notification to the aid beneficiary, by which the beneficiary is asked to repay the State aid that was received. If the aid beneficiary does not comply within the deadline that is set, the authority proceeds to the enforcement of the recovery decision.

According to the Cypriot legal framework, the State does not dispose of an administrative procedure in order to collect revenue. Hence, it follows the same procedure as private parties. In such cases, the civil courts are competent, and the procedure for collecting revenue and the disputes that arise are settled according to the rules provided in the Law of Civil Procedure of Cyprus (Chapter 6).[42] In particular, the State needs to submit a writ of summons (*ex parte*). The State is represented by the Attorney-General of the Republic, as the head of the Law Office of the Republic of Cyprus, who may request that the debtor be condemned to pay. Although the authors of this report contacted the office of the Commissioner for State aid Control, the authors of this report did not have any information on whether such a procedure has ever been followed in Cyprus, so it is not possible to provide any further information on the subject.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

As has already been mentioned above, administrative courts are competent to hear cases where an action is filed against a decision of the administrative authority suspending the grant of State aid, following an opinion by the Commissioner, or against a decision of recovery of unlawful State aid by the Commissioner. As stipulated in Article 18(1) of Public Aid Control Law 30(I)/2001, the Commissioner can order the recovery of unlawful State Aid in case the procedure provided by this Law concerning the approval of the measure by the Commissioner or its notification to the Commission (depending on the case) has not been followed, or in case the conditions under which the Commissioner approved the measure have not been respected.

Until 2016, the Supreme Court of Cyprus was competent to hear — among others — this type of cases at first instance, as was the case in the selected cases, where the complainants brought their claims before the Supreme Court as a first instance court.

The Supreme Court (Review of Administrative Decisions) had the exclusive competence to rule on complaints against any kind of decision of any administration authority, and annul any type of administrative act that was not issued in compliance with the law.

Since 2016, administrative courts have been established in Cyprus, which have the exclusive competence to hear this type of cases. An appeal against the decisions of an administrative court of first instance may be filed before the Supreme Court of Cyprus (Articles 11 and 13 of the Law regarding the establishment and operation of the administrative courts (131(I)/2015)).

Regarding the procedure before administrative courts, any person or legal entity, claiming that their rights were violated due to an administrative decision can be a plaintiff. In the selected State aid cases, the actions challenge decisions by the competent public authorities that were issued following an opinion by the Commissioner for State aid Control, and concern either a suspension of a grant (Supreme Court of Cyprus, 5.8.2016 - 1258/2011 (CY2)), or the rejection of a petition for economic assistance (Supreme Court of Cyprus, 25.2.2008 - 1408/2006 (CY1)).

It is the same in case of actions against a decision of the administrative authority suspending the grant of State aid, following an opinion by the Commissioner, or against a decision of recovery of unlawful State aid by the Commissioner, or against the administrative actions for the recovery of State aid following a decision by the Commission. The administrative courts are competent to hear these cases. However, these courts are not specialised courts for State aid cases.

As to the procedure in cases concerning State aid before civil courts, district courts are competent. These courts have jurisdiction to hear and determine, at first instance, all civil actions, with the exception of matters that fall within the jurisdiction of the Rent Control Tribunal, the Industrial Disputes Tribunal and the Family Court. Appeals against judgments of district courts fall under the competence of the Supreme Court of Cyprus.

A description of the procedural framework applicable in private enforcement of State aid rules

Concerning the procedural framework applicable in private enforcement of State aid rules, once again the role of the Commissioner for State aid Control is crucial.

The Commissioner for State aid Control is an independent government official. The competences and responsibilities of the Commissioner in relation to private enforcement of State aid , as stipulated in Article 9A of Public Aid Control Law 30(I)/2001, are to examine and issue legally binding decisions on the compatibility with State aid rules of draft aid measures granted on the basis of the General Block Exemption Regulations (i.e. aid for small and medium-sized enterprises, employment and training). In all other cases, the Commissioner merely opines on the compatibility of the measure.

Furthermore, according to Article 10 of Public Aid Control Law 30(I)/2001, any State aid has to be notified to the Commissioner of State aid Control. The Commissioner has to assess the measure within two months, in the light of Commission regulations and/or decisions. The Commissioner has the competence to reject or suspend the State aid, by stating the reasons for the decision, or to approve the State aid, with or without conditions, in the event that there is an exemption of notification as provided in Article 108(3) TFEU. The Commissioner must act according to the regulations or the decisions of the EU.

No State aid can be granted in Cyprus, without approval from Commissioner or notification to the Commission.

[42] [Ο περί Πολιτικής Δικονομίας Νόμος (ΚΕΦ. 6)] / The Law of Civil Procedure of Cyprus (Chapter 6).

As provided in Article 18 of Public Aid Control Law 30(I)/2001, the Commissioner may receive a complaint or information that State aid has been granted without approval by the Commissioner or without notification to the Commission for approval. In that case, the Commissioner may order the suspension of the measure and the recovery of the granted amount within a set deadline (Article 18(1) of Public Aid Control Law 30(I)/2001).

According to Articles 18A and 18B of Public Aid Control Law 30(I)/2001, when the Commissioner rules for the recovery of unlawfully granted State aid, the competent authority has to annul, rescind, modify, or terminate the State aid, and send a letter informing any aid beneficiary of the immediate recovery of the granted State aid.

If the State aid beneficiary does not comply with the recovery order within the deadline set by the Commissioner, the Commissioner has a right to enforce the order, even by initiating court procedures (Article 18A(4) of Public Aid Control Law 30(I)/2001). In such cases, the civil courts are competent.

Concerning the private enforcement of State aid rules by civil courts, there is no direct provision under Public Aid Control Law 30(I)/2001. However, Article 21A of this Law provides that in case of a claim for compensation of damage that has been caused due to a violation of either Public Aid Control Law 30(I)/2001 or State aid rules, the existence of a decision by either the Commissioner for State aid Control or the Commission that finds that such a violation has taken place constitutes a rebuttable assumption that the claim is well-founded. Although once again the Commissioner for State aid Control could not provide us with any relevant information, nor has it been possible to trace any relevant case law, the wording of this provision can lead to the conclusion that such a claim can be presented against a beneficiary of State aid by a competitor, within the framework of a dispute before civil courts.

Main findings based on the case summaries

In two of the selected cases, plaintiffs requested the annulment of decisions by the Commissioner for State aid Control, which rejected requests for grants and State funding (Supreme Court of Cyprus, 25.2.2008 - 1408/2006 (CY1)) or annulled existing ones (Supreme Court of Cyprus, 5.8.2016 - 1258/2011 (CY2)), either in the form of economic assistance (Supreme Court of Cyprus, 25.2.2008 - 1408/2006 (CY1)) or in the form of cover of expenditure (Supreme Court of Cyprus, 5.8.2016 - 1258/2011 (CY2)). In one case, the plaintiff requested the annulment of a decision by the Commission for the Protection of Competition, which rejected a complaint that had been submitted by the plaintiff against the grant of allegedly unlawful State aid that distorts competition (998/2009).

The role of the Commissioner for State aid Control is crucial for the judgment on the lawfulness of a State aid measure. Since according to Union law, the Commission has the exclusive competence to rule on the compatibility of a State aid measure with the internal market, national authorities, such as the Commissioner for State aid Control, are competent, together with the Commission to decide on the lawfulness of a State aid measure (*i.e.* whether the procedure of notification of the measure to the Commission for approval has been followed). In case there has been a violation of that procedure, this constitutes unlawful State aid and national authorities can order the recovery of the granted amount. In most cases, the plaintiffs file a petition against the Republic of Cyprus, in particular ministries or other public authorities that have acted in conformity with the rulings of the Commissioner for State aid Control.

The plaintiffs in the selected cases are active in the sectors of animal breeding (Supreme Court of Cyprus, 5.8.2016 - 1258/2011(CY2)), education (998/2009), or manufacturing (Supreme Court of Cyprus, 25.2.2008 - 1408/2006 (CY1)).

Qualitative assessment of the average time of court proceedings

The statistics provided by the Supreme Court of Cyprus on cases brought before national courts (of all jurisdictions and instances) do not include the time it takes a court to rule on a case. There are no official statistics concerning the length of proceedings in Cyprus. Therefore, it is not possible to draw comparisons between the time required for the national courts of Cyprus to rule on State aid cases and the time they require to rule on cases that do not concern State aid.

Qualitative assessment of the remedies awarded by national courts

The Commissioner for State aid Control is the authority that is competent and specialised on the subject, so national courts are usually called upon to rule on a remedy that has been already issued by the Commissioner. In one of the selected cases (Supreme Court of Cyprus, 5.8.2016 - 1258/2011 (CY2)), the remedy awarded by the Commissioner for State aid Control comprised the suspension of the grant of State aid by the competent public service authority, based on the Commissioner's instructions. The Supreme Court of Cyprus was called to rule on the public service authority's action, and consequently on the Commissioner's instructions.

In another case, the Supreme Court of Cyprus was called to rule on the rejection of a petition for economic assistance (Supreme Court of Cyprus, 25.2.2008 - 1408/2006 (CY1)).

It is indicative that, in all the selected cases, the Supreme Court of Cyprus validated the opinion or decision that was issued by the Commissioner of State aid Control, which demonstrates that the Commissioner's rulings are crucial and influence national judges, probably because of the Commissioner's expertise with such cases. Another possible reason for this is the fact that there are no specialised courts for State aid issues.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

In the selected cases, there was no referral for a preliminary ruling to the CJEU, nor a follow-up of such a request. As for the references, the courts referred to the Commission Guidelines on State aid for rescuing and restructuring firms in difficulty and the Commission Notice on the Definition of Aid. Moreover, reference was made to CJEU case

law (Cases C-341/06;[43] C-342/06 P;[44] C-559/12 P[45]), but not more than once in each decision.

Lastly, the courts in the selected cases did not refer to the GBER or to the *de minimis* Regulation.

Qualitative assessment of any other relevant trends in State aid enforcement

As mentioned above, the main trend that can be identified in the selected cases is that the courts agree with the opinions or decisions issued by the Commissioner for State aid Control, because of the Commissioner's expertise and, inversely, because of the national courts lack of specialisation or expertise in the subject of State aid.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

From the study of the selected cases, it would seem that the notion of State aid was properly conducted by the national courts.

However, as has been explained above, the Commissioner for State aid Control is the authority that is competent and specialised on the subject of State aid, and the national courts are called upon to rule on a decision that has been issued by the Commissioner. It is evident that the rulings of the Commissioner for State aid Control are crucial and influence the national judges, possibly because of the Commissioner's expertise in State aid cases. Moreover, there are no courts specialised in State aid issues, and national judges and lawyers lack the specialised expertise in EU matters, particularly in State aid issues.

Any other relevant comments or findings

Not applicable

[43] Case C-341/06, *Chronopost and La Poste v UFEX and others* (2008) ECLI:EU:C:2008:375.
[44] Case C-342/06 P, *La Poste / UFEX e.a.* (2008) ECLI:EU:C:2007:220.
[45] Case C-559/12 P, *France v Commission* (2014) ECLI:EU:C:2014:217.

5.2 Case summaries

Case summary CY1

Date

04/01/2019

Case identifiers

Member State

Cyrpus

Court which adopted the ruling (national language)

Ανώτατο Δικαστήριο - Αναθεωρητική Διαδικασία

Court which adopted the ruling (English)

Supreme Court of Cyprus - Review of Administrative decisions

Instance court which adopted the ruling

Last instance court (general jurisdiction)

Official language of the court

Greek

Hyperlink to ruling

http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2008/4-200802-1408.06.htm&qstring=1408%20w%2F1%202006

Case reference

1408/2006

Procedural context of the case

The plaintiff applied to the relevant public authorities for a grant of economic assistance.

The Ministry of Commerce, Industry and Tourism sent a letter to the Commissioner of State aid questioning whether was is possible to grant economic assistance in this particular case. The Commissioner's reply was negative. As a result, the plaintiff filed a complaint to the Supreme Court of Cyprus.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

25/02/2008

Language

Greek

Headnote

In this ruling, the Court held that the plaintiff could not qualify for State aid as the destruction of facilities by fire, caused by human negligence cannot fall within the definition of 'exceptional occurrences' contained in the relevant domestic and Union law.

Parties

Names of the parties to the action

Michael N. Ioannides Manufacturing & Trading LTD Διά του Επισήμου Παραλήπτη/Εκκαθαριστή

Versus

Κυπριακή Δημοκρατία μέσω Υπουργείου Εμπορίου, Βιομηχανίας και Τουρισμού

The relationship of the plaintiff to the measure

Other

Party requesting access to the measure

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

C - Manufacturing

Manufacturing

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The plaintiff owned a textile factory in Cyprus, that was destroyed completely by fire in 1992. The plaintiff requested economic assistance from the relevant public authorities, due to the destruction of the factory's facilities by fire. They claimed that the incident fell under the term of an 'exceptional occurrence' and therefore they were entitled to a compensatory grant from the State, as that was the case in two similar cases. They also argued that the defendant wrongfully concluded that the conditions for an 'exceptional occurrence' have not been fulfilled, and argued that the rejection of the requested grant constituted unequal treatment.

The defendant (Ministry of Commerce, Industry and Tourism) claimed that it sent a letter to the State aid Commissioner asking whether it was possible to grant economic assistance in this particular case. The Commissioner concluded that that the definition of 'exceptional occurrences' did not cover this particular case. Consequently, the defendant informed the plaintiff of the Commissioner's response.

Furthermore, the defendant argued that the fire started due to human negligence and as a result it cannot be considered as a natural disaster nor an exceptional occurrence (war, strikes, etc.). Moreover, the facilities were insured and the insurance company had paid to the plaintiff almost the whole insured amount. In any case, the granting of State aid could not be approved by the Commission, due to the fact that the incident took place more than three years ago, which is the maximum period.

The defendant also argued that the Commission Guidelines on State aid for rescuing and restructuring firms in difficulty should be followed. Under those Guidelines, the notion of 'exceptional occurrence' must be interpreted restrictively. The case at hand, in which a fire was caused due to human negligence, did not fall under the exceptions from the prohibition of the grant of State aid, as they had been set and interpreted by the Commission.

Remedy(ies) sought

Other remedy sought

Economic assistance in the form of a grant

Outcome of the case

Conclusions adopted by the national court

The Supreme Court stated that whenever a State aid issue arises, the relevant TFEU provisions shall prevail. The Court in this case examined whether Article 87(2) of the EC Treaty (current Article 107(2) TFEU) applied in the case at hand. According to Article 87(2) of the EC Treaty (current Article 107(2) TFEU),"the following shall be compatible with the internal market: (b) aid to make good the damage caused by natural disasters or exceptional occurrences." As stated above, the defendant argued that the fire started due to human negligence and as a result it could be considered as a natural disaster nor an exceptional occurrence (war, strikes, etc.).

The Court referred to the Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014), where the term is defined as follows: "when considering exceptions […] that State aid is incompatible with the common market, the Commission holds that the notion of 'exceptional occurrence' […] must be interpreted restrictively. Hitherto, the Commission has accepted as exceptional occurrences wars, internal disturbances or strikes and, […] fires which result in widespread loss." Consequently, the Court held that the case at hand, in which a fire was caused due to human negligence, did not fall under the exceptions from the prohibition of the grant of State aid, as they have been set and are interpreted by the Commission.

As for the argument of unequal treatment, the Court held that in the other cases, the State aid had been granted under completely different circumstances. In one of those cases, the State aid was granted for reasons of general public interest, referring to the economy, employment and further social consequences.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Communication from the Commission 2004/C 244/02 – Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty, OJ C 244, 1.10.2004
- Commission Notice C/2016/2946 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. 1–50

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary CY2

Date

04/01/2019

Case identifiers

Member State

Cyrpus

Court which adopted the ruling (national language)

Ανώτατο Δικαστήριο
Αναθεωρητική Διαδικασία

Court which adopted the ruling (English)

Supreme Court of Cyprus
Review of Administrative decisions

Instance court which adopted the ruling

Last instance court (general jurisdiction)

Official language of the court

Greek

Hyperlink to ruling

http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2016/4-201608-1258-2011.htm&qstring=1258%20w%2F1%202011

Case reference

1258/2011

Procedural context of the case

The Commissioner for State aid Control, a public authority entrusted with the effective application of State aid rules within Cyprus, sent a letter to the Head of the Veterinary Services of Cyprus (a public service, hereinafter 'the defendant'), stating that covering the expenditure on ear tags for bovine animals by the defendant entailed the granting of State aid, and consequently, it could only be considered as lawful and compatible with State aid rules if notified to and approved by the Commission. Based on this, the defendant suspended the grant.

Following this, the Cypriot Organisation of Bovine Breeders (hereinafter 'the plaintiff') submitted a complaint to the Supreme Court of Cyprus, asking for the annulment of the defendant's decision for the suspension of the grant.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

05/08/2016

Language

Greek

Headnote

In this ruling, the Court held that stating that covering the expenditure on ear tags for bovine animals, entailed a State aid measure which entered into force in breach of the notification procedure and should be immediately suspended.

Parties

Names of the parties to the action

Παγκύπριος Οργανισμός Αγελαδοτρόφων (ΠΟΑ) Δημόσια Λτδ

Versus

Τμήμα Κτηνιατρικών Υπηρεσιών, Υπουργείου Γεωργίας, Φυσικών Πόρων και Περιβάλλοντος

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

M - Professional, scientific and technical activities

Veterinary activities

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The plaintiff brought an action before the Supreme Court of Cyprus against the defendant, with regard to the suspension and discontinuation of a grant for ear tagging of bovine animals, which covered the expenditure of this practice. The defendant based its actions on the Commissioner for State aid Control's decision that the grant entailed State aid and that there had been no notification to the Commission.

The plaintiff argued that the defendant wrongfully considered the grant as State aid and that, according to Articles 3, 4 and 9 of Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97, the defendant had a discretionary authority whether to charge the breeders with the costs or not. Moreover, the plaintiff argued that the Commissioner for State aid Control wrongfully considered that the specific grant was State-funded, as it was funded by the Commission. Furthermore, the plaintiff claimed that the principle of equal treatment was breached, due to the fact that an ear-tagging program for sheep and goats had been exempted from the application of State Aid rules as a program for the protection of public health, in contrast to bovine animals. Lastly, the plaintiff claimed that the defendant had failed to state reasons for such actions.

The defendant argued that the ear-tagging program for sheep and goats had different characteristics from the ear-tagging program for bovine animals, so the two cases were different and as such there was no infringement of the principle of equal treatment. As far as the failure to provide reasons for the suspension of the grant, the defendant claimed that, since the grant was considered to be State aid by both the Commission and the Commissioner, the suspension was compulsory.

According to the Court's reasoning, although there was no formal notification to the Commission on the subject, a series of informal contacts between the Commission and the Commissioner for State aid Control took place in order for the Commissioner to reach its decision, so the decision also reflected the Commission's view on the subject. Furthermore, although the plaintiff argued that the ear tagging program was funded by the Commission, the Court found that: (a) this is not accurate, since the funding by the Commission concerned an ear-tagging program for sheep and goats, which did not include bovine animals; and (b) even if the funding of the ear-tagging for bovine animals was co-funded by EU resources, this does not exclude the existence of unlawful State aid. This is because, according to a letter by the Commissioner for State aid Control referred to in the Court's ruling, the General Directorate of Agriculture and Rural Development has asserted that even EU-funded or co-funded measures that grant economic assistance to farmers fall

under the scope of State aid rules. As a result, the competent authorities are in any case obligated to follow the notification procedure prior to the grant of the assistance.

Remedy(ies) sought

Other remedy sought

Suspension of the payment of the grant by the Veterinary Services of Cyprus

Outcome of the case

Conclusions adopted by the national court

The Supreme Court replied to all the arguments provided by the plaintiff.

According to Regulation (EC) No 1760/2000, there is no obligation on behalf of the public authority to cover the costs for such proceedings. Furthermore, should the public authority decide to cover these costs, those proceedings have to be in alignment with State aid rules and case law on what is considered as direct or indirect State aid. In particular, Regulation (EC) No 1760/2000 should be interpreted and applied according to Articles 107 and 108 TFEU. The Court is bound by the CJEU case law with respect to the interpretation of the State aid definition (Chronopost SA, La Poste, et.al. v UFEX et.al. C-341/06 and 342-06, French Republic v Commission (2014) Case C-559/12).

Additionally, even if the grant was co-funded by the Commission and the State, those grants should have been notified to the Commission beforehand. As a result, the Court agreed with the defendant's arguments that the plaintiff was bound to abide to the decision of the Commissioner for State aid Control.

Therefore, the Court rejected the actions brought by the plaintiff.

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-341/06 P and 342/06 P, Chronopost SA, La Poste v UFEX et. Al. (2008) ECLI:EU:C:2008:375 and ECLI:EU:C:2007:220
- C-559/12 French Republic v Commission (2014) ECLI:EU:C:2014:217

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000, OJ L 204, 11.8.2000

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

5.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Anotato Dikasthrio (Ανώτατο Δικαστήριο)	Supreme Court of Cyprus	Second to last instance court (administrative)	24/2007	28/05/2009 (publication date)	Private enforcement	None - Claim rejected	The plaintiffs sought the reversal of the first instance ruling. That ruling had rejected their claim against the Republic of Cyprus for the refusal to grant them permission to issue an electronic video game similar to that granted to the State TV channel RIK. The Supreme Court rejected the appeal on the grounds that the case does not involve State aid which distorts competition.		
Anotato Dikasthrio (Ανώτατο Δικαστήριο)	Supreme Court of Cyprus	Second to last instance court (administrative)	988/2009	14/11/2011 (publication date)	Private enforcement	None - Claim rejected	The Court rejected the application of the Association of Cyprus Private Trusts against the Competition Commission and confirmed that the legislative framework for the establishment and operation of NGE constituted an aspect of the provision of public education (complementary public education that the State is obliged to grant through the Ministry of Education and Culture). The Supreme Court rejected the appeal and ordered the plaintiff to pay the State's costs.		
Anotato Dikasthrio (Ανώτατο Δικαστήριο)	Supreme Court of Cyprus	Second to last instance court (administrative)	1408/2006	25/02/2008 (publication date)	Public enforcement	None - Claim rejected	The plaintiff requested economic assistance from the relevant public authorities due to the destruction of the factory's facilities by fire. The defendant (Ministry of Commerce, Industry and Tourism) claimed that it sent a letter to the State aid Commissioner asking whether it was possible to grant economic assistance in this particular case. The Commissioner concluded that that the definition of 'exceptional occurrences' did not apply to this particular case. Consequently, the defendant informed the plaintiff of the Commissioner's response. The Supreme Court held that the case at hand, in which a fire was caused due to human negligence, did not fall under the exceptions from the prohibition of the grant of State aid.		The judgment of the previous instance court which is in force is not available.
Anotato Dikasthrio (Ανώτατο Δικαστήριο)	Supreme Court of Cyprus	Second to last instance court (administrative)	1258/2011	05/08/2016 (publication date)	Public enforcement	None - Claim rejected	The plaintiff brought an action before the Supreme Court of Cyprus against the defendant, with regard to the suspension and discontinuation of a grant for ear tagging of bovine animals. The defendant based its actions on the State aid Commissioner's decision that the grant entailed State aid and that there had been no notification to the Commission. The Commissioner ruled that the aid should be immediately suspended or discontinued. The plaintiff appealed to this decision before the Supreme Court. The Supreme Court rejected the plaintiff's case. The Court stated that even if the funding of the ear-tagging for bovine animals was co-funded by EU resources, this does not exclude the existence of unlawful State aid. This was because, according to a letter by the State aid Commissioner referred to in the Court's ruling, the General Directorate of Agriculture and Rural Development has asserted that even EU-funded or co-funded measures that grant economic assistance to farmers fall under the scope of State aid rules. As a result, the competent authorities are obliged to follow the notification procedure prior to the grant of the assistance.		

6. Czech Republic

6.1 Country report

Name national legal expert

Doc JUDr Filip Křepelka PhD

Date

21/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

There is a systematic preliminary control of State aid measures in the Czech Republic in accordance with Act Number 215/2004 Coll., on Arrangement of Some Relations in the Field of State Aid, as amended (hereinafter the 'Act on Arrangement of Some Relations in the Field of State Aid') carried out by the Office for the Protection of Competition (*Úřad pro ochranu hospodářské soutěže*).[46] The competence of the Office for the Protection of Competition, which is a coordination and information body in the area of State aid, is limited by the exclusive competence of the Commission.

According to the Act on Arrangement of Some Relations in the Field of State Aid, the entities granting State aid (*poskytovatelé*) shall ensure the recovery of the granted State aid if requested by the Commission.[47] In such a case, the entity granting the State aid requests the aid beneficiary to repay the granted State aid within a given time period. If not complied with, the aid-granting entity may decide on recovery of the State aid pursuant to the provision of special laws,[48] or if it is not possible to proceed according to the special laws, the aid-granting entity may file a lawsuit to recover the granted aid. Therefore, the Act on Arrangement of Some Relations in the Field of State Aid provides the legal basis for an administrative enforcement of a recovery decision. Public authorities implementing a public budget, which have granted unlawful State aid (*i.e.* ministries, administrative authorities, regions or municipalities), shall adopt administrative decisions for this purpose. These decisions are subject to judicial review by administrative courts, like other administrative decisions.

In other words, the Act on Arrangement of Some Relations in the Field of State Aid stipulates the judicial enforcement of recovery decisions as an auxiliary instrument for cases in which administrative recovery is not possible.

In principle, the administrative courts provide a judicial review of administrative decisions of public authorities. There is no specific court assigned for decisions on State aid recovery. There are eight regional courts (*krajské soudy*), including the Municipal Court in Prague (*Městský soud v Praze*), which adjudicate as the administrative courts of first instance, while the Supreme Administrative Court of the Czech Republic (*Nejvyšší správní soud;* located in Brno) adjudicates on appeals (cassation complaints) against judgments of the regional courts. Finally, in cases of possible violation of the fundamental rights of an entity or an individual, the Constitutional Court (*Ústavní soud*) is competent to hear constitutional complaints as an extraordinary appeal procedure.

A description of the procedural framework applicable in public enforcement of State aid rules

Apart from the legal basis for the recovery of State aid as laid down in the Act on Arrangement of Some Relations in the Field of State Aid, as mentioned above, the public enforcement of State aid rules in the Czech Republic is governed by general procedural legal acts.[49]

Act Number 218/2000 Coll., on the Budgetary Rules, as amended (hereinafter the 'Act on Budgetary Rules'), provides for a comprehensive set of rules on the state budget and the management of public funds, including recovery of subsidies.[50] Recovery of unlawful State aid as specified by Union law is explicitly referred to in Section 15(1)(e) of the Act on Budgetary Rules. According to this Act, the competent public authority may issue an administrative decision requesting the recovery of the granted aid and, if not contested before courts, these decisions become an enforceable legal title.[51]

Moreover, the Act on Budgetary Rules explicitly states that subsidies shall be granted in compliance with the Act on Arrangement of Some Relations in the Field of State Aid.[52] Similar reference is also contained in Act Number 250/2000 Coll., on the Territorial Budgetary Rules, as amended, applicable to self-governing regional units (*i.e.* regions and municipalities) in the Czech Republic and management of their budgets and public funds.

As mentioned above, administrative decisions on the recovery of aid can be reviewed by the above-listed administrative courts, pursuant to Act Number 150/2002 Coll., the Administrative Procedure Code, as amended.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

In principle, in cases of a legal dispute concerning State aid (or unfair competition matters in general), which is of a civil law nature, the general civil courts are competent to adjudicate such disputes. There is no specialised court with the jurisdiction to hear cases concerning the private enforcement of State aid rules.

Pursuant to Section 9(2)(h) of the Act, Number 99/1963 Coll., the Civil Procedure Code, as amended (hereinafter the 'Civil Procedure Code'), the competent courts to adjudicate

[46] http://www.uohs.cz/en/homepage.html (last accessed on 21 January 2019).
[47] Section 7(2) of the Act on Arrangement of Some Relations in the Field of State Aid.
[48] For instance Act No. 218/2000 Coll., on the Budgetary Rules, as amended; Act No. 250/2000 Coll., on the Regional Budgetary Rules, as amended.
[49] As stipulated especially in: Act No. 500/2004 Coll., the Administrative Code, as amended; Act No. 150/2002 Coll., the Administrative Procedure Code, as amended; Act No. 99/1963 Coll., the Civil Procedure Code, as amended; Act No. 218/2000 Coll., on the Budgetary Rules, as amended; Act No. 250/2000 Coll., on the Territorial Budgetary Rules, as amended.
[50] "Subsidies" are defined in section 3(a) of Act on Budgetary Rules as financial funds from the state budget, state financial assets or the national fund provided to legal entities or individuals for specified purposes.
[51] Subsidiarity of the general Act No. 500/2004 Coll., the Administrative Code, as amended, applies.
[52] Section 11 of the Act on the Budgetary Rules.

cases concerning unfair competition matters in the first instance are the regional courts (and the Municipal Court in Prague). The appellate courts are the high courts (*Vrchní soud).* There are two in the Czech Republic: in Prague and in Olomouc. An extraordinary appeal (*dovolání*) against the decision of a high court can be filed (under the conditions as set out in the Civil Procedural Code) before the Supreme Court of the Czech Republic (*Nejvyšší soud,* located in Brno).

As mentioned above, in cases of a possible violation of the fundamental rights of an entity or an individual, the Constitutional Court is competent to hear constitutional complaints in an extraordinary appeal procedure.

In general, judges tend to specialise in particular areas of law (applies to the higher instance courts rather than the lower ones). Hence, the workload of judges reflects such specialisation. Therefore, it is rather a standard that individual competent courts have judge(s) specialised in unfair competition matters.

A description of the procedural framework applicable in private enforcement of State aid rules

The Civil Procedure Code does not contain any explicit provisions on State aid remedies. Therefore, the general rules of civil judicial procedure apply.

Given the rather negligible case law concerning State aid matters in the Czech Republic, some interpretation issues regarding State aid rules still might occur, which might undermine legal certainty in particular cases.

In the *HAMR-Sport, a. s.* case[53], the Ministry of Education, Youth and Sports of the Czech Republic was the sole defendant. It managed a State aid scheme that the plaintiff alleged was unlawful. The court did not invite the individual beneficiaries of the allegedly unlawful State aid to submit their considerations. However, in the *NH Hospital* case[54] , the beneficiaries of the contested Sate aid schemes were identified (operators of the regional hospitals managed by the region). However, they did not intervene in the proceeding.

Regular civil procedure instruments, such as a court injunction or recovery of provided financial support might also apply to the enforcement of State aid rules. As found in the *NH Hospital* case,[55] national courts are often requested to adjudicate in cases when unlawful State aid has been granted. Therefore, suspension of the grant of State aid by a court injunction and recovery of already granted State aid are undoubtedly allowed as an example of usual claims brought before civil courts. Similarly, compensation for the damage caused by unlawful State aid could also be considered as a legitimate means of enforcing legal obligations concerning State aid matters. A lawsuit for damages could possibly be filed also by a competitor if the causal link between the harm sustained by the competitor and the breach of a statutory or contractual obligation by the grantor of unlawful State aid can be proved.

As for the complaints of competitors concerning State aid schemes, such complaints can be filed with the Commission on the unified form in accordance with Council Regulation (EU) 2015/1589 of 13 July 2015.[56]

Finally, voluntary suspension of State aid or even its recovery directly by the public authority that granted the unlawful aid cannot be ruled out.

Main findings based on the case summaries

It should be noted that all the selected cases deal with private enforcement.

The *NH Hospital* cas,e[57] and the *HAMR-sport case,*[58] show attempts by competitors to challenge allegedly unlawful State aid granted to public institutions and non-profit organisations. Case *Regiojet*, a. s.[59] shows an effort to obtain sufficient information for proper consideration of whether a State aid measure was involved. Therefore, the mentioned cases demonstrate the tendency of competitors to defend their position on the given market against the granted State aid, which they often claim to be unlawful.

The scrutinised cases cover quite a wide range of sectors, including healthcare, sports, transportation, electricity production, and State aid in different forms (such as feed-in tariffs or tax advantages) were identified.

Qualitative assessment of the average time of court proceedings

According to available statistics on case load and its management in the Czech judiciary, provided in the Annual Report for the Year 2017,[60] the duration of proceedings varies widely among the courts in both administrative and civil judicial proceedings.

Despite overall improvement in adjudication of routine cases by district courts (100–400 days), complex cases adjudicated by regional courts (disputes related to unfair competition and the administrative judiciary) usually last 12 months or more. However, there are wide regional differences. Generally, appellate proceedings are also lengthy. The Annual Report for the Year 2017 does not include information about the duration of proceedings in last instance courts (*e.g.* the Supreme Court).

In principle, adjudication of a complex case can last a decade, especially if the higher court quashes the judgment of the lower court and sends the case back for reassessment. It seems also that proceedings involving Union law issues take longer than court proceedings in which Czech law applies exclusively.

The 2017 Report does not provide any specific statistics concerning State aid cases. However, given the limited number of State aid cases and their complexity, it can be expected that the duration of such cases would be longer than the average duration.

[53] Supreme Court of the Czech Republic, 28.6.2016 – ECLI:CZ:NS:2016:23.CDO.2493.2014.1 (CZ3).
[54] Supreme Court of the Czech Republic, 25.6.2014 - ECLI:CZ: NS: 2014: 23.cdo.1341.2012.1 (CZ2).
[55] *Ibid.*
[56] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*
[57] Supreme Court of the Czech Republic, 25.6.2014 - ECLI:CZ: NS: 2014: 23.cdo.1341.2012.1 (CZ2).
[58] Supreme Court of the Czech Republic, 28.6.2016 – ECLI:CZ:NS:2016:23.CDO.2493.2014.1 (CZ3).
[59] Municipal Court in Prague, 25.10.2017 – ECLI:CZ: 5A1762014 (CZ1).
[60] The Czech judiciary – annual report 2017, published by the Ministry of Justice; available at: https://www.justice.cz/documents/12681/719244/2017_vyrocni_stat_zprava.pdf/27ba4524-49cb-4744-b834-2c6812f13e5d (last accessed on 21 January 2019).

Qualitative assessment of the remedies awarded by national courts

The case summaries show that the number of rulings in which the national courts granted remedies is relatively low. With regard to the public enforcement of State aid, this might be due to the fact that the Commission has not issued a recovery decision or a recovery injunction towards the Czech Republic since its accession to the EU in 2004. Furthermore, the low number of remedies granted by the national courts could also be the result of the low level of specific expertise on State aid rules of the Czech judges.

In accordance with the European Agreement on Association (agreed 1993, applicable since 1995), the Czech Republic established a pre-accession State aid control mechanism. With effect from the date of accession of the Czech Republic to the EU, the competence to assess the compatibility of State aid with the internal market was taken over by the Commission.

The Office for the Protection of Competition located in Brno (hereinafter the 'Competition Office'), was established in 1991 for the investigation and sanctioning of cartels, abuse of a dominant position, approval of mergers and the control of public procurement. The Competition Office was also assigned with the implementation of State aid control. The Department of State Aid did not cease to exist with the Czech Republic's accession to the EU in 2004.

The Competition Office is the central coordination, advisory, consulting and monitoring authority in the area of State aid. It has an important role in the notification procedure as it cooperates with both the State aid grantors and the Commission and sends the notification forms to the Commission by electronic transmission. In accordance with Union law, the Competition Office serves as the authority for surveillance of *de minimis* aid and also administers the registry of *de minimis* aid.

The surveillance of *de minimis* aid in the Czech Republic by the Competition Office was dealt with in the selected case *Městská část Praha 4.*[61] The Supreme Administrative Court upheld the judgment of the Regional Court in Brno revoking a fine imposed by the Competition Office on the Prague 4 district authority for an administrative offence of not registering the *de minimis* aid in the register administered by the Competition Office within the given deadline. In the ruling, the Supreme Administrative Court dealt with the definition and features of *de minimis* aid and stated that *de minimis* aid pursuant to the Act on Arrangement of Some Relations in the Field of State Aid can only be interpreted as aid within the meaning of Article 107(1) TFEU.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

In general, it seems that the State aid *acquis* has been properly applied by the Czech courts.

References to CJEU judgments, to Union regulations and directives, as well as to Commission decisions and guidelines vary widely in the judgments. Frequently, it is the parties to the proceedings that raise arguments based on Union law or CJEU case law rather than the judge.

Web pages of the Supreme Court[62] and the Supreme Administrative Court[63] summarise all requests for a preliminary ruling filed by courts in the Czech Republic, including the requests of lower courts.[64] According to these overviews, no Czech court has requested for interpretation of State aid rules (Articles 107 and 108 TFEU or related regulations and decisions).

Qualitative assessment of any other relevant trends in State aid enforcement

The limited number of State aid cases does not allow an assessment of whether judges have become more acquainted with State aid rules and thus whether the overall quality of national rulings has improved during the period 2007–2017. However, as some of the selected rulings show, judges from the Supreme Court have generally become more acquainted with State aid rules in comparison to judges from the lower courts[65] (*e.g.* the *NH Hospital* case).[66] In general, this is due to the fact that higher courts (*i.e.* the Supreme Court, the Supreme Administrative Court and the Constitutional Court) have more resources dedicated to in-depth analysis of national and EU legal matters.

There is a scarcity of competitor actions and the main reason could be that judicial proceedings are considered as a rather lengthy tool to challenge unlawful State aid. Thus, there has not been an increase of cases based on competitor complaints.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

The Czech courts have assessed the notion of State aid in several judgments, for instance in the *NH Hospital* case or in the *Městská část Praha 4* case.[67] However, national courts have not always interpreted the notion of State aid correctly.

The *NH Hospital* case had potential for an in-depth analysis of potential effects of State aid on competition in the sector of public and private healthcare.Although the Supreme Court did not expand on the effect of the State aid on competition in the healthcare sector, the Supreme Court thoroughly described the role of the national courts in enforcement of State

[61] Administrative Supreme Court of the Czech Republic, 21.1.2016 - 7 As 286/2015 (CZ5).
[62] Overview available at: http://www.nsoud.cz/Judikatura/ns_web.nsf/web/Zahranicnivztahy~Ceskepredbezneotazky~Predbezne_otazky_Nejvyssiho_soudu~?openDocument&lng=CZ (last accessed on 21 January 2019).
[63] Overview available at: http://www.nssoud.cz/Predbezne-otazky-podane-NSS/art/533?menu=254- (last accessed on 21 January 2019).
[64] Overview available at: http://www.nsoud.cz/Judikatura/ns_web.nsf/web/Zahranicnivztahy~Ceskepredbezneotazky~Predbezne_otazky_ostatnich_ceskych_soudu~?openDocument&lng=CZ (last accessed on 21 January 2019).
[65] Lower courts misunderstood their role in the field of State aid control.
[66] Supreme Court of the Czech Republic, 25.6.2014 - ECLI:CZ: NS: 2014: 23.cdo.1341.2012.1 (CZ2).
[67] Administrative Supreme Court of the Czech Republic, 21.1.2016 - 7 As 286/2015 (CZ5).

aid rules by explaining the competences of the Commission (exclusively assesses the compatibility of such aid with Union law) and the national courts (can be requested to act when unlawful aid has been granted or will be granted).

The case of excessive feed-in tariffs and their reduction with specific tax, assessed among others by the Constitutional Court,[68] shows the limits of both administrative and judicial implementation of State aid rules in the Czech Republic. In this case, the Constitutional Court did not properly analyse whether feed-in tariffs constituted a form of State aid. This is probably because the Constitutional Court focuses on compliance of given measures with the Czech constitutional order rather than on the interpretation of particular national legislation in light of Union law.

Any other relevant comments or findings

Not applicable

[68] The ruling Constitutional Court of the Czech Republic, 15.5.2012 - Pl ÚS 17/11 (CZ4).

6.2 Case summaries

Case summary CZ1

Date

03/01/2019

Case identifiers

Member State

Czech Republic

Court which adopted the ruling (national language)

Městský soud v Praze

Court which adopted the ruling (English)

City Court of Prague

Instance court, which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

Czech

Hyperlink to ruling

http://www.nssoud.cz/files/EVIDENCNI_LIST/2014/5A_176_2014_90_20171220142648_prevedeno.pdf

Case reference

5 A 176/2014

Procedural context of the case

This case concerns judicial action against an administrative decision (first instance of administrative judiciary).

No information on subsequent legal proceedings after the ruling at hand is available.

Type of action

Private enforcement

Delivery date of the ruling

25/10/2017

Language

Czech

Headnote

In this ruling, the Court specified the information that public authorities shall provide for an assessment of whether State aid is an element of a particular measure.

Parties

Names of the parties to the action

Regiojet, a.s

Versus

Magistrát hlavního města Prahy Another party to the proceedings was České dráhy, a.s.

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority; Other (Public limited company controlled by the State)

Sector relating to the State aid argument

H - Transporting and storage

Regional passenger rail transport

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The Central Administration of the Capital City Prague confirmed an administrative decision of the regional organiser of integrated transport (its subordinate authority).

The subordinate authority delivered only figures (sums) of paid subsidies as contract-based remuneration for subsidised regional passenger rail transport.

The plaintiff (as private rail operator) filed an action with the Court for the annulment of the decision that confirmed the decision of the subordinate authority to provide only general information regarding subsidies and turnover.

The plaintiff highlighted the necessity to provide detailed information about costs of operating. According to the plaintiff, such information would enable an assessment of whether State aid was involved in the contracts specifying subsidies for the operator of regional passenger rail transport to be carried out. The plaintiff also requested information on the economic performance related to particular rail lines and connections.

The defendants (the Prague City Hall – i.e. the central administration of the City of Prague, and the national rail operator) argued extensively about the limits of providing information, highlighting the trade secrets of subsidised operators.

Remedy(ies) sought

Other remedy sought

Access to information

Outcome of the case

Conclusions adopted by the national court

The Court identified the information provided by the public authority as insufficient in order to carry out an assessment of whether a State aid element exists with regard to the relevant subsidies. In doing so, it extensively cited principles of transparency, and summarised the principles laid down in the CJEU's Altmark judgment (Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht Case C-280/00) in the context of the subsidising of regional transport.

Eventually, the Court annulled the administrative decision and required the provision of adequate information regarding the financing of subsidised operators of regional passenger rail transport.

The Court confirmed that competitors enjoy the right of adequate information related to the public financing of services of general economic interest – regional passenger rail transportation in this case. Moreover, although the Court did not investigate whether

State aid was granted in this particular case, it specified which information shall be provided in order to allow for an assessment of whether State aid exists. In this case, it found this information was the earnings from tickets sold and all costs of regional passenger rail transport. Nevertheless, the Court declined to require information on the economic performance related to particular rail lines and connections, as requested by the plaintiff.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The delivery of adequate information about the financing of a subsidised operator of regional passenger rail transport

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (2003) ECLI:EU:C:2003:415

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EEC) No 1893/91 of 20 June 1991 amending Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, OJ L 169, 29.6.1991
- Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, OJ L 156, 28.6.1969

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary CZ2

Date

03/01/2019

Case identifiers

Member State

Czech Republic

Court which adopted the ruling (national language)

Nejvyšší soud

Court which adopted the ruling (English)

Supreme Court

Instance court, which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Czech

Hyperlink to ruling

http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/B19BCBBB48BA3EA5C1257D1D004B336D?openDocument&Highlight=0,null,st%C3%A1tn%C3%AD,podpa

Case reference

ECLI:CZ:NS:2014:23.CDO.1341.2012.1; 23 Cdo 1341/2012-1

Procedural context of the case

The private enterprise (public limited company) providing medical services filed an action with the City Court in Prague (Městský soud v Praze) as the court of the first instance as well as an appeal to the High Court in Prague (Vrchní soud v Praze) as the appellate court (case references not available), demanding the suspension of subsidies by the Regional Authority increasing the income of providers of healthcare operating in regional hospitals owned by that Region, resulting from contracts with public health insurance funds.

These inferior courts dismissed the action and appeal (in rulings 32 Cm 128/2010, of 13 June 2011 and 3 Cmo 289/2011-142, of 29 December 2011 respectively) claiming they did not have the competence to scrutinise the applicability of State aid rules. They declared themselves not competent to decide on compliance with Article 107(2) or (3) TFEU, i.e. to establish an exemption from the prohibition of State aid.

The function of a second extraordinary appeal (dovolání) (as summarised here) is to ensure a uniform interpretation in the field of civil law by the Supreme Court.

Type of action

Private enforcement

Delivery date of the ruling

25/06/2014

Language

Czech

Headnote

In this ruling, the Court identified additional subsidies to providers of healthcare (complementing earnings resulting from public health insurance) as State aid measures and ordered lower courts to consider whether this State aid falls under existing schemes approved by the Commission.

Parties

Names of the parties to the action

NH Hospital, a. s.

Versus

Středočeský kraj

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

Q - Human health and social work activities

Healthcare

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The plaintiff argued that subsidies by the Region increasing income resulting from contracts with public health insurance funds constituted State aid.

Moreover, it claimed that the lower courts had misinterpreted the supranational law of the EU enjoying direct effect and primacy, thereby not providing judicial protection, which provided the grounds for the extraordinary second appeal (dovolání) to the Supreme Court.

The plaintiff did not respond to these claims.

Please note it is unclear from the wording of the judgment whether the plaintiff exclusively demanded interim measures to suspend the implementation of an unlawful aid measure, or a recovery order in relation to already granted subsidies as well.

Remedy(ies) sought

Recovery order in relation to unlawful aid; Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Supreme Court agreed with the arguments put forward by the plaintiff.

The Court highlighted the role of national courts in the field of State aid rules. If they identify unlawful State aid, they shall suspend its implementation and order its recovery respectively. The Supreme Court thus ruled that inferior courts shall ascertain whether a contested measure constitutes State aid and delineate it from the mere compensation of an unprofitable public service based on the Altmark principles, as well as whether it falls under exemption based on decisions of the Commission.

The Court highlighted that national courts could and should consult the Commission if they encounter difficulties with the interpretation of facts related to State aid.

The Supreme Court explicitly mentioned the 2005 Commission Decision 005/842/EC on the application of Article 86(2) EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest as an eventual justification for the contested measure.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The subsequent judgments of the inferior courts are unavailable.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (2003) ECLI:EU:C:2003:415

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty 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 number C(2005) 2673), OJ L 312, 29.11.2005
- Commission Notice 2009/C 85/01 on the enforcement of State aid rules by national courts, OJ C 85, 9.4.2009

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

There are recurrent debates about the extent and the limits of the application of State aid rules on additional subsidies by the State, regions and municipalities above earnings generated from public health insurance. These subsidies usually compensate imbalances resulting from existing tariffs and disparate economic and social development in various regions of the Czech Republic, pressure for the increase of wages, increases in prices, or investments into the medical infrastructure. They clearly serve to ensure accessible medical care.

With regard to this case, the Czech organisation and public financing of healthcare deserves a brief explanation. Several public health insurance funds compete for clients, and residents must select one public health insurance fund. Public health insurance funds provide money for the coverage of medical treatment of their clients to providers (operators of hospitals, ambulances, etc.) – these can be public, quasi-private (companies controlled by the State, regions and municipalities) and private. However, contractual terms are subject to tight government control. An annual ministerial decree resulting from complex collective bargaining specifies tariffs for different treatments, and several methods of calculation are used. Providers of medical services repeatedly questioned the compliance of these schemes with State aid rules. However, the Commission has never launched an official investigation into these practices.

Case summary CZ3

Date

03/01/2019

Case identifiers

Member State

Czech Republic

Court which adopted the ruling (national language)

Nejvyšší soud

Court which adopted the ruling (English)

Supreme Court

Instance court, which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Czech

Hyperlink to ruling

http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/55FD4DD164FEE2BFC125804B00473351?openDocument&Highlight=0,null,st%C3%A1tn%C3%AD,podpa

Case reference

ECLI:CZ:NS:2016:23.CDO.2493.2014.1; 23 Cdo 2493/2014-1

Procedural context of the case

Both the City Court in Prague (Městský soud v Praze) and the High Court in Prague (Vrchní soud v Praze) refused an action for the suspension of the implementation of alleged unlawful State aid for both substantial and procedural reasons (rulings 19 Cm 114/2011, of 8 December 2012 and 3 Cmo 19/2013-216, of 8 October 2013 respectively).

The ruling summarised here constituted a second extraordinary appeal to the Supreme Court.

Type of action

Private enforcement

Delivery date of the ruling

28/08/2016

Language

Czech

Headnote

In this ruling, the Court summarised the role of national courts in the field of State aid rules, and identified the contested measure as lawful State aid, falling under an approved scheme.

Parties

Names of the parties to the action

HAMR-Sport, a. s.

Versus

Česká republika – Ministerstvo školství, mládeže a tělovýchovy

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

R - Arts, entertainment and recreation

Sport activities

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The plaintiff brought an action for the suspension of the implementation of alleged unlawful State aid. It also generally questioned the legality of entire subsidy scheme.

The plaintiff – a private provider of sport infrastructure to the general public – contested the public subsidisation of sport infrastructure in accordance with a particular legislative framework reserved for non-government, non-profit organisations and institutions. It claimed that the measure led to unfair competition and was non-compliant with State aid rules.

The plaintiff did not specify the beneficiaries of alleged State aid, nor did it comment on the quantification of this State aid.

The plaintiff brought the second extraordinary appeal to the Supreme Court arguing that the inferior courts did not interpret the national rules on unfair competition and State aid rules properly, ignoring crucial elements of State aid, namely the advantage for beneficiaries and the resulting disadvantage for competitors.

The Ministry of Education, Youth and Sports, as the defendant in the case, justified the differentiation in its own subsidy schemes, by highlighting the advantages and disadvantages of the non-profit sectors, mentioned other schemes accessible to the plaintiff, and claimed that the Ministry was acting in compliance with State aid rules.

Remedy(ies) sought

Recovery order in relation to unlawful aid; Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Supreme Court accepted this second extraordinary appeal as feasible for a clarification of provisions of national law establishing rules for the suppression of unfair competition.

With regard to the argumentation concerning State aid rules, the Supreme Court highlighted the role of national courts and their duty to order recover unlawful State aid or suspend its implementation. It accepted that the contested Ministerial subsidy scheme for non-governmental, non-profit organisations operating infrastructures for sport constituted State aid. Nevertheless, the Supreme Court comes to the conclusion that the Commission approved the subsidy scheme of the Ministry contested by the plaintiff (Commission Decision SA.33575 (2013/NN)).

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission Decision C(2014) 3602 of 11 June 2014
- SA.33575 (2013/NN) – Czech Republic Support from central government to non-profit sport facilities

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary CZ4

Date

03/01/2019

Case identifiers

Member State

Czech Republic

Court which adopted the ruling (national language)

Ústavní soud České republiky

Court which adopted the ruling (English)

Constitutional Court of the Czech Republic

Instance court, which adopted the ruling

Constitutional Court

Official language of the court

Czech

Hyperlink to ruling

https://nalus.usoud.cz/Search/ResultDetail.aspx?id=74283&pos=7&cnt=10&typ=result

Case reference

ECLI:CZ:US:2012:Pl.US.17.11.2; Pl. ÚS 17/11

Procedural context of the case

The case summarised constitutes a proposal, i.e. 'request' of qualified group of deputies/senators for the abrogation of unconstitutional law.

The proceedings with regard to the proposal of a qualified group of deputies or senators form an independent proceeding. Therefore, there were no previous rulings of ordinary courts of the Supreme Court or the Supreme Administrative Court or any other inferior courts directly attached to this ruling.

In parallel, numerous operators of photovoltaic plants individually questioned the constitutionality of the specific tax on income generated from feed-in tariffs as unconstitutional before regional courts, as the administrative courts of first instance, and before the Supreme Administrative Courts. In accordance with the Constitution of the Czech Republic and the Law on the Constitutional Court (zákon č. 182/1993 Sb., o Ústavním soudu), these cases will at some point also make it to the Constitutional Court, either through a proposal of an ordinary court, or through a so-called constitutional complaint.

Type of action

Private enforcement

Delivery date of the ruling

15/05/2012

Language

Czech

Headnote

In this ruling, the Court upheld a tax on the high feed-in tariffs for the generation of electricity from photovoltaic energy meant to reduce 'excessive' aid measures.

Parties

Names of the parties to the action

Skupina senátorů Parlamentu České republiky

Versus

No formal defendant in these proceedings.

De facto: Parlament České republiky – Poslanecká sněmovna; Vláda České republiky

The relationship of the plaintiff to the measure

Other

A group of senators acting in favour of the beneficiaries

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

The generation of electricity by photovoltaic plants

The type of State aid measure challenged in the court proceedings

Other

Feed-in tariffs

Substance of the case

Facts and parties' main arguments in the case

A group of senators of the Parliament of the Czech Republic (the plaintiff) questioned the constitutionality of a law introducing specific taxation on earnings resulting from guaranteed feed-in tariffs on electricity generated in photovoltaic plants established in 2009-2010 in accordance with the Law on Support of Generation of Electricity from Renewable Resources of Energy (zákon č. 180/2005 Sb., o výrobě elektřiny z obnovitelných zdrojů energie) as introduced with the Law adopted in 2010 (č. 402/2010 Sb.).

This group of senators argued by way of provisions of the Charter of Fundamental Rights and Freedoms (Listina základních práv a svobod, 2/1993 Sb.) and the European Convention for Human Rights that the specific tax had a devastating 'choking' effect on operators of photovoltaic plants and criticised the measure as retroactivity illicit.

The (de facto) defendants in this case were the Parliament of the Czech Republic (the Chamber of Deputies) and the Government (the Council of Ministers, the Cabinet) of the Czech Republic. The Government extensively explained the grounds for this specific taxation. The Government proposed and the Parliament adopted the Law on Support of Generation of Electricity from Renewable Resources of Energy as an implementation of the EU directives demanding increased generation of energy from renewable resources. Feed-in tariffs for photovoltaic plants were highest and the law guaranteed this tariff for 15 years. Moreover, a significant decline in prices of photovoltaic panels quickly made this activity extremely profitable, and the resulting boom of photovoltaic plants sharply increased the costs for consumers and the State contributing to this system supporting the generation of electricity from renewable resources.

There were no quotas fixed for newcomers to this sector of energy. Moreover, the law enabled merely a 5% annual reduction for the operators putting their photovoltaic plants into operation in the next years. For political reasons, the State was incapable to amend the law until the end of 2010 and reduce this feed-in tariff. Specific taxation contested before the Constitutional Court was meant to reduce the excessive profits of the operators of photovoltaic plants put into operation in 2009 and 2010.

Both the Parliament and the Government argued extensively in favour of the constitutionality of this specific tax. They highlighted economic factors and the absence of a choking effect for the operators enjoying high feed-in tariffs and denied any alleged incompliance with the constitutional guarantee of property.

The Government also argued by way of State aid rules, claiming that the feed-in tariff would result in unlawful State aid without the reduction achieved with the specific tax. The Government highlighted that State aid shall not exceed the amount necessary to achieve particular goals, i.e. the development of renewable energy sources.

Remedy(ies) sought

Other remedy sought

Retaining State support by the way of overturning the taxation

Outcome of the case

Conclusions adopted by the national court

The Constitutional Court agreed with the Parliament and the Government, that the reduction of feed-in tariffs by the specific tax does not harm the profitability of the operation of photovoltaic plants. The Constitutional Court dismissed the allegation of a choking effect, which would constitute incompliance with the fundamental right of property. Additionally, the Constitutional Court found discrimination among the operators of plants using different renewable resources and operators of photovoltaic plants which went into operation in previous years when solar panels and other equipment was more expensive.

The Constitutional Court summarised the judgments of Constitutional and Supreme Courts of several Member States scrutinising similar measures aimed at the reduction of 'excessive' support undermining stability of public finances. These superior courts unequivocally approved specific taxes or similar measures. Therefore, the proposal (complaint) was dismissed by the Constitutional Court.

Nevertheless, the Constitutional Court did not explicitly resort in its argumentation to State aid rules as an obstacle to having high feed-in tariffs resulting in excessive profits (and thereby potentially constituting unlawful State aid) in place.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

Despite being motivated mainly as a reduction of costs for the State and consumers of electricity, this specific tax on the excessive earnings of operators of the photovoltaic plants which was put into operation in 2009 and 2010 resulting from feed-in tariffs, was also based on the notion of preventing potential unlawful State aid being granted.

We shall bear in mind that status of the feed-in tariffs as State aid remained unclear during the proceedings before the Constitutional Court (11/03/2011 – 15/05/2012). However, the Czech Republic eventually notified the feed-in tariffs as an existing (non-notified) State aid scheme in 2013. In Commission Decision SA 40171, the Commission retroactively approved feed-in tariffs as a measure aimed at the proliferation of the generation of electricity from renewable resources justifiable under Article 107(3) TFEU in 2016. In its decision, it explicitly considered the contested specific tax.

Nevertheless, the Commission required the Czech Republic to reconsider excessive feed-in tariffs and eventually stop guaranteed feed-in tariffs after 15 years (expected originally under Law 180/2005 Sb).

Case summary CZ5

Date

04/01/2019

Case identifiers

Member State

Czech Republic

Court which adopted the ruling (national language)

Nejvyšší správní soud

Court which adopted the ruling (English)

Supreme Administrative Court

Instance court, which adopted the ruling

Last instance court (administrative)

Official language of the court

Czech

Hyperlink to ruling

http://www.nssoud.cz/files/SOUDNI_VYKON/2015/0286_7As__1500021_20160218072340_prevedeno.pdf

Case reference

7 As 286/2015-21

Procedural context of the case

The Czech register of *de minimis* State aid is maintained by the Office for the Protection of Competition in accordance with the Law addressing some relations in the field of State aid (zákon č. 215/2004 Sb., o úpravě některých vztahů v oblasti veřejné podpory). Any *de minimis* State aid needs to thus be notified to this Office.

The Office for Protection of Competition (Úřad pro ochranu hospodářské soutěže – ÚOHS) fined a city borough (sub-municipality) for incompliance with the obligation to notify several cases of *de minimis* State aid to this national register within prescribed period (ÚOHS: 20/11/2012, ÚOHS-S363/20012/VP-21939/2012/420/JVř). This decision was confirmed through an internal administrative appeal (rozklad) (14/03/2013, ÚOHS-R352/2012/VP-4587/2013/320/Rja).

The city borough filed an action to the Regional Court in Brno (Krajský soud v Brně), claiming that the contested measures were not State aid because the recipients of the benefits were not enterprises engaged in economic competition. This Court annulled the aforementioned decision, i.e. annulled the fine and agreed with the city borough (29 Af 40/2013-67, 29. 9. 2015).

The case summarised here concerns a cassation complaint (an appeal against the judgment of the regional court acting as administrative court of first instance).

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

21/01/2016

Language

Czech

Headnote

In this ruling, the Court specified the limits of preliminary national control of State aid and its role in the field of de minimis State aid.

Parties

Names of the parties to the action

Městská část Praha 4

Versus

Úřad pro ochranu hospodářské soutěže

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

Not clear from the case

The type of State aid measure challenged in the court proceedings

Not clear from the case

Substance of the case

Facts and parties' main arguments in the case

The city borough (the plaintiff) filed an action to the Regional Court in Brno (Krajský soud v Brně), claiming that the contested measure was not State aid because its recipient was not an enterprise engaged in economic competition. The judgment of the Supreme Administrative Court does not make reference to this argument with regard to the beneficiary.

The Office for the Protection of Competition (the defendant) argued that *de minimis* State aid shall be reported to the national register of *de minimis* State aid in accordance with the Regulation 1998/2006, and that attribution of *de minimis* State aid does not overlap entirely with general attributes of State aid which is subject to control by the Commission.

Remedy(ies) sought

Other remedy sought

Annulment of a fine for incompliance with an obligation to notify a *de minimis* State aid measure to the national register enabling effective control of State aid

Outcome of the case

Conclusions adopted by the national court

The Supreme Administrative Court highlighted that Czech national legislation (cited above) serving to control *de minimis* State aid shall be interpreted having recourse to Union law.

According to the Court, the Office, as the competent authority, cannot impose a fine for delayed compliance with the requirement to notify *de minimis* State aid to the national register, if the public authority implementing this measure rejects that the measure constitutes State aid.

The fact that the measure constitutes State aid is not proven due to the absence of the obligatory attribution of State aid, i.e. that it shall be granted to an undertaking engaged in competition.

The Court therefore dismissed the cassation complaint against the judgment of inferior court.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-222/04, Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA (2006) ECLI:EU:C:2006:8 (definition of undertaking / enterprise)

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006
- 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 (*de minimis* Regulation)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

6.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Nejvyšší správní soud	Supreme Administrative Court	Last instance court (administrative)	6 As 27/2007 - 117	17/07/2008	Private enforcement	None - Claim rejected	The Court refuses the argument that the State should provide access to information about its negotiation with the Commission related to State aid linked to the rescue of bank IPB realised with a forced takeover by CSOB bank.	Unsuccessful attempt to use a State aid argument to tackle a forced takeover by bank. Pre-accession State aid rules with impact after accession.	
Nejvyšší správní soud	Supreme Administrative Court	Last instance court (administrative)	2 Aps 1/2009 - 172	28/01/2010	Private enforcement	None - Claim rejected	The Court held that the national competition authority has competence to provide consultation on the applicability of State aid rules as applied by the Commission on disputed transactions. Under the Czech law, the competition authority provides, among other things, consultations concerning State aid to the entities granting the aid with regard to the notification procedure towards the Commission. Within such a consultation activity, the competition authority might provide its opinion and/or experience relating to the applicability of or interpretation of State aid rules. Nevertheless, it was explicitly stated by the Court that the results of such a consultancy does not constitute a binding administrative decision.	The dispute on competence illustrates an attempt to argue against undesirable policy on the basis of State aid rules. Pre-accession State aid rules with impact after accession.	
Ústavní soud	Constitutional Court	Constitutional Court	ECLI:CZ:US:2012:Pl.US.17.11.2	15/05/2012	Private enforcement	None - Claim rejected	The case concerned specific tax on feed-in tariffs on energy from photovoltaic plants. The Constitutional Court summarised the judgments of Constitutional and Supreme Courts of several Member States scrutinising similar measures aimed at the reduction of "excessive" support undermining the stability of public finances. These superior courts unequivocally approved specific taxes or similar measures. Therefore, the proposal (complaint) was dismissed by the Constitutional Court.		The reliance on State aid rules as supplementary argumentation was later confirmed as necessary by the Commission in the conditional approval decision SA.40171 - 2015/NN in 2016.
Nejvyšší soud	Supreme Court (civil section)	Last instance court (civil/commercial)	ECLI:CZ:NS:2014:23.CDO.1341.2012.1	25/06/2014	Private enforcement	Case sent back to the lower court for re-assessment	Considering State aid rules, the Court concludes that additional subsidies (aside from the allocation by public health insurance funds in accordance with the annual decree on reimbursements) granted by a region to its own hospitals could constitute State aid, and requests the lower instance court to consider the nature of the measure and whether it should be notified as State aid.	The Supreme Court confirms that the lawfulness of additional subsidies in health care could be exempted from the obligation to notify State aid (decision 2005/842/EC).	The subsequent ruling from the lower court is not available.
Krajský soud v Ostravě	Regional Court in Ostrava	Second to last instance court (administrative)	2 Af 8/2015-69	13/08/2015	Private enforcement	None - Claim rejected	The State aid argument was decisively rejected by the Court. The Court rejected the argument of tax authorities that a possible and hypothetical reluctance to freeze assets in case of expected tax evasion would constitute unlawful State aid.	The Court clarified State aid rules and their interpretation. The Court narrowed down the circumstances which may possibly give rise to State aid by excluding some tax-related situations. As a result, the Court facilitated tax collection by the tax authorities.	
Nejvyšší soud	Supreme Court (civil section)	Last instance court (civil/commercial)	ECLI:CZ:NS:2016:23.CDO.2493.2014.1	28/07/2016	Private enforcement	None - Claim rejected	The Court does not grant a remedy. Although the subsidy constitutes State aid, the pre-accession scheme was approved by the Commission.		
Nejvyšší správní soud	Supreme Administrative Court	Last instance court (administrative)	6 Afs 307/2016	12/06/2017	Private enforcement	None - Claim rejected	The Court does not identify State aid in the different application of a gift tax on the free allocation of emission permits to producers of energy using various resources and technologies, claiming that an opposite approach would hinder any differences in measures. Regarded as acceptable differentiation in tax policy and thus not State aid.		
Nejvyšší správní soud	Supreme Administrative Court	Last instance court (administrative)	6 As 173/2017-168	30/08/2017	Private enforcement	None - Claim rejected	The Court rejects the argument raised by the mobile phone network operator that the allocation of radio frequencies to a competitor constitutes State aid. There is no specific consideration as to whether the allocation of radio frequency could constitute State aid.		
Městský soud v Praze	Prague City Court	Second to last instance court (administrative)	5 A 176/2014	25/10/2017	Private enforcement	Other remedy imposed	The Court annulled an administrative decision which limited access to information. The Court ruled that transparency is necessary for the effective control of State aid rules. The Court considered that information provided about subsidies for local transport was insufficient to enable an assessment against the Altmark principles.		
Nejvyšší správní soud	Supreme Administrative Court	Last instance court (administrative)	7 As 286/2015-21	21/01/2016	Public enforcement	None - Claim rejected	The Court rules that a fine imposed for non-compliance with the duty to notify *de minimis* aid to the National Office for the Protection of Competition (which maintains lists of *de minimis* aid in accordance with Czech law on State aid control) cannot be imposed on an activity which in reality does not constitute State aid. Limits of enforcement of national preliminary control.	Example of preventive national control of State aid.	
Nejvyšší správní soud	Supreme Administrative Court	Last instance court (administrative)	7 Afs 101/2016	09/06/2016	Public enforcement	Other remedy imposed	The Court prevents the forced recovery of State aid consisting of taxation of profits resulting from the excessive feed-in tariff. The Court confirms the application of the specific tax and rejects the argument that this taxation has a 'destructive effect' on particular businesses. Destructive effect is understood in this context as the threat of liquidation which the tax could pose for the business.		

7. Denmark

7.1 Country report

Name national legal expert

Prof Pernille Wegener Jessen

Date

15/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Within the Danish legal system, cases concerning the enforcement of recovery decisions can be brought before the Danish courts.

The district courts serve as courts of first instance. Appeals against judgments rendered by the district courts can be brought before the High Court of Western Denmark (*Vestre Landsret*) or the High Court of Eastern Denmark (*Østre Landsret*), depending on the geographical attachment of the case.

The Maritime and Commercial High Court may also serve as a court of first instance on matters within its particular area of jurisdiction. The specific competence of the Maritime and Commercial High Court in competition law matters is specified in the Danish Administration of Justice Act (*Retsplejeloven*) Section 225,[69] stating that in cases where the Competition Act is of substantial importance, proceedings may be brought before the Maritime and Commercial High Court. The Danish Competition Act Section 11a provides a legal basis for the Danish Competition Council to order the recovery of unlawful State aid. According to the preparatory work of the law, this rule is interpreted in accordance with State aid rules, and the possibility of ordering recovery includes, in principle, also aid within the scope of State aid rules. A recovery order by the Danish Competition Council may be appealed to the Competition Appeals Tribunal[70] and subsequently enter the judicial system by appeal to the Maritime and Commercial High Court.

Appeals against judgments rendered by the Maritime and Commercial High Court may be brought before the Danish high courts, mentioned above, or if the case concerns fundamental questions (*e.g.* statutory interpretations) before the Danish Supreme Court.

In cases where the High Court of Western Denmark or the High Court of Eastern Denmark serves as a court of first instance, appeals against their judgments may be brought before the Danish Supreme Court. Appeals against judgments rendered by the Danish high courts at second instance may also be brought before the Danish Supreme Court provided the case concerns fundamental questions (*e.g.* statutory interpretations). Permission to appeal is granted by the Appeals Permission Board.

There is neither a specialised court nor a specific court that hears a clear majority of cases involving the public enforcement of State aid rules.

A description of the procedural framework applicable in public enforcement of State aid rules

The State entity competent to enforce recovery decisions will be the national entity responsible for the law, regulation, administrative act or agreement on the basis of which the aid to be recovered was authorised.

The process of recovery in relation to a recovery decision is not subject to specific regulation in Denmark, but based on the direct effect of State aid rules and executed in accordance with unwritten principles of law. Accordingly, no general procedural rules exist.

In practice, if the State aid was granted as a consequence of statutory law, recovery may be enforced by the adoption of *ad hoc* legislation, requiring the aid beneficiary to repay the aid.[71] Depending on the type of aid measure, recovery of aid granted on the basis of national regulation, may adequately be enforced by a letter or an administrative order notifying the aid beneficiary about the unenforceability of the aid measure and demanding the recovery of the aid (including interest). If the State aid was granted on the basis of an administrative act, recovery may be enforced by full or partial withdrawal of the administrative act followed by an administrative order to repay the aid (including interest). If the aid is granted on the basis of an agreement, recovery may be enforced by a letter or an administrative act directed to the beneficiary of the aid, stating that the agreement is fully or partly invalid and ordering the aid (including interest) to be repaid by the aid beneficiary.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The competent courts are the same ones as those stated above.

There is thus neither a specialised court nor a specific court that hears a clear majority of cases involving the private enforcement of State aid rules.

A description of the procedural framework applicable in private enforcement of State aid rules

There is no specific procedural framework applicable to the private enforcement of State aid rules in court. Such proceeding will rely on general procedural rules, as given in the

[69] The Danish Administration of Justice Act (Retsplejeloven), LBK no 1284 of 14 November 2018, available at: https://www.retsinformation.dk/Forms/R0710.aspx?id=202196 (last accessed on 15 January 2019).
[70] The Competition Appeals Tribunal is an administrative appeal board, not a court within the Danish judicial system.
[71] See Statutory law 2018-06-08 No 693 regarding the recovery of unlawful and incompatible aid in relation to a tax exemption and reduction for water users, implementing Commission decision of 16 October 2017 regarding aid measure SA.32874 (212/C) (ex. SA.32874 (2011/NN)) implemented by Denmark, available at https://www.retsinformation.dk/Forms/r0710.aspx?id=201247 (last accessed on 15 January 2019).

Danish Administration of Justice Act,[72] which entails the rules related to the procedure followed in Danish courts in civil and criminal proceedings.

Any natural or legal person adversely affected by a State aid measure may challenge this measure in court. In civil courts, the judges are limited by the parties' claims in the case and cannot award any remedies that were not requested for by one of the parties in the proceedings. For example, in a judgment from the High Court of Western Denmark (High Court of Western Denmark, 25.1.2016 - V.L.D. of 25 January 2016 B.1704-14 (DK4)), State aid rules were applied to determine the lawfulness of two premium free guarantees. State aid was found to exist, but since none of the parties claimed that the unlawful aid should be recovered, no remedy was awarded.

Main findings based on the case summaries

In Denmark there have been very few State aid related cases and the number is too low to identify any particular trends (*e.g.* in relation to certain economic sectors). However, at this point the case summaries imply that the cases are primarily private enforcement cases and that the State aid argument is often raised in relation to an overall claim for damages.

Qualitative assessment of the average time of court proceedings

Statistics on the average duration of court proceedings in Danish courts is published in PDF files, available at the website of the Danish courts.[73] The latest numbers, covering an entire year are the 2017 numbers (*Nøgletal for domstolene* 2017).

The average duration of court proceedings will depend on the particular court in question.

In 2017, the common civil cases in the district courts took an average of 14.6 months. In the Maritime and Commercial Court, the civil first instance cases took an average of 22 months. At the Eastern High Court and the Western High Court, the civil first instance cases took an average of 24.9 months, whereas the cases of appeal took an average of 11.9 months. Finally, in the Supreme Court, the civil cases of appeal took an average of 11.5 months.

As such there is no suggestion from the case summaries or any other sources that State aid enforcement proceedings should last longer than other types of proceedings, although it should be noted that in the case of preliminary rulings from the CJEU, proceedings may potentially take longer than normal. Also, it should be noted that State aid rules have only been applied in a very few cases in Denmark, making it difficult to attribute statistical value to the average time ascribed to these cases.

Qualitative assessment of the remedies awarded by national courts

It is clear from the case summaries, as well as from the list of relevant rulings for Denmark, that in general the claims of the plaintiff were rejected by the court and no remedies were awarded. It is likely that this is because in many cases no State aid was found to have been granted (see, *e.g.* High Court of Eastern Denmark, 18.10.2016 - B-2750/13 (DK5)).

Further, in civil cases, plaintiffs usually do not ask for the recovery of aid, and because the judges are limited by the parties' claims in the proceedings, the possibility of recovery of the aid may — from a competition law enforcement perspective — be missed, (*e.g.* High Court of Western Denmark, 25.1.2016 - B.1704-14 (DK4)).

Also, the number of cases in Danish courts on State aid matters is very low, which, in practice, makes the potential for the award of a remedy less likely. However, the number of cases based on a State aid argument has increased over the past six years, which will increase the potential for finding that unlawful State was granted and the likelihood of remedies being awarded. Currently, there is an on-going case at the High Court of Eastern Denmark concerning a competitor's claim for recovery interest under Article 108(3) TFEU and compensation for damage from the Danish State in relation to unlawful aid granted to the beneficiary. This is the first Danish case where recovery interest has to be decided on.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

The specific application of the State aid *acquis* in the summarised cases is in general very limited. However, in some of the cases, specific reference is made to Union law and practice, and also to preliminary assessment letters (PAL) made by the Commission in case the plaintiff has submitted a complaint to the Commission, concerning an allegedly unlawful State aid measure.

Danish courts will refer a question regarding the interpretation of State aid rules to the CJEU, if the court finds that a preliminary ruling is necessary to enable the court to render a judgment. For example, as part of the proceedings at the High Court of Western Denmark (High Court of Western Denmark, 25.1.2016 - B.1704-14 (DK4)), the *Sønderborg* Municipality referred a request for preliminary rulings the CJEU, but the request was dismissed by the High Court of Western Denmark. In none of the cases did the court refer a question on its own initiative. In the selected cases, an explanation may be that the issue of law before the court was not sufficiently complicated and the court found that it was able to render a judgment without referring a request for a preliminary ruling.

Qualitative assessment of any other relevant trends in State aid enforcement

In Denmark, the number of judicial cases based on a State aid argument has increased over the past six years. Also, there has been an increased number of cases in the administrative system (taking State aid rules into account), which may eventually enter into the judicial system. This includes, in particular, opinions by the Board of Appeal (*Ankestyrelsen*), which supervises the Danish municipalities' compliance with certain parts of Danish law applicable to public authorities.[74] So, both the administrative system and the judicial system seem to have become more familiar with applying State aid rules.

[72] LBK no 1284 of 14 November 2018, available at: https://www.retsinformation.dk/Forms/R0710.aspx?id=202196, last accessed on 15 January 2019).
[73] http://www.domstol.dk/om/talogfakta/statistik/noegletal/Pages/default.aspx (last accessed on 15 January 2019).
[74] Opinions regarding economic aid from the municipalities are published on the website of the Board of Appeal (*Ankestyrelsen*) available at: https://www.statsforvaltningen.dk/site.aspx?p=5728&ContentGroupID_100001=299&GroupID_100001=299 (last accessed on 15 January 2019).

Also, the general awareness of State aid rules in Danish society has increased and competitors seem, in general, to be more aware of the possibility of invoking State aid rules as a legal instrument, implying that more cases may be expected also in the future.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

It should be noted that the courts rarely conduct a thorough evaluation of the notion of State aid, but apply State aid rules in a more 'general' manner by referring to the basic criteria of the State aid test and concluding that there is no State aid without going into a deeper argumentation for the finding of no aid. However, depending on the arguments raised by the parties, the disputed matter (*e.g.* the application of the concept of an undertaking like in High Court of Eastern Denmark, 18.10.2016 - B-2750/13 (DK5)) and the potential finding of State aid, the relevant court will carry out a more intensive analysis and the application of the rules seems to become more intensive.

Any other relevant comments or findings

It is a particular question of interest — from an EU perspective — whether a national court finding that State aid subject to Union law has been granted, has an obligation to order recovery based on EU principles of law, regardless of whether the parties to the case have claimed recovery. There are no Danish case law examples of a national statute of limitation being invoked to avoid recovery, and no examples of a recovery decision being suspended while procedures before national courts are on-going.

7.2 Case summaries

Case summary DK1

Date

06/01/2019

Case identifiers

Member State

Denmark

Court which adopted the ruling (national language)

Højesteret

Court which adopted the ruling (English)

Supreme Court of Denmark

Instance court which adopted the ruling

Last instance court (general jurisdiction)

Official language of the court

Danish

Hyperlink to ruling

http://domstol.fe1.tangora.com/media/-300016/files/15-2016.pdf

Case reference

H.D. 23. november 2016 i sag 15/2016 (2. afd.)

Procedural context of the case

By judgment of 12 January 2016 ((8. Afd.) B-31-13), the High Court of Eastern Denmark acquitted the Danish Ministry of Taxation, and dismissed the claim made by the plaintiff, Søfartens Ledere, that the Danish Ministry of Taxation should pay compensation for damages based on the argument that there had been a misapplication by the Ministry of the Danish Law on Taxation of Sailors and the Community Guidelines on State aid to maritime transport (2004/C 13/03). (The ruling precedes the ruling discussed in this summary.)

The judgment was appealed by Søfartens Ledere to the Danish Supreme Court (i sag 15/2016 (2. afd.) ruling of 23 November 2016).

Type of action

Private enforcement

Delivery date of the ruling

23/11/2016

Language

Danish

Headnote

In this ruling, the Court upheld the ruling of the High Court of Eastern Denmark, in essence holding that a general tax reduction did not involve an automatic obligation to adjust the salary of sailors and that the Community Guidelines on State aid to maritime transport (2004/C 13/03) (under which the Commission had assessed the Danish Law of Taxation of Sailors) had not been overruled, with the result that the Danish Ministry of Taxation was not liable to pay compensation for damages.

Parties

Names of the parties to the action

Søfartens Ledere som mandatar for A and B

Versus

Skatteministeriet

The relationship of the plaintiff to the measure

Other

Authorised representative for taxpayers/employees

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Maritime transport

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The parties' arguments were not explicitly stated in the ruling from the Supreme Court but were implicitly included by stating that the parties had repeated their arguments. Thus, the arguments were primarily to be found in the judgment of the High Court of Eastern Denmark, which was also where the facts of the case are further elaborated.

In essence, the State aid perspective of the case concerned a tax exemption granted to sailors, which in practice involved State aid to the shipping companies, because the companies could limit their expenses to wages by only paying the net salary to their employees, i.e. the salary an employee had at his or her disposal after paying taxes. This State aid measure had been assessed and approved by the Commission under the Community Guidelines on State aid to maritime transport (2004/C 13/03).

The argument put forward by the plaintiff was that a general tax reduction on salary should have resulted in an increase in wages – if not, the shipping companies would have received more aid. Accordingly, the plaintiff claimed compensation for the loss incurred due to the lack of adjustment of the salary after the implementation of a general tax reduction, arguing that the conduct of the Danish Ministry of Taxation had been unlawful due to misapplication of the Danish Law on Taxation of Sailors and the Community guidelines on State aid to maritime transport. The defendant argued on the contrary (among other things), that the law was not applied in breach of State aid rules, and that in case of unlawful aid, the aid should be repaid to the State and not be transferred to the sailors.

Remedy(ies) sought

Damages awards to third parties / State liability; Other remedy sought (below)

Compensation for damages based on the argument that wages had not been raised even though the general level of taxation had decreased

Outcome of the case

Conclusions adopted by the national court

The court concluded that the aid granted did not exceed the maximum level of aid stated in the Community Guidelines on State aid to maritime transport. Also, the Supreme Court upheld the ruling of the High Court of Eastern Denmark, in essence holding that the general tax reduction did not involve an automatic obligation to adjust the salary of sailors and that the Community Guidelines on State aid to maritime transport had not been overruled, with the result that the Danish Ministry of Taxation was not liable to pay compensation for damages. Accordingly, the Danish Ministry of Taxation was acquitted.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission communication C(2004) 43, Community Guidelines on State aid to maritime transport (2004/C 13/03), OJ C 13, 17.01.2004

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DK2

Date

06/01/2019

Case identifiers

Member State

Denmark

Court which adopted the ruling (national language)

Østre Landsret

Court which adopted the ruling (English)

High Court of Eastern Denmark

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

Danish

Hyperlink to ruling

http://domstol.fe1.tangora.com/media/-300016/files/110-2013-%C3%98L.pdf

Case reference

Ø.L.D. af 13. maj 2013 I sag B-569-08 (21. afd.)

Procedural context of the case

The proceedings were initially launched by Hans Damm Research A/S before the Copenhagen District Court. However, by ruling of 5 March 2008, the Court had decided to refer the case to the High Court of Eastern Denmark (this ruling precedes the ruling discussed in the summary).

By judgment of 13 May 2013 (ruling (21. afd.) B-569-08), the High Court of Eastern Denmark dismissed the allegation made by Hans Damm Research A/S, that the defendants (the Danish Business Authority, the Agency for Modernisation and the Danish Ministry of Defence) should acknowledge that the award by the Danish State of a contract on the supply of access to a nationwide radio communication network of emergency management purposes constituted unlawful State aid to the selected service provider. Further, the court acquitted the defendants from the plaintiff's claim of compensation for damages.

The judgment was appealed by Hans Damm Research A/S to the Danish Supreme Court (ruling, sag 110/2013 (1. afd.) of 11 February 2013), http://domstol.fe1.tangora.com/media/-300016/files/110-2013.pdf). In the court of appeal, the aspects of the claim concerning State aid were withdrawn. (The ruling follows the ruling discussed in the summary).

After the court case, on 25 March 2008, Hans Damm Research A/S made a complaint to the Commission claiming the granting of State aid to Motorola. The Danish authorities replied by letter of 23 July 2008, and by letter of 14 December 2009 the Commission notified Hans Damm Research A/S that on the basis of the current information there were not sufficient grounds to proceed with the case. By letter of 21 May 2010, Hans Damm Research A/S supplied the Commission with further information. The Commission replied by letter of 3 February 2011 dismissing the presence of aid in the current case.

Type of action

Private enforcement

Delivery date of the ruling

13/05/2013

Language

Danish

Headnote

In this ruling, the Court considered that the award of a service contract on the basis of a public procurement procedure did not involve a benefit distorting competition within the meaning of Article 107 TFEU to the selected service provider.

Parties

Names of the parties to the action

Hans Damm Research A/S

Versus

Erhvervsstyrelsen, Moderniseringsstyrelsen og Forsvarsministeriet

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

Radio communication network of emergency management purposes

The type of State aid measure challenged in the court proceedings

Concession/privatisation of State-owned land/property at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

In 2001, the plaintiff, Hans Damm Research A/S, had acquired a permission from the Danish Business Authority to establish and operate a radio network based on TETRA-technology. In 2007, the relevant law was amended establishing a legal basis, requiring municipalities, regions and certain civil users to use the SINE radio network. The fundamental issue in the case was whether the adoption of the amendments to the law and/or the subsequent SINE-procurement implied that the defendants became liable to pay damage compensation for the expenditures of Hans Damm Research A/S to establish a radio network in relation to the 2001-permission.

Among others, in supporting the overall claim of compensation for damages, the plaintiff, Hans Damm Research A/S, claimed that the award by the Danish State of the SINE-contract constituted unlawful State aid to the selected service provider. Inter alia, the plaintiff claimed that the financing of the establishment of the network infrastructure constituted an economic benefit which would not have been provided under normal market conditions.

The defendants argued that the fact that the contract had been awarded on the basis of a public procurement procedure, and it had been awarded to the economically most advantageous offer, implied that the contract had been awarded without distorting competition. This argument was reinforced by reference to the final letter from the Commission to Hans Damm Research A/S, stating that in the current case the Commission's services considered that the award of the SINE contract awarded through an open tender procedure did not provide any economic advantage that the selected service provider would have not received under normal market conditions (Letter of 3 February 2011).

Remedy(ies) sought

Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

In essence, the Court concluded that the specifics of the service contract in question, the SINE-contract, did not involve an economic benefit distorting competition to the selected service provider.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission letter of 3 February 2011 (reply to complaint submitted by Hans Damm Research A/S)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DK3

Date

06/01/2019

Case identifiers

Member State

Denmark

Court which adopted the ruling (national language)

Østre Landsret

Court which adopted the ruling (English)

High Court of Eastern Denmark

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

Danish

Hyperlink to ruling

http://domstol.fe1.tangora.com/media/-300016/files/90-2013-%C3%98L.pdf

Case reference

Ø.L.D. 7. marts 2013 i sag B-946-11 (19.afd.)

Procedural context of the case

The case proceedings began in the Copenhagen District Court initiated by Talpa Radio B.V. However, by ruling of 21 March 2011, the Court decided to refer the case to the High Court of Eastern Denmark (this ruling precedes the ruling discussed in the summary).

By judgment of 7 March 2013 (ruling (19. Afd.) B-946-11), the High Court of Eastern Denmark acquitted the Radio and Television Board and the Ministry of Culture in a case where the holder of the license to the sixth terrestrial FM-radio channel, Talpa Radio B.V., had returned the license and claimed a reduction in the license fee for the remaining two years and compensation for damages. Talpa Radio B.V. based its arguments, among other things, on the allegation that the specific conditions of the license granted to the holder of the fifth terrestrial FM-radio channel, Sky Radio, constituted State aid. The State aid issue constituted a minor part of the case and was not part of the appeal to the Supreme Court.

The judgment was appealed by Talpa Radio B.V. to the Danish Supreme Court (ruling sag 90/2013 (2. afd.) of 6 November 2014, http://domstol.fe1.tangora.com/New-S%C3%B8geside.31488.aspx?recordid31488=921). The State aid issue was not part of the appeal (the ruling follows the ruling discussed in the summary).

Type of action

Private enforcement

Delivery date of the ruling

07/03/2013

Language

Danish

Headnote

In this ruling, the Court very briefly considered that a calculated population coverage of the fifth terrestrial FM-radio channel in Denmark at 84% instead of the procured population coverage of 78% did not constitute an economic advantage to the license holder.

Parties

Names of the parties to the action

Talpa Radio B.V.

Versus

Radio- og tv-nævnet, og Kulturministeriet

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

Media

The type of State aid measure challenged in the court proceedings

Concession/privatisation of State-owned land/property at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The license holder of the sixth terrestrial FM-radio channel, Talpa Radio B.V., had returned the license two years before the expiry of the concession. Subsequently, the concession was auctioned on new terms making it more feasible for the holder of the license to cover the costs of the license fee. Talpa Radio B.V. claimed a reduction in the license fee for the remaining two years of the concession contract and the compensation for damages. Talpa Radio B.V., among other things, based its arguments on the allegation that the specific conditions of the license to the holder of the fifth terrestrial FM-radio channel, Sky Radio, constituted State aid granted to Sky Radio, arguing that the calculated population coverage of the fifth terrestrial FM-radio channel in Denmark at 84% instead of the procured population coverage of 78% involved State aid to license holder. In essence, the defendants disagreed with this allegation arguing that no State aid was involved, and that a reduction in the license fee to Talpa Radio B.V. would have constituted State aid.

Remedy(ies) sought

Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

In relation to the specific conditions of a licence, the Court found that the existence of an economic benefit had not been documented, and that such conditions did not constitute State aid within the meaning of Article 107(1) TFEU to the licence holder.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1–9
- Commission Notice 2009/C 85/01 on the enforcement of State aid rules by national courts, OJ C 85, 9.4.2009, p. 1–22

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DK4

Date

06/01/2019

Case identifiers

Member State

Denmark

Court which adopted the ruling (national language)

Vestre Landsret

Court which adopted the ruling (English)

High Court of Western Denmark

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

Danish

Hyperlink to ruling

https://hjoerring.dk/media/12425/punkt_3_bilag_1.pdf

Case reference

V.L.D. af 25. januar 2016 B-1704-14

Procedural context of the case

By judgment of 14 July 2014 (BS C3-605/2013), the Sønderborg District Court ordered Sønderborg Municipality to acknowledge that it was not legitimate for the Municipality to demand a premium for the granting of loan guarantees to the plaintiffs. The Court found that the Municipality's decision to grant premium free guarantees to two district heating plants could not have been changed unilaterally by the Municipality, neither on the basis of public or private law (this ruling precedes the ruling discussed in this summary).

The judgment was appealed by Sønderborg Municipality to the High Court of Western Denmark (ruling B-1704-14 of 25 January 2016). As part of the proceedings in the High Court, Sønderborg Municipality requested the Court to refer a request for a preliminary ruling to the CJEU. The request was dismissed by ruling of 10 June 2015 of the High Court.

Type of action

Private enforcement

Delivery date of the ruling

25/01/2016

Language

Danish

Headnote

In this ruling, the Court found that the grant of premium free guarantees by a Municipality was in breach of Article 107(1) TFEU. Consequently, the Court held that the Municipality's subsequent decision to charge premiums for the guarantees granted had been legitimate.

Parties

Names of the parties to the action

Sønderborg Fjernvarme A.m.b.a. og Gråsten Varme A/S

Versus

Sønderborg Kommune

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

District heating

The type of State aid measure challenged in the court proceedings

Guarantee at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

In 2010 and 2011, the plaintiff, Sønderborg Municipality, had decided to grant premium free guarantees to two district heating plants in relation to the financing of investment project supporting the implementation of the heating plans of the Municipality. Subsequently, in 2012, the Municipality decided to charge premiums for the guarantees granted from 2012 onwards.

The two district heating plants argued that the Municipality should acknowledge that it was not legitimate for the Municipality to charge a premium, whereas the Municipality argued that the premium free guarantees were in breach of Article 107(1) TFEU and it was thus obliged to amend its decision.

Remedy(ies) sought

Other remedy sought

The acknowledgment of the right to decide to charge premiums

Outcome of the case

Conclusions adopted by the national court

The High Court of Western Denmark stated that the premium free guarantees were granted in breach of Article 107(1) TFEU. The Court briefly assessed the relevant criteria of Article 107(1), holding that the district heating plants constituted undertakings; that the premium free guarantees involved an economic advantage to the benefit of the district heating plants in their competition with other producers of installations and substances used for heating; and that the aid may be assumed to affect trade between the Member States.

Consequently, the Court held that the decision to grant premium free guarantees was void and the Municipality's subsequent decision to charge premiums was, therefore, legitimate. The claim was dismissed with the consequence that the plaintiff had to acknowledge the right of the Municipality to subsequently charge a guarantee premium.

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission Notice 2008/C 155/02 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. 10–22

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

The Court concluded that the measures at hand constituted State aid within the meaning of Article 107(1) TFEU. In practice, in Denmark, the case has resulted in an increased focus on Municipalities' granting of guarantees in relation to utility service activities. From an academic point of view, the case is of interest with regards to the understanding of the relationship between State aid rules, national law on municipalities, contract law, and national law regarding private enforcement that empowers the parties to choose whether the recovery should be claimed or not, and the relationship to the EU principle of loyalty of the Member States.

Case summary DK5

Date

06/01/2019

Case identifiers

Member State

Denmark

Court which adopted the ruling (national language)

Østre Landsret

Court which adopted the ruling (English)

High Court of Eastern Denmark

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

Danish

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

Ø.L.D. af 18. oktober 2016 i sag B-2750/13 (16. afd.)

Procedural context of the case

The proceedings were originally launched by Kortcenter.dk A/S before the Copenhagen District Court, but subsequently referred to the High Court of Eastern Denmark (by ruling of the District Court of 28 August 2013). This ruling preceded the ruling discussed in the summary.

By judgment of 18 October 2016 (ruling (16. afd.) B-2750-13), the High Court of Eastern Denmark acquitted the Danish State from the overall allegation made by Kortcenter.dk, that the Danish State was liable to pay compensation for damages.

The ruling was not subject to appeal.

At the same time as the court case, the plaintiff had submitted a complaint to the Commission. By letter of 8 June 2016, the Commission notified Kortcenter.dk about its preliminary assessment, concluding that the activities undertaken by the Danish Geodata Agency constituted an exercise of public power.

Type of action

Private enforcement

Delivery date of the ruling

18/10/2016

Language

Danish

Headnote

In this ruling, the Court held that the activities of the Danish Geodata Agency, i.e. composing, updating and supplying of digital maps constituted exercise of public authority and not an economic activity within the scope of Article 107(1) TFEU.

Parties

Names of the parties to the action

KortCenter.dk A/S

Versus

Den danske stat v/Energi-, Forsynings- og Klimaministeriet

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

Digital geodata

The type of State aid measure challenged in the court proceedings

Other

Operating aid

Substance of the case

Facts and parties' main arguments in the case

This case concerned the question of whether the Danish state was liable to pay compensation for damages to Kortcenter.dk. The plaintiff claimed that the Danish Geodata Agency had received unlawful State aid from the Danish State, and/or granted unlawful State aid to the buyers of its services in relation to the public financing of the composition, updating and supply of digital maps, damaging the economic activities of Kortcenter.dk.

The defendants argued that the activities of the Danish Geodata Agency did not constitute economic activities, but constituted exercise of public authority or activities which could not be separated from the exercise of its public powers.

The State measures under assessment entailed the collection of basic digital geographic information, creation and maintenance of an electronic database containing such information, and making the basic digital FOT-maps produced from this information available for use to other central and local State bodies, as well as the public. These State measures were carried out under Danish legislation, including legislation implementing the PSI Directive and the INSPIRE Directive, which imposes certain obligations on Member States as regards the collection and dissemination of certain geographic information. These obligations were intended to promote the general public interest and pursue certain Union policies. Denmark has implemented these obligations under Union law by adopting legislation that imposes the performance of public task on the Danish Geodata Agency.

Remedy(ies) sought

Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

In relation to the State aid issue, the Court discussed the notion of undertaking and the activities of the Danish Geodata Agency in the light of practice from the CJEU and the relevant Directives (see the section above Substance of the case). On this basis, the Court held that the activities of the Danish Geodata Agency in the form of composition, updating and supply of digital maps constituted the exercise of public authority tasks and not an economic activity within the scope of Article 107(1) TFEU.

The overall claim of compensation for damages was dismissed.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-138/11, Compass-Datenbank GmbH v Republik Österreich (2012) ECLI:EU:C:2012:449
- T-214/95, Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities (1998) ECLI:EU:C:1988:77
- C-482/99, French Republic v Commission of the European Communities (2002) ECLI:EU:C:2002:294
- C-83/01 P, C-93/01 P and C- 94/01 P, Chronopost SA, La Poste and French Republic v Union française de l'express (Ufex), DHL International, Federal express international (France) SNC and CRIE SA (2003) ECLI:EU:C:2003:388
- C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (2003) ECLI:EU:C:2003:415
- C-172/03, Wolfgang Heiser v Finanzamt Innsbruck (2005) ECLI:EU:C:2005:130
- C-148/04, Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1 (2005) ECLI:EU:C:2005:774
- C-113/07 P, SELEX Sistemi Integrati SpA v Commission of the European Communities and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol) (2009), ECLI:EU:C:2009:191
- T-231/06 and T237/06, Kingdom of the Netherlands (T-231/06) and Nederlandse Omroep Stichting (NOS) (T-237/06) v European Commission (2010) ECLI:EU:C:2010:525)

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Commission letter to the Member State in Sa.25745 (2013/NN) (ex CP 11/200) – Germany, 02.05.2013
- Commission: Preliminary assessment of 8 June 2016 (answer to a State aid complaint submitted by KortC A/Center.DK

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

The case provides a useful contribution to the understanding of the dividing line between economic and non-economic activities and economic activities which cannot be separated from the exercise of public powers.

7.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Østre Landsret	High Court of Eastern Denmark	Second to last instance court (general jurisdiction)	B-946-11, Østre Landsrets dom af 7. marts 2013 (19. afd.)	07/03/2013	Private enforcement	None - Claim rejected	In relation to the specific conditions of a licence, the Court found that the existence of an economic benefit had not been documented, and that such conditions did not constitute State aid within the meaning of Article 107(1) TFEU to the licence holder.		The State aid issue dealt with by the first instance court was not part of the appeal to the Danish Supreme Court (U.2015.400H).
Østre Landsret	High Court of Eastern Denmark	Second to last instance court (general jurisdiction)	B-569-08, Østre Landsrets dom af 13. maj 2013 (21. afd.)	13/05/2013	Private enforcement	None - Claim rejected	This judgment concerned, *inter alia*, a claim for damages based on the allegation that the award by the Danish State of a contract on the supply of access to a nationwide radio communication network of emergency management purposes constituted unlawful State aid within the meaning of Article 107(1) TFEU to the selected service provider (Motorola). The High Court found that no State aid was involved, thus no State aid-related remedies were granted.		In the appeal of the first instance ruling before the Danish Supreme Court (U.2015.1586H), the State aid-related part of the claim was withdrawn.
Sø- og Handelsretten	Danish Maritime and Commercial High Court	Lower court (general jurisdiction)	U.2013.2799S (S.H.D. 18. juni 2013 i sag U-4-11)	18/06/2013	Private enforcement	None - Claim rejected	The case concerned a rent charged by a municipality to the company Hellers Yachtværft ApS, which rented a property in the harbour of the municipality. The Maritime and Commercial Court found that the rent charged by the municipality was not lower than the market rent. Therefore, the rent did not constitute State aid to Hellers Yachtværft, and thus no State aid-related remedies were granted (and no recovery was needed).	The case concerned Section 11(a) of the Danish Competition Act, which is interpreted in accordance with State aid rules.	This ruling was not appealed to the second/last instance court.
Retten i Sønderborg	District Court of Sønderborg	Lower court (general jurisdiction)	BS C3-605/2013, Retten i Sønderborg, dom af 14. juli 2014	14/07/2014	Private enforcement	Other remedy imposed	In this judgment, the District Court assessed two premium-free guarantees granted by a Danish municipality. The guarantees were granted as security for loans to two district heating plants. The District Court found that the decision of the municipality not to ask for a premium could not be unilaterally changed on the basis of public or private law, and consequently that the municipality's subsequent decision to charge premiums to the district heating plants was unjustified.		The ruling was appealed and overturned by the High Court of Western Denmark (U2016.170V).
Vestre Landsret	High Court of Western Denmark	Second to last instance court (general jurisdiction)	OE2016.B-31-13, SKM2016.50.ØLR, TfS 2016, 123, Østre Landsrets dom af 12. januar 2016, j.nr. B-31-13 (8. afd.)	12/01/2016	Private enforcement	None - Claim rejected	In this judgment, the Danish Ministry of Taxation's management of the Danish Law on Taxation of Sailors was assessed under State aid rules (the Community guidelines on State aid to maritime transport (2004/C 13/03)). No violation of State aid rules was found to exist.		The ruling was confirmed by the Supreme Court (U.2017.630H).
Vestre Landsret	High Court of Western Denmark	Second to last instance court (general jurisdiction)	U.2016.170V (V.L.D. 25. januar 2016 i anke 16. afd. B.1704-14	25/01/2016	Private enforcement	None - Claim rejected	In this judgment, the High Court of Western Denmark assessed two premium-free guarantees granted by a Danish municipality under State aid rules. The guarantees were granted as security for loans to two district heating plants. The High Court found that the municipality's granting of premium-free guarantees violated Article 107(1) TFEU and that the municipality's subsequent decision to charge premiums from the district heating plants, therefore, had been legitimate. Even though State aid rules are applied to assess the lawfulness of the premium-free guarantees, and State aid is found to be present, the party did not claim its recovery. Therefore, no State aid-related remedies were granted.	From a Union law perspective, it is interesting whether the Court, on the basis of the principle of loyalty, should have requested recovery even though the party had not claimed it.	The High Court overturned the ruling by the lower court (BS C3-605/2013).
Østre Landsret	High Court of Eastern Denmark	Second to last instance court (general jurisdiction)	B275000S - MJE, Østre Landsrets dom af 18. oktober 2016, 16. afd. Nr. B-2750-13	18/10/2016	Private enforcement	None - Claim rejected	This case concerned certain issues with regard to unlawful State aid claimed by a competitor. The competitor tried to use references to State aid rules as a basis for claiming compensation for damage. The Court's reasoning mainly concerned the definition of an undertaking/economic activity. The Court found that the relevant activities of the entity were to be considered as the exercise of public powers or as inseparably connected to the exercise of public powers, and not as an economic activity. No State aid was found to be present, thus no State aid-related remedies were granted.		The ruling from the first instance court is final; it was not appealed to the second/last instance court.
Højesteret	Supreme Court of Denmark	Last instance court (general jurisdiction)	U.2017.630H (H.D. 23. november 2016 i sag 15/2016 (2. afd.)	23/11/2016	Private enforcement	None - Claim rejected	In this judgment, the Danish Supreme Court confirmed a ruling of the High Court of Eastern Denmark (TfS 2016, 123), in which the Danish Ministry of Taxation's management of the Danish Law on Taxation of Sailors had been assessed under State aid rules (the Community guidelines on State aid to maritime transport (2004/C 13/03)). No violation of State aid rules was found to exist.		

8. Estonia

8.1 Country report

Name national legal expert

Rene Frolov

Date

04/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

The Estonian court system consists of three instances. The county courts (*maakohus*) and the administrative courts (*halduskohus*) are the courts of first instance. The courts of second instance — the circuit courts — are competent to hear all types of cases based on appeals against rulings of the first instance courts. The highest (third) instance is the Supreme Court of Estonia, which hears appeals in cassation.

Public enforcement (State aid) cases are administrative cases (governmental administrative bodies enforce recovery decisions), meaning that in the first instance an administrative court (the Tallinn or Tartu Administrative Court) reviews these cases like any other administrative case. In the second and third instance, the competent courts are circuit courts (the Tallinn and Tartu Circuit Courts) and the Supreme Court, respectively.

Whether the Tallinn or Tartu Administrative Court has jurisdiction depends on the defendant's seat or place of service. If the subject matter of the dispute consists in acts of the defendant's officials or regional branch, or the harm caused by such acts or the consequences of such acts, the action is to be brought in the court having jurisdiction over the seat of the regional branch or the place of service of the official. As most of the administrative services are seated in Tallinn, the case contesting the recovery decision would mostly be heard in the Tallinn Administrative Court (and in the Tallinn Circuit Court in the second instance). However, as local municipalities or regional branches of implementing agencies may grant aid and/or issue recovery orders, then, depending on their seat of service (north or south region), the Tartu Administrative Court may have jurisdiction.

A description of the procedural framework applicable in public enforcement of State aid rules

Article 42(3) of the Estonian Competition Act[75] sets out the general principle of recovery indicating that if the Commission or the ECJ (current CJEU) decides that unlawful or misused State aid has to be recovered from the aid beneficiary, this decision or judgment shall be forwarded to the grantor of the unlawful or misused State aid. The State aid grantor is then required to demand recovery of the State aid, with interest, pursuant to the recovery decision or the ECJ (current CJEU) judgment.

Public enforcement of State aid rules is not regulated by any *ad hoc* (special) legislation. Nor is there any publicly available ruling on public enforcement cases that would shed light on the specifics of the procedure, (we are aware of pending proceedings concerning recovery of aid granted to national air transport company Estonian Air; the Commission has issued recovery decisions, requiring recovery of State aid from Estonian Air (SA.35956 and SA.36868),[76] but there is no publicly available ruling in this case as yet.) However, under the general principles of administrative law, in order to recover State aid, the administrative act forming the basis of the aid should be revoked on the ground of unlawfulness due to breach of legal norms (*i.e.* in this case, State aid rules).

The situation is more complicated if the aid is granted by way of a legal act (*i.e.* if there is no underlying administrative act (*haldusakt*) and the advantage is conveyed to an aid beneficiary automatically through the application of the legal act (law)). The only way to eliminate the legal effect of a legislative act would be to initiate a constitutional review on the ground that the legislative act is contrary to a higher legal act (based on the principle of primacy of Union law, (EU) State aid rules are superior to national law). This is done in the course of a regular administrative process. If a lower court considers that the issue of compliance with the Constitution is relevant for the outcome of the case, then it will not apply the legislation, but instead send the ruling, declaring the legislation as not applicable, to the Supreme Court for review. The lower court may, and usually does, suspend the proceedings until the Supreme Court's decision on the compliance with the Constitution enters into force.

The person challenging the activity of the administration (*e.g.* non-enforcement of a recovery decision) must have right of action (*kaebeõigus*). Under Article 44(1) of the Code of Administrative Court Procedure (CACP),[77] individuals may have recourse to an administrative court only for the protection of their rights, that is, the non-enforcement of a recovery decision must breach the rights of the plaintiff (in general, being a competitor of the aid beneficiary should be enough to satisfy this condition).

The plaintiff must also comply with the limitation period. A mandatory action (relevant in case of omission or delay by an administrative body) may be filed within 30 days after the date on which the refusal to issue an administrative act or to take an administrative measure was notified to the plaintiff (Article 46(1) of the CACP). In the event of an administrative authority's omission or delay, a mandatory action must be brought within one year after the time-limit for issuing an administrative act or taking an administrative measure has elapsed. If no such time-limit has been established, in the event of an

[75] Konkurentsiseadus - RT I 2001, 56, 332. Available in English at: https://www.riigiteataja.ee/en/eli/510122018001/consolide (last accessed on 4 January 2019).

[76] Commission Decision (EU) 2016/1031 of 6 November 2015 on the measures SA.35956 (13/C) (EX 12/N) implemented by Estonia for AS Estonian Air and on the measures SA.36868 (14/C) (ex 13/N) which Estonia is planning to implement for AS Estonian Air, OJ L 174, 30.6.2016, p. 1-31.

[77] Halduskohtumenetluse seadustik - RT I, 23.02.2011, 3. Available in English at : https://www.riigiteataja.ee/en/eli/512122017007/consolide (last accessed on 4 January 2019).

administrative authority's omission or delay, a mandatory action may be filed within two years after the administrative act or measure was applied for (Article 46(2) of the CACP).

Administrative proceedings are guided by the principle of investigation (*uurimispõhimõte*). In other words, the court must ascertain the facts of the case on its own initiative (including gathering evidence or imposing the obligation of presenting evidence on participants of the proceedings (Article 2(4) of the CACP). At every stage of the proceedings, the court must provide enough explanations to the parties to guarantee that no declaration or evidentiary item necessary to protect a party's interests remains unrecognised because of lack of experience in legal matters and that any defects of form that would prevent a declaration from being heard are cured (Article 2(5) of the CACP).

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

Private enforcement of State aid rules generally takes place in administrative proceedings because aid is mostly granted by way of administrative acts, which must be challenged in administrative proceedings before administrative courts. However, a State aid argument may be raised within the context of civil proceedings. For example, the State, as a party to an agreement, may refuse to fulfil its obligations on the ground that concluding the agreement would constitute an infringement of State aid rules (*e.g.* granting a guarantee to the aid beneficiary) and, hence, the agreement is null and void.

In case of administrative proceedings, all the above comments on public enforcement apply. In case of civil proceedings, the only particularity is that the first instance court is not an administrative court, but a county court (a court competent to resolve all other disputes besides administrative disputes).

A description of the procedural framework applicable in private enforcement of State aid rules

The private enforcement of State aid rules is not regulated by any *ad hoc* (special) legislation. It is subject to the same procedural rules as all other civil or administrative proceedings (for rules in administrative proceedings, see comments above). For example, in an administrative proceeding, a plaintiff may request the annulment of the administrative act by which the State aid was granted. The relevant complaint must be filed within 30 days from the date on which the complainant was notified about the administrative act or became aware of it.

With regard to civil proceedings, the general principles and specific rules governing the proceedings are somewhat different as compared to administrative proceedings (the proceedings are subject to the rules of the Code of Civil Procedure)[78]. In particular, the court resolves the matter solely based on the facts and claims submitted by the parties. The court is not obliged to gather evidence on its own initiative (*i.e.* the principle of investigation does not apply) or provide explanations to the parties so that they would not lose their rights in the procedure or undermine their position due to inexperience.

Main findings based on the case summaries

All relevant rulings identified (including the rulings covered in case summaries) were rulings relating to the private enforcement of State aid rules; no case relating to public enforcement was identified. The small number of public enforcement cases is because there are only a few recovery decisions. As mentioned above, it should be noted that although the Commission has issued recovery decisions concerning State aid granted to Estonian Air (see references above), there are no publicly available rulings (yet) of national courts concerning the enforcement of these recovery decisions.

All cases covered by the case summaries involved complaints by aid beneficiaries against the recovery of the aid by the granting authority (ruling ECLI:EE:RK:2016:3.3.1.8.16.10899 (EE1); ruling ECLI:EE:TRRK:2017:3.14.52367.7975 (EE3); ruling ECLI:EE:TLRK:2014:3.13.1497.19903 (EE2)). In two of the (three) cases, the granting authority was Enterprise Estonia (*Ettevõtluse Arendamise Sihtasutus* or *EAS*) and in the third case (ruling ECLI:EE:TRRK:2017:3.14.52367.7975 (EE3)), it was the Estonian Agricultural Registers and Information Board (*Põllumajanduse Registrite ja Informatsiooni Amet* or *PRIA*).

The number of (Estonian) cases selected for coverage in the case summaries (three) is very small. Therefore, the information on the sectors involved is not very informative: in two of the cases, the beneficiaries were manufacturing companies and in one case a local municipality that used the aid for reconstructing of a local fishing port.

Qualitative assessment of the average time of court proceedings

Most cases identified were subject to administrative proceedings - one relevant case (ruling ECLI:EE:TLRK:2013:2.12.10352.33366) is the exception. This case was resolved in civil proceedings initially, but the issue on State aid was finally resolved in constitutional review proceedings (which are more of an administrative nature)).

The average duration of (administrative) proceedings in the first instance in matters substantially resolved (*i.e.* not dismissed for procedural reasons or because of a settlement between the parties) is 222 days. The average duration of proceedings in the second instance is 233 days.[79] Proceedings in the third or last instance (Supreme Court) are subject to leave for cassation, and only a small number of cassation appeals submitted to the Supreme Court will be admitted for review. In 2017, in administrative cases, 1120 cassation appeals were submitted and only 85 were granted leave to appeal for cassation.[80]

Thus, the average duration of proceedings (first plus second instance) is 455 days (less than 1.5 years). However, no statistics are available on the average duration of

[78] Tsiviilkohtumenetluse seadustik - RT I 2005, 26, 197. Available in English at: https://www.riigiteataja.ee/en/eli/516012019001/consolide (last accessed on 4 January 2019).
[79] Statistics – 1H 2018 – *e.g.* duration of court proceedings in Estonia: https://www.kohus.ee/sites/www.kohus.ee/files/elfinder/dokumendid/2018.a_ipa_menetlusstatistika_koondandmed.pdf (Sections 4.2 and 4.5) (last accessed on 4 January 2019).
[80] https://www.riigikohus.ee/et/riigikohus/riigikohtu-tegevust-iseloomustav-statistika (last accessed on 4 January 2019).

proceedings in the third instance. Still, if the case proceeds to the last instance, it is very likely that the total duration of proceedings is more than two years and, in many cases, probably much longer if the case is referred (back) to the lower court.

The total duration of proceedings in court cases identified in this Study, is between six months and 2.5 years. But one case (*Eesti Pagar*)[81], started in April 2014 is still pending (duration is more than four years; the Supreme Court sent the case back to the circuit court by its decision in June 2016). The average duration of proceedings in cases identified in this Study is around 1.5 years. This is based on nine cases (*i.e.* the *Eesti Pagar* case was excluded) because it is pending and the total duration of the proceedings is (as of now) unknown.

In sum, the duration of proceedings in administrative cases generally (*i.e.* in all matters) is approximately the same as in the identified cases (involving State aid issues). The reason for this is that in most cases, the court found that no State aid was involved. However, in *Eesti Pagar,* where State aid was involved and several complex questions on the interpretation of Union law were raised, the duration of the proceedings has been considerably longer. This is, in many ways, a landmark case that involves many complex legal questions. It is likely to be the key reason why the courts have taken longer to deliver their rulings. Once the Supreme Court referred the case back to the circuit court (which happened before the request for a preliminary ruling was referred to the CJEU), the proceeding had already been on-going for more than two years. Now that the proceeding has been suspended due to proceedings before the CJEU, the outcome is further delayed. (NB: the CJEU has rendered its judgment on 5 March 2019 (C-349/17; see section below for more details on the judgment), [82] but the decision of the circuit court following the CJEU judgment is still pending).

Qualitative assessment of the remedies awarded by national courts

Remedies were awarded in two out of the ten identified cases: the courts upheld the recovery order of the granting authority. The low number of remedies awarded by Estonian courts, if compared to the overall number of cases, is mostly because no State aid was deemed to have been granted. The case *Eesti Pagar* is an exception, as it is still pending and is subject to the preliminary ruling from the CJEU. The CJEU judgment was delivered on 5 March 2019.[83] Thus, it is expected that it will take some time before the national court renders its decision, taking into account the CJEU's observations.

Based on the CJEU judgment, it can be concluded that the Supreme Court had misinterpreted State aid rules. With regard to the first preliminary question, which concerned the concept of 'incentive effect' under Commission Regulation (EC) 800/2008 of 6 August 2008,[84] the CJEU concluded as follows. Within the meaning of the relevant provision of the GBER, when a first order of equipment required for the project or activity was made by means of entering into an unconditional and legally binding commitment, this should be regarded as start of 'work on the project or activity', regardless of any costs of resiling from that commitment (paragraph 82). If the project or activity starts before the submission of the application for State aid, the aid lacks the incentive effect under the GBER. However, the Supreme Court had found that the incentive effect should be interpreted more widely by the granting authority. According to the Supreme Court, a firm commitment to purchase equipment before the submission of an aid application does not exclude an incentive effect where the purchaser can withdraw from the contract without excessive difficulty in the event that aid is refused (paragraph 30). Hence, measuring the costs of withdrawal from the agreement is a means to assess whether there is an incentive effect.

With regard to the second and third question, which concerned the granting authority's obligation to recover the unlawful aid despite any corresponding decision by the Commission, and the creation of a legitimate expectation on the part of the aid beneficiary, the CJEU concluded as follows. The CJEU confirmed that aid that is not compliant with the GBER must be recovered (this is not a discretionary decision of the granting authority), and the granting authority cannot create legitimate expectations towards the beneficiary that could preclude such recovery.

Regarding the fourth question, which referred to the limitation period to recover unlawful aid by the granting authority and more specifically whether this limitation period corresponds to a ten-year period pursuant to Council Regulation (EC) 659/1999 of 22 March 1999,[85] or to a four-year period pursuant to Council Regulation (EC, Euratom) 2988/95 of 18 December 1995,[86] the CJEU considered as follows. Where the conditions for application of Council Regulation (EC, Euratom) 2988/95 of 18 December 1995 are satisfied,[87] the limitation period is four years, and if not, the period set out in national law shall apply.

Finally, regarding the fifth question, which referred to the obligation of the granting authority to recover interest from the beneficiary of the unlawful aid, and the rules applicable to the calculation of this interest, the CJEU confirmed the duty of the national authority to recover interest if it recovers aid on its own initiative. In fact, the CJEU has consistently held that the undue advantage that the aid beneficiary enjoyed consisted in the non-payment of the interest, which it would have paid on the aid amount in question, if it had borrowed that amount on the market during the period of the unlawfulness, and in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasted (paragraph 132). Moreover, the CJEU agreed with the Supreme Court that the rules applicable to the recovery decision are not directly applicable to the calculation of interest in the present case. Council Regulation (EC) 659/1999 of 22 March 1999 contains procedural rules that apply to all administrative procedures in matters of State aid pending before the Commission but it does not contain any provision relating

[81] Supreme Court, 9.6.2016 - ECLI:EE:RK:2016:3.3.1.8.16.10899 (EE1).
[82] Case C-349/17, *Eesti Pagar* (2019) ECLI:EU:C:2019:172.
[83] *Ibid.*
[84] Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, *OJ L 214, 9.8.2008, p. 3–47, replaced by* 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. 1–78.*
[85] Council Regulation EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, *OJ L 83, 27.3.1999, p. 1–9, replaced by* Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*
[86] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, *OJ L 312, 23.12.1995, p. 1–4.*
[87] *Ibid.*

to the powers and obligations of national courts.[88] However, the CJEU emphasised that the applicable national rules must allow full recovery of the aid.

Once the case is resolved, it is possible that remedies will be awarded. Overall, the remedies (including decisions not to grant remedies) applied in the identified and summarised cases can be considered to be adequate.

No other obstacles of enforcement were established based on the identified and summarised cases. However, enforcement by the courts would most likely be easier if a separate procedural framework concerning the recovery of unlawful State aid would exist and if grounds for recovery (even in the absence of a recovery decision from the Commission) would be clearly defined (in the event of infringement of the standstill obligation).

Qualitative assessment of the application of the State aid *acquis*; preliminary references

In most identified cases, CJEU case law was properly applied. For example, with regard to the irrelevance of legitimate expectation in the context of State aid recovery in ruling ECLI:EE:TRRK:2017:3.14.52367.7975 (EE3). In the *Eesti Pagar* case,[89] it is evident from the recent judgment of the CJEU (C-349/17)[90] that State aid rules were not properly applied by the Supreme Court (see relevant case summary and section above for more details). In other cases, no reference was made, nor was one required (*e.g.* if a lack of State aid element is evident).

We identified only one case in which — throughout the proceedings — a request for a reference for a preliminary ruling was made by the Estonian court (*Eesti Pagar* case).[91] The content of the reference included questions on the application of the GBER in relation to the definition of the incentive effect provided therein, on the obligatory nature of recovery in the absence of a recovery decision by the Commission, as well as questions on the legitimate expectations, interest rate and limitation period for recovery (see relevant case summary for more details on the case and the CJEU's conclusions).

Qualitative assessment of any other relevant trends in State aid enforcement

There were only a few cases identified in the Study that involved State aid (ten in total). Therefore, it is not possible to identify any specific trends regarding the enforcement of State aid rules in Estonia. On the basis of the identified cases, no improvement or deterioration is evident. However, *Eesti Pagar* as one of the recent cases involves by far the most substantial analysis of State aid rules in the context of recovery and relevant procedural rules. Considering that the CJEU has ruled in this matter (C-349/17) and clarified numerous legal aspects relating to recovery on the initiative of the national authority (see section 'Qualitative assessment of the remedies awarded by national courts' and case summary for more details), this will serve as an important precedent for future proceedings involving enforcement of State aid rules in Estonia (and possibly in other Member States as well).

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

Identifying the existence or non-existence of State aid is not an easy task for Estonian courts, since there is very limited practice of Estonian courts in that regard. In one relevant case (ruling ECLI:EE:RK:2015:3.3.1.50.15.913), the court even stated that contracting authorities (in the context of applying public procurement law, more specifically, establishing unreasonably low tenders) have limited possibilities to qualify the benefits granted to the tenderers as being State aid. The court added that identifying State aid and assessing its lawfulness is within the competence of the Commission. Taken out of the context of the case, such views could be seen as a violation of the direct effect of Article 108(3) TFEU. However, if viewed in the context of the facts of the case and the framework of public procurement rules, one may come to a different conclusion. The court found no ground for rejection of the offer, even if the tenderer would have received unlawful State aid, and therefore, the question of whether any aid was granted was not analysed by the court. However, the above conclusion could have been phrased in a more cautious manner, in order to avoid misinterpretation of the case law in the future (especially, considering that there are not many cases on the application of State aid rules).

Generally, the courts have established the lack of State aid correctly, but the reasoning is not always consistent. For example, when the courts found that State aid rules were not applicable, irrelevant or incorrect arguments were made. Further, in one (relevant) case (ruling ECLI:EE:TLRK:2018:3.17.1780.10580), the court referred to the unlikeliness of harm to competition while excluding the presence of State aid, although the actual issue was the lack of State resources. In another (summarised) case (ruling ECLI:EE:TRRK:2017:3.14.52367.7975), the court indicated that only grants from EU funds would be considered as subject to State aid rules although this misunderstanding did not affect the outcome of the case.

Any other relevant comments or findings

Estonia was planning an amendment to the Estonian Competition Act, establishing the obligation of the authority that had granted the unlawful State aid to recover this aid (on its own initiative and even in the absence of a recovery decision by the Commission) as well as procedural rules for such recovery (interest calculation, statute of limitation). This plan was put on hold until the preliminary ruling in *Eesti Pagar*, where the relevant legal questions were considered, is published.[92] As mentioned above, the CJEU rendered its judgment on 5 March 2019 (C-349/17),[93] confirming the obligation of the Member State to recover aid even in the absence of a recovery decision from the Commission, if it finds that the conditions for application of the GBER are not complied with (stemming from the standstill obligation as set out in Article 108(3) TFEU). The CJEU also ruled on the interest calculation and limitation

[88] Council Regulation EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, op.cit., *replaced by* Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*
[89] Supreme Court, 9.6.2016 - ECLI:EE:RK:2016:3.3.1.8.16.10899 (EE1).
[90] Case C-349/17, *Eesti Pagar, op.cit.*
[91] *Ibid.*
[92] See here (in Estonian): https://www.riigikogu.ee/download/bff04983-4e52-4bbb-a701-b9f827256d3d (Annex to the explanatory note making reference to *Eesti Pagar* case. The original version (in Estonian) is available in the online system of draft legislation (file No. RAM/17-0710): http://eelnoud.valitsus.ee/main#e7HWim1T (last accessed on 20 March 2019).
[93] Case C-349/17, *Eesti Pagar, op.cit.*

period (see section 'Qualitative assessment of the remedies awarded by national courts' above and case summary for more details). Thus, it is likely that the amendment to the Estonian Competition Act will be adopted to confirm this obligation in the national law and to set out procedural rules for recovery. This would make the enforcement of State aid rules in Estonia more efficient.

8.2 Case summaries

Case summary EE1

Date

04/01/2019

Case identifiers

Member State

Estonia

Court which adopted the ruling (national language)

Riigikohus (halduskolleegium)

Court which adopted the ruling (English)

Supreme Court (Administrative Law Chamber)

Instance court which adopted the ruling

Last instance court (general jurisdiction)

Official language of the court

Estonian

Hyperlink to ruling

https://www.riigiteataja.ee/kohtulahendid/fail.html?id=206132888

Case reference

ECLI:EE:RK:2016:3.3.1.8.16.10899

Procedural context of the case

The plaintiff (AS Eesti Pagar, the beneficiary of the aid) requested annulment of the administrative act by which the aid granting authority, Enterprise Estonia (Ettevõtluse Arendmise Sihtasutus or EAS) ordered recovery of the investment grant (with interest) that it had previously granted and paid out to the beneficiary. The total amount of the grant was EUR 526,300 (plus interest calculated by the time of the recovery decision; EUR 98,454).

Before filing a complaint to the court, the beneficiary submitted an administrative challenge (vaie) to the Ministry of Economic Affairs and Communication. After this challenge was unsuccessful, Eesti Pagar filed a complaint to the Tallinn Administrative Court. The courts of first and second instance dismissed the claims of Eesti Pagar and upheld the recovery decision, but last instance court (the Supreme Court) referred the case back to the second instance (Tallinn Circuit Court) – in the summarised case at hand. In detail:

(1) The Court of First Instance (Tallinn Administrative Court) agreed with the reasoning of the recovery decision of Enterprise Estonia – i.e. that the grant was subject to recovery due to non-compliance with the General Block Exemption Regulation (GBER), because the grant lacked incentive effect set out in Article 8(2) GBER. This was found to be the case, because Eesti Pagar had concluded the agreement for the purchase of equipment (for which it asked for investment aid) before submitting the application for the grant to purchase this equipment.

(2) Eesti Pagar then lodged an appeal to the Tallinn Circuit Court which dismissed the appeal by fully supporting the conclusions of Enterprise Estonia and the Tallinn Administrative Court. Furthermore, both courts agreed that possible legitimate expectations of the beneficiary do not prevent recovery and that Enterprise Estonia was correct to calculate interest in accordance with EU rules (including Regulation No. 794/2004).

(3) The Supreme Court as the Court of Last Instance annulled the ruling of the Tallinn Circuit Court and referred it back to this court. the Tallinn Circuit Court referred a request for a preliminary ruling from the CJEU. The CJEU rendered its judgment on 5 March 2019 (Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium C-349/17). The follow-up national ruling on the Eersti Pagar case was still pending at the moment of drafting this case summary. The Supreme Court considered that the facts of the case were not sufficiently established, because it was not clear whether the incentive effect of the aid was absent or not. It also found that even if the aid lacked incentive effect, the legitimate expectations of the beneficiary should have been considered in deciding over the need of recovery. Furthermore, the Supreme Court considered that EU rules cannot be applied to establish the rate and calculation of interest by way of analogy and that national rules should be applied instead. Because the issue expiry of the statutory limitation period for recovery was also raised by the plaintiff, the Supreme Court considered that it should be assessed (and potential need for a preliminary ruling from the CJEU may arise in that regard) only if there are no other grounds for overturning the recovery decision – i.e. the question was left open.

4) The Tallinn Circuit Court referred a request for a preliminary ruling to the CJEU on 13 June 2017 following the involvement of the Commission who provided amicus curiae observations. The following questions were referred to the CJEU - Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium, C-349/17, (as above, the CJEU rendered its judgment on 5 March 2019 (ECLI:EU:C:2019:172)):

(a) Is Article 8(2) of Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation) to be interpreted as meaning that, in the context of that provision, where the activity to be supported is, for example, the acquisition of an industrial plant, 'work on the project or activity' has started when the agreement for the purchase of the relevant plant has been entered into? Are the Member State authorities authorised to assess an infringement of the criterion mentioned in that provision in light of the costs of withdrawal from an agreement which contravenes the requirement of an incentive effect? If the Member State authorities have such authority, what level of costs (in percentage terms) incurred by withdrawal from the agreement may be deemed to be sufficiently marginal from the aspect of meeting the requirement of the incentive effect?

(b) Is a Member State authority obliged to recover an unlawful aid granted by it even if the European Commission has not adopted a corresponding decision?

(c) Can a Member State authority which decides to grant an aid — on the erroneous assumption that it is an aid that accords with the block exemption requirements, but which is in fact an unlawful aid — engender a legitimate expectation on the part of the aid recipients? Is, in particular, the fact that the Member State authority is aware, on granting the unlawful aid, of the circumstances causing the aid not to be covered by the block exemption sufficient to give rise to a legitimate expectation on the part of the recipients? If the preceding question is answered affirmatively, must the public interest and the interest of the individual be weighed against one another? In the context of that weighing-up of interests, is it significant whether, in relation to the aid at issue, the European Commission has adopted a decision declaring it incompatible with the common market?

(d) Which limitation period applies to the recovery of an unlawful aid by a Member State authority? Is that period ten years, corresponding to the period after which, under Articles 1 and 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, the aid becomes existing aid and can no longer be recovered, or four years in accordance with Article 3(1) of Council Regulation (EC, Euratom) No 2988/95 (3) on the protection of the European Communities' financial interests? What is the legal basis for such recovery where the aid was granted from a structural fund: Article 108(3) TFEU or Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities' financial interests?

(e) If a Member State authority recovers an unlawful aid, is it then obliged to demand from the recipient the payment of interest on the unlawful aid? If so, which rules will then apply to the calculation of the interest, inter alia, as regards the rate of interest and the calculation period?

Regarding the interpretation of 'incentive effect' under Regulation No 800/2008 the CJEU in its judgment of 5 March 2019 (ECLI:EU:C:2019:172), concluded that: "… Article 8(2) of General Block Exemption Regulation must be interpreted as meaning that 'work on the project or activity', within the meaning of that provision, started when a first order of equipment required for that project or that activity was made by means of entering into an unconditional and legally binding commitment before the submission of the aid application, regardless of any costs of resiling from that commitment" (paragraph 82). Regarding the second question, the CJEU confirmed that the national authority must recover the aid on its own initiative if it finds that the aid granted does not comply with the conditions laid down in Regulation No 800/2008. With regard to the third question, the CJEU found that where the national authority grants aid while misapplying Regulation No 800/2008, it cannot cause the beneficiary to hold a legitimate expectation that the aid is lawful and compatible with the internal market. The CJEU found that where the conditions for application of Regulation No 2988/95 are satisfied the limitation period is four years, and if not, then the period set out in national law shall apply. While it is for the national court to determine, the CJEU found the answer was based on the facts known to the CJEU. Furthermore, the facts outlined by the CJEU suggested that the limitation period was not passed by the time of recovery. The CJEU confirmed the duty of the national authority to claim interest if it recovers aid on its own initiative. It must be done according to the national law for the whole period the aid beneficiary benefited from the aid at a rate equivalent to what would have been applied if the beneficiary had to borrow the amount of aid on the market within that period.

Please note that the case number in lower courts (Tallinn Administrative Court and Tallinn Circuit Court) is 3-14-387. These rulings (and their ECLI numbers) are not yet publicly available, because a final ruling in the underlying matter / dispute has not yet been delivered nor entered into force. Information on these rulings is taken from the description of previous proceedings (procedural posture) provided in the ruling of the Supreme Court.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

09/06/2016

Language

Estonian

Headnote

In this ruling, the Court questioned the findings of lowers courts on several aspects of the recovery of State aid in the absence of recovery decision of the Commission.

Parties

Names of the parties to the action

AS Eesti Pagar

Versus

Ettevõtluse Arendamise Sihtasutus; Majandus- ja Kommunikatsiooniministeerium

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

C - Manufacturing

Manufacturing of bread products

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

AS Eesti Pagar concluded an agreement for the supply of equipment on 28 August 2008. Then, on 24 October 2008, it filed an application to Enterprise Estonia (implementing agency providing various grants from EU funds) to receive support to purchase the same equipment. The application was successful, and a grant in the amount of EUR 526,300 (total cost of the project was EUR 2,767,374) was paid to the AS Eesti Pagar following the decision of Enterprise Estonia, dated 10 March 2009.

Around five years later, on 8 January 2014, Enterprise Estonia decided to recover the grant with compound interest (calculated based on the interest rate set for recovery by the Commission under Regulations 659/1999 and 794/2004). The stated reason for recovery was the fact that the contract for the purchase of the equipment (purchase of which was the purpose of the aid) was concluded before submitting the application for aid. Hence, Enterprise Estonia argued, the aid did not fall under the GBER due to lack of incentive effect – under Article 8(2) of the GBER an 'incentive effect' is deemed to exist if the application for aid is submitted before the 'work on the project or activity' has started. Because the exemption from State aid rules under GBER was not applicable and the aid was not notified to the Commission (thus the standstill obligation set out in Article 108(3) TFEU was not complied with), Enterprise Estonia considered that the aid needed to be recovered based on EU rules (as concerns limitation period, applicable interest rate and interest calculation).

As concerns the applicable interest rate and calculation, Enterprise Estonia considered that the same rules as applied by the Commission (in issuing recovery decisions) must be applied. The legitimate expectations of the beneficiary were not deemed relevant by Enterprise Estonia with reference to established CJEU case law.

The plaintiff sought annulment of the recovery decision, claiming that (i) the limitation period for recovery had passed (national law set out 90-days limitation period which had passed); (ii) the granting authority had not substantially assessed the existence of incentive effect; (iii) the principle of legitimate expectations precludes the recovery of the aid; (iv) interest should be calculated under national rules as EU relevant acts are only applicable to recovery decisions by the Commission.

Remedy(ies) sought

Other remedy sought

Annulment of the recovery order in relation to aid

Outcome of the case

Conclusions adopted by the national court

The Supreme Court found – differently from the lower (first and second instance) courts – that the conclusion of a contract before applying for aid does not in itself preclude the existence of incentive effect, and hence, the applicability of GBER. The Supreme Court referred the case back to the Tallinn Circuit Court to establish further facts on the possibility to terminate the contract concluded by the beneficiary and its economic cost to the beneficiary – for example to query and establish if termination (in a hypothetical situation in which the aid would not have been granted) was not merely theoretical and prohibitively costly, the GBER may be applied and there is no ground for recovery.

The Supreme Court stated that if the Circuit Court still finds (based on further facts) that there is no incentive effect, then it must assess the legitimate expectations of the beneficiary, including an assessment of the claims and facts put forward by the plaintiff regarding instructions of the granting authority (allegedly) provided vis-à-vis the timing of execution of the agreement.

As said, the granting authority had calculated interest (on the aid to be recovered) under rules set for recovery decisions of the Commission. The Supreme Court did not agree to such approach – it found that EU rules were not applicable and national rules – which set out considerably lower interest rates and more favourable interest calculation models for the beneficiary – should be applied in the context of this specific recovery.

The question of limitation period was the most complicated one for the Supreme Court. The Supreme Court left the question of the applicable rules open by stating that the question of limitation period must be resolved only if there are no other grounds for annulment of the recovery decision. The Supreme Court did not agree with the lower courts that a 10-year limitation period as set out in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty should be applied and considered it possible that a four-year limitation period set out in Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests is applicable instead. The Supreme Court further considered that a preliminary ruling by the CJEU may be needed on the applicability of Article 2(1) of Regulation No. 2988/95, if it appears that question of limitation period is decisive for the outcome of the case.

It can be noted that with regard to other issues considered above, the Supreme Court did not mention the need for a preliminary ruling by the CJEU.

Because the Supreme Court identified several issues that required establishing (further) facts (the Supreme Court is competent to solve legal questions only and does directly assess evidence nor establish facts), the case was referred (back) to the (second instance) lower court (Tallinn Circuit Court). While the Supreme Court did not think that a preliminary ruling was required, the Tallinn Circuit Court referred a request for a preliminary ruling to the CJEU. The answers provided by the CJEU confirm the relevance of the reference – the CJEU views on the legal questions decisive for the outcome of the case varied from those of the Supreme Court (see overview above).

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The case was sent back to the lower court (Tallinn Circuit Court) for re-assessment. Thereafter, the lower court referred a request for a preliminary ruling to the CJEU and suspended the proceedings until the relevant CJEU ruling enters into force. The CJEU gave its preliminary ruling on the matter on 5 March 2019 (ECLI:EU:C:2019:172). The follow-up national ruling on the Eersti Pagar case is still pending.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-81/10, France Télécom SA v European Commission (2011) ECLI:EU:C:2011:811
- C-630/11 P to C-633/11 P, HGA Srl and Others (C-630/11 P), Regione autonoma della Sardegna (C-631/11 P), Timsas srl (C-632/11 P) and Grand Hotel Abi d'Oru SpA (C-633/11 P) v European Commission (2013) ECLI:EU:C:2013:387
- C-39/94, Syndicat français de l'Express international (SFEI) and others v La Poste and others (1996) ECLI:EU:C:1996:285
- C-275/10, Residex Capital IV v Gemeente Rotterdam (2011) ECLI:EU:C:2011:814
- C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79
- T-427/04 and T-17/05, French Republic (T-427/04) and France Télécom SA (T-17/05) v Commission of the European Communities (2009) ECLI:EU:T:2009:474
- C-5/89, Commission of the European Communities v Federal Republic of Germany (1990) ECLI:EU:C:1990:320
- C-24/95, Land Rheinland-Pfalz v Alcan Deutschland GmbH (1997) ECLI:EU:C:1997:163
- C-99/02, Commission of the European Communities v Italian Republic (2004) ECLI:EU:C:2004:207
- C-568/11, Agroferm A/S v Ministeriet for Fødevarer, Landbrug og Fiskeri (2013) ECLI:EU:C:2013:407
- C-110/02, Commission of the European Communities v Council of the European Union (2004) ECLI:EU:C:2004:395

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- 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 (General Block Exemption Regulation)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

The Supreme Court misinterpreted State aid rules as confirmed by the judgment of the CJEU. Namely, the Supreme Court found that if the aid does not fall under the GBER and there is no recovery decision from the Commission (as this might be the situation in the case at hand if the lack of incentive effect is established), then recovery is a discretionary decision of the granting authority. One aspect relevant in deciding is the existence of legitimate expectations of the beneficiary. The Supreme Court also found that in this case the national authorities may have potentially created such legitimate expectations (even though Union Courts have never considered it possible). The CJEU confirmed that the recovery is not discretionary decision of the national authority. If the national authority finds that the conditions of the GBER are not complied with, then it must recover the aid. The national authority cannot create legitimate expectations to the beneficiary if it has misapplied the GBER.

Case summary EE2

Date

04/01/2019

Case identifiers

Member State

Estonia

Court which adopted the ruling (national language)

Tallinna Ringkonnakohus

Court which adopted the ruling (English)

Tallinn Circuit Court

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

Estonian

Hyperlink to ruling

https://www.riigiteataja.ee/kohtulahendid/fail.html?id=144557370

Case reference

ECLI:EE:TLRK:2014:3.13.1497.19903

Procedural context of the case

By a 19 December 2013 judgment (ruling ECLI:EE:TLHK:2013:3.13.1497.34268), the Tallinn Administrative Court (the court of first instance) dismissed the claim of the complainant, Hansa Biodiesel OÜ (beneficiary of aid). The Court found that Enterprise Estonia (Ettevõtluse Arendamise Sihtasutus; EAS) correctly recovered aid from Hansa Biodiesel OÜ as the aid lacked incentive effect under Article 8(2) of the General Block Exemption Regulation (GBER). The Court agreed with Enterprise Estonia that because the complainant had concluded a binding agreement for the purchase of equipment before applying for the aid (grant) to purchase the same equipment, the aid lacked incentive effect. Hence, Enterprise Estonia argued, the aid did not fall under the GBER and had to be recovered as unnotified aid. The Court relied on CJEU case law and found that the complainant could not rely on legitimate expectations in the given situation, because only the Commission can create legitimate expectations that could prevent recovery.

The complainant appealed against the December 2013 ruling of the Tallinn Administrative Court to Tallinn Circuit Court which on 26 August 2014 (ruling ECLI:EE:TLRK:2014:3.13.1497.19903) dismissed the appeal and upheld the ruling of Tallinn Administrative Court.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

26/08/2014

Language

Estonian

Headnote

In this ruling, the Court held that an incentive effect (as defined in Article 8(2) of the GBER) was not present and consequently the aid had to be recovered.

Parties

Names of the parties to the action

Hansa Biodiesel OÜ

Versus

Ettevõtluse Arendamise Sihtasutus (Enterprise Estonia)

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

C - Manufacturing

Waste (end of life tires) recycling

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

On 24 March 2010, the plaintiff Hansa Biodiesel OÜ filed an application with Enterprise Estonia (defendant) for a grant for an investment into an end of life tires recycling plant. Enterprise Estonia decided on 13 July 2010 to grant the aid. However, Hansa Biodiesel OÜ had already concluded the contract for the purchase of relevant plant equipment (pyrolysis equipment) on 19 November 2009, i.e. before submitting the application for the grant. Based on this fact, Enterprise Estonia recovered the aid with compound interest, finding that the aid lacked incentive effect under Article 8(2) of the GBER due to starting of the project before submission of the application for aid.

After an unsuccessful administrative challenge, the plaintiff filed a complaint to the Tallinn Administrative Court and thereafter (as the court dismissed the complaint) an appeal to the Tallinn Circuit Court. Hansa Biodiesel OÜ claimed that the recovery of aid was not justified as since the incentive effect was present, the GBER applied, and there was no ground for recovery.

More specifically, plaintiff claimed that although it had concluded the agreement for the supply of equipment for the purchase for which the aid was granted, this agreement did not constitute a firm commitment in the meaning of the GBER and, instead, it was a non-binding tentative framework agreement. The plaintiff claimed that instead of deciding based on the fact of concluding such agreement, the courts should have considered the economic content of the agreement – inter alia, the courts should consider the possibility of terminating the agreement from economic point of view. Hansa Biodiesel OÜ further argued that recovery of lawful aid (as it considered that State aid rules were complied with) would be contrary to its legitimate expectations. In support of legitimate expectations, the plaintiff further claimed that it had not hidden the fact of concluding the agreement from the defendant and the defendant had changed its legal position on the existence of incentive effect contrary to the legitimate expectations of the beneficiary.

The plaintiff considered it necessary to refer the question of interpretation of the GBER to the CJEU as only the CJEU can provide an assessment of what constitutes a 'firm commitment' (decisive in the notion of 'start of works') under the GBER. Additionally, the plaintiff considered that the CJEU must provide an assessment on whether the explanations provided in the Regional Aid Guidelines (that the Court relied on regarding the interpretation of the definition of the 'first firm commitment' which is one indication of 'start of works' relevant for the assessment of incentive effect) are applicable in the case.

The defendant, EAS, as grantor of the aid argued that the plaintiff's claims of the non-binding nature of the agreement were not proven nor supported by facts. Under the GBER, only the binding nature of the agreement must be established – i.e. the defendant

or the courts are not required to analyse whether the termination of the agreement would be economically more reasonable for the beneficiary compared to completing the project in the absence of aid (i.e. if the defendant would not have received aid). Regarding legitimate expectations, the defendant relied on CJEU case law and argued that legitimate expectations cannot exist in this case regardless of whether the defendant knew (or did not know) about the agreement.

The defendant thought that referring a request for a preliminary ruling to the CJEU is not necessary. It considered it to be more practical to ask for an opinion of the Commission according to paragraph 89 of the Commission notice on the enforcement of State aid rules by national courts.

Remedy(ies) sought

Other remedy sought

Annulment of the recovery order in relation to aid

Outcome of the case

Conclusions adopted by the national court

The Tallinn Circuit Court upheld the ruling of the Tallinn Administrative Court by which the recovery decision of the defendant, Enterprise Estonia as grantor of the aid, was deemed lawful.

The Court agreed with the defendant that aid was unlawful and rightfully recovered, because it did not meet the criterion of incentive effect under the GBER. The Court found that the agreement concluded by the plaintiff (beneficiary) to purchase the equipment subject to aid (the grant was provided to the beneficiary for the purchase of the same equipment) was a binding agreement and that claims of the contrary were not proven.
Hence, the Court considered that the conclusion of the agreement constituted a firm commitment to start the project (subject to aid), and the criterion of incentive effect as the precondition for application of the GBER was not complied with under Article 8(2) GBER and paragraph 38 of the Regional Aid Guidelines.

The (alleged) legitimate expectations of the beneficiary were deemed irrelevant as according to the CJEU case law this notion cannot prevent recovery – the legitimate expectations could be relied on only if the procedure set out in Article 108 TFEU is complied with and this was not the case (i.e. the aid was not notified to the Commission).

Regarding the need to refer a request for a preliminary ruling to the CJEU, the Court found that the criterion of incentive effect as set out in the GBER is clear – the Court must only assess whether the agreement for the purchase of equipment constitutes a firm and binding commitment. As regards the applicability of Regional Aid Guidelines, the Court explained the legal nature of the guidelines based on CJEU case law and concluded that the application of these guidelines is relevant in the case at hand.

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-142/87, Kingdom of Belgium v Commission of the European Communities (1990) ECLI:EU:C:1990:125
- C-275/10, Residex Capital IV CV v Gemeente Rotterdam (2011) ECLI:EU:C:2011:814
- C-529/09, European Commission v Kingdom of Spain (2013) ECLI:EU:C:2013:31
- C-5/89, Commission of the European Communities v Federal Republic of Germany (1990) ECLI:EU:C:1990:320
- C-81/10, France Télécom SA v European Commission (2011) E CL I:EU: C:2011:811
- T-267/08 and T-279/08, Région Nord-Pas-de-Calais (T-267/08) and Communauté d'agglomération du Douaisis (T-279/08) v European Commission (2011) E CL I:EU: T:2011:209

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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 (General Block Exemption Regulation)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary EE3

Date

04/01/2019

Case identifiers

Member State

Estonia

Court which adopted the ruling (national language)

Tartu Ringkonnakohus

Court which adopted the ruling (English)

Tartu Circuit Court

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

Estonian

Hyperlink to ruling

https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=207395759

Case reference

ECLI:EE:TRRK:2017:3.14.52367.7975

Procedural context of the case

The plaintiff (kaebaja), Lääne-Saare parish, a Municipality, requested annulment of the partial recovery of two grants (25% of both grants, i.e. EUR 77,574.28 in total) by the granting authority, the Estonian Agricultural Registers and Information Board (Põllumajanduse Registrite ja Infromatsiooni Amet or PRIA).

It was undisputed that the aid (granted from the European Fisheries Fund) was State aid. The aid was recovered due to its misuse – i.e. the beneficiary failed to follow the applicable public procurement rules.

By its 10 February 2015 ruling (not publicly available), the Tartu Administrative Court satisfied the complaint and found that the limitation period for recovery had passed.

Upon appeal, the Tartu Circuit Court referred the case back to the Tartu Administrative Court – it found that the national 90-days limitation period did not apply, because EU rules on recovery, which set out a longer four-year limitation period, applied instead – and four years had not passed.

After the case was referred back, by judgment of 8 April 2016 (ECLI:EE:TRHK:2016:3.14.52367.11344), the Tartu Administrative Court dismissed the complaint. The Court agreed with the granting authority that the beneficiary had breached applicable public procurement rules and partial recovery was justified based on that.

By the ruling of 4 April 2017 (ECLI:EE:TRRK:2017:3.14.52367.7975), which has been summarised here, the Tartu Circuit Court dismissed the appeal of the beneficiary and upheld the (2016) ruling of Tartu Administrative Court. The Tartu Circuit Court agreed with the granting authority that public procurement rules had been indeed violated and also dismissed the beneficiary's arguments on legitimate expectations preventing recovery of the grants.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

04/04/2017

Language

Estonian

Headnote

In this ruling, the Court held that in deciding over the recovery of aid granted from EU funds due to misuse of aid (a) national regulation on legitimate expectations of the beneficiary shall not be applied in line with CJEU case law on State aid although (b) legitimate expectations may be relevant in the context of recovery of 'national grants.'

Parties

Names of the parties to the action

Lääne-Saare vald

Versus

Põllumajanduse Registrite ja Informatsiooni Amet

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Operation of fishing port

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The aid measure consisted of a monetary payment (two grants for two stages of construction) for the reconstruction of a fishing port. The grants were partially recovered by the granting authority because the beneficiary was found to have violated public procurement rules when organising the tender for the reconstruction of the fishing port (PRIA found that the aid recipient had wrongfully divided the tender into separate parts and by doing so avoided the full-blown public tender procedure – i.e. two separate tenders were subject to a simplified tender procedure).

The plaintiff requested annulment of the partial recovery of two grants. However, the parties did not raise State aid arguments. The Tartu Circuit Court dismissed the plaintiff's arguments regarding legitimate expectations (under national administrative law) based on the application of State aid rules and the principle of effectiveness – i.e. the Court explained, by reference to CJEU case law, that (a) the national principle of legitimate expectations is not applicable as the grant (aid recovered) was State aid and (b) instead, the court must apply the principle of effectiveness and recover the aid.

Remedy(ies) sought

Other remedy sought

Annulment of the recovery order in relation to aid

Outcome of the case

Conclusions adopted by the national court

The State aid argument was addressed by the Court. The Court found that (a) the aid was granted from EU fund (Fisheries Fund) and therefore (b) it constituted State aid subject to recovery obligation under Union law, regardless of any legitimate expectations that the beneficiary may have under national administrative law. Instead of legitimate expectations, the Courts must apply the principle of effectiveness as confirmed in CJEU case law and recover the aid.

The Tartu Circuit Court dismissed the appeal of the beneficiary and upheld the (2016) ruling of the Tartu Administrative Court.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-24/95, Land Rheinland-Pfalz v Alcan Deutschland GmbH (1997) ECLI:EU:C:1997:163
- C-298/96, Oelmühle Hamburg and Schmidt Söhne v Bundesanstalt für Landwirtschaft und Ernährung (1998) ECLI:EU:C:1998:372
- C-378/98, Kingdom of Belgium v Commission of the European Communities (2001) ECLI:EU:C:2001:370

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

It is noteworthy that the Court considered that as the aid was granted from an EU fund, it is subject to the recovery obligation regardless of any legitimate expectations that the beneficiary may have under national administrative law. Thus, the Court considered that the origin of the grant – an EU–fund – was conclusive on the question of application of State aid rules, although acknowledging that in case of 'national grants', legitimate expectations may be relevant. Thus, the Court misunderstood that for the purpose of State aid recovery, there is no difference whether the aid is granted from the resources of the State or EU (both are State resources for the purpose of State aid rules). This misunderstanding did not affect the outcome of the case. However, it indicates that the Court had not fully understood the concept of State aid – in particular, the notion of State resources as element of State aid.

8.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Tallinna Ringkonnakohus	Tallinn Circuit Court	Second to last instance court (administrative)	ECLI:EE:TLRK:2013:2.12.10352.33366	12/12/2013	Private enforcement	None - Claim rejected	No remedies were granted as the Court found that no State aid was involved (the Court stated that there was no infringement of Union law, in general). The Supreme Court reached the same conclusion.		Ruling by Supreme Court: ECLI:EE:RK:2015:3.2.1.71.14.946.
Riigikohus (halduskolleegium)	Supreme Court (Administrative Law Chamber)	Last instance court (administrative)	ECLI:EE:RK:2014:3.3.1.81.13.131	20/02/2014	Private enforcement	None - Claim rejected	No remedies were granted as the Court found that no State aid was involved. Contrary to the claim of the granting authority, the Court found that a delay interest from the sum that was wrongfully recovered is not State aid - the purpose of the interest is to eliminate the unjust enrichment of the granting authority, not to grant aid. Hence, the claim of the granting authority that aid ceilings under Regulation EC 1698/2005 would not be complied with in case of recovery, was rejected by the Court.		
Tallinna Ringkonnakohus	Tallinn Circuit Court	Second to last instance court (administrative)	ECLI:EE:TLRK:2015:3.14.52874.14789	10/06/2015	Private enforcement	None - Claim rejected	No remedies were granted as the Court found that the plaintiffs' arguments about granting of State aid were not substantiated.		Ruling by Supreme Court: ECLI:EE:RK:2015:3.3.1.50.15.913.
Riigikohus (halduskolleegium)	Supreme Court (Administrative Law Chamber)	Last instance court (administrative)	ECLI:EE:RK:2015:3.3.1.50.15.913	02/12/2015	Private enforcement	None - Claim rejected	No remedies were granted based on the reasoning related to public procurement rules - unlawful aid (in the context of the case the plaintiff claimed that the beneficiary had received State aid that should have been notified to the Commission but was not notified) must bring about unreasonably low offer, which was not the case. The Court found no ground for rejection of the offer, even if the tenderer would have received unlawful State aid (the question of whether any aid was granted was not analysed by the Court).	The Court acknowledged the limited possibilities of contracting authorities to qualify benefits granted to the tenderers as State aid. It held that is the Commission's competence to establish the existence of aid and its lawfulness (the court does not clarify what 'lawfulness' means, but most likely it is compatibility) - thereby, the Court rejects the idea of Member States' obligations to enforce State aid rules (which presumes confirms the existence of aid). This conclusion should be read in the context of the facts of the case - the Court found no ground for rejection of the offer, hence, the assessment of the effect of potential State aid (or whether there was potentially any aid) was not necessary.	
Tallinna Ringkonnakohus	Tallinn Circuit Court	Second to last instance court (administrative)	ECLI:EE:TLRK:2015:3.15.1817.30306	16/12/2015	Private enforcement	None - Claim rejected	No remedies were granted as the Court found that no State aid was involved. This is a public procurement case where the State aid argument was raised based on the fact that only one offer was made and the Altmark criteria could not be applied in case of such tender. The Court did not agree with this approach as the tender procedure was carried out under the applicable legal norms and, hence, the challenged measure could not negatively affect trade between Member States (although the tender procedure precludes the economic advantage, this is irrelevant for the criterion of effect on trade).	This is a public procurement case.	
Riigikohus (halduskolleegium)	Supreme Court (Administrative Law Chamber)	Last instance court (administrative)	ECLI:EE:RK:2016:3.3.1.38.16.10958	13/09/2016	Private enforcement	None - Claim rejected	The Court stated that a contractual fee that is below cost does not constitute State aid (by also mentioning that no cross-subsidisation was established). Hence, no remedies were granted.		
Tallinna Ringkonnakohus	Tallinn Circuit Court	Second to last instance court (administrative)	ECLI:EE:TLRK:2018:3.17.1780.10580	28/06/2018	Private enforcement	None - Claim rejected	No remedies were granted as the Court rejected the plaintiffs' argument that as the private entity (privately owned hospital) received its resources (including premises of the pharmacy) originally from the State (upon its establishment), these resources are State resources. *Inter alia* the Court reasoned that there is no reason to believe that the benefit would substantially harm competition.	The case is noteworthy as the Court reasoned on the absence of State resources with the absence of harm to competition (which is irrelevant to establish involvement of State resources). However, State aid was not the main aspect of the proceedings.	
Tallinna Ringkonnakohus	Tallinn Circuit Court	Second to last instance court (administrative)	ECLI:EE:TLRK:2014:3.13.1497.19903	26/08/2014	Public enforcement	None - Claim rejected	The Court upheld the recovery order because the aid was unlawful (non-compliant with the GBER). The granting authority also claimed interest. The case confirms the recovery obligation of the granting authority if aid is granted contrary to the GBER. The main focus is on the interpretation of the incentive effect under the GBER. The Court found that there is no incentive effect in case a binding agreement for buying goods for which the aid is granted has been concluded before the submission of the application for aid.		
Riigikohus (halduskolleegium)	Supreme Court (Administrative Law Chamber)	Last instance court (administrative)	ECLI:EE:RK:2016:3.3.1.8.16.10899	09/06/2016	Public enforcement	Case sent back to the lower court for re-assessment	No remedies were granted by the Supreme Court, as the Supreme Court overruled the Circuit Court decision which upheld the recovery order. The Supreme Court found several issues with the assessment of the Circuit Court related to the recovery of State aid by the granting authority (on the authority's initiative) and the interpretation of the GBER (the incentive effect in particular). The main question was the existence of an incentive effect under the GBER. These aspects were to be re-considered by the Circuit Court.		This case was referred back to Tallinn Circuit Court which submitted a request for a preliminary ruling to the CJEU (C-349/17). The Commission submitted amicus curia observations after the case was referred back to the Circuit Court.

									The final ruling is yet to be decided (and then made available publicly) after the preliminary ruling is made by the CJEU concerning several issues with regard to the application of State aid rules by the national authorities and courts.
Tartu Ringkonnakohus	Tartu Circuit Court	Second to last instance court (administrative)	ECLI:EE:TRRK:2017:3.14.52367.7975	04/04/2017	Public enforcement	None - Claim rejected	The Court upheld the recovery order (with interest) as it found no material errors in the assessment of the granting authority in deciding the recovery. The recovery was partial (recovery of 25% due to infringement of public procurement rules). The Court endorsed the CJEU view that in State aid cases the principle of effectiveness of Union law prevails over the principle of legitimate expectations of the beneficiary, and found that any legitimate expectations that the beneficiary may have had under national law (though, it would be unlikely under national law as well) do not prevent recovery.	This case is noteworthy for the disapplication of national law (legitimate expectations). The Court endorsed the views of the CJEU on legitimate expectations in case of State aid recovery - i.e. legitimate expectations that the beneficiary may have are not relevant when deciding about the recovery of EU grant (State aid).	

9. Finland

9.1 Country report

Name national legal expert

Anna Kuusniemi-Laine

Date

04/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

The competent courts in cases concerning the public enforcement of State aid rules are the local administrative courts at the first instance and the Supreme Administrative Court at the second and last instance. There are no specialised courts dealing with these types of cases.

A description of the procedural framework applicable in public enforcement of State aid rules

Finland has enacted national legislation providing the procedural framework for the recovery of unlawful State aid, called *laki eräiden valtion tukea koskevien Euroopan unionin säännösten soveltamisesta* (28.3.2001/300) (hereinafter 'the 2001/300 Act').[94] Based on Section 1 of this Act, a decision issued by the Commission for the recovery of State aid shall be enforced in Finland without delay. The authority that granted the aid is also responsible for enforcing the recovery decision. The Ministry of Economic Affairs and Employment of Finland shall enforce the recovery decision in cases where it is not possible to identify the competent authority responsible for the recovery.

According to the 2001/300 Act, the recovery decision must identify the beneficiaries responsible for the repayment of the State aid, the amount of the aid to be recovered, the interest payable and other relevant issues specified in the Commission decision.

The 2001/300 Act also includes rules that enable the Ministry of Economic Affairs and Employment of Finland to obtain all necessary information to fulfil the notification obligations included in Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.[95]

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The competent courts in cases concerning the private enforcement of State aid rules are the local administrative courts at the first instance and the Supreme Administrative Court at the second and last instance. There are no specialised courts dealing with these types of State aid cases

A description of the procedural framework applicable in private enforcement of State aid rules

The administrative courts apply general procedural rules, in particular the Administrative Judicial Procedure Act (586/1996).

It should also be noted that the Local Government Act (410/2015) includes certain substantive rules that oblige the municipalities to take State aid rules into account in their decision-making procedures. These include rules on the sale and lease of real property, which refer to Articles 107 and 108 TFEU (Section 130 of the Local Government Act) as well as rules on the service obligation imposed on market operators (Section 131 of the Local Government Act). This means that when administrative courts deal with questions relating to compliance with State aid rules, the question is often one of compliance with the Local Government Act.

Main findings based on the case summaries

- A clear majority of the State aid cases in Finland are private enforcement cases. Typically, claims about a violation of State aid rules are presented in a situation in which the plaintiff's competitor has received a benefit from a municipality, but the municipality has failed to analyse compliance with State aid rules in its decision-making process. Such cases include, for example, Supreme Administrative Court, 6.11.2009 - KHO:2009:89 (FI2); Supreme Administrative Court, 30.4.2010 - KHO:2010:26; Supreme Administrative Court, 6.4.2011 - KHO:2011:33; Supreme Administrative Court, 6.4.2011 - KHO:2011:34; Supreme Administrative Court, 27.12.2013 – ECLI:FI:KHO:2013:T4078; Supreme Administrative Court, 23.1.2014 – ECLI:FI:KHO:2014:T148 and Supreme Administrative Court, 13.5.2015 – ECLI:FI:KHO:2015:72. If the municipality failed to analyse compliance with State aid rules, the Supreme Administrative Court deemed that the municipality's decision-making procedure violated the Local Government Act. This typically leads to the repeal of the municipality's decision granting the aid. Interim measures are also available.
- The cases concern various sectors ranging from the golf industry to the construction sector to the food processing and manufacturing sector.
- A clear majority of the cases concern municipalities that have granted potentially unlawful aid.

Qualitative assessment of the average time of court proceedings

[94] The Act was enacted to enable the application of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. Even though the Regulation was directly applicable in Finland, the national act, which is quite technical by its nature, clarifies *e.g.* administrative responsibilities regarding State aid recovery measures.

[95] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union , OJ L 248, 24.9.2015, p. 9, replaces as of 14.10.2015 Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

The Ministry of Justice publishes annual statistics concerning the average duration of court proceedings. The duration of court proceedings concerning State aid is not registered separately, but such cases are registered under general administration issues and constitutional law (*valtio-oikeus ja yleishallinto*).[96]

Administrative court	Average duration in months of court proceedings for all matters in 2017	Average duration in months of court proceedings concerning general administration issues and constitutional law
Helsingin hallinto-oikeus (Helsinki Administrative Court)	7.9	8.6
*Hämeenlinnan hallinto-oikeus (*Administrative Court of Hämeenlinna)	7.8	7.6
Itä-Suomen hallinto-oikeus (Administrative Court of Eastern Finland)	6.4	7.8
Pohjois-Suomen hallinto-oikeus (Administrative Court of Northern Finland)	9.6	9.6
Turun hallinto-oikeus (Administrative Court of Turku)	7.6	7.9
Vaasan hallinto-oikeus (Administrative Court of Vaasa)	11.4	13.3
Average	**8.45**	**9.1**

For the Supreme Administrative Court, the average duration of proceedings is given in the table below. The information is based on statistics published by the Supreme Administrative Court.[97]

	Average duration of court proceedings for all matters from 1 Jan to 30 Nov 2018	Average duration of court proceedings concerning general administration issues and constitutional law from 1 Jan to 30 Nov 2018
Supreme Administrative Court	7.1	9.45

The court proceedings in State aid cases generally seem to be somewhat longer than in all cases on average. In certain State aid cases, the proceedings before an administrative court or the Supreme Administrative Court have lasted approximately 18 months, which is well above the average.

Qualitative assessment of the remedies awarded by national courts

A typical remedy in a Finnish State aid case is the repealing of the decision by which the unlawful State aid was granted. For example, these decisions were repealed by the Supreme Administrative Court in rulings Supreme Administrative Court, 6.11.2009 - KHO:2009:89 (FI2) and Supreme Administrative Court, 27.6.2011 - KHO:2011:58 (FI3). Decisions were repealed when State aid rules were violated and when State aid rules were not considered to a sufficient extent in a municipality's decision-making process.

Finnish courts have also imposed interim measures to prevent the payment of potentially unlawful State aid. This was the case, for example, Supreme Administrative Court, 9.2.2012 - KHO:2012:9, in which the implementation of the measure was prohibited on the basis of the Finnish Local Government Act, until the lower administrative court gave its ruling in the main proceeding. The Supreme Administrative Court ruled that implementing a guarantee decision would make an appeal practically ineffective.

With regard to the national statute of limitation, the Supreme Administrative Court held in the ruling Supreme Administrative Court, 13.1.2015 - KHO:2015:7 (FI5) that the recovery of unlawful State aid could not be avoided because the claim had not been lodged during the corporate restructuring process. In other words, the implementation of State aid rules surpassed national legislation in this case. It seems that Finnish courts generally apply efficient remedies in State aid cases.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

Although there has been only one reference for a preliminary ruling in State aid cases from Finland (Supreme Administrative Court, 21.10.2013 - KHO:2013:167 (FI4), see C-6/12),[98] the Supreme Administrative Court applies State aid *acquis* properly. The Supreme Administrative Court typically refers to CJEU case law in its decisions on State aid cases

[96] http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160698/OMTH_11_2018_Tuomioistuinten_ty%C3%B6tilastoja_2017.pdf (last accessed on 4 January 2019).

[97] https://www.kho.fi/fi/index/julkaisut/tilastoja.html (last accessed on 4 January 2019).

[98] Case C-6/12, *P Oy* (2013) ECLI:EU:C:2013:525.

and has also analysed cases in the light of the Commission Notices, for example, Commission Notice 2008/C 155/02[99] and Commission Communication 97/C 209/03 [100] (see, *e.g*. Supreme Administrative Court, 9.2.102 - KHO:2012:9 and Supreme Administrative Court, 27.6.2011 - KHO:2011:58 (FI3) for guarantees and Supreme Administrative Court, 6.11.2009 - KHO:2009:89 (FI2) for the rules on sales of land and buildings). In cases in which a complaint is pending before the Commission, the Supreme Administrative Court has also presented questions to the Commission (*e.g.* Supreme Administrative Court, 16.2.2018 - KHO:2018:28 (FI1)).

The knowledge of the administrative courts of State aid issues has increased in recent years, possibly due to the relatively large number of State aid cases handled by the Supreme Administrative Court.

Qualitative assessment of any other relevant trends in State aid enforcement

The administrative courts have generally become more familiar with State aid rules over the period 2007–2017, and the quality of national rulings has improved. The Supreme Administrative Court has published many of its State aid cases as yearbook decisions, which are decisions of principal importance that may have relevance for other cases (*e.g*. Supreme Administrative Court of Finland, 16.2.2018 - KHO:2018:28 (FI1) and Supreme Administrative Court, 16.2.2018 - KHO:2018:29. Since 2007, the Supreme Administrative Court has published in total 17 yearbook decisions on State aid. Such cases are generally closely followed by judges and practising lawyers.

Several plaintiffs have won cases based on State aid arguments, and some of the cases have become public through press releases and media coverage. This may have encouraged other plaintiffs to put forward State aid arguments to support their cases.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

The notion of State aid is generally well-known and applied by national courts. In addition to direct subsidies, various forms of aid have been identified as potentially unlawful State aid, such as guarantees, tax benefits and sales of property below market price. In certain individual cases, there have been some challenges in applying specific State aid rules, such as the rather complex set of rules concerning services of general economic interest (SGEI). The notion of economic activity has also been a key question in several court proceedings, including for instance, the following cases: Supreme Administrative Court of Finland, 16.2.2018 - KHO:2018:28 (FI1), Supreme Administrative Court, 16.2.2018 - KHO:2018:29 and Supreme Administrative Court, 30.11.2012 - KHO:2012:105.

Any other relevant comments or findings

Not applicable

[99] 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. 10–22.*

[100] Commission Communication on State aid elements in sales of land and buildings by public authorities, *OJ C 209, 10.7.1997, p. 3–5*, replaced by Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946, OJ C 262, 19.7.2016, p. 1-50.

9.2 Case summaries

Case summary FI1

Date

04/01/2019

Case identifiers

Member State

Finland

Court which adopted the ruling (national language)

Korkein hallinto-oikeus

Court which adopted the ruling (English)

Supreme Administrative Court of Finland

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Finnish

Hyperlink to ruling ---

https://www.finlex.fi/fi/oikeus/kho/vuosikirjat/2018/201800672

Case reference

ECLI:FI:KHO:2018:28

Procedural context of the case

The ruling of the Supreme Administrative Court was preceded by the ruling of 31 October 2016 of the Administrative Court of Northern Finland (ruling 16/0338/1).

In its ruling, the Court of First Instance dismissed an appeal by which the plaintiffs 9Lives Oy, Med Group Ensihoitopalvelu Oy and Siikalatvan Sairaankuljetus Oy claimed that the aid in question should be considered as State aid in the meaning of Article 107(1) TFEU. The Court considered that, even though the aid in question was selective, emergency medical services are services of general economic interest (SGEI), and compensating them may constitute State aid in the case that overcompensation is paid to the service providers. However, the Court of First Instance concluded that the compensation paid to the service providers complied with paragraphs 1a and 1b of Article 2 of Commission Decision 2012/21/EU and the criteria set forth in Case C-280/00 (Altmark Trans), and the defendant was hence exempt from making a notification to the Commission.

The plaintiffs thereupon lodged an appeal with the Supreme Administrative Court of Finland. The Court asked the Commission for information relating to a complaint that was pending before the Commission. By its ruling on 16 August 2018, the Court rejected the appeal. However, the Court agreed with the plaintiffs on the fact that following from the circumstances specified above, the services under review were not SGEI services the nature of which should be analysed in light of Commission Decision 2012/21/EU and the so-called Altmark criteria. Instead, the Court argued that, due to special legislative obligations imposed on rescue departments regarding the provision of emergency medical services, their legal and factual situation was not comparable with other service providers offering similar services on the market. Consequently, the Court concluded that the aid at issue was not selective and did not find the compensation to constitute State aid. The Court did not find that the rescue departments would conduct economic activity on the market.

Type of action

Private enforcement

Delivery date of the ruling

16/02/2018

Language

Finnish

Headnote

In this ruling, the Court clarified the notion of economic activity and operating in the healthcare sector.

Parties

Names of the parties to the action

9Lives Oy; Med Group Ensihoitopalvelu Oy; Siikalatvan Sairaankuljetus Oy

Versus

Pohjois-Pohjanmaan sairaanhoitopiirin kuntayhtymä

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

Q - Human health and social work activities

Emergency medical services

The type of State aid measure challenged in the court proceedings

Other

Compensation payable to the service providers

Substance of the case

Facts and parties' main arguments in the case

By its decision of 17 June 2014, the council of the hospital district of the Northern Ostrobothnia region (Pohjois-Pohjanmaan sairaanhoitopiirin kuntayhtymän valtuusto) assigned two rescue departments, namely the rescue department of Oulu-Koillismaa and the rescue department of Jokilaakso, to arrange and provide emergency medical services within the hospital district area (divided into northern and southern areas) as of 1 January 2015. Following this, the hospital district of Northern Ostrobothnia had entered into mutually similar cooperation agreements with the rescue departments. These agreements also defined the compensation payable to the rescue departments for the services, which had been set on the basis of the net cost principle.

The hospital district had previously been divided into six areas, and the services had been provided by in total five service providers, including the parties to the new agreement. The other service providers, 9Lives Oy, Med Group Ensihoitopalvelu Oy and Siikalatvan Sairaankuljetus Oy, claimed that the level of compensation paid for the emergency medical services to the rescue departments had not been determined properly and that it constituted State aid, which should have been notified to the Commission. As a notification had not been submitted, they initiated court proceedings.

The Court of First Instance considered that, even though the aid in question was selective, emergency medical services are services of general economic interest (SGEI), and compensation paid to them may constitute State aid in case overcompensation is paid to the service providers. However, the Court of First Instance concluded that the compensation paid to the service providers complied with paragraphs 1a and 1b of Article 2 of Commission Decision 2012/21/EU and Case C-280/00 (Altmark Trans), and the defendant was hence exempt from making a notification to the Commission. Thus, the court rejected the appeal.

The plaintiffs then lodged an appeal with the Supreme Administrative Court. They claimed that the lower administrative court had erroneously classified the services at issue as SGEI. According to the plaintiffs, the compensation payable to the service providers constituted State aid in the meaning of Article 107(1) TFEU. They stated that the nature of SGEI requires that there are no sufficient incentives to provide services to the market, and this requirement was not fulfilled in the case. In addition, the level of compensation had not been properly determined as required in the Altmark criteria. Furthermore, the plaintiffs argued that the decision of the Council of the hospital district of Northern Ostrobothnia also did not provide grounds on which the services could be classified as SGEI. The plaintiffs additionally claimed that the value of the cooperation agreement exceeded the ceiling of EUR 15 million set for SGEI in the Commission decision. Finally, the plaintiffs noted that a rescue department could not be compared to a hospital when assessing whether paragraph 1b of Article 2 of the Commission decision was applicable to the case.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid; Other remedy sought (below)

The plaintiffs requested the Supreme Administrative Court to prohibit the implementation of the cooperation agreement for the option period of 2018 until the case was resolved by the Court. In addition, the plaintiffs requested the Court to either (i) repeal the rulings of the lower court and the council of the hospital district of Northern Ostrobothnia; or alternatively (ii) refer the case back to the lower court for reassessment.

Outcome of the case

Conclusions adopted by the national court

The Supreme Administrative Court of Finland rejected the appeal. However, in contrast to the view of the lower court, the Court agreed with the plaintiffs on the fact that, following from the circumstances specified by them, the emergency medical services under review were not SGEI the compensation from which should be analysed in light of Commission Decision 2012/21/EU and the Altmark criteria. The defendant had not even claimed this to be the case.

The Court argued that, due to special legislative obligations imposed on the rescue departments regarding the provision of emergency medical services, their legal and factual situations were not comparable with other service providers offering similar services on the market. The Court considered that the recipients of the aid examined did not operate on the market. For example, rescue departments cannot provide emergency medical services freely to the market, unlike other market operators. Consequently, the Court concluded that the aid at hand was not selective and did not find the compensation to constitute State aid.

Remedy(ies) granted – including assessment public enforcement issues

–None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht. (2003) ECLI:EU:C:2003:415
- C-399/08 P, European Commission v Deutsche Post AG (2010) ECLI:EU:C:2010:481
- C-6/12, P Oy (2013) E CL I:EU: C:2013:525
- C-672/13, OTP Bank Nyrt. v Magyar Állam and Magyar Államkincstár (2015) E CL I:EU: C:2015:185
- C-524/14 P, European Commission v Hansestadt Lübeck (2016) ECLI:EU:C:2016:971
- C-70/16 P, Comunidad Autónoma de Galicia and Retegal v European Commission (2017) ECLI:EU:C:2017:1002

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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

Cooperation with the EU institutions

The national court sent a request for information to the Commission (no hyperlink available)

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary FI2

Date

04/01/2019

Case identifiers

Member State

Finland

Court which adopted the ruling (national language)

Korkein hallinto-oikeus

Court which adopted the ruling (English)

Supreme Administrative Court of Finland

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Finnish

Hyperlink to ruling ---

https://www.finlex.fi/fi/oikeus/kho/vuosikirjat/2009/200902754

Case reference

KHO:2009:89

Procedural context of the case

The ruling in question follows a ruling issued by the Administrative Court of Hämeenlinna on 12 September 2008 (registration number not available).

The board of a Municipality had decided to sell a land area of 69 hectares consisting of two separate parcels to a golf company at the price of EUR 330,000. B and C had requested that the decision should be rectified. The board had dismissed the requests. Following that, B lodged an appeal with the Administrative Court of Hämeenlinna demanding that the board's decision should be repealed.

The plaintiffs claimed that the selling price of the land area did not conform to normal market conditions. In addition, the Municipal board had neither arranged a competitive bidding process nor asked for a third-party opinion as required in Articles 87 and 88 of the EC Treaty (current Articles 107 and 108 TFEU). The lower court dismissed the appeal, after which B decided to refer the case to the Supreme Administrative Court.

The Supreme Administrative Court concluded that the decisions were contrary to the Finnish Local Government Act, as the authority had failed to assess the applicability of State aid rules during the decision-making process and had therefore deviated from the required procedure. The Court repealed the decisions of the Municipal board and the lower court.

Type of action

Private enforcement

Delivery date of the ruling

06/11/2009

Language

Finnish

Headnote

In this ruling, the Court considered that a decision of the Municipal authority breached the Finnish Local Government Act because the authority had failed to take into account State aid rules and had therefore deviated from the required procedure.

Parties

Names of the parties to the action

B (anonymised)

Versus

L (anonymised)

The relationship of the plaintiff to the measure

Third party

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

L - Real estate activities

Real estate activities

The type of State aid measure challenged in the court proceedings

Concession/privatisation of State-owned land/property at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The board of a Municipality of L (the defendant) had decided to sell a land area of 69 hectares consisting of two separate pieces of real estate to a golf company at the price of EUR 330,000.

The plaintiffs claimed that the selling price of the land area was not market-based and deviated significantly from prices in similar cases within the Municipality area. They argued that the low price was a hidden subsidy for the buying company. In addition, the plaintiffs referred to the fact that the Municipal board had neither arranged a competitive bidding nor asked for a third-party opinion as required in Articles 87 and 88 of the EC Treaty (current Articles 107 and 108 TFEU).

The lower court dismissed the appeal. The Court concluded, however, that the land area was under-priced, but the price was still reasonable as the buying company had rented the land area for at least 20 years and invested in buildings and machinery without any contribution from the Municipality. The selling price was reasonable compared to the rent the buying company had paid to the Municipality. In addition, the land area in question was the only golf course within the Municipality area. On the other hand, the Court noted that the plaintiffs had not even claimed the alleged subsidy would have had an impact on the trade of the Union.

Remedy(ies) sought

Other remedy sought

For the Supreme Administrative Court to repeal the decisions by the Municipal board and the lower administrative court.

Outcome of the case

Conclusions adopted by the national court

The Supreme Administrative Court concluded that the decisions by the Municipal board and the lower court were contrary to the Finnish Local Government Act (365/1995, revoked) as the authority had failed to assess the applicability of State aid rules during the decision-making process and had therefore deviated from the required procedure.

The Court referred to a prior estimation by a Municipality officer according to which the reasonable selling price would have been approximately EUR 880,000. In contrast to the lower court's view, the Court was of the opinion that the selling price may have potentially constituted State aid. No notification had been delivered to the Commission. In addition, the defendant had not assessed whether the transaction in question would fall within the scope of Commission Regulation (EC) No 1998/2005 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid and Commission Communication on State aid elements in sales of land and buildings by public authorities (97/C 209/03).

Consequently, the Court repealed the decisions of the Municipal board and the lower court.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order in relation to unlawful aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- 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 (*de minimis* Regulation)
- Commission Communication on State aid elements in sales of land and buildings by public authorities, 97/C 209/03, OJ C 209, 10.7.1997 (currently replaced by 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 C/2016/2946, OJ C 262, 19.7.2016)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary FI3

27/06/2011

Date

Language

04/01/2019

Finnish

Case identifiers

Headnote

Member State

In this ruling, the Court considered that a request for an interim measure to suspend the implementation of potentially unlawful aid could not be dismissed merely on the basis that no grounds for preventing the implementation of the aid had been discovered during the main proceedings.

Finland

Court which adopted the ruling (national language)

Parties

Korkein hallinto-oikeus

Names of the parties to the action

Court which adopted the ruling (English)

New Stroms Oy

Supreme Administrative Court of Finland

Versus

Instance court which adopted the ruling

Juankosken kaupunki

Last instance court (administrative)

The relationship of the plaintiff to the measure

Official language of the court

Competitor

Finnish

The relationship of the defendant to the measure

Hyperlink to ruling ---

Public authority

https://www.finlex.fi/fi/oikeus/kho/vuosikirjat/2011/201101765

Sector relating to the State aid argument

Case reference

C - Manufacturing

KHO:2011:58

Manufacture of paper and paperboard

Procedural context of the case

The type of State aid measure challenged in the court proceedings

The ruling of the Supreme Administrative Court of Finland was preceded by ruling of 11/0212/3 of 30 May 2011 of the Administrative Court of Kuopio (nowadays the Administrative Court of Eastern Finland), (register number 00933/11/2299).

In its ruling, the Administrative Court of Kuopio rejected a request by the plaintiff, New Stroms Oy, which sought an interim measure to suspend the implementation of a potentially unlawful guarantee given by the defendant (the City of Juankoski) for the benefit of a competing undertaking Premium Board Finland Oy. The plaintiff argued that because the appeal concerning the granting of potentially unlawful aid (being a separate appeal) was still pending before the lower court, preventing the implementation of the guarantee was necessary to ensure that the appeal did not become worthless for the plaintiff. The lower court referred to the Finnish Local Government Act (365/1995, revoked and replaced by Local Government Act 410/2015) and argued that no grounds for preventing implementation had been discovered at that stage of proceedings.

The plaintiff thereupon lodged an appeal with the Supreme Administrative Court of Finland. The Court considered that a request for an interim measure to suspend the implementation of potentially unlawful aid could not be dismissed merely on the basis that no grounds for preventing the implementation of the aid had been discovered during the main proceedings. This would breach Article 108(3) TFEU and the relevant CJEU case law, which set out additional requirements for preventing implementation.

However, the lower court had not assessed the need for preventing implementation in light of State aid rules in its ruling, and the Supreme Administrative Court could not review them as first instance. The Court repealed the ruling of the lower court and referred the case back for reassessment.

The ruling in question is followed by a judgment of the Supreme Administrative Court (KHO:2012:9).

Guarantee at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

In the case at hand, the City of Juankoski had given a guarantee of EUR 5 million to an undertaking called Premium Board Finland Oy as security for a bank loan of up to EUR 6.26 million. In addition to certain loan covenants, the City of Juankoski demanded a premium of 3.8 percent on the outstanding loan secured by the guarantee.

New Stroms Oy (the plaintiff) argued that the guarantee constituted unlawful State aid and lodged a separate appeal concerning its nature with the lower court. In addition, it claimed that preventing the implementation of the potentially unlawful aid would be necessary to ensure that the appeal concerning the nature of the guarantee would not become worthless.

The City of Juankoski (the defendant) argued that it had deemed the guarantee and its conditions to fulfil the criteria set forth in Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/02). On that basis, it had not notified the guarantee to the Commission.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid

Type of action

Outcome of the case

Private enforcement

Conclusions adopted by the national court

Delivery date of the ruling

The Supreme Administrative Court considered that, in contrast to the ruling of the lower court, a request for an interim measure to suspend the implementation of a potentially unlawful aid could not be dismissed merely based on the fact that no grounds for

preventing the implementation of the aid had been discovered during the main proceedings. The Court considered this to breach Article 108(3) TFEU and the relevant CJEU case law, which set out additional requirements for preventing implementation.

The lower court had not assessed the requirements for preventing the implementation in light of State aid rules in its ruling, and the Supreme Administrative Court could not review them as first instance. The Court repealed the ruling of the lower court and sent the case back for reassessment.

In addition to the suspension of the implementation of the potentially unlawful guarantee, the plaintiff claimed that the guarantee breached State aid rules. The plaintiff had lodged a separate appeal concerning this issue with the lower court.

The Court did not decide on the nature of the guarantee from a State aid perspective because of the separate appeal pending before the lower court.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

By its ruling 11/0250/3 on 30 June 2011 (register number 00933/11/2299), the Administrative Court of Kuopio reassessed the case and dismissed the request for an interim measure as it did not find the guarantee likely to constitute unlawful State aid.

This ruling was also appealed before the Supreme Administrative Court (ruling KHO:2012:9). By its ruling of 9 February 2012, the Supreme Administrative Court repealed the ruling and prevented the implementation of the guarantee until the appeal concerning its nature from the perspective of State aid was resolved. The Court concluded that ordering an interim measure was necessary to ensure that the other appeal would not become worthless.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic (1991) ECLI:EU: C:1991:440
- C-39/94 Syndicat français de l'Express international (SFEI) and others v La Poste and others (1996) ECLI:EU:C:1996:285
- C-261/01 and C-262/01, Belgische Staat v Eugène van Calster and Felix Cleeren (C-261/01) and Openbaar Slachthuis NV (C-262/01) (2003) ECLI:EU:C:2003:571
- C-368/04, Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644
- C-199/06 Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008) E CL I:EU: C:2008:79
- C-384/07 Wienstrom GmbH v Bundesminister für Wirtschaft und Arbeit (2008) ECLI:EU:C:2008:747C-1/09

√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on 'equivalence'
√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Notice 2008/C 155/02 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

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

Although the Commission expressed it would investigate the complaint regarding the relevant State aid measure of the case, no further information is provided on this.

Case summary FI4

Date

04/01/2019

Case identifiers

Member State

Finland

Court which adopted the ruling (national language)

Korkein hallinto-oikeus

Court which adopted the ruling (English)

Supreme Administrative Court of Finland

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Finnish

Hyperlink to ruling

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https://www.finlex.fi/fi/oikeus/kho/vuosikirjat/2013/201303314

Case reference

KHO:2013:167

Procedural context of the case

The ruling at issue is the national follow-up case of Ruling P Oy C-6/12 of the CJEU. The ruling of the Supreme Administrative Court was preceded by a ruling of the Administrative Court of Helsinki issued on 2 December 2009 (registration number 09/1608/3).

Company P Oy had made an application for a deduction on confirmed losses incurred from economic activity for the financial years 1998-2004. As there had been a change of ownership in the company in 2004, the deductibility of losses required the authorisation of the Finnish Tax Administration pursuant to section 122 of the Finnish Income Tax Act (122/1995).

Following the rejection of the tax authorities, the company lodged an appeal with the Administrative Court of Helsinki, which rejected the appeal on the same grounds as the tax authorities. Both the Tax Administration and the lower court were of the opinion that the company had not presented special reasons on the basis of which the deduction of losses would have been necessary for the continuation of the business, despite the changes in ownership.

The company appealed this ruling to the Supreme Administrative Court. The Court was uncertain whether the provisions of Union law on State aid, in particular the criterion of selectivity interpreted in the light of the degree of latitude enjoyed by the tax authorities in the present case, preclude a decision authorising the deduction of losses of a company, despite changes of ownership, so long as that measure has not been duly notified to the Commission in accordance with Article 108(3) TFEU.

The Court referred a request for a preliminary ruling to the CJEU (C-6/12 P Oy, ECLI:EU:C:2013:525), asking the following questions:

"1) In the context of an authorisation procedure, such as that in the third subparagraph of paragraph 122 of the Finnish Income Tax Act, must the criterion of selectivity in Article 107(1) TFEU be interpreted as precluding the authorisation of the deduction of losses in the case of changes of ownership if the procedure referred to in the last sentence of Article 108(3) TFEU is not observed?

(2) In the interpretation of the criterion of selectivity, in particular in order to determine the reference group, is it necessary to take into account the general rule on the deductibility of established losses in paragraphs 117 and 119 of the Finnish Income Tax Act or the provisions concerning changes of ownership?

(3) If the criterion of selectivity in Article 107 TFEU is a priori regarded as being fulfilled, may the system resulting from the third subparagraph of paragraph 122 of the Finnish Income Tax Act be regarded as justified by the fact that it is a mechanism inherent in the tax system itself which is necessary for example in order to prevent tax evasion?

(4) When assessing possible justification and whether the system is a mechanism inherent in the tax system, what importance must be given to the extent of the discretion of the tax authorities? Is it necessary, as regards the mechanism inherent in the tax system itself, that the body applying the law has no discretion and that the conditions for the application of the derogation are set out precisely in the legislation?"

Following the judgment of the CJEU, the Supreme Administrative Court of Finland decided to repeal the decisions of the tax authorities and the lower court and referred the case back to the tax authorities for reassessment.

Type of action

Private enforcement

Delivery date of the ruling

21/10/2013

Language

Finnish

Headnote

In this ruling, the Court held that State aid rules did not prevent the use of an authorisation procedure when assessing the deductibility of losses in taxation after a change of ownership in the company.

Parties

Names of the parties to the action

P Oy (anonymised)

Versus

verohallinto

The relationship of the plaintiff to the measure

Other

A party subject to a decision by the tax authorities

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

Information and communication services

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

Company P Oy (the plaintiff) had made an application for a deduction of confirmed losses incurred from economic activity for the financial years 1998-2004. As there had been a change of ownership in the company in 2004, the deductibility of losses required the authorisation of the Finnish Tax Administration (the defendant) pursuant to Section 122 of the Finnish Income Tax Act (122/1995).

The first subsection of this provision, which is entitled 'The effect of a change in ownership on the deductibility of losses', provided that losses sustained by a company are not deductible if, during the year in which they arise or thereafter, more than half of the company's shares have changed ownership otherwise than by way of inheritance or will, or more than half of its members are replaced. The third subsection of Section 122 provided that, despite the provisions of the first subsection, the competent tax office may, for special reasons, where it is necessary for the continuation of the activities of the company, authorise the deduction of losses when such an application is made.

The application was rejected by the competent tax authorities on 24 October 2008 on the grounds that P had not demonstrated any special reasons on the basis of which granting an authorisation would have been justified, despite the changes of ownership. By a decision given on 2 December 2009, the Administrative Court of Helsinki dismissed P's appeal on the same grounds as those referred to by the competent tax authorities.

In its appeal to the Supreme Administrative Court, the plaintiff, P Oy, claimed that there were special reasons on the basis of which an authorisation for the deduction of the losses should be granted despite the changes in the company's ownership. According to the company, the changes in its ownership were necessary for expanding the business and creating jobs as noted in a guidance letter issued by the Tax Directorate of Finland on 14 February 1996 (No 634/348/96), which was created to clarify Section 122(3) of the Finnish Income Tax Act. In addition, the plaintiff claimed that the tax authorities acted in a discriminatory manner, as they had previously granted an authorisation in a rather similar case. The rejoinder submitted by the Tax Recipients' Legal Services Unit is not available.

The State aid aspect of the case arises from the request for a preliminary ruling referred to the CJEU by the Supreme Administrative Court. The Court was uncertain whether the provisions of Union law on State aid, in particular the criterion of selectivity interpreted in the light of the degree of latitude enjoyed by the tax authorities in the present case, preclude a decision authorising the deduction of losses of a company, despite changes of ownership, so long as that measure has not been duly notified to the Commission in accordance with Article 108(3) TFEU.

Remedy(ies) sought

Other remedy sought

The plaintiff requested the Supreme Administrative Court of Finland to repeal the rulings by the lower court and the tax authorities and grant an authorisation for the deduction of losses.

Outcome of the case

Conclusions adopted by the national court

The judgment by the Supreme Administrative Court follows the preliminary ruling of the CJEU in finding that Article 108(3) TFEU does not preclude a tax regime such as that provided for in the first and third subsections of Section 122 of the Finnish Income Tax Act, if that regime should be classified as 'State aid', from continuing to be applied in the Member State which established it, because it grants 'existing' aid, without prejudice to the competence of the Commission under Article 108(3) TFEU.

However, the CJEU did not take a definitive stance to questions 2-4 as to whether the system at hand would constitute State aid because it did not have sufficient information to rule definitively on classification. Nevertheless, the CJEU stated that a tax regime may satisfy the condition of selectivity as an element of the concept of 'State aid' within the meaning of Article 107(1) TFEU if it were to be established that the reference system, namely the 'normal' system, consists in a prohibition on the deduction of losses in the case of a change of ownership for the purposes of the first subsection of Section 122 of the Finnish Income Tax Act, in relation to which the authorisation procedure provided for in the third subsection of Section 122 would constitute an exception. However, the CJEU concluded that such a regime may be considered compatible with the internal market by the nature or general scheme of the system of which it forms part, but justification is not possible if the competent national authorities, so far as concerns authorisation to derogate from the prohibition on the deduction of losses, have a discretion which empowers them to base authorisation decisions on criteria unrelated to that tax regime.

In light of above, the Supreme Administrative Court concluded that the authorisation procedure in question did not constitute notifiable aid within the meaning of Article 108 TFEU and that applying it to the case did not breach State aid rules. Consequently, the Court did not assess whether the authorisation procedure itself constituted State aid within the meaning of Article 107 TFEU. In addition, the Court concluded that there were special reasons on the basis of which the authorisation to deduct losses should be granted to the company. The Court referred the case back to the tax authorities for reassessment.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The case was referred to the tax authorities for reassessment

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- Case C-6/12, P Oy (2013) ECLI:EU:C:2013:525

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

C-6/12, P Oy (2013) ECLI:EU:C:2013:525 (http://curia.europa.eu/juris/liste.jsf?num=C-6/12&language=NL)

Any other comments (optional)

No other comments

Case summary FI5

Date

04/01/2019

Case identifiers

Member State

Finland

Court which adopted the ruling (national language)

Korkein hallinto-oikeus

Court which adopted the ruling (English)

Supreme Administrative Court of Finland

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Finnish

Hyperlink to ruling

https://www.finlex.fi/fi/oikeus/kho/vuosikirjat/2015/201500050

Case reference

KHO:2015:7

Procedural context of the case

The ruling at issue follows two rulings issued by the Administrative Court of Kuopio (nowadays the Administrative Court of Eastern Finland) on 25 June 2013 (register numbers 13/0256/3 and 13/0257/3).

In a decision issued on 12 June 2012 (C 12/2009, OJ L 12/1), the Commission found that certain measures by the City of Mikkeli for the benefit of the plaintiff, Osuuskunta Karjaportti (previously Järvi-Suomen Portti Osuuskunta), constituted unlawful State aid. The lower court concluded that, as the plaintiff had not appealed the substance of the Commission decision to the GC within the time limit of two months, the national administrative court could only assess the legality of the recovery decisions of the City of Mikkeli concerning the State aid.

In its appeal, the plaintiff argued that it was undergoing restructuring and the recovery of the aid was therefore not possible, as it would conflict with the restructuring programme confirmed by the District Court of Mikkeli. According to the plaintiff, the claims being recovered had ceased on the date of confirmation, and the recovery would breach the Finnish Restructuring of Enterprises Act (47/1993). In addition, the plaintiff disputed the amount of the aid to be recovered on the basis of the Commission decision.

The lower court concluded that the recovery of the unlawful aid could not be avoided on these bases without breaching State aid rules and consequently dismissed the appeal. Following this, the plaintiff lodged an appeal with the Supreme Administrative Court of Finland in which it requested that the Court suspended the implementation of the recovery to ensure the plaintiff's rights. The Supreme Administrative Court dismissed the appeal in its entirety.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

13/01/2015

Language

Finnish

Headnote

In this ruling, the Court confirmed that the relevant national authority is obliged to decide on the recovery of unlawful aid in line with the Commission decision and that this obligation is not affected by restructuring proceedings concerning the aid beneficiary.

Parties

Names of the parties to the action

Osuuskunta Karjaportti

Versus

Mikkeli

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

C - Manufacturing

Manufacturing of food

The type of State aid measure challenged in the court proceedings

Loan at more favourable terms than market conditions; Other (Loans and guarantees); Other (Rescheduling of debts)

Substance of the case

Facts and parties' main arguments in the case

State aid measures in this case refer to a set of loans and guarantees and a rescheduling of debts granted by the City of Mikkeli (the defendant) to the plaintiff. As detailed in the Commission decision, the guarantees granted by the City of Mikkeli to the plaintiff in March 2004 and May 2004, the conversion of unpaid interest into a debt and the measures related to a rescheduling of debts as of 2009, constituted State aid that was incompatible with the internal market.

In its appeals to the lower court and the Supreme Administrative Court, the plaintiff argued that it was undergoing restructuring and the recovery of the aid was therefore not possible, as it would conflict with the restructuring programme confirmed by the District Court of Mikkeli. According to the plaintiff, the claims being recovered had ceased on the date of the confirmation, and the recovery would breach the Finnish Restructuring of Enterprises Act (47/1993). In addition, the plaintiff disputed the amount of the aid to be recovered on the basis of the Commission decision.

The City of Mikkeli stated in its rejoinder that the claims being recovered could not have been lodged and taken into account in the restructuring programme, as the City of Mikkeli was not aware of the grounds of these claims until the Commission gave its decision, which occurred after the confirmation of the restructuring programme. However, the City of Mikkeli noted that it was unclear how the claims should be assessed in relation to the legislation governing the restructuring of enterprises. In addition, it argued that the aid subject to recovery had been calculated in accordance with the Commission decision. The Commission had also provided further assistance in calculating the aid to be recovered.

Remedy(ies) sought

Other remedy sought

The plaintiff requested the Court to repeal the ruling of the lower court and to prohibit the implementation of the recovery.

No other comments

Outcome of the case

Conclusions adopted by the national court

The plaintiff did not appeal the substance of the Commission Decision (2013/8/EU) of 12 June 2012 to the CJEU. The Supreme Administrative Court could not assess the nature of the measures, but it took a stance on whether the recovery of the unlawful State aid was legal.

The Court did not amend the arguments of the lower court when dismissing the appeal in its entirety. The Court agreed with the lower court on the fact that preventing the recovery on the basis of the national Restructuring of Enterprises Act would breach State aid rules and prevent efficient implementation. Consequently, it concluded that the plaintiff's restructuring proceedings did not prevent the recovery of unlawful State aid, nor did they preclude the authority's obligation to implement such a decision. In addition, the Court agreed with the lower court that the amount of the aid being recovered was correct and in line with the Commission decision and that, in accordance with established CJEU case law, the Commission was not obliged to determine the exact amount of the aid to be recovered but only to provide the Member State with guidelines for the calculation.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- 249/85, Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v. Bundesanstalt für landwirtschaftliche Marktordnung (1987) ECLI:EU:C:1987:245
- C-67/85, C-68/85 and C-70/85, Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities (1988) ECLI:EU:C:1988:38
- C-42/93, Kingdom of Spain v Commission of the European Communities (1994) ECLI:EU:C:1994:326
- C-480/98, Kingdom of Spain v Commission of the European Communities (2000) ECLI:EU:C:2000:559
- C-210/09 Scott SA ja Kimberly Clark SAS v. Ville d'Orleans (2010) ECLI:EU:C:2010:294
- C-81/10 P France Télécom SA v European Commission (2011) ECLI:EU:C:2011:811
- C-331/09 European Commission v Republic of Poland (2011) ECLI:EU:C:2011:250
- C-403/10 P Mediaset v European Commission (2011) ECLI:EU:C:2011:533
- C-272/12 P European Commission v Ireland and Others (2013) ECLI:EU:C:2013:812
- C-69/13 Mediaset SpA v. Ministero dello Sviluppo económico (2014) ECLI:EU:C:2014:71

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999 (no longer in force, revoked and replaced by Council Regulation (EU) 2015/1589)
- Notice from the Commission: Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid 2007/C 272/05, OJ C 272, 15.11.2007
- Commission Decision 2013/8/EU of 12 June 2012 on the measures SA. 27420 (C 12/2009) (ex N 19/2009) implemented by Finland for Osuuskunta Karjaportti, OJ L 12, 16.1.2013

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

9.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2009:89	06/11/2009	Private enforcement	Recovery order in relation to unlawful aid	This is a ruling repealing an unlawful decision of an authority. The case concerned the sale of land to a golf course. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure, the authority is required to adequately assess whether State aid rules are applicable.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2010:26	30/04/2010	Private enforcement	Recovery order in relation to unlawful aid	This ruling repealed an unlawful decision of an authority. The case concerned the possibility of certain companies purchasing electricity at prices below the market price. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure, the authority is required to adequately assess whether State aid rules are applicable.	
Oulun hallinto-oikeus	Oulu Administrative Court	Second to last instance court (administrative)	HAO:10/0555/2	26/11/2010	Private enforcement	None - Claim rejected	The Court held that the sublease commitment in question made by the city towards a construction company was not a measure that would have involved unlawful State aid. The construction company was intending to build a day-care centre and lease the premises to a private day-care centre. By a sublease commitment, the city undertook to lease the premises under the same conditions in case the private day-care centre would have to end its operations for financial and production-related grounds, and a new operator could not be found. The Court held that the measure did not amount to unlawful State aid since the measure was considered necessary in light of the shortage of day-care centres and the fact that the city has a legal obligation to provide day-care services.		
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2011:33	06/04/2011	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The case concerned granting of a guarantee. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure, the authority is required to adequately assess whether State aid rules are applicable.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2011:34	06/04/2011	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The case concerned purchase of shares in a company. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure, the authority is required to adequately assess whether State aid rules are applicable.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2011:58	27/06/2011	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The case concerned the plaintiff's requests for interim measures that the previous instance court had dismissed. The Court held that the request for interim measures was essentially linked to the main proceedings that were still pending before the administrative court. The previous instance court had not analysed State aid rules in the decision under review, and the Court could not analyse it as a first instance court. The Court held that the reasoning of the lower court for the dismissal of the request for interim measures was insufficient. The Court repealed the decision of the previous instance court and sent the case back to the lower court for reassessment.	The case confirms that a request for an interim measure to suspend the implementation of potentially unlawful aid may not be dismissed merely based on the fact that during the main proceedings no grounds for preventing the implementation of the aid had yet been discovered. The case was decided by a vote 3-2.	The case was returned to the lower administrative court. The Administrative Court reassessed the case and dismissed the request for an interim measure (decision of Kuopio administrative court, 11/0250/3, register number 00933/11/2299, 30.6.2011). That decision was also appealed before the Supreme Administrative Court (KHO:2012:9).
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2012:9	09/02/2012	Private enforcement	Interim measures to suspend the implementation of an potentially unlawful aid	The implementation of the measure was prohibited on the basis of the Finnish Local Government Act until the lower administrative court had given its ruling in the main proceedings, unless it was otherwise ordered before then.		For the main proceedings, please see case KHO:2015:76.
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2012:31	15/05/2012	Private enforcement	None - Claim rejected	The Court ruled that the decision of the city of Savonlinna had not been made erroneously (on the grounds of the claim that State aid rules had not been taken into account in a sufficient manner). In the case at hand it was held that State aid rules were not applicable to the cooperation agreement concerning land use, as the agreement remained subject to various uncertainties and it was impossible to assess the impact of the various conditions of the agreement.		
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2012:105	30/11/2012	Private enforcement	None - Claim rejected	The party that had bought the real estate from the municipality was not engaged in economic activity nor operating on the market, meaning trade between Member States could not be affected.	The case confirms the non-application of the Commission's Communication on State aid elements in sales of land and buildings by public authorities (which does not result in a practice amounting to unlawful State aid). In this case, the recipient of the aid did not conduct an economic activity, which the Administrative Court failed to assess.	
Kuopion hallinto-oikeus	Kuopio Administrative Court	Second to last instance court (administrative)	HAO:12/0388/3	13/12/2012	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The case concerned sales of shares in a local energy company. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure the authority is required to adequately assess whether State aid rules are applicable.	

Kuopion hallinto-oikeus	Kuopio Administrative Court	Second to last instance court (administrative)	HAO:13/0069/2	18/02/2013	Private enforcement	None - Claim rejected	The Court primarily held that the authority had not erred in application of the *de minimis* rule. The Court confirmed that the State aid received by the merged companies shall be taken into account when calculating the amount of State aid received by the company resulting from the merger.	As a part of the proceedings, the Court asked for a statement from the Commission.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2013:167	21/10/2013	Private enforcement	Other remedy imposed	After having referred a request for a preliminary ruling to the CJEU and received its judgment (case C-6/12), the Court held that the aspects of the tax regime under examination did not infringe State aid rules. The case was returned to the tax authorities for reassessment.	Following a preliminary ruling from the CJEU (case C-6/12), the Court held that State aid rules did not prevent the right to deduct losses in taxation.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO 2013 T 4078	27/12/2013	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The case concerned sale of publicly owned shares. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure the authority is required to adequately assess whether State aid rules are applicable and make sure in advance that the measure does not include unlawful State aid.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO 2014 T 148	23/01/2014	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The case concerned sale of publicly owned property. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure the authority is required to adequately assess whether State aid rules are applicable and make sure in advance that the measure does not include unlawful State aid.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2014/12	24/01/2014	Private enforcement	None - Claim rejected	The plaintiff had not invoked State aid claims (nor presented facts to that effect) in the previous instance. The Supreme Administrative Court did not change the decision of the previous instance.	The case confirms that the Administrative Courts do not have the jurisdiction to rule on issues regarding appeals against the decisions of municipal authorities beyond the scope of the appeal.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO 2014 T 3412	06/11/2014	Private enforcement	None - Claim rejected	The Court considered that the municipality in question had properly taken State aid rules into account when making a decision regarding security for a loan. Consequently, the Court considered that the municipality had not erred when it had not notified the Commission.		
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO 2015 T 1235	13/05/2015	Private enforcement	None - Claim rejected	The plaintiff claimed that the decision of the municipality in question favoured another company, restricted competition and constituted unlawful State aid. The Court considered that the decision did not involve any economic advantage granted from the municipality's resources and the municipality had not erred when it had not notified the Commission.		Previously, an administrative court (second last instance) had considered that the municipality had not properly assessed the application of State aid rules and the existence of State aid could not be excluded. Consequently, the Administrative Court repealed the municipality's decisions.
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2015:72	13/05/2015	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure the authority is required to adequately assess whether State aid rules are applicable. The Court notes that when assessing whether State aid rules is applicable, the circumstances of the case and all agreements at hand must be taken into consideration as a whole (sales of real property, other agreements).	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2015:76	22/05/2015	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure. In the case at hand, the authority failed to clarify the ownership of the company which claimed to be an SME, and consequently the authority had erred in classifying the company as an SME within the meaning of the Commission Notice concerning State aid in the form of guarantees.	The case confirms that during the decision-making procedure the authority is required to appropriately assess the applicability of State aid rules.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2015:126	01/09/2015	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The case concerned the sales of shares of a company and conversion of loans to investment. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure the authority is required to adequately assess whether State aid rules are applicable.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2015:180	17/12/2015	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure. In the case at hand, the authority had failed to assess the profitability of its investments and therefore it was not possible to assess whether the authority was acting as a private investor and to exclude the possibility of the existence of State aid.	The case confirms that during the decision-making procedure the authority is required to adequately assess whether State aid rules are applicable.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO 2016 T 5261	13/12/2016	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The case concerned a guarantee by the municipality. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure the authority is required to adequately assess whether State aid rules are applicable.	
Korkein hallinto-oikeus	Supreme Administrative	Last instance court (administrative)	KHO 2017 T 1421	27/03/2017	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful decision of an authority. The case concerned the purchase of shares in a company and release from guarantees. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority	The case confirms that during the decision-making procedure the authority	

	Court of Finland						failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	is required to adequately assess whether State aid rules are applicable.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	ECLI:FI:KHO:2018:28	16/02/2018	Private enforcement	None - Claim rejected	The Court considered that the recipients of the aid examined did not operate on the market. The case clarifies the scope of the services which are to be classified as services of general economic interest. It is also further noted that due to special obligations imposed on the rescue service departments, their legal and factual situations were not comparable with undertakings providing emergency care services on the market. Therefore, it was concluded that the aid at hand was not selective.	The case clarifies the scope of services that are to be classified as services of general economic interest.	
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2018:29	16/02/2018	Private enforcement	Recovery order in relation to unlawful aid	This decision repealed an unlawful authority decision. The Court held that the decision was contrary to the Finnish Local Government Act, as the authority failed to assess the applicability of State aid rules during the decision-making process and therefore deviated from the required procedure.	The case confirms that during the decision-making procedure the authority is required to adequately assess whether State aid rules are applicable. The case confirms that patient transfer services (Patient transfer services refer to transfer of patients in ambulances in non-urgent situations, as opposed to emergency medical services (urgent ambulance transports of patients)) constitute economic activity under State aid rules.	
Helsingin hallinto-oikeus	Helsinki administrative court	Second to last instance court (administrative)	HAO:18/0556/1	03/07/2018	Private enforcement	None - Claim rejected	The Court held that the aspects of the tax regime under examination were not contrary to State aid rules; the Court found that the national tax imposed on sweets did not violate State aid rules.		
Korkein hallinto-oikeus	Supreme Administrative Court of Finland	Last instance court (administrative)	KHO:2015:7 (related case: KHO 2014 T 2562)	13/01/2015 (02/09/2014)	Public enforcement	Recovery order of the unlawful/incompatible aid	The case concerned enforcement of a Commission decision. The Court examined the lawfulness of the administrative decisions, and a decision by an administrative court that concerned the recovery of the aid. The Court assessed the grounds for recovery and the amount of aid within the limits given by the Commission decision.	The case confirms that the authority is obliged to take decisions regarding the recovery of the unlawful aid, and that this obligation is not affected by the fact that the recipient of the aid is undergoing restructuring.	

10. France

10.1 Country report

Name national legal expert

Camille Sanches Afonso

Date

11/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Within the French legal system, cases concerning the enforcement of recovery decisions have to be brought before the administrative courts. However, the civil courts remain competent if the aid beneficiary is involved in an insolvency procedure, since these procedures are monitored by the commercial tribunals. A clear majority of cases involving the public enforcement of State aid rules are therefore heard by the administrative courts.

For administrative cases (*i.e.* cases of public enforcement except if the case is indirectly related to an insolvency procedure and cases of private enforcement except if no public authorities is a party, or if the State aid is related to tax or social matters), the administrative tribunals are the courts of first instance. Appeals against judgments rendered by administrative tribunals are brought before the Administrative Court of Appeal which has territorial jurisdiction. There are eight administrative courts of appeal in France. Appeals against judgments rendered by administrative courts of appeal are brought before the Council of State (*Conseil d'Etat*).

For civil cases (*i.e.* cases the administrative courts are not competent to hear), the commercial tribunals are the courts of first instance. Appeals against judgments rendered by commercial tribunals are brought before the court of appeal that has the territorial jurisdiction. There are 36 courts of appeal in France. Appeals against judgments rendered by courts of appeals are brought before the Court of Cassation (*Cour de cassation*).

There is no specialised court in France concerning the enforcement of recovery decisions.

A party can bring an action concerning the enforcement of a recovery decision before the court if it has an interest in taking legal action. This means that any party directly or indirectly affected by the measure (addressee of the measure, competitor, public authority), and groups representing the interests of those who have been directly or indirectly affected by the measure (consumer association, trade union, etc.) can bring an action before the national courts concerning the public enforcement of State aid rules.

A description of the procedural framework applicable in public enforcement of State aid rules

There are no specific national procedural rules related to the enforcement of recovery decisions.

Therefore, the national courts apply the general procedural rules on the recovery by the administration of undue sums, and the CJEU case law on public enforcement of State aid rules.

The procedural rules are from diverse sources (General Code on Taxation, General Code for Local Authorities, Commercial Code, Codes on the Civil and Administrative Proceedings), depending on the type of authority that had granted the aid (local authority, taxation authorities, public institution, etc.), the nature of the aid (tax, social, trade, etc.) and the requested remedies or actions (annulment of the recovery order issued by the administration, referral for a preliminary ruling from the CJEU, etc.).

The administrative body that granted the unlawful or incompatible aid has to recover it. To achieve this, the administration issues a recovery order for the amount of the aid to be repaid, including interest. The obligation for the administration to issue a recovery order is not specific to the recovery of State aid but applies to the recovery of any revenue by the State, a local authority or a public institution with a public accountant.[101]

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The competent courts in cases concerning the private enforcement of State aid rules in France are the same on as those concerning the public enforcement of State aid rules (see above).

A clear majority of the cases involving the private enforcement of State aid rules are heard by the administrative courts.

There is no specialised court in France concerning the private enforcement of State aid rules.

However, civil courts have a broader jurisdiction since they are competent for cases in which no public authority is a party, cases relating to State aid on tax matters and cases relating to State aid on social matters (social welfare, family allowance, etc.).

A description of the procedural framework applicable in private enforcement of State aid rules

As for public enforcement, there are no specific procedural rules related to the private enforcement of State aid rules. These proceedings are therefore regulated under the general procedural rules. The applicable procedural rules are from diverse sources depending on the type of authority that granted the aid, the nature of the aid and the requested remedies

[101] Under Article L. 252 A of the French Tax Procedure Handbook.

(recovery of 'illegality interest', annulment of the national measure, damages, State liability, etc.).

Concerning the recovery of 'illegality interest', the administrative body that granted the unlawful aid has to recover it. To achieve this, the administration issues a recovery order for the amount to be recovered. The obligation for the administration to issue a recovery order is not specific to the recovery of unlawful or incompatible State aid but applies to the recovery of any revenue by the State, a local authority or a public institution with a public accountant.[102]

Main findings based on the case summaries

Type of action

There are more rulings relating to private enforcement of State aid rules in France than rulings relating to public enforcement.

The majority of the cases involving the private enforcement of State aid rules are related to the standstill obligation, in which the party that brought the case claims the unlawfulness of the aid.

For private enforcement cases, the most commonly requested remedies are the recovery of the unlawful State aid and the annulment of the national measure granting the unlawful aid.[103]

Numerous cases in public enforcement of State aid rules are related to the unlawfulness of the recovery order issued by the national public authority following a recovery decision. For example, a recovery order issued by the French city of Orléans was annulled by the national court because of a wrong calculation of the interest to be recovered.[104] Another annulment was ordered because the public authority did not give the aid beneficiary the opportunity to discuss the amount to be recovered in breach of the right of defence.[105]

For public enforcement cases, the most commonly requested remedies were the recovery of the unlawful and incompatible State aid including interest,[106] State liability,[107] and a reference for a preliminary ruling from the CJEU.[108]

Sectors

The sectors relating to the public and private enforcement by national courts of State aid rules are very diverse.

Regarding the selected rulings, two cases are related to the market for the export of French-language books (*saga CELF*), two cases are related to a national measure concerning the take-over of firms in difficulty, and the other rulings are related to airport services, agriculture, wind-generated electricity (*saga Vent de colère !*), manufacturing, transport, and information and communication services.

Main actors

The list of relevant rulings and the selected rulings show that the parties, both in cases concerning the private and public enforcement of State aid rules, are diverse: aid beneficiaries, addressees of the measure, competitors, public authorities, consumer associations and trade unions.

In most of the cases, the public authority and the aid beneficiary are involved as parties.

Qualitative assessment of the average time of court proceedings

As the first instance rulings are often not available in France, it is not possible to provide information on the average duration of court proceedings regarding public and private enforcement of State aid rules when no appeal has been lodged.

Moreover, France does not provide information on the average duration of court proceedings in general. Therefore, a comparison to other court proceedings in the country is not possible.

However, generally it can be said that both civil and administrative cases often last more than a year (as also reflected in the selected rulings).

Regarding the public enforcement of recovery decisions, the French Ministry for the Economy and Finance has pointed out that a claim against a recovery order issued by the administration may suspend the recovery process until the end of the procedure,[109] which causes long delays in effective recovery.[110] A selected ruling has since held that the suspensory effect is not automatic in cases related to State aid enforcement.[111] In this case, the Court held that when the aid beneficiary challenges the Commission decision before the CJEU, the suspensory effect will apply until the CJEU renders it decision only if the plaintiff has requested the suspension of the execution of the Commission decision before the CJEU.

For the selected rulings related to public and private enforcement of State aid rules, proceedings lasted between three[112] to twenty years.[113]

[102] Under Article L. 252 A of the French Tax Procedure Handbook.
[103] See, for example, Paris Administrative Court of Appeal, 27.11.2015 - 13PA03172 (FR1) ; ruling ECLI:FR:CESJS:2013:334215.20131126 (FR3) ; ruling ECLI:FR:CESSR:2016:393721.20160415 (FR4).
[104] Nantes Administrative Court of Appeal, 31.8.2010 - 07NT00572 (FR7).
Nantes Administrative Court of Appeal, 1.6.2018 - 16NT02839 (FR9).
[106] See, for example, ruling (ECLI:FR:CCASS:2012:CO01235 (FR11)); case 16NT02839 (FR9) ; ruling ECLI:FR:CECHR:2017:395844.20170224 (FR12), ruling ECLI:FR:CCASS:2012:CO01235 (FR11).
[107] See, for example, case 16NT02839 (FR9) ; ruling ECLI:FR:CECHR:2017:395844.20170224 (FR12).
[108] See, for example, case 07NT00572 (FR7) ; Council of State, 19.12.2008 - 274923 (FR10).
[109] Under Article L 1617-5 1° French General Code for Local Authorities.
[110] French Ministry for Economy and Finance, *Vade-mecum des aides d'Etat*, édition 2016 available at https://www.economie.gouv.fr/files/files/directions_services/daj/publications/vademecum_aides_etat-2016/pdf-vade-mecum-aides-etat/Vade-mecum_aides_etat-2016_complet.pdf (last accessed on 11.1.2019).
[111] Bordeaux Administrative Court of Appeal, 10.12.2015 - 15BX01807 (FR8).
[112] See, for example, ruling ECLI:FR:CCASS:2012:CO01235 (FR11).
[113] The *CELF saga* started in 1996 before the French courts and is still pending before the Paris Administrative Court of Appeal.

Qualitative assessment of the remedies awarded by national courts

It appears from the list of relevant rulings that in cases related to private enforcement, in a large majority of the cases, no remedy was granted. This is because the courts often find that the disputed national measure did not constitute State aid, as claimed by the plaintiff.[114]

To a lesser extent, this is due to the fact that the supreme courts in France (both the Council of State and the Court of Cassation) do not assess the case with regard to the facts, but only consider the way the lower court applied and interpreted the law. Therefore, if a supreme court finds that the lower court has made an error of law, it will often send the case back to this court for reassessment. Thus, in many cases, the supreme courts grant the request, but do not rule on the requested remedies.[115]

In a majority of the cases related to public enforcement, the court orders the enforcement of the recovery decision, by confirming the legality of the recovery order issued by the administration or by ordering the administration to issue such a recovery order.

It has to be noted that a majority of the cases in which the court rejected the claim as not being well-founded were brought by the aid beneficiary or a competitor, claiming damages against the State. This is probably because the national courts tend not to recognise the liability of the State in granting unlawful or incompatible State aid.[116] Therefore, national judges do not easily award reparation in cases related to the enforcement of State aid rules. With regard to private enforcement, the first relevant case in this regard — *CELF* — is pending before the Paris Administrative Court of Appeal.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

The list of relevant rulings and selected rulings show that the French courts rely often on State aid *acquis*, such as Union law and CJEU case law. Indeed, only one of the eleven selected rulings does not refer to any State aid *acquis.*[117]

French courts often refer to the CJEU for preliminary rulings, both in cases related to public and private enforcement of State aid rules. With regard to the selected rulings, six of the eleven judgments have been delivered in cases where at least one preliminary ruling was rendered by the CJEU. Three of these selected rulings are direct follow-ups of a CJEU preliminary ruling.

One possible explanation for this extensive application of the State aid *acquis* might be that France has no specific national procedural rules concerning the private and public enforcement of State aid rules. Therefore, the national courts have to rely to a great extent on Union law and case law.

Qualitative assessment of any other relevant trends in State aid enforcement

From the list of relevant rulings and selected rulings, it is clear that the national courts, from the first to the last instance, are familiar with State aid rules.

In particular, national courts are used to the EU rules related to the notion of the State aid.

Numerous rulings rendered by the national courts are related to the legality of the recovery orders issued by the administration following a Commission decision declaring the aid unlawful and incompatible with the internal market. Most of these rulings are related to the administration's obligation to indicate the amount and the method of calculation of the aid to be recovered. One selected ruling reminded the administration to respect the right of defence while issuing the recovery order and to allow the aid beneficiaries to comment on the amount to be recovered.[118] When the court annuls a recovery order on grounds of procedural defect, according to French case law, the administration should not refund, even provisionally, the amounts already repaid by the aid beneficiary; rather, it should issue a rectified recovery order.[119]

With regard to the public enforcement of recovery decisions, the courts frequently use the threat of financial penalties[120] against the State when they order the recovery of the State aid.[121] This may indicate a trend by the French courts to attempt to shorten the delays in the recovery of the unlawful and incompatible State aid.

The list of relevant rulings and the selected rulings show that while in some cases the courts awarded damages to competitors of State aid beneficiaries for the commercial harm caused by the granting of the State aid, in the majority of cases the courts refrained from doing so.

In 2016, the French Ministry for the Economy and Finance pointed out that this was caused by the difficulty to prove a causal link between the commercial harm caused and the granting of State aid. This could also be explained by the fact that only a few cases were brought by competitors of aid beneficiaries, requesting damages for commercial harm.[122]

However, in a 2017 judgment, the Tribunal of First Instance awarded damages to a competitor of a State aid beneficiary based on the loss of customers caused by the granting of State aid.[123] In the same case, the Court of Appeal confirmed that the State aid had caused commercial harm to the competitor, but requested judicial economic expertise in order to quantify the amount of the damages.[124] This case is still pending.

[114] See, for example, ruling ECLI:FR:CESJS:2013:334215.20131126 (FR3).
[115] See for example the decision Paris Administrative Court of Appeal, 9.10.2018 - (17PA00397 (FR2) which is the follow-up of the judgment of the Council of State, 13.2017 - ECLI:FR:CECHR:2017:382427.20170113 in which the Council of State re-sent the case to the lower instance it had come from in order for the Court of Appeal to investigate the causal link between the loss of customers of the plaintiff and the benefit of the State aid for its competitor.
[116] French Ministry for Economy and Finance, *Vade-mecum des aides d'Etat*, *op.cit*, p.309-310.
[117] Case 13PA03172 (FR1).
[118] Case 16NT02839 (FR9).
[119] Case 07NT00572 (FR7) ; case 16NT02839 (FR9).
[120] Under Article L.911-4 of the French Code of Administrative Justice.
[121] Ruling ECLI:FR:CESSR:2016:393721.20160415 (FR4).
[122] French Ministry for Economy and Finance, *Vade-mecum des aides d'Etat*, *op.cit.*, p. 310 and 340.
[123] Tribunal Administratif de Bastia, 23.2.2017 - 1500375 (FR6).
[124] Marseille Administrative Court of Appeal, 12.2.2018 - 17MA01582-17MA01583.

In the selected ruling of 2018 rendered in the *CELF saga*,[125] the court requested documents and information from several public authorities, including the Commission, in order to seek the Member State's liability by investigating the causal link between the commercial harm caused and the granting of State aid by the Member State. This case is also still pending before the courts.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

From the list of relevant rulings and selected rulings, it is clear that the national courts, from the first to the last instance, are familiar with State aid rules, the notion of State aid and the competences of the national courts regarding the enforcement of these rules.

For example, regarding the notion of State aid in cases related to private enforcement of State aid rules with regard to services of general economic interest, the list of rulings show that the courts extensively rely on the *Altmark* case law[126] in order to assess whether or not there was a violation of the standstill obligation.[127]

Concerning the competences of the national and the Union Courts regarding the public enforcement of State aid rules, the national courts have noted in several decisions that the Union Courts have the exclusive jurisdiction to adjudicate on the validity of a Commission decision. The national courts pointed out the necessity for the Member State to enforce the decision of the Commission immediately and effectively, although the aid beneficiary was challenging this decision before the CJEU.[128]

The court also acted firmly once a violation of the standstill obligation was established, by requesting the recovery of the 'illegality interest'. With regard to this matter, the national courts have referred a question to the CJEU for a preliminary ruling several times.[129] As emphasised above, the national courts do not hesitate to refer to the CJEU for preliminary rulings or rely on EU *acquis* and CJEU case law in coming to a decision.

The main challenge for the French courts now may be to rule on cases related to the damages requested by competitors for the commercial harm caused by the granting of State aid. However, the pending case in the *CELF saga* might create a precedent in this respect.

Any other relevant comments or findings

Not applicable

[125] Ruling 17PA00397 (FR2).
[126] Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH* (2003) ECLI:EU:C:2003:415.
[127] [127] See, for example, ruling 13PA03172 (FR1).
[128] See, for example, case 15BX01807 (FR8) ; case (274923 (FR10).
[129] See, for example, case 07NT00572 (FR7) ; ruling ECLI:FR:CESSR:2016:393721.20160415 (FR4).

10.2 Case summaries

Case summary FR1

Date

06/01/2019

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Cour Administrative d'Appel de Paris (6ème chambre)

Court which adopted the ruling (English)

Paris Administrative Court of Appeal (6th Chamber)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031554643&fastReqId=1899294255&fastPos=19

Case reference

13PA03172

Procedural context of the case

By judgment of 10 July 2008 (case reference not available), the Paris Administrative Tribunal of First Instance had found that the Region of Ile-de-France had granted State aid to undertakings carrying passengers by road without notifying these measures to the Commission. Therefore, the Tribunal had annulled these measures.

This judgment was subsequently confirmed by a judgment of the Paris Administrative Court of Appeal dated 10 July 2010 (case reference not available), and by a judgment of the Council of State dated 23 July 2012 (ECLI:FR:CESSR:2012:343440.20120723).

Following these rulings, the company Autocars R. Suzanne and the trade union for undertakings carrying passengers brought an action before the Paris Administrative Tribunal of First Instance to oblige the Region of Ile-de-France to recover the State aid from the aid beneficiaries.

By judgment of 4 June 2013 (0817138/2-1), the Paris Administrative Tribunal of First Instance upheld the claim of the plaintiffs and ordered the administration to issue recovery orders within a nice month period.

The Region of Ile-de-France lodged an appeal against this judgment; the ruling by the Paris Administrative Court of Appeal of 27 November 2015 on this appeal is summarised here.

Autocars R. Suzanne also filed a private enforcement lawsuit regarding the administration's liability: judgment of the Paris Administrative Court of Appeal dated 27 November 2015 (13PA03175).

Type of action

Private enforcement

Delivery date of the ruling

27/11/2015

Language

French

Headnote

In this ruling, the Court held that an administration cannot rely on a general impossibility of recovery of unlawful aid by stating that the aid beneficiaries would be in a vulnerable situation should the aid be reimbursed.

Parties

Names of the parties to the action

Région Ile-de-France

Versus

Société Autocars R. Suzanne; Syndicat autonome des transporteurs de voyageurs

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Competitor; Other (Trade union)

Sector relating to the State aid argument

H - Transporting and storage

Carriage of passengers by road

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The Région Ile-de-France had funded investments made by undertakings regularly carrying passengers by road for the installation of new equipment on board, the creation of equipment for the ticket sale and validation, the creation of bus stops, etc.

By judgment of 23 July 2012 (ECLI:FR:CESSR:2012:343440.20120723), the Council of State applied the Altmark case law (Case C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH (2003) ECLI:EU:C:2003:415) and concluded that this compensation for a service of general economic interests constituted unlawful State aid since it exceeded what was necessary to cover the costs incurred in the discharge of the public service obligation.

The company Autocars R. Suzanne and the trade union for undertakings carrying passengers brought an action before the Paris Administrative Tribunal of First Instance to oblige the Region of Ile-de-France to recover this unlawful State aid.

The Region of Ile-de-France, as the plaintiff, claimed that the recovery of the State was impossible since the aid beneficiaries would be left in a vulnerable situation by the reimbursing of the aid. Additionally, it claimed that there are material difficulties to recover the State aid and that recovery would have constituted a breach of the principles of the protection of legitimate expectations and legal certainty.

Remedy(ies) sought

Other remedy sought

Withdrawing of the ruling of the Paris Administrative Tribunal of First Instance dated 4 June 2013 (0817138/2-1) ordering the recovery of the unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court held that the administration cannot conclude there is a general impossibility of recovery by claiming material difficulties and a vulnerable situation for the aid beneficiaries once the aid would be reimbursed. The Court confirmed that the impossibility of reimbursing the aid had to be analysed individually, for each aid beneficiary. The Court also pointed out that the principles of the protection of legitimate expectations and legal certainty could only be used by the aid beneficiaries themselves against the State liability and not by the administration to not recover the State aid.

It thus confirmed that the Region of Ile-de-France had to determine which undertakings benefitted from the State aid and the amount to be recovered from each of them, and issue recovery orders against them within a six month period.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order in relation to unlawful aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary FR2

French

Date

06/01/2019

Headnote

In this ruling, the Court held that the State is liable for having granted unlawful and incompatible State aid to the plaintiff's competitor.

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Cour Administrative d'Appel de Paris (4ème chambre)

Court which adopted the ruling (English)

Paris Administrative Court of Appeal (4th Chamber)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000037487127&fastReqId=741740395&fastPos=1

Case reference

17PA00397

Procedural context of the case

By judgment of 15 December 2011 (0911778/7-1), the Paris Administrative Tribunal dismissed the claim made by the plaintiff, since it found the plaintiff did not demonstrate the unlawful and incompatible State aid granted to its competitor had caused a commercial harm. In particular, the plaintiff did not demonstrate that by benefiting from the State aid, its competitor had attracted its clients. By judgment of 12 May 2014 (12PA00767), the Paris Administrative Court of Appeal dismissed the claim made by the plaintiff and confirmed the judgment rendered by the first instance Tribunal.

By judgment of 13 January 2017 (ruling ECLI:FR:CECHR:2017:382427.20170113), the Council of State (10th and 9th sub-sections combined) granted the appeal of the plaintiff and annulled the previous judgments. The Council of State indicated that the national courts have to investigate themselves whether a State aid measure has caused commercial harm to the competitors of the State aid beneficiary. The Council of State re-sent the case to the lower instance it had come from in order for the Court of Appeal to investigate the causal link between the loss of customers of the plaintiff and the benefit of the State aid for its competitor.

The Paris Administrative Court of Appeal – in the ruling at hand - confirmed that the State is liable for having granted State aid to the plaintiff's competitor and sent the case back to the lower court for re-assessment.

The subsequent ruling has not been rendered yet.

Type of action

Private enforcement

Delivery date of the ruling

09/10/2018

Language

Parties

Names of the parties to the action

Société internationale de diffusion et d'édition (SIDE)

Versus

Ministre de la culture et de la communication

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

G - Wholesale and retail trade; repair of motor vehicles and motorcycles

Export of French-language books

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The plaintiff, SIDE, was the sole competitor of the Coopérative d'exportation des livres français (CELF) in the market for the export of French-language books. From 1980 to 2001, the French Ministry for Culture and Communication granted aid to CELF to handle small orders placed by booksellers established abroad. By Commission Decision 2011/179/EU of 14 December 2010, the Commission found that this national measure constituted incompatible and unlawful State aid.

According to the plaintiff, the State was liable for having granted State aid to its competitor. The plaintiff requested the State to repair its commercial harm caused by the granting of the State aid, i.e. the loss of clients, to the State aid beneficiary. The plaintiff argued that the Court had to investigate in order to prove the causal link between the granting of the State aid and the loss of clients and to quantify the damages.

The State, represented by the French Minister for Culture and Communication, argued that SIDE had not proven its commercial harm and that, in any case, the action of SIDE was time-barred for the two first years that CELF had benefitted from the State aid, as stated by the Commission Decision 2011/179/EU of 14 December 2010.

Remedy(ies) sought

Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

The Paris Administrative Court of Appeal confirmed the previous ruling rendered by the Council of State, which followed a ECJ (current CJEU) preliminary ruling (C-199/06, 2008, ECLI:EU:C:2008:79) which stated that the State was required to uphold claims for compensation for damage caused by the unlawful nature of the aid. To do so, the Paris Administrative Court of Appeal recognised that it had to investigate the commercial harm suffered by the State aid beneficiary's competitor itself, in particular by requesting other parties and third parties to provide relevant information and documents. More specifically, in order to prove the causal link between the State aid and the commercial harm suffered by the plaintiff, the Court requested documents from several third parties:

- Accounting documents from the liquidator of the aid beneficiary;
- Economic documents and studies about the disputed State aid from the French Minister for Culture and Communication who had granted the State aid for 20 years;
- Economic studies on the relevant market from the Commission pursuant to the Commission support for national courts provided for in the Notice on the enforcement of State aid rules by national courts (2009/C 85/01) dated 9 April 2009 (paragraph 2.2.4 and 3).

The Paris Administrative Court of Appeal dismissed the argument of the French Minister for Culture and Communication regarding the fact the action of SIDE was time-barred for the two first years of granting of the State aid. The Court considered that the plaintiff was not aware of the exact nature and extent of the harm before the Commission decision dated 14 December 2010, providing that the State aid incompatible with the internal market. Therefore, the time limit of the competitor's action regarding the State liability did not start to run before the Commission decision.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The subsequent ruling has not be rendered yet.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)

References by the court to other relevant aspect of the EU acquis

- Commission Notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009 (Commission Enforcement Notice)

Cooperation with the EU institutions

The national court sent a request for information to the Commission (no hyperlink available)

Preliminary ruling request follow-up

No

Any other comments (optional)

None of the national courts referred a request for a preliminary ruling to the CJEU in this case. However, the Court did refer a request for a preliminary ruling to the CJEU in the public enforcement action in the same litigation 'CELF' regarding the unlawful and incompatible State aid on the market for the export of French-language books (Case C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79).

Case summary FR3

Date

06/01/2019

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Conseil d'État (3ème sous-section jugeant seule)

Court which adopted the ruling (English)

Council of State (3rd Sub-section ruling alone)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028253841&fastReqId=1274283209&fastPos=4

Case reference

ECLI:FR:CESJS:2013:334215.20131126

Procedural context of the case

The company Doux Élevage SNC and the agricultural cooperative Ukl-Arree brought an action before the Council of State for the annulment of inter-ministerial decisions extending to all traders in the affected industry a compulsory contribution introduced by a recognised inter-trade organisation. They considered that these decisions of the public authorities constituted State aid that should have been notified to the Commission.

By judgment of 28 November 2011 (ruling ECLI:FR:CESSR:2011:ruling.20111128), the Council of State decided to stay the proceedings and refer a request for a preliminary question to the CJEU on whether a decision by which a national authority extended to all traders in an agricultural industry an inter-trade agreement which introduced the levying of a contribution on a compulsory basis constitutes State aid.

By the preliminary ruling of 30 May 2013 (Case Doux Élevage SNC and Coopérative agricole UKL-ARREE v Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement du territoire and Comité interprofessionnel de la dinde française (CIDEF) C-677/11), the CJEU concluded that these decisions did not constitute State aid since (i) they did not imply additional costs or losses of revenue for the State, regardless of the fact that the inter-trade organisation used these private funds alongside sums originated from public budget; (ii) the French law did not permit public authorities to exercise control over these contributions except to check their validity and lawfulness; and (iii) the activities carried out by the inter-trade organisation were not imputable to the State.

The ruling summarised here is the follow-up by the Council of State in the action brought by the agricultural cooperative Ukl-Arree.

Type of action

Private enforcement

Delivery date of the ruling

26/11/2013

Language

French

Headnote

In this ruling, the Court held that a decision of the public authority extending an inter-trade agreement to all traders in an industry which introduces the levying of a compulsory contribution does not constitute State aid.

Parties

Names of the parties to the action

Société coopérative agricole Ukl-Arrée

Versus

Comité interprofessionnel de la dinde française (CIDEF); Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement du territoire

The relationship of the plaintiff to the measure

Other

Party subject to levy

The relationship of the defendant to the measure

Beneficiary; Public authority

Sector relating to the State aid argument

A - Agriculture, forestry and fishing

Agricultural industry of turkey farming and production

The type of State aid measure challenged in the court proceedings

Other

Compulsory contributions to an inter-trade organisation

Substance of the case

Facts and parties' main arguments in the case

The Comité interprofessionnel de la dinde française (French turkey inter-trade committee) (CIDEF) was a private-law non-profit association recognised by the administrative authorities as an agricultural inter-trade organisation bringing together four trades: 'production', 'hatching and imports of hatching eggs and stumps', 'slaughter and processing', and 'feed'.

By means of inter-trade agreements, the CIDEF introduced a voluntary inter-trade contribution of EUR 14 per 1,000 turkey poults over three years, to be levied on all members of the trades represented therein, in order to finance activities such as publicity, external relations, quality assurance, research and defence of the sector's interests. By means of inter-ministerial orders, the competent Ministers decided to make this contribution compulsory and to extend its duration.

The company Doux Élevage SNC, a subsidiary of the leading European poultry producer (Doux group), and the agricultural cooperative Ukl-Arree, brought an action before the Council of State for the annulment of the inter-ministerial decisions. They argued that the extension of the inter-trade contribution to all traders in the inter-trade organisation on a compulsory basis constituted State aid that should have been notified to the Commission.

In this case, the Court ruled only on Ukl-Arree's request.

The defendants submitted that established case law of the CJEU since the Pearle and Others judgment (Case Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten C-345/02) considered that contributions introduced by recognised inter-trade organisations for the purposes of financing common activities decided on by those organisations (called

'cotisations volontaires obligatoires' or 'CVO') as well as administrative measures rendering such contributions compulsory for all traders in the affected industry, does not constitute State aid since they did not imply additional costs or losses of revenue for the State.

Remedy(ies) sought

Other remedy sought

Annulment of the national measure

Outcome of the case

Conclusions adopted by the national court

The Council of State followed the preliminary ruling of the CJEU (Case Doux Élevage SNC and Coopérative agricole UKL-ARREE v Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement du territoire and Comité interprofessionnel de la dinde française (CIDEF) C-677/11) and held that the decision to extend an inter-trade contribution which was initially voluntary and later made compulsory by an inter-ministerial order did not constitute State aid since:

- It did not imply additional costs or losses of revenue for the State, regardless of the fact that the inter-trade organisation used these private funds alongside sums originated from public budget;
- French law did not permit public authorities to exercise control over these contributions except to check their validity and lawfulness; and
- The activities carried out by the inter-trade organisation are not imputable to the State.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-345/02, Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten (2004) ECLI:EU:C:2004:448

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-677/11, Doux Élevage SNC and Coopérative agricole UKL-ARREE v Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement du territoire and Comité interprofessionnel de la dinde française (CIDEF) (2013) ECLI:EU:C:2013:348
(http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrec=nl&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-677%252F11&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=6284641)

Any other comments (optional)

No other comments

Case summary FR4

Date

06/01/2019

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Conseil d'Etat (9ème / 10ème Sous-sections réunies)

Court which adopted the ruling (English)

Council of State (9th / 10th Sub-sections combined)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032409025&fastReqId=1835902904&fastPos=34

Case reference

ECLI:FR:CESSR:2016:393721.20160415

Procedural context of the case

The State had laid down conditions for the purchase of electricity generated by wind-power installations at a price higher than its market value.

The consumers' association Vent de colère ! Fédération nationale brought an action before the Council of State, claiming that this measure constituted an advantage liable to affect trade between Member States and to have an impact on competition and should therefore have been notified to the Commission.

By judgment of 15 May 2012 (324852), the Council of State referred a request for a preliminary ruling to the CJEU. By a judgment of 19 December 2013 (Case Association Vent De Colère! Fédération nationale and Others v Ministre de l'Écologie, du Développement durable, des Transports et du Logement, Ministre de l'Économie, des Finances et de l'Industrie C-262/12) the CJEU held that this national measure constituted an intervention through State resources that should have been notified.

By judgment of 28 May 2014 (ruling ECLI:FR:XX:2014:324852.20140528), the Council of State annulled the national measure. The consumers' association Vent de colère ! Fédération nationale brought an action before the Council of State in order to oblige the State to execute this judgment in compliance with EU rules on private enforcement. The ruling summarised here is that of the Council of State on this matter.

By two subsequent judgments of 11 October 2017 (ruling ECLI:FR:CECHS:2017:393721.20171011) and 20 December 2017 (ruling ECLI:FR:CECHS:2017:409693.20171220), the Council of State confirmed that the State had issued recovery orders for an amount of EUR 47,103,631.08 and has therefore fulfilled its obligations.

Type of action

Private enforcement

Delivery date of the ruling

15/04/2016

Language

French

Headnote

In this ruling, the Court held that the State is liable for taking all necessary measures to ensure the recovery of the 'illegality interest' accrued over the whole period of unlawfulness, under threat of financial penalties.

Parties

Names of the parties to the action

Association Vent de colère ! Fédération nationale

Versus

État français

The relationship of the plaintiff to the measure

Consumers' association

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Wind-generated electricity

The type of State aid measure challenged in the court proceedings

Other

Setting conditions for the purchase of electricity generated by wind-power installations at a price higher than its market value

Substance of the case

Facts and parties' main arguments in the case

The State imposed the obligation to purchase wind-generated electricity at a price higher than its market value to the nationalised electricity distributor Électricité de France and to the non-nationalised distributors. The additional costs imposed on the distributors and arising from this obligation were offset in full through the charges paid by the final consumers of electricity located in the French territory. The amount of the charges payable by the final consumers was calculated in proportion to the quantity of electricity consumed and determined by the Minister for Energy. This mechanism has been considered by the CJEU as an intervention through State resources which constituted State aid under Article 107(1) TFEU (Case Association Vent De Colère! Fédération nationale and Others v Ministre de l'Écologie, du Développement durable, des Transports et du Logement, Ministre de l'Économie, des Finances et de l'Industrie C-262/12).

The consumers' association Vent de colère ! Fédération nationale brought an action before the Council of State pointing out that the State had not issued any orders to recover the unlawful interest accrued over the whole period of unlawfulness. The plaintiff requested that the Court oblige the State to comply with Article 108 TFEU and Commission Regulation (EC) No 794/2004 of 21 April 2004 on private enforcement under threat of financial penalties.

Remedy(ies) sought

Recovery of interest; Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

The Court held that the beneficiaries of the unlawful aid obtained a financial advantage and requested the State recover the interest the aid beneficiaries would have paid if they had borrow on the capital markets the funds corresponding to the amount of the State aid. The Court also ordered the State to pay a penalty payment of EUR 10,000 per day until the effective recovery if the State did not fulfil with its recovery obligation within six months following this judgment.

Remedy(ies) granted – including assessment public enforcement issues

Recovery of interest; Damages awards to third parties / State liability

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-368/04, Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644
- C-199/06, Centre d'exportation du livre français (CELF), Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79

√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary FR5

Date

06/01/2019

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Cour Administrative d'Appel de Nantes (1ère chambre)

Court which adopted the ruling (English)

Nantes Administrative Court of Appeal (1st Chamber)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000034879002&fastReqId=720031575&fastPos=1

Case reference

5NT02316

Procedural context of the case

By several decisions, the Commission had declared the radio broadcasting aid scheme notified by the French State compatible with internal market.

By judgment of 22 December 2008 (Société Régie Networks v Direction de contrôle fiscal Rhône-Alpes Bourgogne C-333/07), the ECJ (current CJEU) annulled the last Commission decision dated 10 November 1997 which declared the tax on advertisements broadcast on radio and television in French territory compatible with the internal market.

The company Régie Networks, which had paid EUR 27,740 by way of charge on advertising companies for 2001, claimed reimbursement of that sum from the administration.

By judgment of 18 June 2015 (1201550), the Rennes Administrative Tribunal of First Instance dismissed the plaintiff's request. The plaintiff lodged an appeal against this judgment before the Nantes Administrative Court of Appeal, whose ruling is the summarised case at hand.

Type of action

Private enforcement

Delivery date of the ruling

01/06/2017

Language

French

Headnote

In this ruling, the Court held that the effects of a CJEU case annulling a Commission decision declaring the aid compatible only applied to the undertakings that initiated legal proceedings prior to the date of delivery of the judgment.

Parties

Names of the parties to the action

Régie Networks

Versus

Ministre des finances et des comptes publics

The relationship of the plaintiff to the measure

Other

Contributor to the measure

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

Advertisements broadcast on radio and television

The type of State aid measure challenged in the court proceedings

Other

Parafiscal charge on advertisements broadcast on sound radio and television within French territory

Substance of the case

Facts and parties' main arguments in the case

The sound radio broadcasting services, whose commercial revenue deriving from broadcasts of brand or sponsorship advertising was less than 20% of their total turnover, benefitted from a levy on the revenue from advertisements broadcast on sound radio and television.

The Commission had declared this measure compatible with the internal market. However, by judgment of 22 December 2008 (Société Régie Networks v Direction de contrôle fiscal Rhône-Alpes Bourgogne C-333/07), the ECJ (current CJEU) annulled the Commission decision.

The company Régie Networks, which had paid EUR 27,740 by way of charge on advertising companies for 2001, claimed reimbursement of that sum from the administration in accordance with the ECJ (current CJEU) judgment.

The Court did not specify the arguments of the defendant in its ruling.

Remedy(ies) sought

Recovery order in relation to unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court held that the effects of the ECJ (current CJEU) ruling (Société Régie Networks v Direction de contrôle fiscal Rhône-Alpes Bourgogne C-333/07) on this matter applied only to undertakings which had initiated legal proceedings prior to the date of delivery of the judgment. Since the plaintiff had not brought legal proceedings regarding the national measure prior to the date of delivery of the ECJ (current CJEU) judgment, it could not dispute the national measure and request the reimbursement of the tax it had paid.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:

- C-333/07, Société Régie Networks v Direction de contrôle fiscal Rhône-Alpes Bourgogne (2008) ECLI:EU:C:2008:764

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary FR6

Date

14/03/2018

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Tribunal administratif de Bastia

Court which adopted the ruling (English)

Bastia Administrative Court

Instance court which adopted the ruling

Lower court (administrative)

Official language of the court

French

Hyperlink to ruling

http://bastia.tribunal-administratif.fr/content/download/91226/875028/version/1/file/1500375%20Corsica%20Ferries.pdf

Case reference

1500375

Procedural context of the case

The judgment at hand was preceded by a judgment of 6 April 2016 in which the Marseille Administrative Court of Appeal (12MA02987) ruled that the financial compensation provided for in the public service delegation contract between the Territorial Collectivity of Corsica and the SNCM/CMN group constituted unlawful State aid as it had not been notified to the Commission. As such, this judgment upheld a decision of the Commission of 2 May 2013 (C(2013)1926) which was confirmed by a judgment of the GC of 1 March 2017 (SNCM v Commission, T-454/13).

In the present case, the Bastia Administrative Court granted the remedies sought by the plaintiff who claimed to have sustained damage caused by the unlawful contract between the Territorial Collectivity of Corsica and the SNCM/CMN group.

However, in a subsequent judgment of 12 February 2018, the Marseille Administrative Court of Appeal suspended the execution of the judgment of the Bastia Administrative Court and commissioned an expert to assess the damage sustained by the plaintiff in order to determine the amount of the compensation due by the Territorial Collectivity of Corsica (17MA01582-17MA01583).

Type of action

Private enforcement

Delivery date of the ruling

23/02/2017

Language

French

Headnote

In this ruling, the Court held that the Territorial Collectivity of Corsica was liable for the damage caused by the unlawful aid awarded to the plaintiff's competitor.

Parties

Names of the parties to the action

Société CORSICA FERRIES

Versus

Collectivité Territoriale de Corse

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Public maritime service

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

On 7 June 2007, the Corsican Regional Assembly awarded the public service delegation for maritime services between Marseille and Corsica to the SNCM/ CMN group. On the same day, the President of the Executive Council of the Territorial Collectivity of Corsica (the defendant) signed the public service delegation contract which included a complementary service requiring the delegate to increase its service capacity for 36 weeks per year. The financial compensation provided for by the contract to the SNCM/ CMN group was subject to the obligation of prior notification to the Commission as it constituted State aid. However, no prior notification had been sent to the Commission.

According to the plaintiff, the unlawful public service delegation contract between the Territorial Collectivity of Corsica and the SNCM/ CMN group constituted a wrongful act which had caused them damage in terms of loss of profits due to the number of travellers who used the maritime services provided by their competitor. Moreover, the plaintiff's maritime services and the ones provided by the SNCM/CMN group are perfectly substitutable.

The defendant argued that the plaintiff had not suffered a loss of profits as the service was provided by the SNCM/CMN group at a loss. Moreover, the defendant argued that there was no causal link between the alleged damage and the wrongful act as it had not been proven that the number of travellers using the maritime services generated by the public service delegation would have used the plaintiff's maritime services. Finally, the defendant argued that the plaintiff had not demonstrated its capacity to absorb the travellers having used the SNCM/CMN group's maritime services.

Remedy(ies) sought

Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

Based on the judgment of the Marseille Administrative Court of Appeal (12MA02987) which annulled both the decision of the Corsican Regional Assembly to award to the SNCM/ CMN group the public service delegation for maritime services between Marseille and Corsica and the decision of the President of the executive Council of the Territorial Collectivity of Corsica to sign the public service delegation contract, the Bastia Administrative Court concluded that the unlawfulness of the contract was of such a nature as to activate the Territorial Collectivity of Corsica's liability. In order to do so, the Bastia Administrative Court had to establish whether

there was a causal link between the wrongful act and the damage sustained. First, the Bastia Administrative Court concluded that the plaintiff was entitled to claim loss of profits as the damage was actual and certain. Secondly, the Bastia Administrative Court concluded that the plaintiff had demonstrated the existence of a causal link between the aid granted by the Territorial Collectivity of Corsica and the damage pleaded. In fact, the unlawful aid deprived the plaintiff of numerous clients given its market share. Furthermore, the plaintiff had demonstrated on the basis of a detailed analysis its absorption capacity of travellers using the maritime services generated by the unlawful aid.

Thus, the Bastia Administrative Court ruled that the Territorial Collectivity of Corsica was obliged to grant remedies for the damage sustained as a result of the unlawful public delegation service contract.

Remedy(ies) granted – including assessment public enforcement issues

Damages awards to third parties / State liability

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

National case law:
- The Marseille Administrative Court of Appeal, 6 April 2017, 12MA02987
- The Marseille Administrative Court of Appeal, 4 July 2016, 15MA02101

References by the court to other relevant aspect of the EU acquis

- Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of Société Nationale Maritime Corse-Méditerranée (notified under document C(2013) 1926), OJ L 220, 17.8.2013

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary FR7

Date

06/01/2019

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Cour Administrative d'Appel de Nantes (2ème chambre)

Court which adopted the ruling (English)

Nantes Administrative Court of Appeal (2nd Chamber)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023109616&fastReqId=1493226065&fastPos=1

Case reference

07NT00572

Procedural context of the case

In 1987, the City of Orléans and the Department of Loiret sold, on preferential terms, a plot of land situated in the industrial estate of Orléans to the company Scott, owned by Kimberly Clark, to enable the company to build a household paper factory. The City and the Department charged a preferential rate for the water treatment levy. By a decision of 12 July 2000 (2002/14/EC), the Commission found these measures constituted unlawful and incompatible State aid.

By two recovery orders issued on 5 December 2001, the City of Orléans requested Scott to reimburse EUR 457,323.88 and Kimberly Clark to reimburse EUR 188,744.38. The companies brought an action against these recovery orders requesting their annulment and the refund of the sums already paid to the City.

By judgment of 9 January 2007 (case reference not available), the Orléans Administrative Tribunal of First Instance dismissed the plaintiffs' request, upon which the plaintiffs lodged an appeal against this judgment.

By judgment of 29 December 2008 (case reference not available), the Nantes Administrative Court of Appeal referred a request for a preliminary ruling to the CJEU on whether the administrative authority could rectify a recovery order annulled by a national court on grounds of a procedural defect.

The CJEU held – in its judgment of 20 May 2010 (Case Scott SA and Kimberly Clark SAS v Ville d'Orléans C-210/09,) – that it was possible to rectify a procedural defect after annulment by the national court of recovery orders. However, the State was not obliged to refund, even provisionally, those amounts to the beneficiary of that aid.

The ruling of 31 August 2010 by the Nantes Administrative Court of Appeal summarised here represents the follow-up to this preliminary ruling.

This judgment has been confirmed by a subsequent judgment of the Council of State dated 28 December 2012 (ruling ECLI:FR:CESSR:2012:344052.20121228).

Type of action

Public enforcement

Date of the Commission decision

12/07/2000

Delivery date of the ruling

31/08/2010

Language

French

Headnote

In this ruling, the Court held that the administration should not refund, even provisionally, the amount recovered from the aid beneficiary by means of a recovery order subsequently annulled on grounds of a procedural defect.

Parties

Names of the parties to the action

Société Scott SA; Société Kimberly Clark SNC

Versus

Ville d'Orléans

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

C - Manufacturing

Manufacturing of household and sanitary paper

The type of State aid measure challenged in the court proceedings

Concession/privatisation of State-owned land/property at more favourable terms than market conditions; Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

Scott and Kimberly Clark brought an action against the recovery orders from the City of Orléans, requesting their annulment and the refund of the sums already paid to the administration. They claimed that the recovery orders are null and void since they impose the recovery of compound interest, and neither the Commission decision nor the EU regulations impose the recovery of compound interest.

The City of Orléans pointed out that if the recovery orders had a procedural defect, their annulment should not necessarily lead to the reimbursement of the sums recovered but only allow the administration to rectify the recovery orders by requesting payment of simple interest.

Remedy(ies) sought

Other remedy sought

Annulment of the recovery orders and refund of the sums paid under these orders

Outcome of the case

Conclusions adopted by the national court

The Court followed the CJEU preliminary ruling and annulled the recovery orders on grounds of a procedural defect and requested the administration to reimburse the difference between the compound interest that had been paid by the aid beneficiaries under the recovery order and the simple interest that was actually due since neither the Commission decision, nor State aid rules imposed the recovery of compound interest. The Court also ordered the administration to issue rectified recovery orders.

As the Court confirmed that the administration should not refund, even provisionally, the amount recovered from the aid beneficiary by means of a recovery order, it did not order the administration to reimburse the whole amounts paid by the plaintiffs but only the difference between compound and simple interest.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC)No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Commission Decision 2002/14/EC of 12 July 2000 on the state aid granted by France to Scott Paper SA Kimberly-Clark (Text with EEA relevance) (notified under document number C(2000) 2183), OJ L 12, 15.1.2002

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case 210/09, Scott SA and Kimberly Clark SAS v Ville d'Orléans (2010) ECLI:EU:C:2010:294 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-210/09)

Any other comments (optional)

No other comments

Case summary FR8

Date

06/01/2019

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Cour administrative d'appel de Bordeaux (3ème chambre - formation à 3)

Court which adopted the ruling (English)

Bordeaux Administrative Court of Appeal (3rd Chamber - panel of three judges)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031603326&fastReqId=973120687&fastPos=1

Case reference

15BX01807

Procedural context of the case

By Commission decision (EU) 2015/1226 of 23 July 2014 (SA.22614 C 53/2007), the Commission found that the Pau Béarn Chamber of Commerce and Industry had granted incompatible and unlawful State aid to Ryanair Ltd and Airport Marketing Services Ltd under agreements for airport and marketing services.

Since the Pau Béarn Chamber of Commerce and Industry had no authority to issue a recovery order, it issued two payment notifications on 6 October 2014 and requested the Pau Administrative Tribunal to order interim recovery measures for a total amount of EUR 2,236,627.85.

By judgment of 19 May 2015, the Pau Administrative Tribunal dismissed this request, since Ryanair Ltd and Airport Marketing Services Ltd had filed a complaint before the Administrative Tribunal on 4 May 2015, requesting the annulment of the payment notifications, and under National Decree n°2012-1246 dated 7 November 2012, procedures against the payment notifications issued by public authority had suspensory effect. The Pau Béarn Chamber of Commerce and Industry lodged an appeal against this judgment, which was ruled on by the Bordeaux Administrative Court of Appeal in the ruling at hand.

Type of action

Public enforcement

Date of the Commission decision

23/07/2014

Delivery date of the ruling

10/12/2015

Language

French

Headnote

In this ruling, the Court held that actions brought before national courts against a State aid recovery procedure had no suspensory effect in order to comply with the EU principle of immediate and effective recovery of the aid.

Parties

Names of the parties to the action

Chambre de commerce et d'industrie Pau Béarn

Versus

Ryanair Ltd ; Airport Marketing Services Ltd

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

H - Transporting and storage

Airport and marketing services

The type of State aid measure challenged in the court proceedings

Other

Contractual and marketing arrangements

Substance of the case

Facts and parties' main arguments in the case

Ryanair Ltd and Airport Marketing Services Ltd benefitted from airport and marketing services contracts with the Pau Béarn Chamber of Commerce and Industry, by which they were paid an annual amount that was considered as incompatible State aid by the Commission in Commission Decision (EU) 2015/1226 dated 23 July 2014.

The Pau Béarn Chamber of Commerce and Industry had no authority to issue recovery orders, and therefore issued two payment notifications on 6 October 2014 and requested the national judge to grant interim recovery measures. The aid beneficiaries challenged these notifications before the Court, through another procedure.

In this particular case, the plaintiff, Pau Béarn Chamber of Commerce and Industry, argued that the fact that the State aid recovery was automatically suspended when the aid beneficiaries brought actions challenging the recovery order, without allowing the judge to consider whether this suspensory effect was relevant in the case, was incompatible with the EU principles of immediate and effective execution of Commission decisions.

The defendants argued that the action they brought against the State aid recovery procedure had suspensory effect on the action the public authority brought before the Court in order to obtain an interim recovery order, and that the Court should suspend its ruling on the interim recovery measures until the judgment on the legality of the recovery procedure was rendered.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

The Court applied ECJ (current CJEU) judgment (Commission of the European Communities v French Republic C-232/05 dated 5 October 2006), and considered that by granting a suspensory effect of actions brought against demands for payment issued for the recovery of aid granted, the procedure could have considerably delayed the recovery of the aid and therefore prolonged the unfair competitive advantage resulting from the aid at issue. The Court held that in order to comply with the EU rules on the immediate and effective recovery of the aid, the actions brought against the national recovery procedure should have no suspensory effect. Therefore, the Court granted the interim recovery measure.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid; Requests of aid recovery suspension

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-205/82 to 215/82, Deutsche Milchkontor GmbH and others v Federal Republic of Germany (1983) ECLI:EU:C:1983:233
- C-383/06 to C-385/06, Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening (C-383/06) and Gemeente Rotterdam (C-384/06) v Minister van Sociale Zaken en Werkgelegenheid and Sociaal Economische Samenwerking West-Brabant (C-385/06) v Algemene Directie voor de Arbeidsvoorziening (2008) ECLI:EU:C:2008:165
- C-232/05, Commission of the European Communities v French Republic (2006) ECLI:EU:C:2006:651
- C-465/93, Atlanta Fruchthandelsgesellschaft mbH and Others v Bundesamt für Ernährung und Forstwirtschaft, (1995) ECLI:EU:C:1995:369

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Commission Decision (EU) 2015/1226 dated 23 July 2014 (SA.22614 C 53/2007)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

The Court referred to Article 23 bis paragraph 2 of Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 and confirmed that the Commission could submit written observations since it was seeking the execution of Commission Decision SA.22614 (C53/207) and the immediate recovery of the aid by the French authorities.

Case summary FR9

Date

06/01/2019

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Cour Administrative d'Appel de Nantes (5ème Chambre)

Court which adopted the ruling (English)

Nantes Administrative Court of Appeal (5th Chamber)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036989137&fastReqId=647812686&fastPos=3

Case reference

16NT02839

Procedural context of the case

By Commission Decision of 16 December 2003 (2004/343/EC), the Commission found that a tax exemption provided by Article 44(7) of the French General Tax Code constituted incompatible State aid.

Subsequently, the Commission brought an action against the French State before the ECJ (current CJEU) for failure to fulfil its obligation to recover the State aid. The ECJ (current CJEU) rendered a judgment on 13 November 2008 (Commission of the European Communities v French Republic C-214/07) finding the French State had failed to fulfil its obligation.

Following this judgment, the Director for public finances of the French Department of Ille-et-Vilaine issued, on 27 November 2009, a recovery order for the amount of EUR 2,012,643 against one of the aid beneficiaries, the company Société Vergers de Châteaubourg.

The Société Vergers de Châteaubourg challenged this recovery order before the administration. By a ruling of 15 March 2010 (case reference not available), the administration dismissed the claim. The plaintiff thus brought an action against the recovery order and the decision of the administration confirming the validity of the recovery order.

By judgment of 15 June 2016 (ruling 1001968), the Rennes Administrative Tribunal of first instance dismissed the claim of the plaintiff. The plaintiff brought an appeal against this judgment. The ruling of the Nantes Administrative Court of Appeal of 1 June 2018 with regard to this appeal is summarised here.

Type of action

Public enforcement

Date of the Commission decision

16/12/2003

Delivery date of the ruling

01/06/2018

Language

French

Headnote

In this ruling, the Court held that the State had to allow State aid beneficiaries to comment on the amount of the State aid and the calculation method used before issuing a definitive recovery order.

Parties

Names of the parties to the action

Société Vergers de Châteaubourg

Versus

Ministre de l'action et des comptes publics

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

C - Manufacturing

Manufacturing of milk powder, apple juice and apple sauce sold to the agro-food industries

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The Article 44 septies of the French General Tax Code provided for an exemption from corporation tax for a period of two years to companies created to take over the activities of industrial firms in difficulty. This Article was considered as a State aid measure that was incompatible with the internal market, by Commission decision of 16 December 2003 (2004/343/EC).

The Société Vergers de Châteaubourg requested the annulment of the recovery order issued by the Director for public finances of the French Department following the Commission decision.

It claimed that the administration did not allow it to comment on the amount of the State aid to be recovered, and the calculation method used when it received the recovery order. The Court did not specify the arguments of the defendant.

Remedy(ies) sought

Other remedy sought

Annulment of the recovery order issued by the public authority

Outcome of the case

Conclusions adopted by the national court

The Court held that the administration had to allow State aid beneficiaries to comment on the amount of the State aid and the calculation method used before issuing a definitive recovery order. It stated that, in this case, the administration had not provided

evidence that the plaintiff had been given the opportunity to make remarks on the quantum of the State aid to be recovered. By not doing so, the administration had breached the plaintiff's right of defence.

Therefore, the Court annulled the recovery order issued against the plaintiff. However, the Court did not order the administration to reimburse the amount paid by the plaintiff under the annulled recovery order. It pointed out that the public authority had to issue a fresh recovery order since the annulment of the recovery order had been decided on the grounds of defect in form.

Remedy(ies) granted – including assessment public enforcement issues

Quantification of the aid to be recovered; Other remedy imposed (Annulment of the recovery order); Other remedy imposed (Possibility to issue a new amended recovery order)

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- Case C-214/07, Commission of the European Communities v French Republic (2008) ECLI:EU:C:2008:619
- Case C-202/14, Adiamix SAS v Direction départementale des finances publiques de l'Orne (2014) ECLI:EU:C:2014:2420

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty
- Commission Decision 2004/343/EC of 16 December 2003 on the aid scheme implemented by France for the takeover of firms in difficulty (Text with EEA relevance) (notified under document number C(2003) 4636), OJ L 108, 16.4.2004

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary FR10

Date

06/01/2019

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Conseil d'État (10ème et 9ème sous-sections réunies)

Court which adopted the ruling (English)

Council of State (10th / 9th sub-sections combined)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000019989570&fastReqId=1835902904&fastPos=129

Case reference

274923

Procedural context of the case

From 1980 to 2001, the French Ministry for Culture and Communication had granted aid to CELF to handle small orders placed by booksellers established abroad. By a letter dated 20 March 1992, the company SIDE, the sole competitor of CELF in the market for the export of French-language books, drew the Commission's attention to this national measure which had not been notified to the Commission.

By three successive Commission decisions (dated 18 May 1993 (NN 127/92), 10 June 1998 (1999/133/EC), 20 April 2004 (2005/262/EC)), the Commission found that the aid had not been notified and was therefore unlawful, but that the aid was compatible with the 'common market' on the ground that it satisfied the conditions for derogation under Article 87(3)(d) of the EC Treaty (current Article 107(3)(d) TFEU).

SIDE lodged an appeal against each of these Commission decisions.

By three successive judgments (dated 18 September 1995 (Société Internationale de Diffusion et d'Edition (SIDE) v Commission of the European Communities T-49/93), 28 February 2002 (Société internationale de diffusion et d'édition (SIDE) v Commission of the European Communities T-155/98), 15 April 2008 (Société internationale de diffusion et d'édition SA (SIDE) v Commission of the European Communities. T-348/04)), the CFI (current GC) annulled the Commission decisions in so far as they declared the aid compatible with the 'common market'.

At the same time as the proceedings before the GC, SIDE requested the Minister for Culture and Communication that payment of the aid granted to CELF be stopped and that the aid already paid be repaid. That request was rejected by decision of 9 October 1996. SIDE brought an action for annulment of that decision before the Paris Administrative Tribunal which annulled the decision by judgment of 26 April 2001.

The Minister for Culture and Communication and CELF appealed against that judgment to the Paris Administrative Court of Appeal. By judgment of 5 October 2004 (01PA02717), the Court of Appeal upheld the judgment appealed against and ordered the French State to recover, within three months of the date of notification of the judgment, the sums paid to CELF and, if failing to do so, to pay a penalty of EUR 1,000 per day for any delay under Article L. 911-4 of the French Code of Administrative Justice.

The Minister for Culture and Communication and CELF appealed against that judgment before the Council of State.

By judgment of 29 March 2006 (274923) the Council of State referred a request for a preliminary ruling from the ECJ (current CJEU). The ECJ (current CJEU) gave a preliminary ruling on 12 February 2008 (Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) C-199/06) confirming that the obligation to recover unlawful State aid extends also, for the purposes of calculating the sums to be paid by the recipient, to the period between a decision of the Commission declaring the aid to be compatible with the 'common market' and the annulment of that decision by the Union Courts.

The present judgment from the Council of State of 19 December 2008 follows-up on this preliminary ruling, as well as requests another preliminary ruling from the CJEU.

The CJEU gave its second preliminary ruling in this case on 11 March 2010 (Case Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) C-1/09, ECLI:EU:C:2010:136). Following this second preliminary ruling, the Council of State ordered - by a judgment dated 30 December 2011 (274923) - the recovery of the State aid granted between 1982 and 2001 (including interest). A subsequent judgment was rendered by the Council of State (10th and 9th sub-sections combined) on 13 January 2017 (ruling ECLI:FR:CECHR:2017:382427.20170113).

Type of action

Public enforcement

Date of the Commission decision

18/05/1993; 10/06/1998; 20/04/2004

Delivery date of the ruling

19/12/2008

Language

French

Headnote

In this ruling, the Court held that the State had to recover the interest accrued over the whole period of unlawful State aid, despite the Commission declaring the unlawful aid compatible with the internal market by three decisions.

Parties

Names of the parties to the action

Ministre de la culture et de la communication et de la communication; Coopérative d'exportation des livres français (CELF)

Versus

Société internationale de diffusion et d'édition (SIDE)

The relationship of the plaintiff to the measure

Public authority; Beneficiary

The relationship of the defendant to the measure

Competitor

Sector relating to the State aid argument

G - Wholesale and retail trade; repair of motor vehicles and motorcycles

Export of French-language books

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

From 1980 to 2001, the French Ministry for Culture and Communication granted aid to the CELF to handle small orders placed by booksellers established abroad. The company SIDE, sole competitor of CELF in the market for the export of French-language books brought an action before the Commission against this national measure.

The Commission rendered three successive decisions declaring the aid scheme was compatible with the 'common market'. These three Commission decisions subsequently were annulled by the CFI (current GC).

In this case, the plaintiffs argued that the Court of Appeal (which ordered the French State to recover the sums paid to CELF as well as a penalty in case of delay) should have held that the fact that the Commission had recognised the aid's compatibility with the 'common market' precluded the obligation to repay the aid which followed, as a rule, from unlawfulness in the implementation of measures of State aid by the Member State.

SIDE argued that the State aid and interest had to be recovered for the whole period of unlawfulness of the State aid, despite the decisions of the Commission considering the State aid compatible with the 'common market'.

Remedy(ies) sought

Other remedy sought

Annulment of a court ruling ordering the recovery of the unlawful State aid and interest

Outcome of the case

Conclusions adopted by the national court

The Council of State held that the State had to recover the interest accrued over the whole period of unlawfulness, regardless of the fact that the Commission had declared the unlawful aid compatible with the 'common market' and did not request the recovery of the aid itself.

Moreover, the Council of State referred a request for a preliminary ruling to the CJEU on whether a national court may stay the adoption of its decision regarding the recovery of State aid until the Commission has ruled on the compatibility of the aid with the 'common market' after the annulment of a prior Commission decision declaring the aid compatible by the CFI (current GC).

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered; Indirect challenges against a Commission decision *via* CJEU preliminary ruling

Difficulties referred to by the national court in deciding the case (optional)

The CJEU gave its second preliminary ruling in this case on 11 March 2010 (ECLI:EU:C:2010:136), in which it declared that the adoption by the Commission of three successive decisions declaring aid to be compatible with the 'common market', which were subsequently annulled by the CJEU, is not, in itself, capable of constituting an exceptional circumstance such as to justify a limitation of the recipient's obligation to repay that aid.

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79
- T-348/04, Société internationale de diffusion et d'édition SA (SIDE) v Commission of the European Communities (2008) ECLI:EU:T:2008:109

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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
- Commission Decision NN 127/92 of 18 May 1993
- Commission Decision 1999/133/EC of 10 June 1998 concerning State aid in favour of Coopérative d'exportation du livre français (CELF) (notified under document number C(1998) 1728), OJ L 44, 18.2.1999
- Commission Decision 2005/262/EC of 20 April 2004 on the aid implemented by France in favour of the Coopérative d'exportation du livre français (CELF), OJ L 85, 2.4.2005

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:7 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-199/06)

Any other comments (optional)

No other comments

Case summary FR11

Date

06/01/2019

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Cour de cassation (Chambre commerciale)

Court which adopted the ruling (English)

Court of Cassation (Commercial Chamber)

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000026774212&fastReqId=592762871&fastPos=17

Case reference

ECLI:FR:CCASS:2012:CO01235

Procedural context of the case

By decision of 16 December 2003 (2004/343/EC), the Commission found that the tax exemption provided by Article 44 septies of the French General Tax Code constituted incompatible State aid.

The Commission brought an action before the ECJ (current CJEU) against the French State for failure to fulfil its obligation to recover the State aid. The ECJ (current CJEU) rendered a judgment on 13 November 2008 (Commission of the European Communities v French Republic C-214/07) finding the French State had failed to fulfil its obligation.

Following this judgment, the Director for public finances of the French Department of Loire issued, on 30 November 2009, a recovery order against one of the aid beneficiaries, the company Société stéphanoise de construction mécanique (SCM).

However, on 2 February 2005, the SCM had been wound up by judgment of the Court.

By ruling of 18 December 2009 (reference number not available), the judge of first instance held that the Director for public finances of the French Department of Loire could not require the recovery of the State aid since he had not reported this debt to the liquidator of the SCM within the deadline established by French law.

The Director for the public finances of the French Department of Loire lodged an appeal against this ruling.

By judgment of 23 September 2011 (reference number not available), the Lyon Court of Appeal confirmed the previous judgment. The plaintiff thereupon lodged an appeal in cassation against that judgment, on which the Commercial Chamber of the Court of Cassation issued a ruling on 11 December 2012 (summarised here).

Type of action

Public enforcement

Date of the Commission decision

16/12/2003

Delivery date of the ruling

11/12/2012

Language

French

Headnote

In this ruling, the Court considered that French law did not provide any exception to the one-year limitation period for the reporting of debt to the liquidator of an insolvent undertaking. Therefore, it was not possible for the administration to recover State aid after the expiry of the limitation period expired.

Parties

Names of the parties to the action

Directeur départemental des finances publiques de la Loire

Versus

M. X..., en sa qualité de liquidateur judiciaire de la société Stéphanoise de construction mécanique (SCM) (anonymised)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Other

Liquidator of the beneficiary

Sector relating to the State aid argument

K - Financial and insurance activities

Takeover of firms in difficulty

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

Article 44 septies of the French General Tax Code provided for exemption from corporation tax for a period of two years for companies created to take over the activities of industrial firms in difficulty. This Article had been considered as granting State aid incompatible with the internal market by the Commission decision dated 16 December 2003 (2004/343/EC). The SCM benefitted from this tax exemption.

The recovery order was issued by the French administration the 30 November 2009.

However, the SCM had been under a liquidation proceeding since 2 February 2005. Therefore, the liquidator of the SCM has refused to pay the debt relating to the recovery of this State aid, arguing that the administration had failed to report this debt within the deadline established by French law.

The Director for public finances of the French Department of Loire – the plaintiff in this case – argued that in accordance with the principles of direct effect and primacy of the Union law, a national rule which precludes the administration to implement the Commission decision and recover an incompatible State aid should not be applied.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

The Court relied on ECJ (current CJEU) case Commission of the European Communities v French Republic C-214/07 and confirmed that the State must apply any procedure allowing the administration to claim the recovery of incompatible State aid, despite the expiration of the limitation period to do so, but only if such an exception to the limitation period existed and was still available. The Court noted that in this case, the administration had not reported its claim to recover the State aid to the liquidator of the aid beneficiary within the one-year limitation period provided for under French insolvency law. As the law did not provide any exception to this limitation period, there is, according to the Court, an absolute impossibility to implement the Commission.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected; Liquidation of the aid beneficiary – i.e. aid recovery in the context of insolvency proceedings; Avoiding the aid recovery due to impossibility of recovery

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-214/07, Commission of the European Communities v French Republic (2008) ECLI:EU:C:2008:619

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Commission Decision 2004/343/EC of 16 December 2003 on the aid scheme implemented by France for the takeover of firms in difficulty (Text with EEA relevance) (notified under document number C(2003) 4636), OJ L 108, 16.4.2004

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary FR12

Date

06/01/2019

Case identifiers

Member State

France

Court which adopted the ruling (national language)

Conseil d'État (3ème - 8ème chambres réunies)

Court which adopted the ruling (English)

Council of State (3rd / 8th Chambers combined)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

French

Hyperlink to ruling

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000034081862&fastReqId=1835902904&fastPos=16

Case reference

ECLI:FR:CECHR:2017:395844.20170224

Procedural context of the case

By a decision of 16 December 2003 (2004/343/EC), the Commission found the tax exemption provided by the Article 44(7) of the French General Tax Code was an incompatible State aid.

The Commission brought an action against the French State before the ECJ (current CJEU) for failure to fulfil its obligation to recover the State aid. The ECJ (current CJEU) rendered a judgment on 13 November 2008 (Commission of the European Communities v French Republic C-214/07), finding the French State had failed to fulfil its obligation.

Following this judgment, the Director for public finances of the French Department of Oise issued, on 17 May 2011, a recovery order for an amount of EUR 533,008 against one of the aid beneficiaries, the company Luchard Industrie.

By judgment of 26 November 2013 (ruling 1102895), the Amiens Administrative Tribunal of first instance dismissed the claim made by the company Luchard Industrie requesting the annulment of the recovery order. The plaintiff brought an appeal against this judgment.

Following this, by judgment of 4 November 2015 (ruling 14DA00178), the Douai Administrative Court of Appeal confirmed that the limitation period for the State to claim the State aid recovery had not expired. However, the Court annulled the recovery order since it did not describe the method of calculation used in order to set the quantum of the interest to be paid. The Court indicated that the administration had to issue a new recovery order.

The plaintiff thereupon lodged an appeal in cassation against this judgment before the Council of State. The plaintiff claimed the action of the State for the recovery of the State aid was time-barred.

By the judgment of 24 February 2017 (ruling ECLI:FR:CECHR:2017:395844.20170224) at hand, the Council of State (3rd / 8th Chambers combined) dismissed the claim made by the plaintiff.

Type of action

Public enforcement

Date of the Commission decision

16/12/2003

Delivery date of the ruling

24/02/2017

Language

French

Headnote

In this ruling, the Court held that the entire 10-year limitation period for the State to claim the recovery of State aid starts again after a judgment of the CJEU ruling on an action for failure of the Member State to fulfil its obligation to recover the State aid.

Parties

Names of the parties to the action

Société Luchard Industrie

Versus

Ministre des Finances et des Comptes Publics

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

K - Financial and insurance activities

Takeover of firms in difficulty

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

Article 44 septies of the French General Tax Code provided for an exemption from corporation tax for a period of two years for companies created to take over the activities of industrial firms in difficulty.

The plaintiff benefitted from this tax exemption in 2002. By decision of 16 December 2003 (2004/343/EC), the Commission had considered this tax exemption constituted State aid. The recovery order was issued by the French administration on 17 May 2011.

The plaintiff claimed the action of the State for the recovery of the State aid was time-barred.

The Minister of Finance and Public Accounts noted that pursuant to the Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999), the 10 year limitation period for the State to claim the recovery of State aid is halted by the proceedings before the Commission and the CJEU.

Remedy(ies) sought

Other remedy sought

Expiration of the action for the recovery of State aid

Outcome of the case

Conclusions adopted by the national court

The Court ruled that since the Commission brought an action against the French State before the CJEU for failure to fulfil obligations with regard to the recovery of the State aid, the 10 year limitation period had started again at the day the ECJ (current CJEU) judgment was rendered, i.e. on 13 November 2008 (Commission of the European Communities v French Republic C-214/07). Its ruling confirmed that the limitation period for the State to claim the State aid recovery is 10 years pursuant to EU Regulation n° 659/1999/CE dated 22 March 1999, and that the entire limitation period starts again after the judgment of the CJEU ruling on an action for failure to fulfil obligations brought by the Commission in this case.

Therefore, the Director for public finances of the French Department of Oise had been able to issue a recovery order for an amount of EUR 533,008 on 17 May 2011 without having its recovery action being time-barred.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid; Avoiding the aid recovery due to impossibility of recovery

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-214/07, Commission of the European Communities v French Republic (2008) ECLI:EU:C:2008:619

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Commission Decision 2004/343/EC of 16 December 2003 on the aid scheme implemented by France for the takeover of firms in difficulty (Text with EEA relevance) (notified under document number C(2003) 4636), OJ L 108, 16.4.2004

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

10.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Cour d'appel de Versailles	Versailles Court of Appeal	Second to last instance court (civil/commercial)	No information	30/01/2007	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law and applies the criteria of the Altmark decision of the ECJ (current CJEU) to conclude that the compensation for services of general economic interest does not constitute State aid.		
Cour de cassation (Chambre Civile 2)	Court of cassation (2nd Civil Chamber)	Last instance court (civil/commercial)	No information	14/03/2007	Private enforcement	Case sent back to the lower court for re-assessment; Recovery order in relation to unlawful aid; Recovery of interest	This decision remitted the case to the lower instance it had come from in order to investigate whether the scheme constituted unlawful State aid.	This decision confirms well-established case law that the parameters of the subsidy calculation have to be established in advance in an objective and transparent manner under the Altmark decision of the ECJ (current CJEU) in order to not constitute State aid.	The Court re-sends the case to the lower instance it had come from in order to investigate whether the scheme constitutes unlawful State aid: https://www.doctrine.fr/d/CA/Versailles/2010/B450122FA7F95EA2F12CC.
Cour Administrative d'Appel de Paris (5ème Chambre)	Paris Administrative Court of Appeal (5th Chamber)	Second to last instance court (administrative)	No information	01/10/2007	Private enforcement	None - Claim rejected	The national measure does not constitute State aid. This decision confirms that there is no prohibition if the revenue from the tax is not hypothecated to the aid measure at issue.		
Cour Administrative d'Appel de Paris (5ème Chambre)	Paris Administrative Court of Appeal (5th Chamber)	Second to last instance court (administrative)	No information	05/11/2007	Private enforcement	None - Claim rejected	The national measure does not constitute State aid. This decision confirms that there is no prohibition if the revenue from the tax is not hypothecated to the aid measure at issue.		
Conseil d'État (2ème - 7ème sous-sections réunies)	Council of State (2nd / 7th sub-sections combined)	Last instance court (administrative)	No information	04/04/2008	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that there is no State aid if the national measure does not create an advantage for its beneficiary.		
Conseil d'État (3ème et 8ème sous-sections réunies)	Council of State (3rd / 8th Sub-sections combined)	Last instance court (administrative)	No information	07/05/2008	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms and follows well-established case law to conclude that the disputed national measure is not State aid: 1) the national measure has not been granted *via* State owned resources and did not imply additional costs or loss of revenue for the State; 2) the State had no control over the contribution system or its income.		
Cour de cassation (Chambre commerciale)	Court of cassation (Commercial Chamber)	Last instance court (civil/commercial)	No information	23/09/2008	Private enforcement	Case sent back to the lower court for re-assessment	No remedy was granted as the Court remitted the case to the lower instance it had come from in order to investigate whether the scheme was unlawful State aid and therefore had to be recovered. This decision confirms well-established case law and confirms that the implementation of the system of supervising State aid is a matter for both the Commission and, having regard to the direct effect, the national courts.		The subsequent ruling from the lower court is not available. Another decision from the same Court, same date, regarding the same national measure and with the same outcome: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000019535766&fastReqId=592762871&fastPos=27.
Cour d'appel de Paris	Paris Court of Appeal	Second to last instance court (civil/commercial)	No information	06/11/2008	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms there is no State aid if the national measure does not create an advantage for its beneficiary - the exclusion of foreign income from the social security contribution base is allowed without prejudice to the principle of equal social protection.		Another decision from the same court, same date, regarding the same national measure and with the same outcome: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020203669&fastReqId=335744192&fastPos=1.
Conseil d'Etat (Assemblée)	Council of State (Assembly)	Last instance court (administrative)	ECLI:FR:CEASS:2008:282920.20081107	07/11/2008	Private enforcement	None - Claim rejected	The national measure does not constitute State aid. This decision confirms that the decision of the Government not to notify a national measure to the Commission can be subject to a claim before the national courts, but that the decision of the Government to notify potential State aid to the Commission cannot be subject to a claim before the national courts.		
Cour Administrative d'Appel de Nantes (1ère Chambre)	Nantes Administrative Court of Appeal (1st Chamber)	Second to last instance court (administrative)	No information	28/12/2009	Private enforcement	None - Claim rejected	The national measure does not constitute State aid. This decision confirms that there is no prohibition if the revenue from the tax is not hypothecated to the aid measure at issue.		
Conseil d'État (1ère et 6ème sous-sections réunies)	Council of State (1st / 6th Sub-sections combined)	Last instance court (administrative)	No information	07/07/2010	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law and applies the criteria of the Altmark decision of the CJEU to conclude that the compensation for services of general economic interest does not constitute State aid.		

Cour Administrative d'Appel de Paris (4ème chambre)	Paris Administrative Court of Appeal (4th Chamber)	Second to last instance court (administrative)	No information	12/07/2010	Private enforcement	Recovery order in relation to unlawful aid	The disputed national measure, which constitutes unlawful State aid, is retroactively declared void. This decision applies the criteria of the Altmark decision of the CJEU to conclude that the national measure constitutes State aid, since its amount exceeds what is necessary to cover the costs incurred in the discharge of the public service obligations.		Ruling confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026219178&fastReqId=1835902904&fastPos=85.
Cour d'appel de Versailles (5ème chambre)	Versailles Court of Appeal (5th Chamber)	Second to last instance court (civil/commercial)	No information	02/09/2010	Private enforcement	Recovery order in relation to unlawful aid; Recovery of interest	The Court rules the disputed national measure constitutes State aid and has to be recovered. This ruling applies the criteria of the Altmark decision of the CJEU to conclude that the contributions paid by the laboratories to finance a State aid measure have to be reimbursed to the laboratories.		This decision has been confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024917368&fastReqId=133639450&fastPos=1.
Conseil d'État (2ème - 7ème sous-sections réunies)	Council of State (2nd / 7th sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2010:332393.20101012	12/10/2010	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law and applies the criteria of the Altmark decision of the CJEU to conclude that the compensation for services of general economic interest does not constitute State aid.		
Cour Administrative d'Appel de Paris (2ème Chambre)	Paris Administrative Court of Appeal (2nd Chamber)	Second to last instance court (administrative)	No information	24/11/2010	Private enforcement	None - Claim rejected	The plaintiff had argued that the Commission had not analysed substantial changes in the method of financing the notified State aid in its decision dated 22 March 2006 since these changes occurred during the Commission investigation. The plaintiff considered these changes to constitute State aid which should have been notified. The Court states that the Commission did not omit to analyse these changes since they had been notified to the Commission during the investigation. Therefore, the Court concludes that the Commission decision, which concluded that the scheme constituted State aid compatible with the TFEU, did take into account the changes in the method of financing the national scheme.		This decision confirms the aid scheme for the film and audio-visual industry has been properly analysed by the Commission in its decision C(2006) 832 dated 22 March 2006.
Conseil d'État (1ère sous-section jugeant seule)	Council of State (1st sub-section ruling alone)	Last instance court (administrative)	No information	16/02/2011	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law and applies the criteria of the Altmark decision of the CJEU to conclude that the compensation for services of general economic interest does not constitute State aid.		
Conseil d'État (3ème et 8ème sous-sections réunies)	Council of State (3rd / 8th Sub-sections combined)	Last instance court (administrative)	No information	16/02/2011	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law and confirms that State aid has to be granted *via* State-owned resources - the Court states that there is no State aid if the national measure does not imply additional costs or loss of revenue for the State.		
Conseil d'État (3ème et 8ème sous-sections réunies)	Council of State (3rd / 8th Sub-sections combined)	Last instance court (administrative)	No information	19/07/2011	Private enforcement	None - Claim rejected	The disputed national measure (the setting of fishing quotas) does not constitute State aid.		Three others decisions from the same court, same date, regarding the same national measure and with the same outcome: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000024669956&fastReqId=1835902904&fastPos=95. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000024390129&fastReqId=1835902904&fastPos=98. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000024390128&fastReqId=1835902904&fastPos=99.
Conseil d'État (2ème et 7ème sous-sections réunies)	Council of State (2nd / 7th sub-sections combined)	Last instance court (administrative)	No information	26/07/2011	Private enforcement	Recovery order in relation to unlawful aid	Any national measure falling within the definition of Article 107 TFEU has to be notified to the Commission - the disputed national measure, which constitutes unlawful State aid, is retroactively declared void.	This decision confirms the notification obligation for the State for any aid falling within the scope of Article 107 TFEU.	
Cour d'appel de Paris	Paris Court of Appeal	Second to last instance court (civil/commercial)	No information	25/10/2011	Private enforcement	None - Claim rejected	This decision states that the beneficiary of State aid cannot request damages from its lawyer who advised on the tax scheme which was subsequently declared incompatible with the internal market by the Commission: 1) the recovery of the incompatible aid does not cause harm because the aid was an unfair advantage to its beneficiary; 2) granting damages up to the amount of the aid would be like granting a benefit equivalent to the incompatible aid.		Ruling re-confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027104670&fastReqId=592762871&fastPos=16.
Cour Administrative d'Appel de Marseille (Chambres réunies)	Marseille Administrative Court of Appeal (combined Chambers)	Second to last instance court (administrative)	No information	07/11/2011	Private enforcement	Recovery order in relation to unlawful aid; Other remedy imposed	This decision applies the criteria of the Altmark decision of the CJEU and concludes that the compensation for services of general economic interest constitutes State aid. The remedy granted is the amicable termination of the contract (public service delegation agreement) which constitutes State aid within one year. In order to preserve the continuity of the functioning of the maritime public service of Corsica, the Court pronounces the application of the remedy within a one year period.		This decision has been overturned on appeal: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026199020&fastReqId=1835902904&fastPos=87.
Conseil d'État (10ème et 9ème sous-sections réunies)	Council of State (10th / 9th sub-sections combined)	Last instance court (administrative)	No information	09/11/2011	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law and confirms that there is no State aid if the national measure does not create an advantage for its beneficiary.		

Conseil d'État (3ème et 8ème sous-sections réunies)	Council of State (3rd / 8th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2011:334183.20111128	28/11/2011	Private enforcement	Other remedy imposed	The Court pronounces a stay of proceedings pending the CJEU's preliminary ruling.	The national court refers a request for a preliminary ruling to the CJEU on whether the national measure constitutes State aid.	The judgment of the CJEU dated 30 May 2013 (C-677/11) declares that the national measure does not constitute State aid.
Cour de cassation (Chambre civile 2)	Court of cassation (2nd Civil Chamber)	Last instance court (civil/commercial)	No information	01/12/2011	Private enforcement	Recovery order in relation to unlawful aid; Recovery of interest	This decision confirms the previous decision from the lower court and orders the recovery of the State aid.		This decision confirms the previous decision from the lower court: decision of the Versailles Court of Appeal dated 2 September 2010 (not publicly available).
Conseil d'État (1ère sous-section jugeant seule)	Council of State (1st sub-section ruling alone)	Last instance court (administrative)	No information	16/03/2012	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law and applies the criteria of the Altmark decision of the CJEU to conclude that the compensation for services of general economic interest does not constitute State aid - the amount of the compensation for services of general economic interest does not exceed what is necessary to cover the costs incurred in the discharge of the public service obligations.		
Conseil d'Etat (9ème / 10ème Sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2012:324852.20120515	15/05/2012	Private enforcement	Other remedy imposed	The Court pronounces a stay of proceedings pending the CJEU's preliminary ruling.	The national court refers a request for a preliminary ruling to the CJEU on whether a mechanism for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind-generated electricity at a price higher than the market price that is financed by final consumers, such as that resulting from Law No. 2000-108, must be regarded as State aid.	The CJEU considered this national measure to constitute an intervention through State resources (case C-262/12 dated 19 December 2013). National measure has been declared void by the Council of State in a decision dated 28 May 2014: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000029036637&fastReqId=1835902904&fastPos=60. Payment of interest was confirmed by a subsequent decision dated 15/04/2016: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032409025&fastReqId=1835902904&fastPos=34. Other subsequent decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036253515&fastReqId=1835902904&fastPos=1. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000035774963&fastReqId=1835902904&fastPos=10.
Conseil d'État (7ème et 2ème sous-sections réunies)	Council of State (7th / 2nd Chambers combined)	Last instance court (administrative)	ECLI:FR:CESSR:2012:355616.20120713	13/07/2012	Private enforcement	Case sent back to the lower court for re-assessment; Recovery order in relation to unlawful aid	This decision overturns the lower court's decision. the Court remitted the case to the lower instance it had come from in order to check whether the candidate selected was the one capable of providing the public service at the lowest cost. The Court considers that in this case, what would constitute State aid is not the delegation of a public service itself, but the choice of a candidate by the administration which is not capable of providing this public service at the lowest cost. In this case, the contract (i.e. the public service delegation agreement) itself could stay in force, but the administration has to organise a new selection procedure.		The court re-sent the case to the lower instance it had come from in order to check whether the candidate selected was the one capable of providing the public service at the lowest cost: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032374427&fastReqId=1899294255&fastPos=15. This decision overturns the lower court's decision: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000024802956&fastReqId=1899294255&fastPos=45.
Conseil d'État (7ème et 2ème sous-sections réunies)	Council of State (7th / 2nd sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2012:347073.20120713	13/07/2012	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law and applies the criteria of the Altmark decision of the CJEU to conclude that the compensation for services of general economic interest does not constitute State aid - the amount of the compensation for services of general economic interest does not exceed what is necessary to cover the costs incurred in the discharge of the public service obligations.		
Conseil d'État (3ème et 8ème sous-sections réunies)	Council of State (3rd / 8th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2012:343440.20120723	23/07/2012	Private enforcement	None - Claim rejected	This decision confirms the previous decision of the court of second instance which declared the disputed national measure constituting State aid to be void. This decision confirms and follows well-established case law and the decision of the court of second instance which applies the criteria of the Altmark decision of the		Confirms the ruling rendered by a lower court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CET

							CJEU to conclude that the national measure constitutes State aid, since its amount exceeds what is necessary to cover the costs incurred in the discharge of the public service obligations.		ATEXT000022789037&fastReqId=459973021&fastPos=88.
Conseil d'État (9ème et 10ème sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2012:348856.20121022	22/10/2012	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms that there is no prohibition if the revenue from the tax is not hypothecated to the aid measure at issue.		
Conseil d'État (9ème sous-section jugeant seule)	Council of State (9th Sub-section ruling alone)	Last instance court (administrative)	ECLI:FR:CESJS:2012:348344.20121207	07/12/2012	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms that there is no prohibition if the revenue from the tax is not hypothecated to the aid measure at issue.		Eight other decisions from the same Court, same date, regarding the same national measure and with the same outcome: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026738942&fastReqId=1835902904&fastPos=73. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026738945&fastReqId=1835902904&fastPos=80. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026738940&fastReqId=1835902904&fastPos=79. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026738946&fastReqId=1835902904&fastPos=78. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026738936&fastReqId=1835902904&fastPos=77. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026738941&fastReqId=1835902904&fastPos=76. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026738938&fastReqId=1835902904&fastPos=75. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026738944&fastReqId=1835902904&fastPos=74.
Cour de cassation (Chambre civile 1)	Court of cassation (1st Civil Chamber)	Last instance court (civil/commercial)	ECLI:FR:CCASS:2013:C100199	19/02/2013	Private enforcement	None - Claim rejected	This decision states that the beneficiary of State aid cannot request damages up to the amount of the aid from its lawyer who advised on the advised tax scheme which was subsequently declared incompatible with the internal market by the Commission.		Confirms the ruling rendered by a lower court: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025300695&fastReqId=2137864905&fastPos=1
Cour administrative d'appel de Paris (1ère chambre)	Paris Administrative Court of Appeal (1st Chamber)	Second to last instance court (administrative)	No information	25/03/2013	Private enforcement	Recovery order in relation to unlawful aid	Any national measure falling within the definition of Article 107 TFEU has to be notified to the Commission - the disputed national measure, which constitutes unlawful State aid, is retroactively declared void.	This decision confirms the notification obligation for the State for any aid falling within the scope of Article 107(1) TFEU.	This decision has been overturned on appeal: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000027651446&fastReqId=1225040008&fastPos=1.
Cour de cassation (Chambre civile 2)	Court of Cassation (Civil Chamber 2)	Last instance court (civil/commercial)	ECLI:FR:CCASS:2013:C201171	11/07/2013	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a national measure does not constitute State aid if it is not granted to an entity falling within the definition of undertaking under Union law and CJEU case law.		
Cour Administrative d'Appel de Nancy (4ème chambre - formation à 3)	Nancy Administrative Court of Appeal (4th Chamber - panel of three judges)	Second to last instance court (administrative)	No information	30/09/2013	Private enforcement	Recovery order in relation to unlawful aid	The disputed national measure is retroactively declared void, since it exceeds what is necessary to cover the costs incurred in the discharge of the public service obligations and therefore constitutes State aid.		This decision has been overturned on appeal: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000030236191&fastReqId=1835902904&fastPos=52.
Conseil d'État (3ème sous-section jugeant seule)	Council of State (3rd Sub-section ruling alone)	Last instance court (administrative)	ECLI:FR:CESJS:2013:351709.20131021	21/10/2013	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a national measure does not constitute State aid if 1) it is not selective but extends to the whole industry; and/or 2) it does not imply additional costs or loss of revenue for the State.		This decision applies the judgment of the CJEU dated 30 May 2013 (C-677/11) declaring that the national measure does not constitute State aid.

Conseil d'État (3ème sous-section jugeant seule)	Council of State (3rd Sub-section ruling alone)	Last instance court (administrative)	ECLI:FR:CESJS:2013:334215.20131126	26/11/2013	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a national measure does not constitute State aid if 1) it is not selective but extends to the whole industry; and/or 2) it does not imply additional costs or loss of revenue for the State.		This decision applies the judgment of the CJEU dated 30 May 2013 (C-677/11) declaring that the national measure does not constitute State aid.
Cour Administrative d'Appel de Versailles (3ème Chambre)	Versailles Administrative Court of Appeal (3rd Chamber)	Second to last instance court (administrative)	No information	17/12/2013	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms that the State does not have to notify: 1) purely formal or administrative alterations of an already-approved aid scheme; 2) alterations of the financing of an already-approved aid scheme if this change was already presented in the first notification, and approved by the Commission.		Three other decisions from the same court, same date, regarding the same national measure and with the same outcome: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028443402&fastReqId=1899294255&fastPos=37. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028443395&fastReqId=1899294255&fastPos=38. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028443398&fastReqId=1899294255&fastPos=36.
Conseil d'État (3ème sous-section jugeant seule)	Council of State (3rd Sub-section ruling alone)	Last instance court (administrative)	ECLI:FR:CESJS:2013:353483.20131226	26/12/2013	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a national measure does not constitute State aid if: 1) it is not selective but extends to the whole industry; and/or 2) it does not imply additional costs or loss of revenue for the State.		This decision applies the judgment of the CJEU dated 30 May 2013 (C-677/11) declaring that the national measure does not constitute State aid.
Conseil d'État (3ème sous-section jugeant seule)	Council of State (3rd Sub-section ruling alone)	Last instance court (administrative)	ECLI:FR:CESJS:2013:353485.20131226	26/12/2013	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a national measure does not constitute State aid if: 1) it is not selective but extends to the whole industry; and/or 2) it does not imply additional costs or loss of revenue for the State.		This decision applies the judgment of the CJEU dated 30 May 2013 (C-677/11) declaring that the national measure does not constitute State aid.
Cour Administrative d'Appel de Versailles (3ème Chambre)	Versailles Administrative Court of Appeal (3rd Chamber)	Second to last instance court (administrative)	No information	30/12/2013	Private enforcement	None - Claim rejected	The disputed national measure did not constitute State aid. This decision confirms that the State does not have to notify: 1) purely formal or administrative alterations of an already-approved aid scheme; 2) alterations of the financing of an already-approved aid scheme if this change was already presented in the first notification, and approved by the Commission.		
Cour Administrative d'Appel de Marseille (4ème chambre, formation à 3)	Marseille Adminsitrative Court of Appeal (4th Chamber - panel of three judges)	Second to last instance court (administrative)	No information	04/02/2014	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms that the State does not have to notify an alteration of the financing of an already-approved aid scheme if this change was already presented in the first notification, and approved by the Commission.		
Cour Administrative d'Appel de Nantes (1ère Chambre)	Nantes Administrative Court of Appeal (1st Chamber)	Second to last instance court (administrative)	No information	13/02/2014	Private enforcement	None - Claim rejected	The State complied with the decision of the Commission dated 16 December 2003 declaring the national measure unlawful. This decision confirms that: 1) the State does not prejudice the principle of legitimate expectation by the retroactive annulment of the unlawful State aid; 2) the State has not exceeded the decision of the Commission dated 16 December 2003 by making the new scheme subject to prior authorisation in order for the administration to control the conditions for eligibility of small and medium-sized companies for the exemption under Commission Regulation (EC) No 70/2001 dated 12 January 2001.		This decision has been confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032260301&fastReqId=647812686&fastPos=13.
Cour Administrative d'Appel de Versailles (3ème Chambre)	Versailles Administrative Court of Appeal (3rd Chamber)	Second to last instance court (administrative)	No information	04/03/2014	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms that the State does not have to notify: 1) purely formal or administrative alterations of an already-approved aid scheme; 2) alterations of the financing of an already-approved aid scheme if this change was already presented in the first notification, and approved by the Commission.		Three other decisions from the same court, same date, regarding the same national measure and with the same outcome: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028700112&fastReqId=1899294255&fastPos=33. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028700104&fastReqId=1899294255&fastPos=32. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028700115&fastReqId=1899294255&fastPos=31.
Cour Administrative d'Appel de Paris (6ème chambre)	Paris Administrative Court of Appeal (6th Chamber)	Second to last instance court (administrative)	No information	12/05/2014	Private enforcement	None - Claim rejected	No remedy granted because the plaintiff did not demonstrate commercial harm, i.e. that by benefiting from the State aid its competitor has attracted the plaintiff's clients.	This decision confirms that the plaintiff has to demonstrate harm caused by the State aid.	This decision was overturned on appeal: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000033866959&fastReqId=1597614067&fastPos=9.

									Previous decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025115795. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000019989570&fastReqId=1835902904&fastPos=129. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008224813&fastReqId=1334442506&fastPos=2.
Conseil d'Etat (9ème / 10ème Sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:XXSSR:2014:324852.20140528	28/05/2014	Private enforcement	Recovery order in relation to unlawful aid	Any national measure falling within the definition of Article 107 TFEU has to be notified to the Commission - the disputed national measure, which constitutes unlawful State aid, is retroactively declared void.	This decision confirms the notification obligation for the State for any aid falling within the scope of Article 107 TFEU.	The payment of interest has been confirmed in a subsequent decision dated 15 April 2016: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032409025&fastReqId=1835902904&fastPos=34. Subsequent decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036253515&fastReqId=1835902904&fastPos=1. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000035774963&fastReqId=1835902904&fastPos=10. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032409025&fastReqId=1835902904&fastPos=34. Previous decision in France in this case: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025886223&fastReqId=1835902904&fastPos=88.
Conseil d'État (9ème - 10ème sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2014:363945.20140716	16/07/2014	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that there is no State aid if the national measure does not have an impact on competition in the market.		
Cour administrative d'appel de Nancy (2ème chambre - formation à 3)	Nancy Administrative Court of Appeal (2nd Chamber - panel of three judges)	Second to last instance court (administrative)	No information	30/10/2014	Private enforcement	None - Claim rejected	The Court confirms well-established case law that the beneficiary of the State aid cannot request damages from the State by arguing that the recovery of the incompatible aid causes harm to the aid beneficiary: 1) the recovery of the aid by the State is required by TFEU; 2) the fact that the aid is granted by the State should not create any legitimate expectations for the beneficiary regarding the compatibility of the aid measure with the TFEU; 3) the aid has to be recovered since it constituted an unfair advantage to its beneficiary and granting damages up to the amount of the aid would be like granting a benefit equivalent to the incompatible aid.		Ruling confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000030982979&fastReqId=1763589445&fastPos=1.
Cour de cassation (Chambre civile 2)	Court of Cassation (Civil Chamber 2)	Last instance court (civil/commercial)	ECLI:FR:CCASS:2014:C201863	18/12/2014	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a national measure does not constitute State aid if it is not granted to an entity falling within the definition of undertaking under Union law and CJEU case law.		
Conseil d'État (7ème / 2ème sous-sections réunies)	Council of State (7th / 2nd Chambers combined)	Last instance court (administrative)	ECLI:FR:CESSR:2015:373645.20150213	13/02/2015	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The Court overturns the previous decision of the Court of second instance which had miscalculated the costs incurred in the discharge of the public service obligations. The case is remitted to the lower instance it had come from in order to re-check if the national measure exceeds what is necessary to cover the re-calculated costs incurred in the discharge of the public service obligations and if it therefore constitutes State aid.		This decision overturns the lower court's decision: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028026520&fastReqId=927848033&fastPos=1. This court re-sent the case to the lower instance it had come from: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000035743677&fastReqId=1039870733&fastPos=4.

Conseil d'État (1ère - 6ème sous-sections réunies)	Council of State (1st / 6th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2015:367961.20150224	24/02/2015	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law and applies the criteria of the Altmark decision of the CJEU to conclude that the disputed national measure does not constitute State aid.		
Conseil d'Etat (1ère sous-section jugeant seule)	Council of State (1st sub-section ruling alone)	Last instance court (administrative)	ECLI:FR:CESSR:2015:377955.20150427	27/04/2015	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law and applies the criteria of the Altmark decision of the CJEU to conclude that the compensation for services of general economic interest does not constitute State aid.		
Cour Administrative d'Appel de Versailles (7ème Chambre)	Versailles Administrative Court of Appeal (7th Chamber)	Second to last instance court (administrative)	No information	11/06/2015	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms that there is no prohibition if the revenue from the tax is not hypothecated to the aid measure at issue.		This decision has been confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032928865&fastReqId=97019166&fastPos=2.
Cour administrative d'appel de Versailles (1ère Chambre)	Versailles Administrative Court of Appeal (1st Chamber)	Second to last instance court (administrative)	No information	21/07/2015	Private enforcement	None - Claim rejected	The Court confirms the decision of the first instance Court and well-established case law that the beneficiary of the State aid cannot request damages from the State by arguing that the recovery of the incompatible aid causes harm: 1) the recovery of the aid by the State is required by TFEU; 2) the fact that the aid is granted by the State should not create any legitimate expectations for the beneficiary regarding the compatibility of the aid measure with the TFEU; 3) the aid has to be recovered since it constituted an unfair advantage to its beneficiary and granting damages up to the amount of the aid would be like granting a benefit equivalent to the incompatible aid.		Ruling confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031554549&fastReqId=1954422347&fastPos=1.
Conseil d'État (9ème - 10ème sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2015:363984.20150727	27/07/2015	Private enforcement	None - Claim rejected	The disputed national measure is found not to constitute State aid. This decision confirms well-established case law that there is no State aid if the national measure does not create an advantage for its beneficiary.		
Cour Administrative d'Appel de Lyon (5ème Chambre - formation à 3)	Lyon Administrative Court of Appeal (5th Chamber - panel of three judges)	Second to last instance court (administrative)	No information	01/10/2015	Private enforcement	None - Claim rejected	No remedy granted because the plaintiff does not demonstrate commercial harm, i.e. that it would have chosen another tax regime if the unlawful State aid was not in force.	This decision confirms that the plaintiff has to demonstrate harm caused by the State aid in order to obtain damages.	
Cour Administrative d'Appel de Lyon (5ème Chambre)	Lyon Administrative Court of Appeal (5th Chamber)	Second to last instance court (administrative)	No information	01/10/2015	Private enforcement	None - Claim rejected	The Court ruled that purely formal or administrative alterations of the aid scheme do not have to be notified to the Commission.	This decision confirms well-established case law that purely formal or administrative alterations of an aid scheme which do not affect the evaluation of the compatibility of the aid measure with the internal market do not have to be notified to the Commission.	
Conseil d'État (9ème - 10ème sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:XX:2015:369417.20151009	09/10/2015	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a national measure is not State aid if it is not granted *via* the State's owned resources.		
Conseil d'État (8ème - 3ème sous-sections réunies)	Council of State (8th / 3rd Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2015:368755.20151021	21/10/2015	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a national measure does not constitute State aid if it is not granted to an entity falling within the definition of undertaking under Union law.		This decision overturns the lower court's decision: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000027651446&fastReqId=1225040008&fastPos=1.
Cour Administrative d'Appel de Paris (6ème chambre)	Paris Administrative Court of Appeal (6th Chamber)	Second to last instance court (administrative)	No information	27/11/2015	Private enforcement	None - Claim rejected	This decision confirms the previous decision of the Court of second instance which declared the disputed national measure constituting State aid to be void. This decision confirms well-established case law and follows the previous decisions in this case which applied the criteria of the Altmark decision of the CJEU to conclude that the national measure constitutes State aid, since its amount exceeds what is necessary to cover the costs incurred in the discharge of the public service obligations.		Confirms the previous decisions rendered in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026219178&fastReqId=1835902904&fastPos=85. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000022789037&fastReqId=459973021&fastPos=88.
Cour Administrative d'Appel de Paris (6ème chambre)	Paris Administrative Court of Appeal (6th Chamber)	Second to last instance court (administrative)	No information	27/11/2015	Private enforcement	None - Claim rejected	No remedy granted because the plaintiff does not demonstrate commercial harm, i.e. that by benefiting from the State aid its competitors have won tenders that the plaintiff had participated in.	This decision confirms that the plaintiff has to demonstrate the causal link between the alleged commercial harm and the benefit of the State aid for its competitors.	Plaintiff has also filed a lawsuit against the administration constituting public enforcement: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028509148&fastReqId=480258752&fastPos=1. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CET

									ATEXT000031554643&fastReqId=999715983&fastPos=1.
Cour Administrative d'Appel de Paris (6ème chambre)	Paris Administrative Court of Appeal (6th Chamber)	Second to last instance court (administrative)	13PA03172	27/11/2015	Private enforcement	Recovery order in relation to unlawful aid	This decision requires the administration, within a nine month period, to 1) determine the amount of State aid to be recovered from each beneficiary; 2) issue a recovery order for each beneficiary.	This decision indicates that the State cannot rely on a general impossibility of recovery of unlawful aid - the impossibility of recovery has to be examined for each beneficiary.	This decision confirms a decision from the same court dated 31 December 2013: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028509148&fastReqId=480258752&fastPos=1. The plaintiff has also filed a private enforcement lawsuit against the administration: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031554645&fastReqId=261865931&fastPos=1.
Cour d'appel de Versailles	Versailles Court of Appeal	Second to last instance court (civil/commercial)	No information	08/12/2015	Private enforcement	Other remedy imposed	The Court pronounces a stay of proceedings pending the CJEU's preliminary ruling.	The national court refers a request for a preliminary ruling to the CJEU on whether the national measure constitutes State aid.	The judgment of the CJEU dated 30 June 2016 (C-669/15) considers the question manifestly inadmissible. Other decisions in this case: - https://www.doctrine.fr/d/CA/Versailles/2016/8778DF2DED16B1792EC5. - https://www.doctrine.fr/d/CA/Versailles/2016/6612D6A4ABF6F15BA730. - https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036856485&fastReqId=768818833&fastPos=1.
Conseil d'Etat (9ème - 10ème sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2010:310775.20101223	23/12/2015	Private enforcement	None - Claim rejected	This decision confirms that the question of whether State aid is compatible with the TFEU is an exclusive competence of the Commission.		
Cour administrative d'appel de Paris (10ème chambre)	Paris Administrative Court of Appeal (10th Chamber)	Second to last instance court (administrative)	No information	23/02/2016	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a contribution to a public service is excluded from the quantum of unlawful aid if the contribution did not directly affect the amount of the aid, i.e. the aid was not granted within the limits of the expected revenue from this contribution.		Ruling confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000034076452&fastReqId=1835902904&fastPos=17.
Conseil d'État (9ème - 10ème sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2016:384092.20160309	09/03/2016	Private enforcement	None - Claim rejected	The Court rules that purely formal or administrative alterations of an aid scheme do not have to be notified to the Commission.	This decision confirms well-established case law that purely formal or administrative alterations of an aid scheme which do not affect the evaluation of the compatibility of the aid measure with the internal market do not have to be notified to the Commission.	
Conseil d'État (9ème - 10ème sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2016:375467.20160309	09/03/2016	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a national measure is not State aid if it is not granted *via* State owned resources.		
Conseil d'Etat (8ème - 3ème sous-sections réunies)	Council of State (8th / 3rd sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2016:377874.20160316	16/03/2016	Private enforcement	None - Claim rejected	The Court rules that the State has complied with the decision of the Commission dated 16 December 2003 declaring the national measure unlawful.	This decision confirms that the State does not prejudice the principle of legitimate expectation by the retroactive annulment of the unlawful State aid.	This decision confirms the decision of the lower court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028781852&fastReqId=647812686&fastPos=21.
Conseil d'État (9ème - 10ème sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2016:388762.20160316	16/03/2016	Private enforcement	Recovery order in relation to unlawful aid	Any national measure falling within the definition of Article 107 TFEU has to be notified to the Commission - the disputed national measure, which constitutes unlawful State aid, is retroactively declared void.	This decision confirms the notification obligation for the State for any aid falling within the scope of Article 107 TFEU.	
Conseil d'État (1ère - 6ème sous-sections réunies)	Council of State (1st / 6th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2016:385154.20160330	30/03/2016	Private enforcement	None - Claim rejected	The Court considers that the national measure, regarding cultural institutions and projects, falls within the scope of the Commission Regulation No. 651/2014 of 17 June 2014.	This decision applies Commission Regulation No. 651/2014 of 17 June 2014 and quotes the following exemption: "cultural institutions and projects do not typically give rise to any significant distortion of competition".	
Cour Administrative d'Appel de Marseille (Chambres réunies)	Marseille Administrative Court of Appeal (combined Chambers)	Second to last instance court (administrative)	No information	06/04/2016	Private enforcement	Recovery order in relation to unlawful aid	The disputed national measure which constitutes unlawful State aid (i.e. the decision by which a candidate for the delegation of public service has been chosen) is retroactively declared void. The Court applies the Altmark decision of the CJEU to conclude the national measure constitutes State aid - the candidate chosen by the administration was not the one capable of providing the public service at the lowest cost.		Previous decisions in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026199020&fastReqId=1835902904&fastPos=87.

									- https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000024802956&fastReqId=1899294255&fastPos=45.
Conseil d'Etat (9ème / 10ème Sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2016:393721.20160415	15/04/2016	Private enforcement	Recovery order in relation to unlawful aid; Recovery of interest; Damages awards to third parties / State liability	The Court ordered the recovery from the beneficiaries of the unlawful aid of the interest they would have paid if the aid had been notified, and stated that if the Member State had not started the recovery of the remedies within a six month period following this decision, the Court would order it to pay a penalty payment per day until the effective recovery. This decision indicates that the beneficiary of unlawful aid obtained a financial advantage (i.e. without the aid, the beneficiary would have had to borrow the funds on the capital markets, including interest at market rates). Therefore, the State has to take all necessary measures to ensure the recovery of the unlawful interest accrued over the whole period of unlawfulness (from the date on which the aid was granted until its actual recovery) regardless of whether the Commission has subsequently declared the unlawful aid compatible with the internal market.	This decision thus confirms that recovery of the interest should take place even after a Commission decision declaring the unlawful aid compatible with the internal market. The State has to take all necessary measures to ensure recovery of the unlawful interest accrued for the whole period of unlawfulness.	Subsequent decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036253515&fastReqId=1835902904&fastPos=1. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000035774963&fastReqId=1835902904&fastPos=10. Previous decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000029003637&fastReqId=1835902904&fastPos=60. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025886223&fastReqId=1835902904&fastPos=88.
Conseil d'État (9ème - 10ème chambres réunies)	Council of State (9th / 10th Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2016:375501.20160513	13/05/2016	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that there is no State aid if the national measure does not create an advantage for its beneficiary.		Two other decisions from the same court, same date, regarding the same national measure and with the same outcome: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032621236&fastReqId=1835902904&fastPos=32. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032529632&fastReqId=1835902904&fastPos=33.
Cour Administrative d'Appel de Paris (2ème Chambre)	Paris Administrative Court of Appeal (2nd Chamber)	Second to last instance court (administrative)	No information	18/05/2016	Private enforcement	None - Claim rejected	The Court rules purely formal or administrative alterations of an aid scheme do not have to be notified to the Commission.	This decision confirms well-established case law that purely formal or administrative alterations of an aid scheme which do not affect the evaluation of the compatibility of the aid measure with the internal market do not have to be notified to the Commission.	
Cour Administrative d'Appel de Paris (2ème Chambre)	Paris Administrative Court of Appeal (2nd Chamber)	Second to last instance court (administrative)	No information	18/05/2016	Private enforcement	None - Claim rejected	The Court considers that the plaintiff cannot argue the aid is incompatible with the TFEU, on the basis that the Member State did not comply with the Commission decision setting out the obligation to transmit an annual report to the Commission on the scheme that has been considered compatible with the TFEU.	This decision considers that only the Commission can impose a penalty on France for the fact it has not complied with the Commission decision setting out the obligation for the Member State to transmit an annual report to the Commission on the scheme that has been considered compatible with the TFEU.	
Cour Administrative d'Appel de Paris (4ème Chambre)	Paris Administrative Court of Appeal (4th Chamber)	Second to last instance court (administrative)	No information	14/06/2016	Private enforcement	None - Claim rejected	The claim of the liquidator of the aid beneficiary was rejected - damages from the State up to the amount of the aid cannot be requested by arguing that the recovery of the incompatible aid causes harm to the aid beneficiary. This decision confirms that the liquidator of the aid beneficiary cannot request damages from the State by arguing that the recovery of the incompatible aid causes harm: 1) the recovery of the aid by the State is required by TFEU; 2) the fact that the aid is granted by the State should not create any legitimate expectations for the beneficiary regarding the compatibility of the aid measure with the TFEU; 3) the aid has to be recovered since it constituted an unfair advantage to its beneficiary and granting damages up to the amount of the aid would be like granting a benefit equivalent to the incompatible aid.		Subsequent decision in France in this case: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036965982&fastReqId=1387552199&fastPos=1. Previous decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028937929&fastReqId=2265187674&fastPos=1. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025115795. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000019989570&fastReqId=1835902904&fastPos=129. -

									https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008224813&fastReqId=1334442506&fastPos=2.
Cour de cassation (Chambre civile 2)	Court of Cassation (Civil Chamber 2)	Last instance court (civil/commercial)	ECLI:FR:CCASS:2016:C201019	16/06/2016	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms that a national measure does not constitute State aid if it is not selective but extends to the whole industry.		
Cour administrative d'appel de Marseille (6ème Chambre - formation à 3)	Marseille Administrative Court of Appeal (6th Chamber - panel of three judges)	Second to last instance court (administrative)	No information	04/07/2016	Private enforcement	Other remedy imposed	This decision confirms the application of the criteria of the Altmark decision of the CJEU to conclude that the disputed compensation for services of general economic interest constitutes State aid. This decision confirms the remedy that has been granted by the first instance jurisdiction (decision not publicly available), i.e. immediate termination of the contract (public service delegation agreement) which constitutes State aid. This decision confirms the application of the criteria of the Altmark decision of the CJEU to conclude that the disputed compensation for services of general economic interest constitutes State aid: 1) it exceeds what is necessary to cover the costs incurred in the discharge of the public service obligations; and 2) the procedure of selection did not allow for the selection of the tenderer capable of providing the services at the least cost to the community.		Ruling confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000035911903&fastReqId=1835902904&fastPos=8.
Conseil d'Etat (Assemblée)	Council of State (Assembly)	Last instance court (administrative)	ECLI:FR:CEASS:2016:395824.20160713	13/07/2016	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms that State aid has to be granted *via* State-owned resources - there is no State aid if the national measure does not imply additional costs or loss of revenue for the State.		
Conseil d'État (8ème - 3ème chambres réunies)	Council of State (8th / 3rd Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2016:392574.20160719	19/07/2016	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms that there is no prohibition if the revenue from the tax is not hypothecated to the aid measure at issue.		This decision confirms the lower court's decision: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000030716586&fastReqId=565247866&fastPos=1.
Conseil d'État (9ème - 10ème chambres réunies)	Council of State (9th / 10th Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2016:376193.20160921	21/09/2016	Private enforcement	Other remedy imposed	The national court refers a request for a preliminary ruling to the CJEU in order to determine if the disputed national measure constitutes State aid.	The national court refers a request for a preliminary ruling to the CJEU - in a situation in which France has regularly notified the Commission of legal changes having a significant impact on the aid scheme prior to the implementation, and in particular of changes relating to the method by which the scheme is financed, does a substantial increase in revenue from fiscal resources allocated to the scheme, compared to the projections submitted to the Commission, constitute a significant change within the meaning of Article 108 TFEU, which would require a new notification to be made?	The preliminary ruling has been given by the CJEU on 20 September 2018 (C-510/16) - the substantial alterations in the financing of the scheme should have been notified. Case pending before the French Council of State.
Conseil d'État (9ème - 10ème chambres réunies)	Council of State (9th / 10th Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2016:392494.20161027	27/10/2016	Private enforcement	None - Claim rejected	The Court rules that no notification is required for research and development, and innovation aid and environmental aid (application of the GBER).	This decision confirms that no notification is required for new measures introduced in order to create more favourable financial conditions for investments in improving energy efficiency (application of the GBER; research and development, and innovation aid and environmental aid).	
Cour d'appel de Versailles	Versailles Court of Appeal	Second to last instance court (civil/commercial)	No information	08/11/2016	Private enforcement	Other remedy imposed	The Court pronounces a stay of proceedings pending the CJEU's preliminary ruling.	The national court refers a request for a preliminary ruling to the CJEU on whether the national measure constitutes State aid.	The judgment of the CJEU dated 15 March 2017 (C-515/16) declares that the national measure constitutes State aid. Other decisions in this case: - https://www.doctrine.fr/d/CA/Versailles/2016/8778DF2DED16B1792EC5. - ttps://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031999201&fastReqId=768818833&fastPos=2. - https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036856485&fastReqId=768818833&fastPos=1.
Cour d'appel de Versailles	Versailles Court of Appeal	Second to last instance court (civil/commercial)	No information	08/11/2016	Private enforcement	Other remedy imposed	The Court pronounces a stay of proceedings pending the CJEU's preliminary ruling.	The national court refers a request for a preliminary ruling to the CJEU on whether the national measure constitutes State aid.	The judgment of the CJEU dated 15 March 2017 (C-515/16) declares that the national measure constitutes State aid. Other decisions in this case: -

									https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031999201&fastReqId=768818833&fastPos=2. - https://www.doctrine.fr/d/CA/Versailles/2016/6612D6A4ABF6F15BA730. - https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036856485&fastReqId=768818833&fastPos=1.
Cour Administrative d'Appel de Paris (7ème Chambre)	Paris Administrative Court of Appeal (7th Chamber)	Second to last instance court (administrative)	No information	18/11/2016	Private enforcement	None - Claim rejected	The Court rules purely formal or administrative alterations of an aid scheme do not have to be notified to the Commission.	This decision confirms that purely formal or administrative alterations of an aid scheme which do not affect the evaluation of the compatibility of the aid measure with the internal market do not have to be notified to the Commission.	
Conseil d'État (1ère - 6ème chambres réunies)	Council of State (1st / 6th Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2016:390060.20161228	28/12/2016	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision applies the criteria of the Altmark decision of the CJEU to conclude that the compensation for services of general economic interest does not constitute State aid.		
Conseil d'État (10ème et 9ème sous-sections réunies)	Council of State (10th / 9th sub-sections combined)	Last instance court (administrative)	ECLI:FR:CECHR:2017:382427.20170113	13/01/2017	Private enforcement	Case sent back to the lower court for re-assessment; Damages awards to third parties / State liability	No remedy was granted, as the Court remitted the case to the lower instance it had come from in order for the Court of Appeal to investigate the causal link between the loss of customers of the plaintiff and the benefit of the State aid for its competitor.	This decision indicates that the national courts need to investigate themselves whether a State aid measure has caused commercial harm to the competitors of the aid beneficiary.	This decision overturns the lower court's decision: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028937929&fastReqId=2265187644&fastPos=1. Other previous decisions in France on this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025115795. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000019989570&fastReqId=1835902904&fastPos=129. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008224813&fastReqId=1334442506&fastPos=2. This Court re-sent the case to the lower instance court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000037487127&fastReqId=741740395&fastPos=1.
Conseil d'État (9ème - 10ème chambres réunies)	Council of State (9th / 10th Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2017:399115.20170222	22/02/2017	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms and follows the decision of the second instance court that a contribution to a public service is excluded from the quantum of unlawful aid if the contribution did not directly affect the amount of the aid, i.e. the aid was not granted within the limits of the expected revenue from this contribution.		Confirms the ruling rendered by a lower court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032108775&fastReqId=187335058&fastPos=1.
Conseil d'État (9ème - 10ème chambres réunies)	Council of State (9th / 10th Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2017:395948.20170222	22/02/2017	Private enforcement	Recovery order in relation to unlawful aid	Any national measure falling within the definition of Article 107 TFEU has to be notified to the Commission - the disputed national measure, which constitutes unlawful State aid, is retroactively declared void.	This decision confirms the notification obligation for the State for any aid falling within the scope of Article 107 TFEU.	
Tribunal Administratif de Bastia	Bastia Administrative Tribunal	Lower court (administrative)	1500375	23/02/2017	Private enforcement	Damages awards to third parties / State liability	The Tribunal awards damages to the plaintiff (competitor of the beneficiary of the State aid) for the loss of customers because of the State aid.	This decision confirms that competitors of the beneficiary of the State aid can request damages for the loss of customers because of State aid.	Previous decision in this case declaring that the national measure constitutes State aid: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032374427&fastReqId=1899294255&fastPos=15.
Cour Administrative d'Appel de Nantes (1ère chambre)	Nantes Administrative Court of Appeal (1st Chamber)	Second to last instance court (administrative)	5NT02316	01/06/2017	Private enforcement	None - Claim rejected	This decision confirms that the effects of the CJEU judgment dated 2 December 2008 (C-333/07) apply only to the undertakings which initiated legal proceedings prior to the date of delivery of the judgment. It thus excludes the effects of the CJEU judgment in this case, as the plaintiff had not brought legal proceedings regarding the national measure prior to the date of delivery of this judgment.		
Conseil d'État (9ème - 10ème	Council of State (9th / 10th Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2017:386627.20170607	07/06/2017	Private enforcement	None - Claim rejected	The Court confirms and follows the decision of the second instance Court that the beneficiary of the State aid cannot request damages from the State by arguing that the recovery of the incompatible aid causes harm to the aid beneficiary: 1) the recovery of the aid by the State is required by TFEU; 2) the fact that the aid is		Confirms the ruling rendered by a lower court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CET

chambres réunies)							granted by the State should not create any legitimate expectations for the beneficiary regarding the compatibility of the aid measure with the TFEU; 3) the aid has to be recovered since it constituted an unfair advantage to its beneficiary and granting damages up to the amount of the aid would be like granting a benefit equivalent to the incompatible aid.		ATEXT000034879192&fastReqId=1835902904&fastPos=14.
Cour Administrative d'Appel de Nancy (1ère chambre - formation à 3)	Nancy Administrative Court of Appeal (1st Chamber - panel of three judges)	Second to last instance court (administrative)	No information	05/10/2017	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision states that the national measure does not exceed what is necessary to cover the re-calculated costs incurred in the discharge of the public service obligations and therefore does not constitute State aid.		Previous decision in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000030236191&fastReqId=1835902904&fastPos=52. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028026520&fastReqId=927848033&fastPos=1.
Conseil d'Etat (9ème Chambre)	Council of State (9th Chamber)	Last instance court (administrative)	ECLI:FR:CECHS:2017:393721.20171011	11/10/2017	Private enforcement	None - Claim rejected	This decision finds that France has applied the previous decision granting remedies, has started the recovery procedure, and claimed the payment of interest from the unlawful aid beneficiaries. Therefore, the Court does not order the payment of penalties.	This decision confirms that the State is free to choose the appropriate measures in order to ensure the recovery of the unlawful interest accrued over the whole period of unlawfulness.	Remedies have been granted by a decision of the Council of State dated 15 April 2016: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032409025&fastReqId=1835902904&fastPos=34. Subsequent decision in France in this case: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036253515&fastReqId=1835902904&fastPos=1. Previous decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032409025&fastReqId=1835902904&fastPos=34. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000029003637&fastReqId=1835902904&fastPos=60. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025886223&fastReqId=1835902904&fastPos=88.
Conseil d'Etat (9ème Chambre)	Council of State (9th Chamber)	Last instance court (administrative)	ECLI:FR:CECHS:2017:393179.20171011	11/10/2017	Private enforcement	None - Claim rejected	The Court confirms and follows the decision of the second instance court that the beneficiary of the State aid cannot request damages from the State by arguing that the recovery of the incompatible aid causes harm to the aid beneficiary: 1) the recovery of the aid by the State is required by the TFEU; 2) the fact that the aid is granted by the State should not create any legitimate expectations for the beneficiary regarding the compatibility of the aid measure with the TFEU; 3) the aid has to be recovered since it constituted an unfair advantage to its beneficiary and granting damages up to the amount of the aid would be like granting a benefit equivalent to the incompatible aid.		Confirms the ruling rendered by a lower court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031554549&fastReqId=1954422347&fastPos=1
Conseil d'Etat (7ème / 2ème Chambres réunies)	Council of State (7th / 2nd Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2017:403335.20171025	25/10/2017	Private enforcement	None - Claim rejected	The disputed national measure constitutes State aid. This decision confirms the application of the criteria of the Altmark decision of the CJEU by the national court.		Confirms the ruling rendered by a lower court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032897870&fastReqId=1306582161&fastPos=1.
Conseil d'Etat (3ème / 8ème Chambre réunies)	Council of State (3dr / 8th Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2017:400442.20171124	24/11/2017	Private enforcement	None - Claim rejected	The Court rules that taxes used exclusively to finance public authorities do not constitute State aid and do not have to be notified to the Commission.	This decision confirms that taxes used exclusively to finance public authorities do not constitute State aid and do not have to be notified to the Commission.	
Conseil d'Etat (9ème Chambre jugeant seule)	Council of State (9th Chamber ruling alone)	Last instance court (administrative)	ECLI:FR:CECHS:2017:409693.20171220	20/12/2017	Private enforcement	None - Claim rejected	This decision confirms the decision of the Council of State.	This decision confirms that recovery of the interest should take place even after a Commission decision declaring the aid compatible with the internal market, and that the interest has to be calculated from the date on which the aid was granted until its actual recovery.	This decision confirms the decision of the Council of State dated 15 April 2016 granting remedies: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032409025&fastReqId=1835902904&fastPos=34. Other previous decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000035774963&fastReqId=1835902904&fastPos=10.

									- https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000029003637&fastReqId=1835902904&fastPos=60. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025886223&fastReqId=1835902904&fastPos=88.
Cour administrative d'appel de Marseille	Marseille Administrative Court of Appeal	Second to last instance court (administrative)	17MA01582 - 17MA01583	12/02/2018	Private enforcement	Other remedy imposed	The Marseille Administrative Court of Appeal suspended the execution of the judgment of the Bastia Administrative Court (1500375) which ruled that the Territorial Collectivity of Corsica must grant remedies for the damage sustained from the granting of unlawful State aid. Given the overvaluation of the amount of the damage sustained by the plaintiff, the Marseille Administrative Court of Appeal commissioned an expert to assess it in order to determine the amount of the compensation due by the Territorial Collectivity of Corsica.		
Cour Administrative d'Appel de Marseille	Marseille Administrative Court of Appeal	Second to last instance court (administrative)	No information	12/02/2018	Private enforcement	Recovery order in relation to unlawful aid; Damages awards to third parties / State liability	The Court confirms the decision of the lower Tribunal that awards damages to the plaintiff (competitor of the beneficiary of the State aid) for the loss of customers because of the State aid, but requests judicial economic expertise in order to quantify the amount of damages.	This decision confirms that competitors of the beneficiary of the State aid can request damages for the loss of customers because of State aid.	This decision confirms the lower court's decision: https://www.achatpublic.info/sites/default/files/document/documents/ta_bastia_23_fevrier_2017_societe_corsica_ferries_1500375.pdf?from=recherche&page=150.
Cour d'appel de Versailles	Versailles Court of Appeal	Second to last instance court (civil/commercial)	No information	10/04/2018	Private enforcement	Recovery order in relation to unlawful aid; Damages awards to third parties / State liability	The Tribunal awards damages to the plaintiff (competitor of the beneficiary of the State aid) for the loss of opportunity because of the State aid.	This decision confirms that competitors of the beneficiary of the State aid can request damages for the loss of opportunity because of State aid.	Previous decision in this case: Versailles Court of Appeal dated 11 February 2014 (not publicly available).
Cour d'appel de Versailles	Versailles Court of Appeal	Second to last instance court (civil/commercial)	No information	12/04/2018	Private enforcement	None - Claim rejected	The disputed national measure does not constitute State aid. This decision confirms well-established case law that a national measure does not constitute State aid if 1) it is not selective but extends to the whole industry; and/or 2) it does not imply additional costs or loss of revenue for the State.		
Conseil d'Etat (9ème / 10ème Sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CECHR:2018:402174.20180530	30/05/2018	Private enforcement	None - Claim rejected	The claim of the liquidator of the aid beneficiary was rejected - damages from the State cannot be requested up to the amount of the aid by arguing that the recovery of the incompatible aid caused harm to the aid beneficiary.		This decision confirms the decision of the lower court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032721172&fastReqId=1558267310&fastPos=1.
Cour Administrative d'Appel de Paris (4ème chambre)	Paris Administrative Court of Appeal (4th Chamber)	Second to last instance court (administrative)	17PA00397	09/10/2018	Private enforcement	Case sent back to lower court for re-assessment	The Court rules that the State is liable for having granted State aid to the plaintiff's competitors. However, in order to quantify the commercial harm to the plaintiff, the Court re-sends this case to a subsequent hearing and requests the parties to provide their financial information, and the Commission to provide the relevant market studies and economic analysis in the meantime.	The Court decided that the State is liable for having granted State aid to the plaintiff's competitors. The commercial harm to the plaintiff will be quantified in a subsequent decision.	Subsequent decision from the lower court is not yet available. Previous decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028937929&fastReqId=2265187684&fastPos=1. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025115795. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000019989570&fastReqId=1835902904&fastPos=129. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008224813&fastReqId=1334442506&fastPos=2.
Cour Administrative d'Appel de Lyon (5ème chambre - formation à 5)	Lyon Administrative Court of Appeal (5th Chamber - panel of five judges)	Second to last instance court (administrative)	No information	12/07/2007	Public enforcement	Recovery order of the unlawful/incompatible aid; Indirect challenge against Commission decision *via* CJEU preliminary ruling	The Court pronounces a stay of proceedings pending the ECJ (current CJEU) preliminary ruling.	The national court refers a request for a preliminary ruling to the ECJ (current CJEU) concerning the validity of the decision of the Commission dated 10 November 1997 not to raise any objections to the new version of an aid scheme to support local radio stations (State aid No. 679/97 – France).	The judgment of the ECJ (current CJEU) dated 2 December 2008 (C-333/07) considers the decision of the Commission not to raise any objections to the new version of an aid scheme to support local radio stations to be invalid.

Conseil d'État (10ème et 9ème sous-sections réunies)	Council of State (10th / 9th sub-sections combined)	Last instance court (administrative)	274923	19/12/2008	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered; Indirect challenge against Commission decision *via* CJEU preliminary ruling	The Court pronounces a stay of proceedings pending the CJEU's preliminary ruling. Remedy was granted by the decision of the highest administrative Court dated 30 December 2011: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025115795.	The Court refers a request for a preliminary ruling to the ECJ (current CJEU) on whether: 1) a national court may stay the adoption of its decision regarding the recovery of State aid until the Commission has ruled on the compatibility of the aid with the 'common market' after the annulment of a prior positive decision by the ECJ (current CJEU); 2) the adoption by the Commission of three successive decisions declaring aid to be compatible with the 'common market', which were subsequently annulled by the ECJ (current CJEU), is - in itself - capable of constituting an exceptional circumstance such as to justify a limitation of the recipient's obligation to repay that aid.	Second CELF decision of the CJEU (C-1/09) dated 11 March 2010. Subsequent decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000033866959&fastReqId=1597614067&fastPos=9. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032721172&fastReqId=1558267310&fastPos=1. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028937929&fastReqId=2265187648&fastPos=1. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025115795. Previous decision in France in this case: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008224813&fastReqId=1334442506&fastPos=2.
Cour Administrative d'Appel de Nantes (2ème chambre)	Nantes Administrative Court of Appeal (2nd Chamber)	Second to last instance court (administrative)	07NT00572	31/08/2010	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered	The Court decided that the administration had to reimburse the difference between the compound interest that had been paid by the beneficiary of the aid under the recovery order and the simple interest that was actually due. Neither the Commission decision, nor Article 11(2) of Commission Regulation (EC) No 794/2004 dated 21 April 2004 regarding State aid impose the recovery of compound interest.	This case confirms the amount of the aid recovered, but orders the administration to reimburse the difference between the compound interest that has been paid by the beneficiary of the aid under the recovery order and the simple interest that was actually due. This case confirms that if the recovery order issued by the State has a procedural defect, the annulment of this order should not necessarily lead to the reimbursement of the sums recovered under State aid rules; the State has to be able to rectify the procedural defect rendering void the order without being required to pay, even provisionally, the reimbursed State aid.	Ruling confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026856801&fastReqId=1835902904&fastPos=70.
Conseil d'État (10ème et 9ème sous-sections réunies)	Council of State (10th / 9th sub-sections combined)	Last instance court (administrative)	No information	30/12/2011	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered	The Court grants the recovery of the State aid and interest. The adoption by the Commission of three successive decisions declaring aid to be compatible with the internal market, which were subsequently annulled by the CJEU, does not constitute an exceptional circumstance such as to justify a limitation of the recipient's obligation to repay that aid. Therefore, the beneficiary of the aid has to pay back the amount of the aid and interest, accruing from the date on which the aid was granted until its actual recovery.	This decision confirms that the recovery interest accrues from the date on which the aid was granted until its actual recovery, even if State did not request the recovery straight after the Commission decision declaring the aid incompatible.	Subsequent decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000033866959&fastReqId=1597614067&fastPos=9. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032721172&fastReqId=1558267310&fastPos=1. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028937929&fastReqId=2265187648&fastPos=1. Previous decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000019989570&fastReqId=1835902904&fastPos=129. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008224813&fastReqId=1334442506&fastPos=2.
Cour d'appel de Colmar	Colmar Court of Appeal	Second to last instance court (civil/commercial)	No information	13/03/2012	Public enforcement	Recovery order of the unlawful/incompatible aid; Liquidation of	This decision indicates that when an undertaking is subject to collective proceedings and the period for registration of the liability relating to the repayment of the incompatible aid has expired, the State must apply any procedure to lift a time-bar in order to allow the presentation of claims, but only where such a procedure exists and is still available. No procedures were available in this case,	This decision confirms that, as no procedure was available to lift a time-bar to allow the presentation of claims 'out of time' in order to recover the incompatible aid from the insolvent undertaking, the	Ruling confirmed by the highest court: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027367200&fastReqId=592762871&fastPos=13.

						the aid beneficiary - i.e. aid recovery in the context of insolvency proceedings; Avoiding the aid recovery due to impossibility of recovery	meaning the result is an absolute impossibility to implement the decision of the Commission.	result is an absolute impossibility to implement the decision of the Commission.	
Cour Administrative d'Appel de Nantes (1ère Chambre)	Nantes Administrative Court of Appeal (1st Chamber)	Second to last instance court (administrative)	No information	26/07/2012	Public enforcement	Indirect challenge against Commission decision *via* CJEU preliminary ruling	The Court pronounces a stay of proceedings pending the CJEU's preliminary ruling.	The national court refers a request for a preliminary ruling to the CJEU on whether the Commission decision ruling that the national measure constitutes State aid is valid, and in particular on whether the selectivity criterion is actually satisfied. Is the scheme actually an existing aid scheme, which means aid already allocated does not have to be recovered? Does the national measure actually distort or threaten to distort competition and affect trade between Member States? The CJEU considered that the request for a preliminary ruling was inadmissible, since the national court did not give sufficient information to the CJEU in order to motivate its questions on the validity of the Commission decision (case C-368/12 dated 18 April 2013).	The question on whether, in this case, the scheme is actually an existing aid scheme would be posed again to the CJEU in the same case: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028725164&fastReqId=1136003912&fastPos=1.
Cour de cassation (Chambre commerciale)	Court of Cassation (Commercial Chamber)	Last instance court (civil/commercial)	ECLI:FR:CCASS:2012:CO01235	11/12/2012	Public enforcement	Recovery order of the unlawful/incompatible aid; Liquidation of the aid beneficiary - i.e. aid recovery in the context of insolvency proceedings; Avoiding the aid recovery due to impossibility of recovery	This decision indicates that when an undertaking is subject to collective proceedings and the period for the registration of the liability relating to the repayment of the incompatible aid has expired, the State must apply any procedure to lift a time-bar in order to allow the presentation of claims, but only where such a procedure exists and is still available. No procedures were available in this case, meaning the result is an absolute impossibility to implement the decision of the Commission.	This decision confirms that, as no procedure was available to lift a time-bar to allow the presentation of claims 'out of time' in order to recover the incompatible aid from the insolvent undertaking, the result is an absolute impossibility to implement the decision of the Commission.	
Conseil d'Etat (9ème - 10ème sous-sections réunies)	Council of State (9th / 10th Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2012:335552.20121228	28/12/2012	Public enforcement	None - Claim rejected	The Court applies Commission decision 2004/343/EC dated 16 December 2003 and confirms that the administration has to annul the scheme that has been considered to constitute unlawful and incompatible State aid.	This decision confirms that undertakings cannot continue to benefit from a scheme that has been considered to constitute unlawful and incompatible State aid by the Commission.	
Conseil d'État (8ème - 3ème sous-sections réunies)	Council of State (8th / 3rd Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2012:344052.20121228	28/12/2012	Public enforcement	None - Claim rejected	This decision confirms that the administration used a correct coefficient in order to calculate the amount of the aid to be recovered.		Confirms the ruling rendered by a lower court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023109616&fastReqId=1493226065&fastPos=1. Follow-up of the CJEU ruling dated 5 October 2006 (C-232/05) in which the court stated that France failed to fulfil its obligations in order to recover from the beneficiary the aid referred to in Commission decision of 12 July 2000 (2002/14/EC).
Cour administrative d'appel de Bordeaux (3ème chambre - formation à 3)	Bordeaux Administrative Court of Appeal (3re Chamber - panel of three judges)	Second to last instance court (administrative)	No information	05/02/2013	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered; Identification of the aid beneficiary	The Court granted the recovery of the State aid and interest. The Court stated that 1) the limitation period for the State to claim the recovery of the aid had not expired; 2) the aid beneficiary cannot challenge the interest by arguing that the delay in the aid recovery was attributable to the State; 3) the recovery obligation is extended to the company that acquired the assets - including the undue advantage created by the aid - of the original beneficiary of the incompatible aid.		This decision has been overturned on appeal: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000030926046&fastReqId=1835902904&fastPos=46.

Cour de cassation (Chambre commerciale)	Court of Cassation (Commercial Chamber)	Last instance court (civil/commercial)	ECLI:FR:CCASS:2013:CO00221	26/02/2013	Public enforcement	Recovery order of the unlawful/incompatible aid; Liquidation of the aid beneficiary - i.e. aid recovery in the context of insolvency proceedings; Avoiding the aid recovery due to impossibility of recovery	This decision indicates that when an undertaking is subject to collective proceedings and the period for the registration of the liability relating to the repayment of the incompatible aid has expired, the State must apply any procedure to lift a time-bar in order to allow the presentation of claims, but only where such a procedure exists and is still available. No procedures were available in this case, meaning the result is an absolute impossibility to implement the decision of the Commission.	This decision confirms that, as no procedure was available to lift a time-bar to allow the presentation of claims 'out of time' in order to recover the incompatible aid from the insolvent undertaking, the result is an absolute impossibility to implement the decision of the Commission.	
Cour de cassation (Chambre commerciale)	Court of Cassation (Commercial Chamber)	Last instance court (civil/commercial)	ECLI:FR:CCASS:2013:CO00428	23/04/2013	Public enforcement	Recovery order of the unlawful/incompatible aid; Liquidation of the aid beneficiary - i.e. aid recovery in the context of insolvency proceedings; Avoiding the aid recovery due to impossibility of recovery	This decision confirms no procedure was available to lift a time-bar in order to allow the presentation of claims 'out of time' in order to recover the incompatible aid from the insolvent undertaking. The result is an absolute impossibility to implement the decision of the Commission.	This decision confirms that no procedure was available to lift a time-bar so in order to allow the presentation of claims 'out of time' in order to recover the incompatible aid from the insolvent undertaking. The result is an absolute impossibility to implement the decision of the Commission.	Confirms the ruling rendered by a lower court: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025969570&fastReqId=631733652&fastPos=1.
Cour de cassation (Chambre commerciale)	Court of Cassation (Commercial Chamber)	Last instance court (civil/commercial)	ECLI:FR:CCASS:2013:CO00536	28/05/2013	Public enforcement	Recovery order of the unlawful/incompatible aid; Liquidation of the aid beneficiary - i.e. aid recovery in the context of insolvency proceedings; Avoiding the aid recovery due to impossibility of recovery	This decision indicates that when an undertaking is subject to collective proceedings and the period for the registration of the liability relating to the repayment of the incompatible aid has expired, the State must apply any procedure to lift a time-bar in order to allow the presentation of claims, but only where such a procedure exists and is still available. No procedures were available in this case, meaning the result is an absolute impossibility to implement the decision of the Commission.	This decision confirms well-established case law that no procedure was available to lift a time-bar so in order to allow the presentation of claims 'out of time' in order to recover the incompatible aid from the insolvent undertaking. The result is an absolute impossibility to implement the decision of the Commission.	
Cour Administrative d'Appel de Paris (6ème chambre)	Paris Administrative Court of Appeal (6th Chamber)	Second to last instance court (administrative)	No information	31/12/2013	Public enforcement	Recovery order of the unlawful/incompatible aid	This decision obliges the administration to issue a payment order for the recovery the unlawful State aid.		This decision confirms a decision from the same court dated 27 November 2015: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031554643&fastReqId=1899294255&fastPos=19. The plaintiff has also filed a private enforcement lawsuit against the administration: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031554645&fastReqId=2618659331&fastPos=1.
Cour Administrative d'Appel de Nantes (1ère Chambre)	Nantes Administrative Court of Appeal (1st Chamber)	Second to last instance court (administrative)	No information	13/02/2014	Public enforcement	Indirect challenge against Commission decision *via* CJEU preliminary ruling	The Court pronounces a stay of proceedings pending the CJEU's preliminary ruling. Remedies were granted by a subsequent decision rendered by the same court dated 28 May 2015.	The national court refers a request for a preliminary ruling to the CJEU on whether the Commission decision ruling that the national measure constitutes State aid is valid, in particular regarding the order to recover the incompatible aid whereas the scheme should actually be qualified as existing aid scheme, which excludes the recovery of the aid that has already been allocated. The CJEU considered that the aid scheme could not be qualified as existing aid: it constituted State aid from its entry into	Remedies were be granted by a subsequent decision rendered by the same court dated 28 May 2015: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026314365&fastReqId=459973021&fastPos=22.

								force, and not as a result of developments in the internal market (case C-202/14 dated 4 December 2014).	
Cour Administrative d'Appel de Nantes (3ème Chambre)	Nantes Administrative Court of Appeal (3rd Chamber)	Second to last instance court (administrative)	No information	12/03/2015	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered	The recovery of the interest was granted. This decision confirms that 1) the Commission provided sufficient motivation to declare the national measure incompatible under Article 107 TFEU; and 2) the aid beneficiary cannot challenge the recovery of interest by arguing that the delay in the aid recovery is attributable to the State and thus that the aid beneficiary had a legitimate expectation that the aid would not be recovered.	This decision confirms that the interest has to be calculated to run from the date on which the aid was granted until its actual recovery, even if the State did not request the recovery straight after the Commission decision declaring the aid incompatible.	
Cour Administrative d'Appel de Nantes (3ème Chambre)	Nantes Administrative Court of Appeal (3rd Chamber)	Second to last instance court (administrative)	No information	12/03/2015	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered	The Court granted the recovery of the State aid and interest. The plaintiff does not refuse to pay back the aid but it considers the method of quantification of the aid is leading to an incorrect amount of aid being recovered from it. The national court considers that 1) the State has applied the method of quantification used by the Commission in its decision declaring the State aid incompatible; 2) this method does not lead to the claim of amounts in excess of the benefits that the aid beneficiaries actually received; 3) the recovery order issued by the State does not have to describe the method of calculation and can only provide the total amount of the aid to be recovered, since the aid beneficiary can always ask the administration for more information about the calculation methods used.		This decision has been overturned on appeal: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000034833587&fastReqId=1835902904&fastPos=15.
Cour Administrative d'Appel de Nantes (1ère Chambre)	Nantes Administrative Court of Appeal (1st Chamber)	Second to last instance court (administrative)	No information	28/05/2015	Public enforcement	Recovery order of the unlawful/incompatible aid	The recovery of the State aid and interest was granted. This decision confirms well-established case law that the beneficiary cannot argue against the recovery of incompatible aid by saying that it had legitimate expectations regarding the compatibility of the aid measure because it was a measure created by the State: 1) the recovery of the aid by the State is required by the Commission decision declaring the aid incompatible; 2) the fact that the aid is granted by the State should not create any legitimate expectations for the beneficiary regarding the compatibility of the aid measure with the TFEU; 3) the aid has to be recovered since it constituted an unfair advantage to its beneficiary.		Previous decisions in France in this case: - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000028725164&fastReqId=1136003912&fastPos=1. - https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026314365&fastReqId=1537834058&fastPos=1.
Conseil d'État (8ème - 3ème sous-sections réunies)	Council of State (8th / 3rd Sub-sections combined)	Last instance court (administrative)	ECLI:FR:CESSR:2015:367567.20150722	22/07/2015	Public enforcement	Recovery order of the unlawful/incompatible aid	This decision renders void the recovery order issued by the State as it does not describe the method of calculation of the aid to be recovered. The State will have to issue a new recovery order. This decision overturns the decision of the second instance court on the conclusion that the recovery order issued by the State does not have to describe the method of calculation of the aid to be recovered.		This decision overturns the lower court's decision: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000027048858&fastReqId=502865882&fastPos=1.
Cour administrative d'appel de Douai (2e chambre - formation à 3)	Douai Administrative Court of Appeal (2nd Chamber - panel of three judges)	Second to last instance court (administrative)	No information	04/11/2015	Public enforcement	Recovery order of the unlawful/incompatible aid	The recovery of the State aid and interest was granted. The limitation period for the State to claim the recovery of the aid had not expired. This decision states that: 1) the limitation period stops during the proceedings before the Commission and the whole limitation period starts again after the Commission decision; 2) the State does not have to explain the method of calculation of the interest to be recovered if it applies the Commission Regulation No. 794/2004/EC dated 21 April 2004.		This decision - regarding the limitation period question only - has been confirmed by the Council of State: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000034081862&fastReqId=1835902904&fastPos=16.
Cour administrative d'appel de Bordeaux (3ème chambre - formation à 3)	Bordeaux Administrative Court of Appeal (3re Chamber - panel of three judges)	Second to last instance court (administrative)	15BX01807	10/12/2015	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered; Requests of aid recovery suspension	The Court granted the recovery of the State aid. The Court considered that the national appeal procedure against the national recovery order should not have suspensive effects, in order to comply with the EU rules on the immediate and effective recovery of the aid; the amount of the aid to be recovered has to be calculated in line with the decision of the Commission and the method of quantification of the aid used has to be described in the national recovery order; the regional institution that had granted the unlawful and incompatible aid had the competence to recover the aid on behalf of the State.	This decision confirms national procedures, in which the recovery of the unlawful and incompatible aid is challenged, should not have suspensive effect, in order to comply with the EU rules on the immediate and effective recovery of the aid.	
Cour Administrative d'Appel de Versailles (3ème Chambre)	Versailles Administrative Court of Appeal (3rd Chamber)	Second to last instance court (administrative)	No information	09/02/2016	Public enforcement	None - Claim rejected	The Court rules that 1) the plaintiff cannot argue that the Commission did not inform him about its decision dated 16 December 2003 in order to avoid reimbursing the unlawful State aid; 2) the retroactive recovery of unlawful State aid is without prejudice to the principles of legitimate confidence and legal security.		
Cour administrative d'appel de Douai (2e chambre - formation à 3)	Douai Administrative Court of Appeal (2nd Chamber - panel of three judges)	Second to last instance court (administrative)	No information	05/07/2016	Public enforcement	None - Claim rejected	The Court considers that the post-merger company, into which the beneficiary of the State aid has been merged, cannot be considered as the aid beneficiary and therefore does not have to reimburse the aid.		This decision has been overturned on appeal: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036086511&fastReqId=1835902904&fastPos=4.
Conseil d'État (3ème - 8ème chambres réunies)	Council of State (3rd / 8th Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2017:395844.20170224	24/02/2017	Public enforcement	Recovery order of the unlawful/incompatible aid; Avoiding the aid recovery due to impossibility of recovery	The recovery of the State aid and interest was granted. The limitation period for the State to claim the recovery of the aid has not expired.	This decision confirms that the limitation period stops during the proceedings before the Commission, and starts again after the Commission decision.	Confirms the ruling rendered by a lower court: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031447245&fastReqId=752062373&fastPos=1.

Conseil d'État (3ème chambre)	Council of State (3rd Chamber)	Last instance court (administrative)	ECLI:FR:CECHS:2017:390132.20170531	31/05/2017	Public enforcement	Case sent back to the lower court for re-assessment	The Court remitted the case to the lower instance it had come from in order to identify the reasoning of the State in the quantification of the aid to be recovered.	This decision obliges the State to provide the aid beneficiary with an explanation / the calculation method used to fix the quantum of aid that the State requested the plaintiff to repay.	This decision overturns the lower court's decision: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000030444458&fastReqId=1729337570&fastPos=1. The subsequent ruling from the lower court is not yet available.
Cour Administrative d'Appel de Douai (2ème chambre - formation à 3)	Douai Administrative Court of Appeal (2nd Chamber - panel of three judges)	Second to last instance court (administrative)	No information	01/06/2017	Public enforcement	Recovery order of the unlawful/incompatible aid	This decision rendered void the recovery order issued by the State since it does not describe the method of calculation of the aid to be recovered. The State will have to issue a new recovery order. This decision confirms that the recovery order issued by the State does not describe sufficiently the method of calculation of the aid to be recovered.		
Cour Administrative d'Appel de Versailles (6ème Chambre)	Versailles Administrative Court of Appeal (6th Chamber)	Second to last instance court (administrative)	No information	16/11/2017	Public enforcement	None - Claim rejected	The Court considers that the company that has acquired the beneficiary of the State aid cannot be considered as benefiting from the aid since it has bought the assets of the undertaking at the market price. Therefore, it will not have to reimburse the aid.		This decision has been overturned on appeal: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000037254025&fastReqId=647812686&fastPos=1.
Conseil d'Etat (3ème / 8ème Chambre réunies)	Council of State (3dr / 8th Chambers combined)	Last instance court (administrative)	ECLI:FR:CECHR:2017:403183.20171124	24/11/2017	Public enforcement	Case sent back to the lower court for re-assessment	This ruling overturns the lower court's ruling and states that the recovery obligation must be extended to companies other than the original beneficiary of the incompatible aid when the assets of the original aid beneficiary - including the undue advantage created by the aid - are transferred to the acquirer of the assets, even if the assets have been bought at market price. No remedy was granted, as the Court remitted the case to the lower instance it had come from in order to identify if the post-merger company, in which the beneficiary of the State aid had been merged, could be considered as the aid beneficiary and therefore would have to reimburse the aid.		This decision overturns the lower court's decision: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032852977&fastReqId=706548096&fastPos=1. The subsequent ruling from the lower court is not yet available.
Cour Administrative d'Appel de Versailles (6ème Chambre)	Versailles Administrative Court of Appeal (6th Chamber)	Second to last instance court (administrative)	No information	25/01/2018	Public enforcement	Recovery order of the unlawful/incompatible aid	This decision renders void the recovery order issued by the State since it does not describe the method of calculation of the aid to be recovered. The State will have to issue a new recovery order within two months (State aid to be recovered with interest).	This decision confirms that 1) the recovery order issued by the State has to describe the method of calculation of the aid to be recovered; 2) the aid beneficiary cannot challenge the interest by arguing that the delay in the aid recovery is attributable to the State.	
Cour Administrative d'Appel de Nantes (5ème Chambre)	Nantes Administrative Court of Appeal (5th Chamber)	Second to last instance court (administrative)	16NT02839	01/06/2018	Public enforcement	Quantification of the aid to be recovered; Other remedy imposed	This decision renders void the recovery order issued by the State because the aid beneficiary had no possibility to comment on the amount of the State aid and the calculation method used when it received the recovery order. The State will have to issue a new recovery order.	This decision confirms that the State has to respect the right of defence while recovering incompatible State aid.	
Cour administrative d'appel de Nancy (2ème chambre - formation à 3)	Nancy Administrative Court of Appeal (2nd Chamber - panel of three judges)	Second to last instance court (administrative)	No information	14/06/2018	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered; Identification of the aid beneficiary	This decisions states: 1) The Commission decision declaring the aid to be incompatible is sufficiently substantiated regarding selectivity, the identification of the aid beneficiary and the method for the quantification of the aid to be recovered; 2) The undertaking that has to reimburse the aid is still the initial beneficiary, even if its parent company has been acquired by a third party, if the initial beneficiary is still active on the relevant market at the time of the recovery; 3) The beneficiary of the aid has to pay back the amount of the aid and interest, calculated to run from the date on which the aid was granted until its actual recovery.		
Conseil d'État (8ème chambre)	Council of State (8th Chamber)	Last instance court (administrative)	ECLI:FR:CECHS:2018:416508.20180726	26/07/2018	Public enforcement	Case sent back to the lower court for re-assessment	This ruling overturns the lower court's decision and states that the recovery obligation must be extended to companies other than the original beneficiary of the incompatible aid when the assets of the original aid beneficiary - including the undue advantage created by the aid - are transferred to the acquirer of the assets, even if the assets have been bought at market price. No remedy was granted, as the Court remitted the case to the lower instance it had come from in order to check if the advantage deriving from the granted State aid had been transferred to the company that acquired the beneficiary of the State aid.		This decision overturns the lower court's decision: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036081801&fastReqId=647812686&fastPos=6. The subsequent ruling from the lower court is not yet available.

11. Germany

11.1 Country report

Name national legal expert

Dr Andrés Martin-Ehlers LLM

Date

11/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

There are no specialised courts in Germany that are specifically competent for State aid cases (whether in public or private enforcement).

There are generally two paths that a State aid case in Germany can follow: the civil court path or the administrative court path. Whether a given case should be heard before a civil or an administrative court depends in particular on the entity granting the aid/benefit. If the aid was granted by a public authority or undertaking operating commercially, so effectively by an administrative act, the administrative courts are competent. However, if the aid was granted by a civil contract, the civil courts are competent. In practice, however, this distinction is not always so clear-cut and there are borderline cases, as evidenced by the *Magic Mountain* case (Higher Administrative Court Berlin-Brandenburg, 18.12.2017 – ECLI:DE:OVGBEBB:2017:1218.6B3.17.00 (DE3)).

If a case is lodged before a civil court, in the first instance it is heard at a regional civil court (*Landgericht*). There are 115 of them in Germany. An appeal may be lodged with the competent higher regional court – civil court of appeal (*Oberlandesgericht*). There are 24 such courts in Germany. The last instance judgments are rendered by the Federal Court of Justice (*Bundesgerichtshof*), which rules in extraordinary cases, when the appeal from the judgment of the second instance court is admitted or the Federal Court of Justice itself confirms a non-admission appeal.

If a case is lodged before an administrative court, in the first instance it is within the competence of a regional administrative court (*Verwaltungsgericht*). There are 51 such courts in Germany. In the second instance, it is heard by the competent higher administrative court (*Oberverwaltungsgericht*), provided that the appeal fulfils the restrictive admission criteria of Section 124 of the Administrative Procedure Code (*Verwaltungsgerichtsordnung*). There are 15 higher administrative courts in Germany. Finally, if the appeal to the last instance court is allowed, the case is considered by the Federal Administrative Court (*Bundesverwaltungsgericht*).

A description of the procedural framework applicable in public enforcement of State aid rules

At the national level, the Federal Ministry for Economic Affairs and Energy is in charge of controlling the implementation of State aid rules. The Federal Ministry for Economic Affairs and Energy also represents Germany in most State aid procedures before the Commission. The other two ministries, which can be in charge if the State aid proceedings concern the fields of agriculture and traffic, are the Federal Ministry for Food and Agriculture and the Federal Ministry for Transport and Digital Infrastructure. The responsibility of the Federal Ministry for Economic Affairs and Energy includes, in particular, the initial notification of individual aid or aid schemes to the Commission, the monitoring of notification procedures, and — following the approval of the Commission of the State aid measures — the mediation between the Commission and the various national aid grantors (such as federal and state ministries, municipalities and development banks) in the implementation of the aid measures (*e.g.* in the form of annual reports), including any recovery procedures (if the Commission does not take a decision).[130]

Any State aid recovery decision of the Commission should therefore be enforced in a timely and appropriate manner, in compliance with the 'Recovery Notice of the Federal Ministry for Economic Affairs and Energy '. This ministerial notice is issued to facilitate the process of understanding and of applying State aid rules in practice by the German authorities. The notice is therefore not a legal act; it merely has an informatory character. The Federal Ministry for Economic Affairs and Energy, the Federal Ministry for Food and Agriculture and the Federal Ministry for Transport and Digital Infrastructure ensure close monitoring and control in each individual State aid recovery case (*e.g.* through the agreement of detailed implementation schedules).[131]

[130] BMWI website, available at https://www.bmwi.de/Redaktion/DE/Artikel/Europa/beihilfenkontrollpolitik.html (last accessed 10/01/2019).

[131] Eine Handreichung des Referats „Beihilfenkontrollpolitik" im Bundesministerium für Wirtschaft und Energie Stand: Dezember 2015, p. 10, available at https://www.efre-thueringen.de/mam/efre20/bibliothek/beihilferegelungen_der_kom/handlungsempfehlungen_bmwi_compliance_-_stand_14.12.2015.pdf (last accessed 10 January 2019).

The recovery of State aid declared unlawful by the Commission is governed by the national administrative procedure, which is applied and interpreted in conformity with Union law.

The granting of aid without observing the duty to notify and to await the outcome of the proceeding of the Commission according to Article 108(3) TFEU is considered to be unlawful (ger. *rechtswidrig*), but — different from civil law — not void. The corresponding national legal bases for recovery are provided in the Administrative Procedure Act *(Verwaltungsverfahrensgesetz*, in particular paragraphs 48, 49, 49a at national level, and the respective regional administrative procedure rules (*Landesverwaltungsverfahrensgesetze* — different in every region — *Land*). The administrative act granting the State aid must be repealed once a violation of the notification obligation is confirmed because the aid in question was unlawful from the start. Once the act is repealed, the State aid paid to date must be recovered, in accordance with paragraph 49a(1) of the Administrative Procedure Act: the authority shall confirm the repayment of the aid with a recovery notice to the aid beneficiary. The amount of interest, according to paragraph 49a(3) of the Administrative Procedure Act, should be calculated from the date that the unlawfulness was confirmed.

Moreover, the administrative procedural rules need to be modified in order to comply with the provisions of Union law. For instance, the procedural rules must ensure that the enforcement of a Commission decision is not made practically impossible by national legal provisions. Limitation periods for the recovery are therefore irrelevant; the principle of legitimate expectation does not apply. [132]

If the aid beneficiaries fail to fulfil their obligation within the prescribed period, enforcement will be immediately executed by the national enforcement law. [133]

Only in exceptionally rare cases, such as when a company that received unlawful State aid does not exist any longer, a Member State may claim that it was impossible to recover State aid. If a company is in liquidation, the recovery is deemed to have been completed even if only a partial amount has been repaid. In the insolvency proceedings, the Member State needs to prioritise the interests of the Union in recovering the aid.[134]

The national courts cannot suspend recovery proceedings when the aid beneficiary challenges the recovery decision before the Union Courts.[135]

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The courts competent in the private enforcement cases are the same as in the public enforcement cases, (see question above).

A description of the procedural framework applicable in private enforcement of State aid rules

There are no specific legal provisions that govern the private enforcement of State aid rules in Germany.

When State aid is unlawful within the meaning of Union law, German civil law and German administrative law have tools that can be applied to private enforcement of State aid rules.

According to established national case law of the civil courts, unlawful State aid measures are not considered just ineffective, but also void. This interpretation stems from Section 134 of the German Civil Code (*Bürgerliches Gestzbuch*), according to which "a legal transaction that violates a statutory prohibition is void unless the statute leads to a different conclusion". Therefore, a contract between a public and a private body, including a contract relating to State aid that is in breach of the Union law obligation to notify according to Article 108(3) TFEU, shall be treated as if it was never concluded. Thus, any payment made under that contract was made without a legal basis. As a result, the civil law provisions regarding unjustified enrichment are applicable between the aid beneficiary and the grantor of the aid. Therefore, the aid needs to be repaid, including any interest due (according to Sections 812 *et seq.* of the German Civil Code). In cases of direct recovery, the grantor is obliged to act according to the recovery decision of the Commission. In case of a competitor claim, the competitor may oblige the aid grantor to effect recovery on the basis of Article 823(2) of the German Civil Code in conjunction with Article 108(3) TFEU (*Lufthansa* case).[136]

Contracts concluded in violation of the duty to notify the Commission according to Article 88(3) EC Treaty (current Article 108(3) TFEU) were first declared void in judgments of the Federal Court of Justice from 2000 to 2003 (which fall outside the time scope of this Study; *e.g.* the judgment of the Federal Court of Justice of 24 September 2002 - KZR 10/01 or the judgment of 4 April 2003 - V ZR 314/02). The *Landmark* judgment[137] marked the end of the development (at

[132] BVerwGE 106, 328 (Alcan).
[133] Das Europäische Beihilfenrecht - Ein Leitfaden für die Praxis - Knut Büsching und Dr. Jens Homann - Mitarbeiter der Senatsverwaltung für Wirtschaft, Technologie und Frauen, Berlin - und Thomas Wiese - Rechtsanwalt, Brüssel - 4. aktualisierte Fassung 2012, p. 25.
[134] *Id.*, p. 25.
[135] BGH, decision of 13 September 2012, III ZB 3/12 (OLG Jena, LG Mühlhausen).
[136] Federal Court of Justice, 10.2.2011 - I ZR 136/09 (DE6).
[137] Federal Court of Justice, 5.12.2012 - I ZR 92/11.

least in civil law) of the rule that an infringement of the duty to notify according to Article 88(3) EC Treaty (current Article 108(3) TFEU) leads to the underlying contract becoming null and void according to Section 134 of the German Civil Code. This judgment specified that a breach of the ban on State aid does not automatically result, under Union or German law, in the total annulment of the sales contract granting that aid. If the purchase price constitutes State aid, it is sufficient to remove the unlawful competitive advantage. This means it suffices that the aid beneficiary pays the difference between the agreed upon and the higher (aid-free) price, plus the interest accrued until recovery.

There are several tools available for civil recovery claims. An example is the three-step approach consisting of a request for information on the exact design of the aid in question, a confirmation that this information is correct and, finally, the recovery of the aid about which information was sought. This is typically combined with a claim to cease and desist from granting such aid in the future. These instruments may by combined with additional measures such as a payment of the aid into a blocked (escrow) account once the Commission has initiated an in-depth investigation (CJEU case law *Lufthansa / Frankfurt-Hahn airport*).[138] However, the referring court, the Koblenz Higher Regional Court rejected such claims and, therefore, did not adhere to the ruling of the CJEU.

Finally, the assertion of claims for damages may also be considered provided that the competitor can prove that the public financing of the State aid beneficiary caused economic disadvantage to the competitor.[139] Among the cases analysed for this Study, the plaintiff claimed damages, albeit unsuccessfully, for instance in the case Federal Administrative Court, 31.5.2012 – ECLI:DE:BVerwG:2012:310512U3C12.11.0.

Criminal law proceedings are also conceivable in State aid cases. In particular, a subsidy fraud (according to Section 264 of the German Criminal Law (*Strafgesetzbuch*) can be relevant here as it could be used against the State aid beneficiary. Corresponding procedures are directed against the persons involved in the beneficiary's company, at least the management, as well as other people along the entire corporate management chain. The company itself handles the fine, if ruled by the court, according to Section 30 of the Administrative Violations Law (*Ordnungswidrigkeitengesetz*)).

As for the entities granting the unlawful State aid, disciplinary measures for the incorrect use of public funds may come into question, for instance Section 266 of the German Criminal Code (embezzlement and abuse of trust).

Among the cases analysed within the course of this Study, there was only one criminal law case: the judgment of the Criminal Chamber of the Federal Court of Justice, 25.11.2017 - ECLI:DE:BGH:2017:251017U1STR339.16.0 (the Court considered the subsidy fraud accusation and dismissed the claim as not falling within the scope of criminal jurisdiction).

The courts can also suspend the proceedings until such time that the CJEU renders its judgment. The courts exercised that right in the past, for instance, in the judgment of the Federal Finance Court (*Bundesfinanzhof*), 30.5.2017 - II R 62/14.

Main findings based on the case summaries

Type of action

There are significantly more private enforcement cases as compared to public enforcement cases in Germany in the decade under analysis for this Study.

As for the remedies requested, in the private enforcement cases, most of the plaintiffs sought annulment of the act granting State aid to a competitor and a declaration that the contested measure was unlawful State aid (*e.g.* case Federal Administrative Court, 10.10.2012 – ECLI:DE:BVerwG:2012:101012U7C11.10.0; Higher Regional Court Nürnberg, 21.11.2017 - 3 U 134/17). Also, in a high proportion of judgments, plaintiffs applied for injunctive relief (*e.g.* Higher Administrative Court Berlin-Brandenburg, 6 S 54.15).

In public enforcement, the most often requested remedy was the recovery of unlawful State aid (ruling ECLI:DE:BVerwG:2010:161210U3C44.09.0 (DE4)), the introduction of interim measures that would prevent the unlawful aid from being granted (*e.g*. Administrative Court Trier, 8.3.2013 - 1 L 83/13. TR) or — quite the opposite — the annulment of the interim measures in place (*e.g.* Higher Administrative Court Rheinland-Pfalz, 10.6.2013 - 6 B 10351/13).

Sectors

Whilst State aid cases have appeared across many sectors, there is a significant number of cases that concerns State aid granted to airlines at some airports, for instance, claims lodged by competing airlines (the main airports concerned appear to be Lübeck and Frankfurt Hahn, *e.g*. Higher Regional Court Koblenz, 25.2.2009 - 4 U 759/07; Higher Regional Court Schleswig, 8.4.2015 -

[138] Case C-284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt Hahn Gmnh* (2013) ECLI:EU:C:2013:755.
[139] EU Beihilfenrecht – Grundlagen, Leitfaden, Baden Wuerttemberg Ministerium fuer Finanzen und Wirtschaft, p.95-96, available at https://wm.baden-wuerttemberg.de/fileadmin/redaktion/m-wm/intern/Publikationen/Wirtschaftsstandort/Leitfaden_EU-Beihilfenrecht_Grundlagen_Band-1_web.pdf (last accessed 10 January 2019).

6 U 54/06; Federal Court of Justice, 1.6.2017 – ECLI:DE:BGH:2017:010617BIZB4.16.0).

There is also a high overall number of cases discussing the compatibility of the fee for public radio and television with State aid rules (*e.g*. 4 A 291/13), in which the courts held that the public radio and TV fee did not entail State aid.[140] The other sectors with a high number of State aid related cases include agriculture (*e.g*. Federal Court of Justice, 29.4.2016 – ECLI:DE:BGH:2016:290416BBLW2.12.0 (DE1); VII ZR 183/08), energy/environment (*e.g.* Federal Administrative Court, 10.10.2012 – ECLI:DE:BVerwG:2012:101012U7C11.10.0; Federal Court of Justice, 6.5.2015 - VIII ZR 56/14), provision of broadband services (*e.g.* Administrative Court Freiburg, 29.11.2016 - 3 K 2814/14), sale of land (*e.g*. DE:VGHB:2018:0911.5V1502.18.00) and subsidies for sports promotion (*e.g*. Higher Administrative Court Berlin-Brandenburg, 18.12.2017 - DE:OVGBEBB:2017:1218.6B3.17.00 (DE3)).

Main actors

In most instances, a State aid beneficiary, or an entity that applied for State aid and was not granted the aid, and a public authority granting State aid were involved in the proceedings before the national courts. In many cases, a competitor was involved as well.

Qualitative assessment of the average time of court proceedings

According to the *Justiz-und-Recht* website, the average duration of an administrative procedure before the German courts is 10.3 months. The duration of the proceedings varies depending on whether they are first instance or second instance proceedings. There are noteworthy differences also between the various regions in Germany: in the first instance proceedings, the shortest proceedings, on average, take place in Rheinland-Pfalz (5.8 months), while the longest in Mecklenburg-Vorpommern (19.5 months). As for the second instance courts, the shortest average duration of proceedings is noted in Rheinland-Pfalz (6.8 months), while the longest in Thüringen (47.8 months). On average, a combined first and second instance proceedings takes the shortest in Rheinland Pfalz (16.7 months) and the longest in Mecklenburg-Vorpommern (52.3 months).[141]

The duration of the civil proceedings, on average, is even longer: in the first instance (at the level of regional courts) the proceedings take on average 14.2 months, while in the second instance (higher regional courts) , they take on average 30.2 months.[142]

Against the statistical data as provided above, the picture in practice is somewhat different. Cases on basic questions of Union law are lengthy and cumbersome. Thus, it took the German civil courts six years of proceedings (2006 to 2011) until the Federal Court of Justice confirmed the direct applicability of Article 108(3) TFEU in national proceedings. In this context, it is noteworthy that the German civil courts struggled with this question at a time when the administrative courts had already confirmed the direct applicability of Article 108(3) TFEU on the basis of the standing jurisprudence of the CJEU. Once this or other basic principles are established, it is observed that the court proceedings concerning State aid usually roughly fit within the average duration of court proceedings, or divert slightly from the average values, taking slightly shorter or longer. For instance, a first instance case at the Administrative Court of Schleswig – Holstein (Administrative Court Schleswig Holstein, 26.11.2015 – ECLI:DE:VGSH:2015:1126.4A291.13.0A), took 20 months, which is longer than average. On the other hand, a civil case in Nordrhein-Westfalen (Higher Regional Court Düsseldorf, 12.10.2016 – ECLI:DE:OLGD:2016:1012.VI.U.KART2.16.00), took seven months in the first instance and six months in the second instance, which is slightly shorter than average. An administrative case from the Higher Administrative Court of Berlin-Brandenburg, 7.6.2016 - OVG 6 S 54.15 (DE7), took only seven months in the second instance, which is significantly below the Berlin average of 23.4 months.

Qualitative assessment of the remedies awarded by national courts

In general, there are few successful State aid arguments, and in most of the selected cases, no remedy was granted by the national court. The courts most often rejected a claim or sent the case back for reassessment to the lower instance court, which then rejected the claim. Although the reasons for this vary from case to case, the prevailing reason seems to be that the court found that the contested measure did not constitute State aid at all (*e.g.* in the cases concerning the lawfulness of the obligation to pay broadcasting fees, such as the case 4 A 291/13 of the Administrative Court Schleswig-Holstein).

[140] NB this conclusion was also in the end confirmed in a CJEU judgment, CaseC-492/17 *Südwestrundfunk contre Tilo Rittinger e.a*. (2018) ECLI:EU:C:2018:1019.

[141] The data stems from recht-und-justiz website, providing statistics on the length of court proceedings in Germany, available at https://justiz-und-recht.de/wie-lange-dauert-ein-verwaltungsgerichtliches-verfahren-eine-prognose-fuer-das-jahr-2016-sieger-und-verlierer-2014/, last accessed 09 January 2019.

[142] The data stems from the website static.ndr.de, providing statistic on the length of the court proceedings in Germany, available at https://static.ndr.de/charts/static/yAwqC/index.html, last accessed 09 January 2019.

There is also a significant number of cases in which the claim was rejected as the subsidy — the alleged State aid in relation to which the plaintiff claimed a breach of the notification requirement stemming from Article 108(3) TFEU — in the end turned out to be existing aid. This was the case, for instance, if a new legislation 'introducing' State aid in fact reflected the contents of existing or old legislation, including State aid rules (*e.g.* Finance Court Cologne, 9.3.2010 - 13 K 3181/05).

In reference to the cases specifically concerning applications for injunctive relief, the main reason for denying the injunction was that the courts did not usually establish a high probability of success in the main proceedings, which would justify granting the injunction (*e.g.* Federal Financial Court, 1.12.2015 - VII R 55/13). Such a high probability of success, that is, a highly probable breach of State aid rules is a condition *sine qua non* for granting injunctions.

On rare occasions, however, the courts did decide to grant State aid remedies. This was the case, for instance, when the courts issued an order requiring the recovery of unlawful aid in the cases Federal Court of Justice, 5.7.2007 - IX ZR 221/05 (DE11); Federal Administrative Court, 16.12.2010 - ECLI:DE:BVerwG:2010:161210U3C44.09.0, (DE4); Administrative Court Trier, 19.11.2013 - 1 K 1053/12.TR; Administrative Court Freiburg, 29.11.2016 - 3 K 2814/14; Federal Financial Court, 30.1.2009 - VII B 180/08 (DE8). An order requiring the recovery of the unlawful aid was the most popular State aid remedy granted by the courts. The other remedy granted by the courts in some cases during the analysed period was the grant of interim measures to prevent the grant of unlawful aid (*e.g*. Administrative Court Trier, 8.3.2013 - 1 L 83/13. TR1 L 83/13. TR).

Qualitative assessment of the application of the State aid *acquis*; preliminary references

It can be concluded that, generally, the German courts quote State aid rules correctly.

The main EU *acquis* referenced by the courts were Articles 107(1), 107(2) and 108(2), 108(3) TFEU. The other Union law relied upon by the courts included, *inter alia*:

- Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty;[143]
- Commission Notice on the application of the State aid rules to measures relating to direct business taxation;[144]
- Commission Decision 1999/268/EC of 20 January 1999;[145]
- Commission Communication of 10 July 1997 on State aid elements in sales of land and buildings by public authorities;[146]
- Council Regulation (EU) 2015/1589 of 13 July 2015;[147]
- Commission Regulation (EU) 651/2014 of 17 June 2014;[148]
- Commission Notice on the *de minimis* rule for State aid;[149]
- Information from the Commission — Community guidelines on State aid for small and medium-sized enterprises;[150]
- Commission Decision 2008/715/EC of 11 March 2008;[151]
- Information from the Commission - Community guidelines on State aid for environmental protection).[152]

Overall, it can therefore be said that the German courts refer to a wide variety of State aid rules, which demonstrates their awareness of State aid rules. The references to the EU *acquis* were relevant to the subject matter of the case at hand. However, the interpretation of Union law was not always in line with Union law and jurisprudence.

Moreover, although earlier the German courts did not refer many State aid related requests for preliminary rulings to the CJEU, they seem to have referred more such questions in the recent years. Between 2007 and 2017 there were less than ten CJEU rulings concerning German State aid issues, and the majority of them were referred to and ruled on by the Union courts during 2016–2018: the ruling of 10/05/2016 T-47/15 on the Renewal Energy Act,[153] and the ruling C-492/17 on the compatibility of the German broadcasting fee with State aid rules.[154] Some of the cases were referred to the CJEU only in 2017: Federal

[143] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, *op.cit., replaced by* Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*

[144] Commission Notice on the application of the State aid rules to measures relating to direct business taxation, *OJ C 384, 10.12.1998, p. 3–9.*

[145] Commission decision of 20 January 1999 on the acquisition of land under the German Indemnification and Compensation Act, *OJ L 107, 24.4.1999, p. 21–48.*

[146] Commission Communication on State aid elements in sales of land and buildings by public authorities, *OJ C 209, 10.7.1997, p. 3–5*, replaced by Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946, OJ C 262, 19.7.2016, p. 1-50.

[147] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*

[148] Commission Decision (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 TFEU, *OJ L 187, 26.6.2014, p. 1–78.*

[149] Commission Notice on the *de minimis* rule for State aid, *OJ C 68, 6.3.1996, p. 9–10.*

[150] Information from the Commission - Community guidelines on State aid for small and medium-sized enterprises, *OJ C 213, 23.7.1996, p. 4–9.*

[151] 2008/715/EC: Commission decision of 11 March 2008 on State aid (Germany) exemption from mineral oil tax for greenhouse undertakings, *OJ L 238, 5.9.2008, p. 10–26.*

[152] Information from the Commission - Community guidelines on State aid for environmental protection, OJ C 72, 10.3.1994, p. 3.

[153] Case T-47/15 *Federal Republic of Germany v European Commission* (2016) ECLI:EU:T:2016:281.

[154] Case C-492/17 *Südwestrundfunk v Tilo Rittinger and others*, *op.cit*.

Finance Court case, 30.5.2017 - II R 62/14; Regional Court of Tübingen, 3.8.2017 - -ECLI:DE:LGTUEBI:2017:0803.5T121.17.0A.

Qualitative assessment of any other relevant trends in State aid enforcement

In recent years, German courts have shown a clear tendency not to follow Union law and/or jurisprudence. In this context, one particular issue was the jurisprudence of the Union Courts which clarified that the decision of the Commission to initiate State aid proceedings was binding on a national court and even the basis for preliminary measures, such as the payment of the alleged aid into a blocked account.

Even before this jurisprudence developed, the courts did not align with the Commission. Thus, in 2010, the Federal Administrative Court (Third Senate) in one case denied the existence of aid although it was fully aware that the Commission had initiated a State aid proceeding during the on-going appeal.[155] The Federal Administrative Court did not align with the Commission, which led to considerable problems, because following its investigation the Commission concluded that in fact there was (unlawful) aid. This case is quite noteworthy, because the aid beneficiary challenged the decision of the Commission before the Union Courts. The GC rejected the application, stating that the Federal Administrative Court had manifestly infringed Union law.[156] Moreover, the Federal Constitutional Court annulled the judgment of the Federal Administrative Court, but due to legal issues, which were not State aid related.[157]

Nevertheless, the Federal Administrative Court remains hesitant. In 2016, the Tenth Senate (with the presiding judge who had previously chaired the Third Senate) decided in the *MagicMountain* case that although the Commission had rendered its decision, it was up to the national courts to analyse and decide upon the notion of State aid.[158]

Notably in 2017, the civil Federal Court of Justice (Federal Court of Justice, 9.2.2017 – ECLI:DE:BGH:2017:090217UIZR91.15.0 (DE2)) decided in the case of the Lübeck airport that the Commission decision to initiate an in-depth investigation indeed binds a national court in a parallel proceeding. Even so, the Federal Court of Justice blurred this principle down by developing a catalogue with exceptions, which are not provided for in Union law and which render the principle futile.

Finally, a very critical chain of jurisprudence is led by the Higher Regional Court of Koblenz. It was this Court, which, in 2012, referred the question of the binding effect of a preliminary decision to the CJEU. And it was also this Court that did not adhere to the ruling of the CJEU on the binding effect. Instead, it held in a procedural decision that the initiation of a State aid proceeding just shifted the burden of proof. Thus, the Commission decision merely indicated the existence of aid, but with the possibility of rebutting this indication.

As a consequence, one clear trend in German State aid cases seems to be that the German courts are very reluctant to grant injunctive relief in State aid cases. The courts usually fail to establish a "high probability of success in the main proceedings", which would allow them to grant an injunction, as the brief or summary examination conducted by the court rarely reveals a highly probable breach of the State aid rules at hand (*e.g*. Federal Financial Court, 1.12.2015 - VII R 55/13; DE:VGHB:2018:0911.5V1502.18.00).

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

Except for the above, it seems that the German courts conduct the notion of State aid well, consequently relying upon Articles 107(1), 107(2) and 108(2), 108(3) TFEU and referring a (slightly) increased number of requests for preliminary rulings referred to the CJEU. Nevertheless, the German courts have not always followed the viewpoint of the CJEU.

One of the main challenges to the interpretation of the notion of State aid by the German courts is the federal structure of the German judiciary, at least in administrative law, according to which each individual region has its own jurisdiction and laws. It is therefore challenging to get an overview and a consistent approach towards the State aid questions. Even when searching for State aid cases from the instances lower than the Federal Administrative Court, a different database for each region needs to be checked.

Another challenge can be found in the interaction between the tax law and State aid rules, and the overlap between the two, which can cause a lack of legal certainty for both the courts and the parties. More legal certainty could be achieved by introducing secondary legislation which could clearly and unambiguously set out allowable benefit rules for certain areas or exempt some sets of standards from State aid control. Just to illustrate, among the cases analysed within the framework of this Study, cases bordering on State aid and tax law were included, for instance Federal Financial Court, 27.11.2013 - I R

[155] Federal Administrative Court , 16.12.2010 - 3 C-44.09.
[156] Case T-309/1 (2014).
[157] Federal Constitutional Court , 29.10.2015 - 2 BvR, 1493/11.
[158] Federal Constitutional Court , 26.10.2016 - 10.C 3.15.

17/12; Federal Financial Court, 31.7.2013 - I R 82/12; Higher Administrative Court Lüneburg, 18.5.2016 - ECLI:DE:OVGNI:2016:0518.9LA186.15.0A; Federal Financial Court, 30.1.2009 - VII B 180/08 (DE8).

Any other relevant comments or findings

Not applicable

11.2 Case summaries

Case summary DE1

Date

04/01/2019

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Bundesgerichtshof

Court which adopted the ruling (English)

Federal Court of Justice

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

German

Hyperlink to ruling

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=74996&pos=0&anz=1

Case reference

DE:BGH:2016:290416BBLW2.12.0

Procedural context of the case

The plaintiff challenged the decision of the Landkreis Jerichower Land at the first instance court (Amtsgericht Stendal,ruling 4 Lw 4/09 of 2 October 2010). The Court dismissed their claim. The court of appeal, Oberlandesgericht Naumburg, also dismissed their claim (ruling 2 Ww 12/10, of 31 July 2012). The final instance court, the Federal Court of Justice (BLw 2/12, 29.11.2013), decided to refer a request for a preliminary ruling to the CJEU (case C 39/14 BVVG Bodenverwertungs- und -verwaltungs GmbH ECLI:EU:C:2015:470). The Court asked the CJEU the following question:

"Does Article 107(1) TFEU preclude a national provision such as paragraph 9(1)(3) of the Grundstückverkehrsgesetz (Land Transactions Act, GrdstVG) which, for the improvement of agricultural structures, effectively prohibits an emanation of the State, such as BVVG, from selling to the highest bidder in a public call for tenders agricultural land available for sale, if the highest bid is grossly disproportionate to the value of the land?"

Following the preliminary ruling by the CJEU, the Federal Court of Justice decided in the present case to refer the case back the OLG Naumburg, as it did not possess the necessary empirical information to decide the case.

Type of action

Private enforcement

Delivery date of the ruling

29/04/2016

Language

German

Headnote

In this ruling, the Court decided under what circumstances a refusal to sell to the highest bidder in an open bidding process, is lawful.

Parties

Names of the parties to the action

BVVG Bodenverwertungs- und -verwaltungs GmbH

Versus

Landkreis Jerichower Land

The relationship of the plaintiff to the measure

Other

Private entity responsible for the privatisation of State owned agricultural land

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

A - Agriculture, forestry and fishing

Agriculture

The type of State aid measure challenged in the court proceedings

Other

Refusal to sell land to the highest bidder in an open, transparent and unconditional bidding process

Substance of the case

Facts and parties' main arguments in the case

Mr. and Mrs. Erbs were the highest bidders in a public bidding process organised by the BVVG for the sale of agricultural land. They subsequently signed a contract with the BVVG. The Landkreis Jerichower Land refused to authorise the sale based on domestic law on the ground that the price agreed was grossly disproportionate to the agricultural market value of the land at issue.

Under national case law, a sale price is grossly disproportionate if it is more than 50% higher than the "the agricultural market value of the land". This value is defined as the price paid for equivalent land bought and sold for agricultural purposes.

This public authority was challenged by the parties before the Court of First Instance (Amtsgericht — Landwirtschaftsgericht), which rejected the case, as it held that the sale price was indeed grossly disproportionate according to a market value estimate compiled by a group of experts.

The second instance Court of Appeal also dismissed the claim. It mandated another expert report to calculate the value of the land and confirmed on the basis of this report that the sale price was indeed grossly disproportionate to the agricultural market value.

Furthermore, the Court of Appeal justified its ruling based on arguments of agricultural policy. In line with the objectives of the domestic law, the Court held that permitting a sale at a significantly higher price would affect the ability of farmers in need of land to expand their businesses. This contravenes the objectives of keeping the price of agricultural land affordable in order to regulate agricultural holdings as it was intended by the legislator. The Court of Appeal held that the refusal of allowing the sale was only permissible if a farmer was willing to buy the land. In this case, this condition was met as the court found a farmer who, while not participating in the public auction, was willing to buy the land.

The BVVG and the buyers challenged the decision of the public authority in court. Significant concerns regarding State aid rules arose in the last instance court, the Bundesgerichtshof. This Court referred a request for a preliminary ruling to the CJEU. The court asked

the CJEU whether the refusal to sell to the highest bidder (and therefore the highest price) from a public auction infringes Article 107(1) TFEU, taking into consideration that, at the point of refusal, it is not known to whom the land will be sold.

Remedy(ies) sought

Other remedy sought

Withdrawal of the refusal to sell the land to the winner of the public auction

Outcome of the case

Conclusions adopted by the national court

The Court rejected the legal interpretation of the lower courts and followed the guidance received from the CJEU. The case was sent back to the Court of Appeal, as the Court did not have the necessary information, mainly data about the offers submitted by the other bidders, to enable it to conclude whether the price agreed was grossly disproportionate to the agricultural market value of the land, newly defined as free market value by the CJEU in its preliminary ruling.

The Court rejected the claim of the Court of Appeal that the case Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG v BVVG Bodenverwertungs- und -verwaltungs GmbH C-239/09, could be distinguished on the basis of concerning sale of subsidised sales, while this sale concerned regular agricultural land. The Court rather held, in accordance with the opinion of the CJEU, that a sale such as this would also be relevant, as it may confer "on the purchaser, as a recipient, an advantage which, in essence, leads to a reduction of the State budget consisting in the State forgoing the difference between the market value of the land and the lower price paid by that purchaser."

The Court further followed the CJEU opinion according to which an "open, transparent and unconditional" public tender was the preferred way to establish the market price of land. In case the highest offer received is credible, binding and not speculative, there was a presumption that this offer represents a close and sufficient approximation of the price of land.

This had consequences for the present case, as it created a presumption that the winning price in the action corresponds to the market value of the land. This presumption could have been rebutted, if for example the highest bid would have been significantly higher in comparison to the other bids submitted or, in case of a singular bid, to the free market price, as observed by appropriate and sound economic methods based on sufficient data (such as data from comparable BVVG sales). Thus, expert reports are appropriate only in cases in which there are clear initial suspicions of speculation. In the present case, the Court did not possess the relevant bidding process information to determine whether the winning bid corresponded to the market value. Therefore, the case was sent back to the Court of Appeal.

In light of the preliminary ruling given by the CJEU, the Court held that paragraph 9(1)(3) GrdstVG did not breach State aid rules per se, as long as the application of the rule results in a price which closely approximates the market value of the land. The agricultural market value of the land was to be interpreted as free market value, discoverable in non-speculative bidding processes or through other processes. This re-interpretation of market value affected all sales of agricultural land which fell under this law, including sales between private parties, as it would have been unconstitutional to treat equivalent situations differently and discriminate against private sellers (Article 3(1) Grundgesetz (German Basic Law)). The previous interpretation (market value obtainable in the sale between agricultural producers) was rejected following the preliminary opinion of the CJEU, as it may have enabled farmers to purchase land at rates below those of the free market. Any other interpretation of paragraph 9(1)(3) GrdstVG would have constituted State aid, subject to a notification requirement. A continuation of the previous interpretation favouring a separate agricultural market value would have required notification by Germany and the approval of the Commission.

With regard to the agricultural policy argument concerning the justification of paragraph 9(1)(3) GrdstVG as safeguarding the interest of agricultural holdings and the profitability of farmers, the Court held that it is the effects of State interventions which determine their legality under Union law, rather than their causes and policy aims. The aims of the national law could be pursued only within the boundaries of State aid rules.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The lower court judgment is pending.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- 120/73, Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz (1973) ECLI:EU:C:1973:118
- C-143/99, Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke v Finanzlandesdirektion für Kärnten (2001) ECLI:EU:C:2001:598
- C-156/00, Kingdom of the Netherlands v Commission of the European Communities (2003) ECLI:EU:C:2003:149
- C-66/02, Italian Republic v Commission of the European Communities (2005) ECLI:EU:C:2005:768
- C-140/09, Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri (2010) ECLI:EU:C:2010:335
- C-214/12 P, Land Burgenland and Others v European Commission (2013) ECLI:EU:C:2013:682
- C-417/10, Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v 3M Italia SpA (2012) ECLI:EU:C:2012:184
- C-37/14, European Commission v French Republic (2015) ECLI:EU:C:2015:90
- C-39/14, Proceedings brought by BVVG Bodenverwertungs- und -verwaltungs GmbH (2015) ECLI:EU:C:2015:470

National case law:
- Decision V BLw 18/63 BGH, 12.12.1963
- Decision V BLw 10/68 BGH, 02.07.1968
- Decision V BLw 16/75 BGH, 03.06.1976
- Decision BLw 14/00 BGH, 27.04.2001
- Decision V ZR 314/02 BGH, 04.04.2003
- Decision BLw 5/13 BGH, 25.04.2014
- Decision BLw 2/12 BGH, 29.04.2016

√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Communication of 10 July 1997 on State aid elements in sales of land and buildings by public authorities, OJ 1997 C 209, 10.7.1997 (currently replaced by 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 C/2016/2946, OJ C 262, 19.7.2016)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-39/14 BVVG Bodenverwertungs- und -verwaltungs GmbH ECLI:EU:C:2015:470 (http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-39/14%20P&td=ALL)

Any other comments (optional)

No other comments

Case summary DE2

Date

04/01/2019

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Bundesgerichtshof

Court which adopted the ruling (English)

Federal Court of Justice

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

German

Hyperlink to ruling

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=3164b3217aa808a9dfe3b31166f46d98&nr=77447&pos=0&anz=21

Case reference

DE:BGH:2017:090217UIZR91.15.0

Procedural context of the case

Air Berlin brought its first claim for disclosure and recovery to the Landgericht Kiel (Regional Court Kiel). The plaintiff was partially successful (ruling 14 O Kart 176/04, 28.07.2006) as regards the disclosure claim. The other claim was not decided upon.

On 10 July 2007, the Commission formally opened its investigation into possible aid received by Ryanair from the Airport Lübeck.

Back in the national court proceedings, the Schleswig-Holsteinische Oberlandesgericht (Higher Regional Court Schleswig-Holstein), granted the appeal against the ruling of the first instance on the grounds that Article 108(3) TFEU was not directly applicable and as a consequence competitors did not have standing to bring a private law claim based on (6 U 54/06, 20.05.2008).

The Federal Court of Justice (I ZR 213/08 10.02.2011) then annulled the ruling of the lower court, finding that Article 108(3) TFEU confers standing to competitors, as it is meant to protect their legitimate interests. The case was sent back to the lower court.

The Schleswig-Holsteinische Oberlandesgericht (6 U 54/06, 14.01.2013; 08.04.2015) then requested the Commission's opinion and asked whether the (preliminary) appraisal regarding the unlawfulness of the State aid in question, expressed by the opening of a formal investigation, was binding upon the national court. The Commission answered affirmatively. The Court then referred a request for a preliminary ruling to the CJEU on the same question. Since the CJEU had already confirmed the binding effect in its judgment of 21 November (Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH C-284/12), it asked whether the ruling was to be upheld. After confirmation by the national court, the CJEU (Case C-27/13 Flughafen Lübeck GmbH v Air Berlin plc & Co. Luftverkehrs KG – Great Chamber) confirmed its jurisdiction in a ruling without oral hearing by instructing national courts to "take all necessary measures arising from a possible breach of the obligations of cessation of recovery of unlawful aid". The Court took this to mean that the opening of a formal Commission investigation was binding.

Ryanair, as beneficiary and party to the dispute, then challenged this view to the Bundesgerichtshof (Federal Court of Justice). In this present case (I ZR 91/15, 09.02.2017), the main issue under dispute is again the interpretation of the preliminary ruling given by the CJEU.

Type of action

Private enforcement

Delivery date of the ruling

09/02/2017

Language

German

Headnote

In this ruling, the Court held that the recovery of a grant on the basis of a provisional classification as State aid granted by the Commission may prove disproportionate. Ultimately, this examination is the responsibility of the German courts dealing with a recovery request.

Parties

Names of the parties to the action

Air Berlin plc & Co. Luftverkehrs-KG

Versus

Flughafen Lübeck GmbH

An interested party to the proceedings was Ryanair

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority; Third party; Beneficiary

Sector relating to the State aid argument

H - Transporting and storage

Airport services

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The defendant was the operator of the airport of Lübeck. At the time of the measures in question, the company was owned by the City of Lübeck. On 29 May 2000, the airport granted Ryanair conditions more favourable than those granted to other airlines using the airport. These conditions consisted of lower fees and payment of 'marketing support' for the opening of new routes.

The plaintiff was Air Berlin, a competitor of Ryanair. Air Berlin alleged that the measures in question constituted State aid and thus should have been notified to the Commission (Article 108(3) TFEU), to which it had complained. Air Berlin requested the disclosure of information regarding the content of the special agreement between the airport authority and Ryanair in order to quantify the amount of aid and consequently the recovery of the aid.

In the current instance, Ryanair claimed that the preliminary ruling given by the CJEU in the lower instance should be interpreted as meaning that the opening of formal Commission investigations is only binding in some circumstances and, contrary to the view of the lower court, may not be binding in the present case. The lower court had formulated its preliminary question in such a manner that, if the CJEU held that the national court was bound to find the existence of State aid by the opening of a formal Commission investigation, it would not be necessary for the CJEU to answer the other parts of the preliminary question. However, despite this formulation, the CJEU had also answered questions 3 and 4. Ryanair argued that this choice means that national courts are not

always bound by the findings expressed in the opening of formal Commission investigations as to the existence of State aid. In other words, because the CJEU felt the need to answer to questions 3 and 4, this implied that there were caveats regarding the binding effect of formal Commission investigations for national courts.

Remedy(ies) sought

Recovery order in relation to unlawful aid; Interim measures to suspend the implementation of an unlawful aid; Other remedy sought (Disclosure of information regarding the aid)

Outcome of the case

Conclusions adopted by the national court

The case is sent back to the lower court for procedural reasons. The lower court was mistaken as to the admissibility of a partial ruling (Teilurteil) of the first instance court, which should have been corrected. The Court rejected the argument of Ryanair as to the correct interpretation of the preliminary ruling given by the CJEU. However, while the Court found that preliminary findings expressed through the opening of Commission investigations are generally binding upon national courts, there may be certain special circumstances in which the courts can depart from these findings. The factual circumstances of the present case may fall under this exception.

The CJEU had answered the court's question by instructing national courts to "take all necessary measures arising from a possible breach of the obligations of cessation of recovery of unlawful aid". Therefore, national courts may take interim measures such as to stop the granting of State aid and order preliminary recovery into a blocked account in order to safeguard the effectiveness of the decision of the Commission to formally open an investigation by the Commission.

Contrary to the view of the lower court, the Federal Court of Justice found that the CJEU ruling does not imply an absolute obligation for national courts assume the existence of State aid, once the Commission has opened an investigation. The Court interpreted this answer of the CJEU to mean that national courts are generally not permitted to take decisions that amount to the negation of the existence of State aid, in cases in which the Commission has opened a formal investigation. However, there is no absolute obligation for national courts to follow the (preliminary) assessment of the Commission.

The fundamental right to be heard according to Article 19(4) German Basic Law and Article 47 Charter of Fundamental Rights of the EU ensure that public authorities and aid beneficiaries have the right to present their arguments as to the legality of the aid measure before a national court, regardless of whether a Commission investigation has been opened. Any other interpretation would run contrary to the principle of effective legal protection, as the interested parties do not have the procedural means to intervene in the Commission investigation prior to the opening of the formal investigation.

In case the national court doubts the assessment of the Commission or new relevant factual circumstances come to light (in the sense that the court has more information as compared to the Commission), the national court is required by the principle of loyal co-operation (Article 4(3) EC Treaty) to ask the Commission for assistance. If the doubts persist, the national Court is obliged by Union law to refer a request to the CJEU for a preliminary ruling.

Furthermore, the Court found that even if it is bound by the assessment of the Commission that the measure in question constitutes unlawful aid, this does not translate into an obligation to order disclosure or recovery of the aid. The obligation to ensure the effectiveness of the Commission investigation needed to be reconciled with the principle of proportionality.

The Court explained that the respect of the principles of proportionality and loyal co-operation are also binding upon the Commission. According to CJEU jurisprudence, the enforcement of for example recovery measures is only permissible if there are no doubts as to the unlawful nature of the aid, if the aid measure is about to be implemented or has already been implemented and there are no special circumstances which would make a recovery measure disproportionate. The latter would be the case, if for example it is highly likely that the measure under Commission investigation will be declared compatible with the single market (Article 107(2) or (3) TFEU) and the recovery would seriously endanger the targeted recipient.

Regarding the present case, the Court expressed doubts as to the proportionality of ordering the recovery of aid: The Commission had opened the investigation in 2007 and only issued a final decision two days before this judgment was rendered, which could not be used in the present case as the full text of the decision was not made available. However, given that it took 10 years for the Commission to finalise the investigation, the Court found that making a recovery order would be disproportionate. If the Commission is unable to reach a decision which satisfied the procedural requirements of a recovery order, a national court can also not be expected to do so. Otherwise, the Commission could strategically delay the closing of an investigation, in which the formal requirements of a recovery order are not met, and thereby force a national court to make a recovery order instead. This would run counter to the principle of loyal co-operation.

Based on the present case, the Court also found that any competition distorting effect has likely ceased to exist, as the aid was paid between 2000-2004, the defendant no longer operates the airport and Ryanair does not fly to Lübeck airport anymore. A preliminary recovery order based on the opening of a formal investigation procedure by the Commission may appear disproportionate given these facts. It is for the national courts to decide whether this is the case.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The lower court judgment is unavailable.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-129/13, Alpiq RomIndustries and Alpiq RomEnergie v European Commission (2014) ECLI:EU:T:2014:895
- T-517/12, Alro SA v European Commission (2014) ECLI:EU:T:2014:890
- T-332/06, Alcoa Trasformazioni Srl v Commission of the European Communities (2009) ECLI:EU:T:2009:79
- T-251/13, Gemeente Nijmegen v European Commission (2015) ECLI:EU:T:2015:142
- T-162/13, Magic Mountain Kletterhallen GmbH and Others v European Commission (2016) ECLI:EU:T:2016:341
- C-27/13, Flughafen Lübeck GmbH v Air Berlin plc & Co. Luftverkehrs KG (2014) ECLI:EU:C:2014:240
- C-284/12, Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH (2013)ECLI:EU:C:2013:755
- C-75/97, Kingdom of Belgium v Commission of the European Communities (1999) ECLI:EU:C:1999:311
- C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic (1991) ECLI:EU:C:1991:440
- C-1/09, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2010) ECLI:EU:C:2010:136
- C-198/91, William Cook plc v Commission of the European Communities (1993) ECLI:EU:C:1993:197
- C-319/07 P, 3F v Commission of the European Communities (2009) ECLI:EU:C:2009:435
- T-134/09 P, Antonio Basile and I Marchi Italiani Srl v Office for the Harminisation of the Internal Market (2012) ECLI:EU:T:2012:328

National case law:
- Decision I ZR 208/94 BGH, 16.01.1997
- Decision I ZR 213/08 BGH 10.02.2011
- Decision 10 C 3/15 BverwG 26.10.2016

√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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 (Text with EEA relevance), OJ L 248, 24.9.2015
- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999

Cooperation with the EU institutions

The national court sent a request for opinion to the Commission at the lower instance – the Schleswig-Holsteinisches Oberlandesgericht (http://ec.europa.eu/competition/court/airport_case_nc_de.pdf)

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DE3

Date

04/01/2019

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Oberverwaltungsgericht Berlin-Brandenburg

Court which adopted the ruling (English)

Higher Administrative Court Berlin-Brandenburg

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

German

Hyperlink to ruling

http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=MWRE180000177&doc.part=L&doc.price=0.0#focuspoint

Case reference

DE:OVGBEBB:2017:1218.6B3.17.00

Procedural context of the case

This is the latest judgment in the case in which the earlier judgments were issued by the Higher Regional Court Berlin-Brandenburg of 18 February 2015 (ruling OVG 6 B 24.14) and the Federal Administrative Court of 26 October 2016 (ruling 10 C 3.15).

Magic Mountain (plaintiff) sought to obtain an injunction against the planned long-term lease of land in favour of DAV in December 2010. It argued that the conditions offered were distorting competition and incompatible with State aid rules.

In December 2012, the Commission declared the aid measures given by the State to the DAV to constitute State aid and also decided that they were compatible with the internal market. The Commission rendered this decision upon the complaint of Magic Mountain and without initiating an in-depth investigation. An action by Magic Mountain against this decision in front of the GC was dismissed (Case Magic Mountain Kletterhallen GmbH and Others v European Commission T-162/13).

Magic Mountain continued its legal challenge in front of the national courts. It argued that the rental contract between the public authority and the DAV from October 2011 was void because the low rental price constituted unnotified State Aid. The first instance court held that the rental contract provision concerning the rent was void up until 5 December 2012, the date in which the aid was approved by the Commission. The rest of the contract was not declared void. This was upheld by the Higher Administrative Court Berlin-Brandenburg, which argued that it was bound by the corresponding decision of the Commission.

The Federal Administrative Court rejected this judgment. According to its judgment, the Commission decision was not binding upon national courts, in particular because the Commission had not initiated an in-depth investigation and therefore the recipient of aid had no right to be heard. It held that national courts are obliged to inquire into the factual circumstances of a case and to freely determine the existence of the aid. It drew this conclusion amongst others from the judgment of the CJEU in the reference C-284/12 Deutsche Lufthansa AG / Flughafen Frankfurt-Hahn GmbH, where the CJEU stated that if a national court had doubts concerning the opinion of the Commission, it was bound to end the proceedings and refer the case to the CJEU (which the BverwG did not do).

The Federal Administrative Court then sent the case back to the Higher Administrative Court Berlin-Brandenburg and instructed the court to determine on the facts of the case whether the measure in favour of DAV constituted notifiable State aid (present case).

Type of action

Private enforcement

Delivery date of the ruling

18/12/2017

Language

German

Headnote

In this ruling, the Court held that a 'cure' for the breach of the notification obligation under Article 108(3) TFEU is not possible, even if the aid in question was eventually found by the Commission to be compatible with the internal market.

Parties

Names of the parties to the action

Magic Mountain GmbH; Deutscher Alpenverein (DAV)

Versus

Land Berlin

The relationship of the plaintiff to the measure

Beneficiary; Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

R - Arts, entertainment and recreation

Promotion of health/sports

The type of State aid measure challenged in the court proceedings

Other

Long-period lease for rent significantly below market rate

Substance of the case

Facts and parties' main arguments in the case

The dispute arose in relation to a long-period lease on conditions significantly below the market rate for the purpose of the promotion of sports. The plaintiff (Magic Mountain) is a private company operating a climbing gym. The German Alpine Club (DAV) received land in the vicinity from the City of Berlin on a long-period lease for rent significantly below market conditions. The DAV built and opened a climbing gym on that land.

In accordance with the instructions of the Federal Administrative Court, the present instance sought to determine whether the measure in question, up until the final decision of the Commission in 2012, constituted notifiable State aid. The major argument between the parties circled around the question whether the nominally non-profit organisation DAV was in fact undertaking market-based economic activity.

DAV argued that the Commission decision concerned the activities of DAV at federal level, while in the present case the dispute concerns the activity at local level in Berlin. It could not be said the activities of DAV in Berlin were of commercial nature, as the climbing gym in question offers types of activities aimed at sport climbers, which is different from the activities offered by typical

commercial climbing gyms. Furthermore, only club members, aspirants, schools and social state programs were allowed to use the DAV climbing gym in Berlin.

Magic Mountain argued that it was wrong to argue for a separation of DAV activities between local and federal levels, as the entire DAV is a single economic entity, according to the ruling of the Federal Administrative Court. If one then analysed the federal structure of the DAV, it appeared clear that it is engaged in economic activity. The vast majority of DAV climbing gyms are open to non-members. Even members-only gyms can be regarded as being commercial entities, as members have to pay a price each time they use the gym. DAV owns mountain huts, sold food, drink and operated climbing shops at their gyms. It also organised excursions and events, rents equipment, and sold advertising space. Most of these commercial activities occur also at the Berlin climbing gym in question. Therefore, even if one were to regard the federal and local activities of DAV as separable, DAV was still engaged in economic activity.

Remedy(ies) sought

Other remedy sought

In the appeal at hand, the plaintiffs continue to pursue their repayment and interest payment requests. The defendant in the counter-appeal objects to the finding made by the first instances with the follow-up revision.

Outcome of the case

Conclusions adopted by the national court

The Court largely followed the arguments of Magic Mountain. The claim of DAV was dismissed. The Court found that the measure of allowing a climbing gym of the German Alpine Club (DAV) to pay a considerably lower rent than the market rent, in the context of sports promotion, constituted aid within the meaning of Article 107(1) TFEU. As such, the Land Berlin was required to implement recovery measures.

The Court admitted amicus curiae observations from the Commission (although not on the basis of paragraphs 65 et seq. Verwaltungsgerichtsordnung (Regulation on Administrative Courts – VwGO)), which claimed that the Federal Administrative Court was deviating from the jurisdiction of the CJEU according to which a decision of the Commission in State aid matters was binding. Opposed thereto, the Federal Administrative Court had instructed the court to consider the Commission decision as to the facts of the case as non-binding and to freely undertake its own examination as to whether the challenged measure constituted State aid.

Despite the suggestion of the Commission that a national court may set aside a provision of national law such as paragraph 144(6) VwGO, the Court was ultimately not required to do so, as it reaches the same conclusion as the Commission decision on the facts of the case.

The Court concluded that the activity of the DAV constituted commercial activity. This finding was valid both for the federal as well as the local Berlin activities of the club. The DAV provided goods and services for payment on the free market. The fact that DAV was a club does not change the commercial nature of its activity. It was easy to become a member. Therefore, the requirement of membership for using the Berlin gym was not a barrier somehow shielding the gym from the free market. In addition to this, members also had to pay an entrance fee each time they are using the gym. Therefore, DAV membership operated differently from typical sports club membership, which allowed members to use the facilities of their sports club without limitation.

The Court further found that the measure in favour of DAV potentially restricted trade between Member States, as it is possible that climbing gym operators from other Member States were prevented from entering the Berlin market, because the favourable measures granted to DAV by the City of Berlin distorted competition in the market.

In 2014, the Commission enlarged the scope of the General Block Exemption Regulation (GBER) *inter alia* to allow granting of aid for sport and multifunctional recreational infrastructures. According to Article 55 GBER, State aid granted to sports infrastructures shall be compatible with the internal market and is not be subject to the EU notification requirement. However, the Court found that the GBER could not be applied retroactively. Therefore, it could not serve as a 'cure' for the breach of the notification obligation under Article 108(3) TFEU in cases of aid granted prior to its introduction.

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-288/11 P, Mitteldeutsche Flughafen AG, Flughafen Leipzig-Halle GmbH v European Commission (2012) ECLI:EU:C:2012:821
- C-41/90, Klaus Höfner and Fritz Elser v Macrotron GmbH (1991) ECLI:EU:C:1991:161
- C-82/01, Aéroports de Paris v Commission of the European Communities (2002) ECLI:EU:C:2002:617
- C-35/96, Commission of the European Communities v Italian Republic (1998) ECLI:EU:C:1998:303
- C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79
- T-162/13, Magic Mountain Kletterhallen GmbH and Others v European Commission (2016) ECLI:EU:T:2016:341

National case law:
- Decision 10 C 3.15 BverwG 26.10.2016
- Decision OVG 6 B 24.14 BverW 18.02.2015

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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 Text with EEA relevance, OJ L 187, 26.6.2014
- 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 (General Block Exemption Regulation)
- 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 (Text with EEA relevance), OJ L 248, 24.9.2015

Cooperation with the EU institutions

The Commission provided the national court with amicus curiae observations (http://ec.europa.eu/competition/court/magic_mountain_amicus_curiae_observation_de.pdf)

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DE4

Date

04/01/2019

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Bundesverwaltungsgericht

Court which adopted the ruling (English)

Federal Administrative Court

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

German

Hyperlink to ruling

https://www.bverwg.de/de/161210U3C44.09.0

Case reference

ECLI:DE:BverwG:2010:161210U3C44.09.0

Procedural context of the case

The plaintiff, a competitor operating in the area of disposal of animal carcasses, brought a claim challenging the annual contributions made by the members to a public special purpose association, before the Administrative Court of Trier (Verwaltungsgericht Trier, ruling 1 K 533/08 of 2 December 2008). The Court held that, while the challenged measure indeed constituted State aid, the recovery was not appropriate due to special circumstances for the years 2005-2008, i.e. the special purpose association did not make any financial gain from the contribution in those years.

On appeal, the High Administrative Court Koblenz (Oberverwaltungsgericht Koblenz, ruling 6 A 10113/09 of 24 November 2009) upheld the first instance ruling and also dismissed the claims of the plaintiff.

On appeal, the Federal Administrative Court (Bundesverwaltungsgericht, BverwG) again rejected the claims of the plaintiff, but changed the reasoning of the ruling (present case). According to this instance Court, the claims for the years 2005-2009 failed on procedural grounds, as the plaintiff failed to timely contest the administrative acts by which the aid was granted. Concerning the year 2010, the Court found that the contested measures did not constitute State aid. In doing so, the Court undertook its own analysis of State aid rules and negated the fact that in the course of the appeal the Commission had initiated an in-depth investigation (which the Court was well aware of).

This judgment of the Federal Administrative Court was then declared null and void by the German Constitutional Court, however for reasons not related to State aid rules (Constitutional Court, ruling 2 BvR 1493/11). The Constitutional Court held that the Federal Administrative Court failed to adequately consider essential points raised by the plaintiff.

In the meantime, the Commission concluded its in-depth investigation in 2012 by stating that the contributions in question did indeed constitute unlawful State aid and ordered a respective recovery (Commission Decision 2012/485/EU of 25 April 2012 on State aid. This decision was thus entirely opposed to the judgment of the Court and had moreover been positively reviewed by the Union Courts in a number of cases brought by the special purpose association on the one hand (Zweckverband Tierkörperbeseitigung v Commission Case T-309/12) and the Federal Republic of Germany on the other hand (Case Deutschland v Commission T-295/12 and Case Deutschland v Commission C-446/14 P). In this context, it is noteworthy that in the first court case the special purpose association claimed legitimate expectations against recovery, which it based on the judgment of the Federal Administrative Court. However, the GC rejected this argument by stating that the national court had manifestly infringed Union law.

This decision of the Commission led to additional national proceedings. Thus, the members of the special purpose association successfully initiated preliminary proceedings against the special purpose association for the recovery of the aid by payment into a blocked account (OVG Koblenz, ruling 6 B 10351/13 of 10 June 2013). This ruling of the OVG Koblenz is also noteworthy in that it too denies a claim of the recipient on legitimate expectations.

Lastly, the case returned to the Federal Administrative Court (ruling 3 C 22.15 (3 C 44.09) of 19 September 2016 where it was closed in accordance with the wishes of the parties, with the special purpose association having to pay the fees of both sides. The Court considered that had the case been decided, the plaintiff would likely have won in full. However, the special purpose association was in the process of being dismantled as a consequence of the Commission decision which established the unlawfulness of the aid granted under State aid rules by Germany to the Zweckverband Tierkörperbeseitigung in Rhineland-Palatinate, Saarland, Rheingau-Taunus-Kreis and Landkreis Limburg-Weilburg (notified under document C(2012) 2557)) .

In light of these developments, in addition to the fact that the Commission had waived the necessity to recover the aid in this instance, the Court considered that it was appropriate to close the case.

Type of action

Private enforcement

Delivery date of the ruling

16/12/2010

Language

German

Headnote

In this ruling, the Court held that the levy in question (compensation for animal carcass disposal) does not constitute State aid which would require approval from the Commission.

Parties

Names of the parties to the action

Saria Bio-Industries AG & Co KG; Anonymised

Versus

Zweckverband Tierkörperbeseitigung in Rheinland-Pfalz, Saarland, Rheingau-Taunus-Kreis und Landkreis Limburg-Weilburg

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Other

Special purpose association

Sector relating to the State aid argument

E - Water supply; sewerage; waste managment and remediation activities

Animal carcass disposal

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The plaintiffs challenged the annual contributions granted by the State to the special purpose association for the disposal of animal carcass (Zweckverband) on the basis that this contribution constituted notifiable State aid under Article 107(1) TFEU. They sought the recovery of the State Aid as well as an injunction against future aid.

The plaintiffs were German and French companies which competed on the market with the Zweckverband on the market of disposal of category 3 material (uncontrolled goods as defined by Regulation 1069/2009 EC).

The Zweckverband was a special purpose association established under the laws of Rheinland-Pfalz with the purpose of disposing of category 1 and category 2 material (Landesgesetz zur Ausführung des TierNebG). In accordance with Union laws, there are special procedures for the disposal of such animal material regarded as 'controlled good'. The Zweckverband disposed of all three categories of material and operated also beyond the borders enshrined in its statute. The Zweckverband received annual contributions from its member districts in order to balance its books. This amount of the contribution was annually fixed. From 2010, with retroactivity to 1 January 2009, the Zweckverband changed its statute with the effect that it was required to fix the annual contribution in advance. Additionally, the annual contribution could only be used to balance the costs incurred in the disposal of category 1 and category 2 material, as well as through keeping free space in the event of emergency use (e.g. epidemics). Thus, from 2009 onwards, the Zweckverband introduced a financial separation between its activities with uncontrolled goods and those with controlled goods.

The Zweckverband argued against the claim brought by the plaintiffs, that the economic advantages it gained were minimal and that the distortion to competition through cross-subvention on the market for category 3 material was negligible. With regard to 2009-2010, the Zweckverband argued that, under the new statute, the rules on the annual contributions did not constitute State aid. The Zweckverband had separated its commercial activities (category 3) from its public service activities (category 1 and category 2). The annual contribution was to be regarded for compensation for performing a public duty mandated by law and was not to be regarded as market activity. Furthermore, the Zweckverband did not benefit financially from the annual contributions.

Remedy(ies) sought

Recovery order in relation to unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court followed the arguments of the defendant and dismissed the claims of the plaintiff. The Court found that the claims failed on procedural grounds for the years 2005-2009 and that the annual contribution under the new statute of 2010 did not constitute State aid.

The Court held that the plaintiffs failed to timely contest the administrative acts by which the aid was granted for the years 2005-2009. As the application of State aid rules before German national courts was governed by national procedural rules, it was up to the national court to decide whether these requirements are fulfilled. The Court held that the statute of limitations under German procedural rules began from the time the plaintiffs knew or should have known of the administrative acts by which aid was granted. However, the plaintiffs had failed to contest the administrative act in time. Thus, under German procedural law, recovery was barred for the years 2005-2009.

As for the year 2010, the BverwG came to the conclusion that the annual contributions did not constitute State aid under Article 107(1) TFEU, as the contested situation fell under the Altmark ruling. Based on its interpretation of Union law and jurisprudence, the Court concluded that it was entitled to assess the Altmark requirements itself, without the need to refer a request for a preliminary ruling to the CJEU. In this context, the BverwG undertook an 'abbreviated' analysis of the Altmark judgment of the CJEU, which only dealt with three out of four criteria. Moreover, the BverwG did not take into account that – in the course of the appeal – the Commission had initiated an in-depth investigation of the measures at stake.

With regard to the first Altmark requirement, the Court described the purpose of the Zweckverband as being a service of general economic interest, as defined by Union law. As long as required for the performance of the public service, the compensation of any activity of the Zweckverband was exempt from State aid rules, i.e. keeping free capacity in case of animal epidemics. With regard to the second Altmark requirement, the Court decided that the updated statute of the Zweckverband was sufficiently transparent about the purposes of the annual compensation. With regard to the third Altmark requirement, the Court held that the annual contribution was adequate in ensuring the maintenance of free capacity in case of animal epidemics. With regard to the fourth Altmark requirement, the Court found that this requirement did not apply on the present facts, as there was complete economic separation of commercial and public service activities as a result of the new statute from 2010. The annual contributions have the purpose of compensating a separate public service, based on the obligation to dispose of animal carcass under German law, and are not a compensation for an operator involved in market-based economic activity which also takes on additional public service obligations. The maintenance of reserve capacity also fell under this public service purpose, and was therefore subject to regulation by the State. Because of its non-economic nature, it could not be challenged by alleged competitors.

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-1/09, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2010) ECLI:EU:C:2010:136
- C-392/04 and C-422/04, i-21 Germany GmbH (C-392/04) and Arcor AG & Co. KG (C-422/04) v Bundesrepublik Deutschland (2006) ECLI:EU:C:2006:586
- C-188/95, Fantask A/S e.a. v Industriministeriet (Erhvervministeriet) (1997) ECLI:EU:C:1997:580
- C-480/06, Commission of the European Communities v Federal Republic of Germany (2009) ECLI:EU:C:2009:357
- 120/73, Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz (1973) ECLI:EU:C:1973:118
- C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79
- C-224/97, Erich Ciola v Land Vorarlberg (1999) ECLI:EU:C:1999:212
- C-312/93, Peterbroeck, Van Campenhout & Cie SCS v Belgian State (1995) ECLI:EU:C:1995:437
- C-289/07, Commission of the European Communities v Portuguese Republic (2008) ECLI:EU:C:2008:198
- C-126/01, Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA (2003) ECLI:EU:C:2003:622
- C-228/96, Aprile Srl, in liquidation, v Amministrazione delle Finanze dello Stato (1998) ECLI:EU:C:1998:544
- C-39/94, Syndicat français de l'Express international (SFEI) and others v La Poste and others (1996) ECLI:EU:C:1996:285
- C-480/06, Commission of the European Communities v Federal Republic of Germany (2009) ECLI:EU:C:2009:357
- C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (2003) ECLI:EU:C:2003:415
- C-368/04, Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644
- C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic (1991) ECLI:EU:C:1991:440
- C-261/01, Belgische Staat v Eugène van Calster and Felix Cleeren (2003) ECLI:EU:C:2003:571

National case law:
- Decision 3 C 7.09 BverwG, 19.11.2009
- Decision IV C 2.72 BverwG, 25.01.1974
- Decision OVG 6 B 254.14 18.02.2015

√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on 'equivalence'
√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DE5

Date

04/01/2019

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Landgericht Berlin-Brandenburg

Court which adopted the ruling (English)

Regional Court of Berlin Brandenburg

Instance court which adopted the ruling

Lower court (civil/commercial)

Official language of the court

German

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

ECLI:DE:LGBE:2011:0314.90°107.08.0A; 90 O 107/08

Procedural context of the case

This is a first instance case. The case was first considered by the Regional Court of Berlin Brandenburg on 18 June 2009 (90 O 107/08). The Court decided to pose questions to the CJEU, which ruled on the matter on 16 December 2010 in case C-239/09, ECLI:EU:C:2010:778. This judgment is the follow up at national level.

The German Court referred the following question to the CJEU: "Do the second and fourth sentences of paragraph 5(1) of the FlErwV, which was passed in application of the first sentence of paragraph 4(3) of the AusglLeistG, infringe Article 87 of the EC Treaty (current Article 107 TFEU)?"

This question referred to national law provisions providing for calculation methods for determining the value of agricultural and forestry land, offered for sale by public authorities in the context of a privatisation plan. The CJEU held that such provisions are permissible under Union law, insofar they provide for effective mechanisms for the updating of the prices in market situations in which land prices are rising sharply. The price actually paid by the purchaser should, in so far as possible, reflect the market value of that land.

Type of action

Private enforcement

Delivery date of the ruling

14/03/2011

Language

German

Headnote

In this ruling, the Court emphasised that the concept of market value under State aid rules represents any 'achievable' price. The market value is "the price which a private investor acting under market conditions could have fixed."

Parties

Names of the parties to the action

Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG

Versus

BVVG Bodenverwertungs- und -verwaltungs GmbH

The relationship of the plaintiff to the measure

Other

Purchaser of the land who claims they should be allowed to benefit from the measure

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

O - Public administration and defence; compulsory social security

Sales of land by public authorities

The type of State aid measure challenged in the court proceedings

Other

Valuation of market price

Substance of the case

Facts and parties' main arguments in the case

Seydaland bought agricultural land from BVVG. The two entities had a dispute as to the correct method of valuing the agricultural land subject to the sale, upon which the price to be paid depended. The contract between the parties contained a clause allowing for the price of sale to be verified and amended by courts. Before the Regional Court of Berlin Brandenburg, Seydaland sought reimbursement for part of the selling price of the land, claiming that, calculated on the basis of the official regional reference valuations, the overall price should have been lower.

Seydaland claimed that determining the selling price based on the prevailing market situation should not have been accepted as valid determination method. The BVVG had determined the price by analysing the average sale price in a 20km radius, which resulted in a significantly (around 20%) higher price than that put forward by the regional reference valuations provided by the German Government. According to Seydaland, the only permissible methods by which the BVVG could have calculated the price were the regional reference valuations or to have referred to the valuation committee created by the national law in question (paragraph 5(1)Flächenerwerbsverordnung (Land Acquisition Regulation, FlErwV).

The BVVG argued that the regional reference valuations were inappropriate, as they did not reflect the prevailing market situation, especially in periods of rapid price increases. As a result, using regional reference valuations may have constituted a violation of State aid rules.

Remedy(ies) sought

Other remedy sought

Partial recovery of purchase price for overvalued agricultural land bought from the State

Outcome of the case

Conclusions adopted by the national court

The claim was rejected. The agricultural land was valued correctly by the BVVG.

According to the preliminary ruling given by the ECJ (current CJEU) (Case C-239/09 Seydaland v BVVG), Article 87 of the EC Treaty (current Article 107 TFEU) precludes provisions of national law which do not provide for effective mechanisms for the updating of the prices in market situations in which land prices are rising sharply. The Court found that the current provisions of national law (paragraph 5,(1), sentences 2 and 3 Flächenerwerbsverordnung (Land Acquisition Regulation) did not contain such effective mechanisms for dynamic price calculation.

Regarding State Aid, the Commission has prohibited Germany to sell land designated for re-privatisation in the former GDR at rates lower than 65% of the market price (Commission Decision 1999/268/EC of 20 January 1999). A higher intensity of State aid would be incompatible with the internal market. On the basis of the current legislation (Ausgleichsleistungsgesetz), the BVVG had already applied the 35% discount on the market value on the sale in question. Therefore, in case the land is valued below the market rate, there would be an automatic breach of Article 87 of the EC Treaty (current Article 107 TFEU).

As regional reference valuations were likely to be outdated, there was a duty not to use them, as national courts and other organs of the state have a duty not to breach Union law. This included a duty to set aside provisions of national law when their application is likely to lead to a breach of Union law.

In absence of an expert report, the Court assumed the role of valuing the market price of the land. The Court considered the pricing of BVVG to be 'compatible with the law' in view of the market value determination and the justified inclusion of comparative values. In the ruling, the Court emphasised that the concept of market value under State aid rules represents any 'achievable' price. The market value is "the price which a private investor acting under market conditions could have settled upon. The most secure method of determining the market value is public precondition-free bidding process."

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-239/09 Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG v BVVG Bodenverwertungs- und -verwaltungs GmbH (2010) ECLI:EU:C:2010:778

National case law:
- LG Berlin, Urt. V. 14. 3. 2011 – 90 O 107/08 und 90 O 44/09
- KG Berlin, Decision 22 U 179/09-26. 8. 2010; 22 U 202/09- Urt. V. 26. 8. 2010
- KG Berlin, Decision 22 U 14/10 18. 11. 2010

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Commission Decision 1999/268/EC of 20 January 1999 on the acquisition of land under the German Indemnification and Compensation Act (notified under document number C(1999) 42), OJ L 107, 24.4.1999

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-239/09 Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG v BVVG Bodenverwertungs- und -verwaltungs GmbH (2010) ECLI:EU:C:2010:778 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-239/09)

Any other comments (optional)

No other comments

Case summary DE6

Date

04/01/2019

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Bundesgerichtshof

Court which adopted the ruling (English)

Federal Court of Justice

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

German

Hyperlink to ruling

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=3164b3217aa808a9dfe3b31166f46d98&nr=55464&pos=8&anz=21

Case reference

I ZR 136/09

Procedural context of the case

Lufthansa challenged the measures of Flughafen Frankfurt Hahn allegedly favouring Ryanair in form of 'marketing support' at the LG Bad Kreuznach (2 O 441/06). In its judgment of 16 May 2007, the Court dismissed the claim, rejecting that competitors had a right to stand and to bring a private law claim based on Article 108(3) TFEU.

On appeal, the OLG Koblenz (ruling 4 U 759/07) at first indicated that it would reject the claim by a ruling without oral hearing on the grounds that there was no right to stand, no element of aid, no imputability of an eventual aid to the state etc. However, after the Commission opened an in-depth investigation in 2008, the Court realised that its position was not in line with Union law. On this basis, the Court scheduled an oral hearing and rejected the appeal by judgment of 25 February 2009. The Court basically left open whether the measures at stake constituted aid. It now merely argued that there was no right to stand, i.e. that Article 108(3) TFEU was not directly applicable.

The Federal Court of Justice (present case) found that, in accordance with previous and standing CJEU jurisprudence, Article 108(3) TFEU in conjunction with, in particular, national tort (wrongful conduct) law created individual rights enforceable before national courts. As such, the Court sent the case back to the OLG Koblenz in order to determine whether the measures put in place by Flughafen Frankfurt Hahn constituted unlawful State aid.

Thereupon, the OLG Koblenz (ruling 9 U 759/07) asked for a Commission opinion as to whether it considers the initiation of an in-depth investigation by the Commission as binding. After an affirmative answer, the OLG Koblenz then decided on the 30.05.2012 to refer a request for a preliminary ruling to the CJEU. The OLG Koblenz asked the following question:

"Does an uncontested decision of the Commission to initiate a formal investigation procedure under the second sentence of Article 108(3) TFEU have the result that, in appeal proceedings concerning the recovery of payments made and an order to refrain from making future payments, a national court is bound by the Commission's legal opinion in that decision as to whether a measure constitutes State aid?"

The CJEU (Case Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH C-284/12) gave the following answer:

"Where, in accordance with Article 108(3) TFEU, the Commission has initiated the formal examination procedure under Article 108(2) TFEU with regard to a measure which has not been notified and is being implemented, a national court hearing an application for the cessation of the implementation of that measure and the recovery of payments already made is required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.

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

Where the national court entertains doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure, it may seek clarification from the Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, it may or must refer a request to the CJEU for a preliminary ruling."

Thereupon, the OLG Koblenz delayed the national proceeding; it rejected several motions for interim measures until it advised in August 2014 that – contrary to the CJEU – a Commission decision did not bind the national court. Instead, such decision only led to the presumption of aid, which could however be rebutted by the parties (grantor and recipient of aid). Because of this non-adherence to the CJEU, Lufthansa undertook several unsuccessful attempts to challenge the judges on the grounds of bias (Befangenheitsantrag).

Lufthansa then appealed on this point to the Federal Court of Justice (ruling I ZB 4/16 of 1 June 2017), where its claim was dismissed, probably on the basis of the judgment of the Federal Court of Justice in February 2017 in the case of Lübeck (which formally accepts the binding nature of a decision of the Commission, but then goes on to create a number of exceptions to this principle) .

In the meanwhile, on 1 October 2014, the Commission closed its investigation with the decision that the measures in question offered by Frankfurt Hahn Airport to Ryanair do not constitute State aid. Lufthansa has challenged this decision before the GC (Case Deutsche Lufthansa v Commission T-492/15). The GC rendered its judgement on 12 April 2019, dismissing Lufthansa's claim and obliging Lufthansa to pay the process costs.

Type of action

Private enforcement

Delivery date of the ruling

10/02/2011

Language

German

Headnote

In this ruling, the Court held that the prohibition of State aid pursuant to Article 108(3) TFEU is a protective law which also exists in the interest of the beneficiary's competitors. Claims by competitors based on the law of tort (paragraph 823 Abs. 2 BGB – German Civil Code) are permissible.

Parties

Names of the parties to the action

Lufthansa AG

Versus

Flughafen Frankfurt-Hahn GmbH

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Other

Public company potentially controlled by State

Sector relating to the State aid argument

H - Transporting and storage

Airport services

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

Flughafen Frankfurt Hahn airport was a public company owned predominantly by two German Federal States, Rhineland-Palatinate and Hessen and by the originally majority shareholder FRAPORT, the operator of the airport Frankfurt am Main (FRAPORT itself being a public company). The company had generated losses ever since it commenced its operations and increased these losses significantly from the point in time it initiated business with Ryanair, its only passenger customer from 1999 to 2003. The vast majority of passenger traffic in the airport was from Ryanair, which only had to pay a very low lump sum per departing passenger in order to cover take-off fees, landing fees, use of air airport tower fees, or ground-handling fees. In addition, Ryanair also received payment from the airport for promoting new routes which were labelled 'marketing support' on the basis of individual contracts.

Lufthansa brought a claim alleging that the above-mentioned 'marketing support' was notifiable State aid and therefore contrary to Article 108(3) TFEU. Lufthansa argued that the airport is a State-owned company and thus subject to State aid rules. Lufthansa sought a disclosure of the marketing support, followed by a recovery order against Ryanair. Finally, Lufthansa also sought a cease and desist injunction against granting future unlawful aid. The first and second instances dismissed the case without an appraisal of the State aid aspects brought up. Both Courts held that a competitor, such as Lufthansa, did not have standing to bring a claim based on Article 108(3) TFEU. According to those courts, the purpose of State aid rule was not to protect the interest of competitors (Schutzgesetz), but was rather concerned with the policy goal of promoting the integration of the internal market. This interpretation of the law was challenged successfully by Lufthansa on appeal to the Federal Court of Justice and constituted one of the main issues in the present case.

Remedy(ies) sought

Recovery order in relation to unlawful aid; Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Federal Court of Justice decided to waive the judgment of the Higher Regional Court. The Court held that competitors have standing to enforce State aid rules under tort law and unfair competition law. The case was sent back to the lower court for re-appraisal of whether the measures applied by Frankfurt Hahn Airport constituted State aid.

The Court considered that the claims of Lufthansa are based on the law of tort (paragraph 823 Abs. 2 BGB) in conjunction with Article 108(3) TFEU. The prohibition of State aid pursuant to Article 108(3) TFEU is a protective rule which also exists in the interest of the beneficiary's competitors. Additionally, it is a market conduct regulation within the meaning of paragraph 4 No. 11 Gesetz gegen den unlauteren Wettbewerb(Unfair Competition Law, UWG). Anyone who infringes the implementation ban can therefore be prosecuted under tort and competition law for information, recovery, cease and desist and ultimately compensation. However, the unfair competition law claim lapses in principle within six months (paragraph 11 UWG), while for a claim under tort law (paragraph 823(2) BGB), a limitation period of three years applies.

Contrary to the lower instance courts, the Federal Court of Justice found in the present case that competitors are indeed entitled to seek the enforcement of State aid rules prohibiting the granting of advantages not previously notified and permitted by the Commission. The Court based its assessment mainly on previously existing and standing CJEU jurisprudence on this issue. According to the Court, the CJEU had established that State aid rules create individual rights, which are enforceable before national courts. Accordingly, Article 108(3) TFEU was to be interpreted as granting rights to individual competitors affected by anti-competitive State aid practices in order to protect them i.e. claims against a public authority to recover aid granted without notification and permission of the Commission and to prohibit the granting of further aid. This was necessary in order to ensure the effectiveness of State aid rules. Without challenges by competitors, which are well-placed to discover such infringements, State aid rules are likely to be under-enforced, which would render Union law ineffective in this area. Additionally, without the ability to rely upon Article 108(3) TFEU by competitors, there are few other interim measures available to obtain the recovery of aid, as long as there is no final Commission decision. The Court found nothing in the national law to contradict its assessment. The interpretation of the lower courts on this issue was therefore found to be flawed.

The Court subsequently discussed the requirements which must be met by private parties in order to bring a claim based on Article 108(3) TFEU. Private parties must show that they are competitors of the aid beneficiary. Additionally, the Court discussed the statutes of limitations for these claims and finds that the 3-year limit for tort claims had not yet passed in the present case.

Having established that the claim of Lufthansa was permissible in principle, the Court decided to send back the case to the lower instance court for the appraisal of the State aid claims. It made several (non-binding) recommendations to the lower court in this regard. As such, it advised the lower court that it was of particular importance to determine whether the actions of the airport were imputable to the State, given the complex ownership of the airport and composition of its managerial board. The Court also advised the lower court that it was of importance to inquire whether other air transportation companies were eligible for the same type of advantages such as those of Lufthansa, and to establish whether the airport had acted in a customary manner (i.e. as would be expected from a private company in the free market).

The Court instructed the lower instance not to make a determination as to the permissibility of State aid, in case it determined that the measure in question constituted State Aid. However, the lower court was also instructed not to suspend the trial in order to await a Commission decision.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

No remedy granted. Case closed after Commission found aid compatible with the internal market.
OLG Koblenz (9 U 759/07, 11.12.2015)
Federal Court of Justice (I ZB 4/16, 01.06.2017)

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-144/91, Gilbert Demoor en Zonen NV and others v Belgian State (1992) ECLI:EU:C:1992:518
- C-39/94, Syndicat français de l'Express international (SFEI) and others v La Poste and others (1996) ECLI:EU:C:1996:285
- C-368/04, Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644
- C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic (1991) ECLI:EU:C:1991:440
- C-261/01, Belgische Staat v Eugène van Calster and Felix Cleeren (2003) ECLI:EU:C:2003:571
- C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79
- C-482/99, French Republic v Commission of the European Communities (2002) ECLI:EU:C:2002:294
- C-1/09, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2010) ECLI:EU:C:2010:136
- C-24/95, Land Rheinland-Pfalz v Alcan Deutschland GmbH (1997) ECLI:EU:C:1997:163
- 301/87, French Republic v Commission of the European Communities (1990) ECLI:EU:C:1990:67
- Case C-144/91 Gilbert Demoor en Zonen NV and others v Belgian State ECLI:EU:C:1992:518
- Case 120/73 Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz ECLI:EU:C:1973:152

National case law:
- Decision 2 O 441/06 LG Bad Kreuznach 16.05.2007
- Decision 23 W 727/83 OLG Hamm, 07.02.1984
- Decision I ZR 143/04 BGH, 04.10.2007
- Decision XI ZR 160/07 BGH, 29.01.2008
- Decision I ZR 73/05 BGH, 30.04.2008
- Decision 4 U 759/07 OLG Koblenz25.02.2009
- Decision VI ZR 385/02 BGH, 18.11.2003
- Decision XI ZR 53/03 BGH, 18.11.2003
- Decision 10 W 151/08 OLG Düsseldorf, 05.03.2009
- Decision KZR 21/08 BGH, 23.06.2009
- Decision I ZR 56/57 BGH, 29.04.1958
- Decision VI ZR 105/03 BGH, 16.03.2004
- Decision VI ZR 50/05 BGH, 28.03.2006
- Decision V ZR 314/02 BGH, 04.04.2003

- Decision I ZR 28/98 BGH, 11.05.2000
- Decision IX ZR 256/06 BGH, 05.07.2007 Decision KZR 23/96
- Decision 29 U 1703/03 OLG München, 15.05.2003
- Decision KZR 33/04 BGH, 07.02.2006
- Decision I ZR 152/59 BGH, 22.12.1961
- Decision I ZR 12/95 BGH, 20.02.1997
- Decision 2 BvR 1497/03 BverfG, 09.10.2003
- Decision VI ZR 385/02 BGH, 18.11.2003
- Decision II ZR 16/93 BGH, 13.04.1994
- Decision I ZR 171/90 BGH, 09.04.1992
- Decision XI ZR 53/03 BGH, 20.01.2004
- Decision V ZR 314/02 BGH, 04.04.2003
- Decision VI ZR 50/05 BGH, 28.03.2006
- Decision I ZR 143/04 BGH, 04.10.2007
- Decision IX ZR 256/06 BGH, 05.07.2007
- Decision IX ZR 256/06 BGH, 20.11.2007
- Decision XI ZR 160/07 BGH, 29.01.2008
- Decision I ZR 73/05 BGH, 30.04.2008
- Decision I ZR 28/98 BGH, 11.05.2000
- Decision 4 U 759/07 OLG Koblenz, 25.02.2009
- Decision I ZR 136/71 BGH, 28.09.1973
- Decision I ZR 195/81 BGH, 26.01.1984
- Decision VI ZR 105/03 BGH, 16.03.2004
- Decision 6 A 10113/09 OVG Rheinland-Pfalz, 24.11.2009
- Decision 6 U 54/06 OLG Schleswig, 20.05.2008

√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DE7

Date

04/01/2019

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Oberverwaltungsgericht Berlin-Brandenburg (6. Senat)

Court which adopted the ruling (English)

Higher Administrative Court Berlin-Brandenburg (6th chamber)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

German

Hyperlink to ruling

http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=MWRE160001753&doc.part=L&doc.price=0.0#focuspoint

Case reference

OVG 6 S 54.15

Procedural context of the case

The plaintiff submitted a complaint to the Commission on the 21 September 2015 (2015/093131). The Commission registered the presently relevant part of the complaint as SA.43145 (2016/NN) – 'Alleged unlawful aid to Youth Hostel Berlin Ostkreuz gGmbH and others – Non-tax measures'. The Commission informed the complainant of the suspension of the appraisal of the complaint while the case was pending before the Verwaltungsgericht Berlin. The plaintiff requested the reopening of the complaint and invited the Commission to take a decision. On the 29 May 2017 the Commission took the decision and decided not to raise objections to the measure on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) TFEU (Commission Decision C(2017) 3220 final). The plaintiff then challenged the decision of the Commission and sought its annulment (Case A & O Hotel and Hostel Friedrichshain v Commission T-578/17). This case is still pending.

Parallel to the complaint pursued before the Commission, the plaintiff also brought a claim before the Verwaltungsgericht Berlin (ruling VG 18 K 421.15). Following requests by the national court, the Commission submitted information (2015/107374) and an opinion (sj.c(2016)53 8626). The case is still pending.

In addition to this, plaintiff attempts to obtain a preliminary injunction. The case at hand represents the last instance ruling for this claim. In the first instance, the Verwaltungsgericht Berlin had rejected the preliminary injunction.

Type of action

Private enforcement

Delivery date of the ruling

07/06/2016

Language

German

Headnote

In this ruling, the Court discussed the question whether the lease-free transfer of a built-up property to an institution of the free youth welfare service, constituted unlawful State aid within the meaning of Article 107(1) TFEU, if investment and maintenance obligations were imposed upon the institution of the free youth welfare service in return for the leased property.

Parties

Names of the parties to the action

A & O Hotel and Hostel Friedrichshain GmbH

Versus

Land Berlin

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

I - Accommodation and food service activities

Hostels operated by non-profit entities

The type of State aid measure challenged in the court proceedings

Other

Interim injunction; Lease-free transfer of a built-up property to an institution of the free youth welfare service

Substance of the case

Facts and parties' main arguments in the case

The plaintiff is a private company running budget hotels and hostels. It operated a hostel in the same Berlin neighbourhood as the hostel planned by the free youth welfare service. The plaintiff sought an interim injunction against the cost-free transfer of a built-up property to a registered institution of the free youth welfare service by the City of Berlin public authority (defendant).

The Deutsche Jugend Herbergen free youth welfare service (non-profit organisation) received the property under the condition that it will operate the building as youth hostel. This also entailed the obligation to renovate and expand the building, as well as run the hostel at its own cost. The contract, with a running period of 31 years, stipulated that the primary aim of the transfer was the pursuit of pedagogical youth work.

The plaintiff argued that the lease was incompatible with behaviour expected in a free market, and thus qualified as unlawful State aid. The plaintiff sought an interim injunction in line with the prohibition of implementation of unlawful State aid found in Union law, in order to prevent their competitor from obtaining an unlawful competitive advantage before the main proceedings of the Court. Their request was rejected in the previous instance (Verwaltungsgericht Berlin). In the present case they sought to overturn this ruling.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The claim of the plaintiff was rejected. No interim measures were granted.

The Court held that the plaintiff has neither the right to impose provisional measures to secure the ban on the opening of the youth hostel or the payment of a provisional market interest rate (application 1) nor to claim recovery of the saved lease expenses for the period from 1 February 2014 (application 2).

An injunction could only be granted if specific provision for granting effective legal protection is absolutely necessary and there is a high degree of probability of success in the main proceeding. These conditions were not met in the present case, as the outcome of the case in the main proceedings was open. Furthermore, it could not be conclusively determined that the plaintiff would be deprived of effective legal protection as a consequence of not obtaining a preliminary injunction.

It was not clear (and it was not to be determined in this preliminary present stage of the case) whether the plaintiff would be successful in the main proceedings. In order to rely on the prohibition of implementation of unlawful State aid (Article 108(3) TFEU), the plaintiff would have had to show that the conduct in question constituted unlawful State aid in accordance with Article 107(1) TFEU. As the Commission decision on this particular case was pending, the plaintiff could not do so at this point in time. The Commission had not opened the formal investigation at the time of this case but had stated that it intended to suspend the investigation until the main proceedings, running parallel to the present case, were concluded. As a result, the Court was not in the position to presume the outcome of the main proceedings, i.e. to form a firm opinion as to the unlawfulness of the conduct in question under State aid rules.

The Court explained that the question of legality revolved around the question of whether the requirements of investment and other financial obligations imposed by the lease contract on the youth organisation could be considered an appropriate counter performance for having received the property at no cost. The Court based this assessment on a Commission statement which explained that investment and renovation works could, under certain circumstances, be appropriate market practices, as they may increase the value of the property in question. The Commission further suggested that an independent, court-appointed expert should be consulted by the national Court (in the main proceedings) to determine the answer to these questions.

Both parties to the dispute relied on party-appointed experts to support their arguments. The present Court could not offer a preliminary answer to this inquiry in the present proceedings. This should have been done in the main proceedings with the help of an independent, Court appointed expert.

There was no decision by the Commission to formally open an investigation (Article 6(1) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999)) into the present matter. The Commission investigation was suspended as it awaited the decision in the main proceedings. As such, the Court decided the claim of the plaintiff, that an interim injunction was appropriate once an investigation by the Commission is opened, must fail.

Concerning the potential effects of not granting a preliminary injunction, under the assumption that the plaintiff will be successful in the main proceedings, the Court concluded that there was no serious and irreparable threat to the right of the plaintiff to free and fair competition. On the facts of the case, the youth association was likely to gain an unlawful competitive advantage only after 10 years of operating the hostel, as this was the time it would take for the amortisation of contractually agreed investment and renovation costs, which were to be invested before the opening of the hostel. These investment costs were roughly equal to a market-based lease rate for 10 years. As such, it was unlikely that the plaintiff would have suffered and anti-competitive harm until the finalisation of the main proceedings.

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

The Court referred to difficulties in relation to establishing the possible final outcome of the case at hand (in relation to the legality of State aid at hand). The Court explained that the question of legality revolves around the question of whether the requirements of investment and other financial obligations imposed by the lease contract on the youth organisation could be considered an appropriate counter performance for having received the property at no cost. The Court repeated the Commission's argument that in some circumstances it should indeed be sufficient as the requirement to conduct reparatory work was a recognised market practice in some instances. The Court however ruled that this can only be adequately decided by an impartial professional expert consulted in the main proceedings.

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-578/17: Action brought on 26 August 2017 — A & O Hotel and Hostel Friedrichshain v Commission, OJ C 338, 9.10.2017

National case law:
- Decision 3 C 44.09 BverwG, 16.12.2010 ECLI:DE:BverwG:2010:161210U3C44.09.0
- Decision 3 C 44.09 BverwG, 06.01.2010 ECLI:DE:BverwG:2010:060110B3C44.09.0
- Decision I ZR 92/11 BGH, 05.12.2012

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission decision of 29 May 2017

Cooperation with the EU institutions

The national court sent a request for opinion to the Commission in the main proceedings – not in the injunctive relief proceedings (http://ec.europa.eu/competition/court/verwaltungsgericht_berlin_de.pdf)

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DE8

Date

04/01/2019

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Bundesfinanzhof

Court which adopted the ruling (English)

Federal Financial Court

Instance court which adopted the ruling

Last instance court (financial)

Official language of the court

German

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

VII B 180/08

Procedural context of the case

This is the last instance judgment of this case, delivered by the Federal Finance Court. The first instance ruling was provided by the Finance Court of Düsseldorf (4 V 2681/08, 08.08.2008). Prior to this, the plaintiff unsuccessfully contested the recovery order in an administrative procedure before the Hauptzollamt.

The plaintiff in this case contested the recovery order served by the Hauptzollamt and simultaneously demanded the suspension of enforcement. The plaintiff relied upon national law, found in breach of State aid rules by the Commission Decision C(2008) 860. The claim was rejected both by the Hauptzollamt in the administrative procedure, as well as by the Finance Court of Düsseldorf (first instance ruling). The Finance Court of Düsseldorf held that recovery order based on Art 13(3) of Council Regulation (EC) No. 659/1999 EC was lawful. The plaintiff could not rely on legitimate expectations, despite the State aid being granted without qualifications by the public authority. Additionally, the Court found that the application of the statute of limitation was precluded in the present case, as, according to the case law of the CJEU, a Member State must disapply national procedural rules which make the recovery of unlawful State aid practically impossible. Finally, the Court found no evidence of undue hardship.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

30/01/2009

Language

German

Headnote

In this ruling, the Court held that the primacy of Union law precluded the application of Article 169 of the Regulation of taxation concerning the mineral oil tax concession for greenhouse cultivation, as it constituted a selective tax measure and thus an unlawful State aid measure within the meaning of Article 87(1) EC (current Article 107(1) TFEU).

Parties

Names of the parties to the action

Anonymised

Versus

Hauptzollamt (HZA)

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Mineral oil in greenhouse cultivation

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The plaintiff was a private company active in agriculture (greenhouse cultivation). From 2001 to 2004 the company received tax concessions for mineral oil used for greenhouse heating purposes, in accordance with Section 25 paragraph 3a sentence 1 No. 1.4 of the Mineralölsteuergesetzes (MinöStG 1993 – Law on taxation for mineral oil), from the defendant (Hauptzollamt). This law was found to be incompatible with 'common market' by Commission Decision C(2008) 860.

Having thus rejected the German authorisation request, the Commission demanded the suspension of the granting of unlawful State aid as well as the recovery of the unlawfully granted State aid. In 2008 the Hauptzollamt served the plaintiff a notice requesting the reimbursement of the tax concessions granted between 2001 and 2004, as well as the accrued interest. The plaintiff contested this notice in court.

In this final instance, the plaintiff contested the recovery order with recourse to the principle of legitimate expectations. According to the plaintiff, the fact that the tax concession was granted without any qualification by the public authority, had the legal consequence of creating the legitimate expectation that the aid would not be later withdrawn. The plaintiff, as beneficiary of the tax concession, was therefore entitled to trust in the legality of the aid received. Finally, the amount of aid requested by the recovery order was immensely high, giving rise to an undue hardship suitable to preclude recovery.

The Hauptzollamt contested these arguments and largely follows the argumentation of the first instance court. The recovery of the unlawful State aid was necessary for overriding reasons of public interest, so that even the assumption of genuine retroactive effects would have been justified and constitutionally unobjectionable. The defendant underlined that the Commission had taken into account the legitimate expectations, yet in the end reached the conclusion that a recipient of State aid could only rely on this principle if the aid was granted in a procedurally correct manner, with regard to the respective procedures laid down in EU legislation (including notification). Finally, the enforcement of a valid recovery notice could not constitute an undue hardship.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

The Court rejected the claim and decided the recovery order was valid. There were no serious doubts as to the legality of the recovery order, and thus no reason to suspend the enforcement.

The Commission had classified the tax concessions in question as unlawful State aid. This was not contested before the Union Courts and was not contested in the present case. As such, the Commission classification was valid. For Germany, this resulted in an obligation, derived from Article 14(3) Regulation 659/1999, to recover the unlawfully granted State aid.

Contrary to the claims of the plaintiff, there was no genuine retroactive effect concerning the recovery notice. State aid rules (Articles 87 and 88 of the EC Treaty (current Articles 107 and 108 TFEU)) – and Article 14 Regulation 659/1999) were already valid for the period in which aid was granted (2001-2004). Contrary to the provisions of Union law, the national law on the basis of which the aid was granted, the Mineralölsteuergesetz (The law on taxation for mineral oil, MinöStG 1993), had not been notified by the German legislator to the Commission. The incompatibility of the national law with Union law was thus already visible at the time the tax concessions were granted.

Furthermore, the recovery of the unlawful State aid was necessary for overriding reasons of public interest, so that even the assumption of genuine retroactive effects would be justified and constitutionally unobjectionable. It was in the interest of Germany to avoid an infringement proceeding or a fine for failing to recover unlawfully granted State aid. It was therefore necessary to grant primacy to Union law over incompatible national laws. According to the jurisprudence of the German Constitutional Court (ruling 2 BvR 1210/98 of 17 February 2000) on the recovery of unlawfully granted State aid, in addition to the national public interest in recovering unlawfully granted State aid, courts must also take into account the public interest of the EU regarding the enforcement of EU Competition Law.

Concerning legitimate expectations, the Court largely adopted the position of the first instance court. A recipient of State aid could only rely on this principle if the aid was granted in a procedurally correct manner, with regard to the respective procedures laid down in the EU legislation. This included the obligation upon undertakings to check whether the State aid measure was notified, for example by regularly checking official publications or requesting information from public authorities. As the Commission pointed out in its decision, a prudent undertaking could have been aware of the risk of a possible recovery. The undertaking could not rely on legitimate expectations in this case. If the Federal Government failed to provide the necessary notification of aid and thereby failed to comply with the procedure foreseen in Article 88 of the EC Treaty (current Article 108 TFEU), this did not enable a beneficiary undertaking to generally rely on the correctness of the aid granted to it in breach of Union law.

The mineral oil tax concession for greenhouse cultivation granted in accordance with the domestic law, and introduced for reasons of competition policy, constituted a selective tax measure and thus an unlawful State aid measure within the meaning of Article 87(1) of the EC Treaty (current Article 107(1) TFEU). This resulted from the case law of the CJEU and the precedent set by Commission decisions and soft law. This should have been evident both to the Federal Government of Germany and to the plaintiff. Thus, the plaintiff could not claim that they could not have known that the national measure in question was incompatible with the 'common market'.

The primacy of Union law precluded the application of the national statute of limitations (Article 169 of the Regulation of Taxation) in this case. This view followed the rulings of the CJEU on this matter, which held that applying such rules when it comes to the recovery of State aid would lead to a prolongation of the unlawful competitive advantage created by the State Aid and would make recovery more onerous or even impossible. The weight of the Union law interest was higher than the countervailing principle of (national) legal certainty.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-143/99, Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten (2001) ECLI:EU:C:2001:598
- C-6/97, Italian Republic v Commission of the European Communities (1999) ECLI:EU:C:1999:251
- C-169/95, Kingdom of Spain v Commission of the European Communities (1997) ECLI:EU:C:1997:10
- C-232/05, Commission of the European Communities v French Republic (2006) ECLI:EU:C:2006:651
- C-176/96, Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB) (2000) ECLI:EU:C:2000:20
- C-24/95, Land Rheinland-Pfalz v Alcan Deutschland GmbH (1997) ECLI:EU:C:1997:163

National case law:
- Decision 2 BvR 1210/98 BverfG, 17.02.2000
- Decision III R 35/95 BFH, 12.10.2000
- Decision 2 BvR 687/85 BverfG, 08.04.1987
- Decision 2 BvR 1210/98, BverfG, 17.02.2000

√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Decision 2008/715/EC of 11 March 2008 on State aid (Germany) exemption from mineral oil tax for greenhouse undertakings (notified under document number C(2008) 860), OJ L 238, 5.9.2008
- Information from the Commission – Community guidelines on State aid for environmental protection, 10 March 1994 (AblEG Nr. C 72/3)
- Commission Decision 2008/860/EC of 29 October 2008 on a Community financial contribution towards Member States' fisheries control, inspection and surveillance programmes for 2008 (notified under document number C(2008) 6262), OJ L 303, 14.11.2008

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DE9

Date

04/01/2019

Headnote

In this ruling, the Court discussed the question of whether the restructuring clause of Section 8c (1a) Corporate Tax Act (KStG) should have been banned as it caused a breach of the prohibition on State aid laid down in Article 107(1) TFEU, and whether Section 8c (1) Corporate Tax Act (KStG) constituted a violation of Article 3(1) of the German Constitution.

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Finanzgericht Münster

Court which adopted the ruling (English)

Finance Court Münster

Instance court which adopted the ruling

Lower court (financial)

Official language of the court

German

Hyperlink to ruling

https://www.justiz.nrw.de/nrwe/fgs/muenster/j2011/9_V_357_11_K_Gbeschluss20110801.html

Case reference

9 V 357/11 K,G

Procedural context of the case

This is a case in the context of the decision of the Commission of 26 January 2011 (Commission Decision C 7/10 (ex CP 250/09 and NN 5/10) of 26 January 2011 on State aid implemented by Germany, 2011/527/EU), which prohibited the further application of the restructuring clause found in Section 8c (1a) Körperschaftsteuergesetz (Corporate Tax Act,KStG), as the aid was found to constitute aid incompatible with the internal market.

Germany challenged this decision before the CJEU, but its application was rejected. The CJEU then dismissed Germany's appeal as inadmissible because it considered it to be time-barred (Case Federal Republic of Germany v European Commission C-102/13 P).

Nevertheless, the CJEU rendered a judgment on the essence of the provision in 2018, following appeals from two German economic operators (judgment of 28 June 2018 – Case Dirk Andres v European Commission C-203/16 P). In this context, the CJEU decided that the Commission had erred in law and annulled its decision.

Type of action

Public enforcement

Date of the Commission decision

03/02/2011

Delivery date of the ruling

01/08/2011

Language

German

Parties

Names of the parties to the action

____GmbH (anonymised)

Versus

Finanzamt

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

K - Financial and insurance activities

Tax credits

The type of State aid measure challenged in the court proceedings

Other

A Finanzamt (tax authority) measure intended to claim back tax advantages

Substance of the case

Facts and parties' main arguments in the case

In a decision rendered on 26 January 2011, the Commission took the view that Section 8c (1a) Corporate Tax Act (KStG) represented an aid measure incompatible with the internal market. The Commission regarded the design of the restructuring clause, in the form introduced in 2009, as selectively favouring companies threatened by bankruptcy. The restructuring clause had the effect of permitting companies to reduce their tax burden in subsequent years by annulling out losses. The condition for the application of the clause was a change in ownership with the purpose of returning the company to economic stability.

On the basis of above-mentioned decision of the Commission of 26 January 2011, the German tax authorities were generally no longer allowed to apply the restructuring clause – despite the action for annulment brought by the Federal Government in this regard before the CJEU.

The plaintiff was a private company which had relied on the tax advantages granted by the national restructuring clause. Despite the fact that there had been ownership changes in the company, under national law (Sanierungsklausel, paragraph 8c(1a) KStG) the company had still expected to be able to carry forward losses from previous years despite a change in its shareholding (caught by paragraph 8c(1) KStG), provided this change of ownership had the purpose of restoring the liquidity and stability of the company and several requirements were met. The clause also applied retroactively.

After the Commission decision classified this national rule as unlawful State aid, the German tax authority informed the plaintiff that it would not apply the restructuring clause and that the plaintiff would not receive the corresponding tax advantages.

The plaintiff sought the suspension of enforcement of the recovery measure initiated by the Finanzamt and the continued application of national law. In support of this the plaintiff argued that the Commission decision was not final, as it was challenged by the Federal Republic of Germany before the CJEU. The plaintiff argued that until this challenge was not resolved by the CJEU, the Commission decision was not binding and enforceable. Furthermore, the plaintiff alleges that the Commission decision, as to the finding that the Sanierungsklausel selectively favoured undertakings, was likely to be flawed. Specifically, the plaintiff contested the finding of the Commission that the general rule was the forfeiture of loss carry-forwards on significant changes in ownership and that this meant that the existing Sanierungsklausel was the exception to the general rule. The plaintiff argued that the better view is that the general

rule was that carry forward of losses was generally permissible. Additionally, the plaintiff argued that it should have been able to rely on the national rule due to the principle of legitimate expectations and because of undue hardship.

The defendant tax authority argued that the Commission decision was binding and enforceable. The defendant argued that under State aid rules, the effective implementation of Commission decisions entailed that the restructuring clause could no longer be applied and that already granted tax advantages must be recovered within four months.

Of further importance for some lines of argumentation in this case was the action for annulment brought by the Federal Government of Germany regarding the Commission decision before the CJEU. The legal challenge was rejected both by the GC (Case Federal Republic of Germany v Commission T-205/11) as well as by the CJEU (Case Federal Republic of Germany v Commission C-102/13 P), due to the Federal Government of Germany submitting its challenge to the Commission decision after the deadline had passed.

Remedy(ies) sought

Other remedy sought

Suspension of enforcement claim regarding the recovery notice served by the public authority

Outcome of the case

Conclusions adopted by the national court

The Court largely followed the substantive arguments of the plaintiff. The Court granted an interim suspension of the enforcement order. Additionally, the Court granted leave for appeal to the highest Financial Court, as it considered the legal questions of the case of high importance and in need of appraisal by the higher instance.

The Court rejected the argument of the plaintiff that Commission decisions were not binding and enforceable, in case of legal challenge by the Government of a State, until the CJEU has issued a final decision on the matter. Nevertheless, the Court found that it was permitted to grant interim measures in cases where it has considerable doubts as to the validity of the Commission decision under Union law or if there are some doubts as to the legal validity of the Commission decision coupled with undue hardship for the private party involved, if the Commission decision was applied.

The Court found that this was the case here. The Court had considerable doubts that the measure in question constituted selective State aid. Following the argumentation of the plaintiff, the Court argued that it was questionable whether the general rule was the forfeiture of loss carry-forwards in case of significant changes in ownership and that this means that the existing Sanierungsklausel was the exception to the general rule. The Court was inclined towards the view that the general rule was that carry forward of losses is generally permissible. This view entailed that there is no selectivity in the Sanierungsklausel, meaning that it would not have fallen under State aid rules. In support of this point, the Court also argued that there is no selectivity with regard to which economic areas or types of companies are protected by the Sanierungsklausel. The rule applied to any company in financial difficulty and this would not have constituted selectivity as understood by State aid rules.

With regard to undue hardship, the Court found that the enforcement of the tax recovery measures initiated by the Finanzamt would have put the plaintiff company in danger of going out of business. As there were doubts as to whether the measure in question actually constituted State aid and because the enforcement of recovery would have put the plaintiff in danger of going out of business, the Court decided that an interim suspension of enforcement order was appropriate.

The second main argument of the Court was not concerned with State aid rules. The Court had doubts as to the constitutionality of paragraph 8c(1) KStG, which prohibited a company to carry forward losses from previous years in case there has been a change in shareholding. The Court argued that this rule may infringe the principle of equality found in Article 3 German Basic Law. The Court granted leave for appeal to the highest Financial Court for further clarification of this issue.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

Suspension of enforcement of the recovery payment granted for a limited period of time; Right of appeal to the higher instance court

Difficulties referred to by the national court in deciding the case (optional)

This case concerned the issue of a restructuring clause included in the German law and whether it constituted State aid. The Court considered State aid to be the main issue in the proceeding and expressed considerable doubts regarding the issue, did not solve the State aid question decisively and referred the case to the higher instance court due to its 'fundamental importance'.

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-205/11, Federal Republic of Germany v European Commission (2012) ECLI:EU:T:2012:704
- C-305/09, European Commission v Italian Republic (2011) ECLI:EU:C:2011:274
- C-304/09, European Commission v Italian Republic (2010) ECLI:EU:C:2010:812
- C-323/05, Commission v United Kingdom ECLI:EU:C:2006:157
- C-188/92, TWD v Bundesrepublik Deutschland (1994) ECLI:EU:C:1994:90
- C-200/97, Ecotrade Srl v Altiforni e Ferriere di Servola SpA (AFS) (1998) ECLI:EU:C:1998:579
- T-34/02, DEP – Le Levant 015 and Others v European Commission (2010) ECLI:EU:T:2010:559
- T-34/02, Le Levant 001 and Others v European Commission (2006) ECLI:EU:T:2006:59
- C-68/95, T. Port v Bundesanstalt für Landwirtschaft und Ernährung (1996) ECLI:EU:C:1996:452
- C-465/93, Atlanta Fruchthandelsgesellschaft and Others (I) v Bundesamt für Ernährung und Forstwirtschaft (1995) ECLI:EU:C:1995:369
- C-232/05, Commission of the European Communities v French Republic (2006) ECLI:EU:C:2006:651
- 143/88, Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn (1991) ECLI:EU:C:1991:65

National case law:
- Decision IX R 19/08 BFH, 28.10.2008
- Decision VII B 180/08 BFH 30.01.2009
- Decision II B 157/08 BFH 02.04.2009
- Decision VI B 69/09 BFH 25.08.2009
- Decision II B 168/09 BFH 01.04.2010
- Decision 2 BvR 283/92 BverfG 03.04.1992
- Decision 8 S 93.05 OVG Berlin-Brandenburg 07.11.2005
- Decision 2 BvR 615/90 BverfG 22.12.1991

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Commission Notice 98/C 384/03 on the application of the State aid rules to measures relating to direct business taxation OJ C 384, 10.12.1998
- Commission Decision 2011/527/EU of 26 January 2011 on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany — Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel) (notified under document C(2011) 275) Text with EEA relevance, OJ L 235, 10.9.2011

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DE10

Date

04/01/2019

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Bundesgerichtshof

Court which adopted the ruling (English)

Federal Court of Justice

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

German

Hyperlink to ruling

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=46126&pos=7&anz=728

Case reference

III ZR 279/07

Procedural context of the case

State aid was granted to an undertaking by the Land Brandenburg without notifying and awaiting approval by the Commission, which was legally required in this case. Subsequently, a Commission decision found the State aid in question to be unlawful.

A recovery order was granted by the first instance court (LG Frankfurt (Oder), ruling 12 O 125/06 of 11 December 2006).

The second instance overturned this judgment (OLG Brandenburg, ruling 4 U 20/07 of 10 October 2007).

The case was referred to the Federal Court of Justice in the extraordinary revision procedure, by the public authority – party to the conflict, after the judgment of the Higher Regional Court of Brandenburg.

The highest court affirmed the second instance judgment by refusing an extraordinary revision (present case).

Type of action

Public enforcement

Date of the Commission decision

17/06/2002

Delivery date of the ruling

06/11/2008

Language

German

Headnote

In this ruling, the Court held that if an authority grants State aid without notifying the Commission and receiving its decision, it needs to inform the persons concerned that a recovery order may be issued should the State aid later be deemed unlawful. Otherwise, a subsequent recovery order may be countered by an equivalent damages claim.

Parties

Names of the parties to the action

Land Brandenburg

Versus

D. GmbH (anonymised)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Third party

Sector relating to the State aid argument

O - Public administration and defence; compulsory social security

Regional economic development – disadvantaged regions

The type of State aid measure challenged in the court proceedings

Other

Recovery order; Failure to inform beneficiary of lack of notification

Substance of the case

Facts and parties' main arguments in the case

The claims of the parties resulted from a letter of liability signed by the defendant concerning to the granting of State aid in form of an investment subsidy in favour of a third party.

The plaintiff was the public authority of the Land Brandenburg responsible for granting investment aid for the development of the regional economy. The recipient of the subsidy received and used the aid to open a new site of production in Brandenburg.

The aid was granted on the basis of a national aid plan from 1999, which did not differentiate between the wider Brandenburg region and the parts of Brandenburg in closer proximity to Berlin.

The Commission objected to this national plan and opened a formal investigation procedure (Article 88(2) of the EC Treaty (current Article 108(2) TFEU)), as it considered the areas of Brandenburg surrounding Berlin to be part of the Berlin labour market and therefore not a disadvantaged region. Accordingly, Germany committed to differentiate between the areas of Brandenburg surrounding Berlin and the rest of Brandenburg regarding investment aid for SMEs, resulting in a lower permissible aid intensity for the former area in accordance with Article 87(3)(c) of the EC Treaty (current Article 107(3)(c) TFEU), while the rest of Brandenburg remained eligible for higher intensity of State aid in accordance with Article 87(3)(a) of the EC Treaty (current Article 107(3)(a) TFEU).

The public authority served the beneficiary a partial recovery notice regarding the aid awarded over the maximum funding ceiling set by Union law. Subsequently, the beneficiary filed for insolvency. The public authority then revoked the partial recovery notice and instead requested the entire aid to be repaid, as the purpose of granting the aid had been thwarted by the insolvency. The public authority sought recovery against the collateral provider on the basis of the letter of liability.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

A recovery order was not granted.

First, the Court regarded the letter of liability signed by the defendant as giving rise to joint liability. However, it then held the fault of the public authority to be predominant with regard to this joint liability.

While the defendant had failed to ascertain whether the public authority had complied with its obligation to notify the Commission, this was of minor importance, as the main circumstances leading to the claim of restitution were not within the responsibility or sphere of influence of the defendant. The predominant cause giving rise to the dispute was the grave fault of the public authority which had failed to notify the Commission and wait for its response. SMEs and their guarantors could expect to generally be able to rely on the lawfulness of acts and procedures undertaken by specialised public authorities.

Second, the public authority should have known and had the duty to inform the defendant, prior to signing the letter of liability, that the aid granted was not in accordance with Union law. Furthermore, the public authority should have informed the defendant that as a result there was the risk of having to return the State aid received.

For these reasons the Court rejected the recovery order in this case.

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-39/94, Syndicat français de l'Express international (SFEI) and others v La Poste and others (1996) ECLI:EU:C:1996:285
- C-148/04, Unicredito Italiano SpA v Agenzia della Entrate, Ufficio Genova 1 (2005) ECLI:EU:C:2005:774
- C-183/02 P and C-187/02 P, Daewoo Electronics (Demesa) v Teritorio Historico de Alava (2004) ECLI:EU:C:2004:701
- C-24/95, Land Rheinland-Pfalz v Alcan Deutschland GmbH (1997) ECLI:EU:C:1997:163
- C-169/95, Kingdom of Spain v Commission of the European Communities (1997) ECLI:EU:C:1997:10

National case law
- Decision V ZR 314/02 BGH, 04.04.2003
- Decision III ZR 299/05 BGH, 12.10.2006 citing further CJUE case law concerning the principle of effectiveness

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)

References by the court to other relevant aspect of the EU acquis

- Commission Notice on the *de minimis* rule for State aid, OJ C 68, 6.3.1996
- Information from the Commission – Community guidelines on State aid for small and medium-sized enterprises, 2014/C 200/01, OJ C 200, 28.6.2014
- Proposal for a Council Regulation (EC) on aid to shipbuilding, OJ C 213, 23.7.1996
- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 83, 27.3.1999
- Commission Decision 2001/272/EC of 14 March 2000

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary DE11

Date

04/01/2019

Case identifiers

Member State

Germany

Court which adopted the ruling (national language)

Bundesgerichtshof

Court which adopted the ruling (English)

Federal Court of Justice

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

German

Hyperlink to ruling

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=3164b3217aa808a9dfe3b31166f46d98&nr=41090&pos=14&anz=21

Case reference

IX ZR 221/05

Procedural context of the case

The case was referred to the Federal Court in the extra ordinary revision procedure, after the judgment of the Regional Court of Magdeburg (ruling 5 O 92/04 of 8 December 2004) and the Higher Regional Court of Naumburg (ruling 5 U 5/05 of 18 May 2005).

The plaintiff was successful in the first and second instance. At the Federal Court of Justice (present case, ruling IX ZR 221/05 of 5 July 2007), the plaintiff was only partly successful, as he failed to follow the necessary insolvency claim procedures for parts of his claim.

In decision of 9 April 2002, the Commission found the aid granted in this case to be incompatible with the 'common market'.

Type of action

Public enforcement

Date of the Commission decision

09/02/2002

Delivery date of the ruling

05/07/2007

Language

German

Headnote

In this ruling, the Court held that if Germany was obliged by a decision of the Commission to recover State aid, the recovery was an insolvency claim pursuant to Section 38 InsO (Insolvenzordnung – Insolvency Regulation), regardless of whether the aid was an equity replacing loan.

Parties

Names of the parties to the action

Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS)

Versus

Insolvenzverwalter (anonymised)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Other

Insolvency administrator of beneficiary

Sector relating to the State aid argument

C - Manufacturing

Manufacturing of ship engines

The type of State aid measure challenged in the court proceedings

Loan at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The State aid beneficiary SKL-M developed, produced and repaired ship engines. After a failed restructuring attempt, the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) took over the control of the company in 1997 in view of later privatisation.

Together with MTU, another engine manufacturer, the BvS proposed a restructuring plan. As part of this plan, SKL-M was to receive loans of 54.9 million DM (the German currency before the Euro) from the Region (Land) of Saxony-Anhalt in order to balance the books and for further investment. In case aid to SKL-M was approved by Commission decisions, these loans were to be converted into outright State aid.

On the 1 September 2000, SKL-M became insolvent. On 9 April 2002, the Commission investigation found the aid given to SKL-M to be incompatible with the 'common market'. At the point of insolvency, SKL-M was controlled by BvS as its managing partner. As BvS is an authority of the state, the Commission took the view that SKL-M was de facto a state-owned company. Consequently, the Commission was able to find that the loans granted by the BvS constituted State Aid.

The BvS attempted the recovery of State aid in the insolvency proceedings. It declared its claims to the insolvency administrator, which then issued a preliminary contestation of the declared claims. The BvS then brought a declaratory action (Feststellungsklage), in which it changed its claims from subordinate claims (Nachrangforderung) to insolvency claims pursuant to paragraph 38 Insolvenzordnung (Insolvency Regulation, InsO). Under German law, claims in insolvency regarding equity-replacing loans are subordinate to other claims in insolvency. The BvS argued that the initial loan contract was declared void due to the breach of the rules on the implementation of State aid. As such, BvS was not bound by the limitations of paragraph 38 InsO regarding equity-replacing loans, which would have demoted the priority of its claims to the insolvency administrator. Instead, it argued it could bring its claim as unjust enrichment (Bereicherungsanspruch). Despite controlling and managing a company in financial difficulty and providing it with loans, the BvS argued it was able to declare claims with regular priority as part of the insolvency proceedings.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

The Court found the claim of BvS partially inadmissible on procedural grounds and partially justified. The judgments of the previous instances were altered in relation to the declaratory action regarding the claims registered as loans and interest. If a plaintiff changes her classification of the claims in the insolvency proceeding from subordinate to regular priority under Section 38 InsO, they are required to register their claim anew under the relevant insolvency procedures. Secondly, the Court found that State aid rules mandate courts to allow Germany to recover State aid, if obliged by a decision of the Commission, under paragraph 38 InsO , regardless of whether the loans granted were equity-replacing loans. In other words, the effective implementation of the recovery of State aid obligation precludes claims in insolvency of subordinate rank.

The Court dealt with two main legal issues in this appeal. The first issue concerned the ability of a plaintiff in insolvency to change the rank and legal basis of their insolvency claim during the proceedings. Overturning the ruling of the lower courts, the Federal Court of Justice found that this was not possible. The Court explained that a declaratory action may affect all other debtors and the insolvency administrator. The correct declaration of insolvency claims was obligatory, as it gives the other interested parties the opportunity to consult and, if necessary, contest the declaration. Therefore, changing the claims during the proceedings was not possible and the procedures of insolvency laws must be followed instead (paragraph 181 InsO). According to the Court, it was also not incompatible with the principle of State aid rules and the Commission decision to require the plaintiff (BvS) to register its claim anew.

The second main issue was whether State aid rules and the principle of effectiveness precluded the application of the rules concerning equity-replacing loans found in paragraph 39 (1) No. 5 InsO. These national rules stipulated that claims in insolvency in such a situation are of subordinate rank. The Court found that the application of these rules is indeed precluded when it comes to the recovery of State aid. A subordinate insolvency claim would put the state in an impossible position, as it would give rise to conflict with the obligations imposed by State aid rules. A claim of this type might preclude the successful and immediate recovery of the aid. This is so because plaintiffs with only subordinate claims do not have a vote in the insolvency proceedings, which in this case would leave the state without any power. The state would have no means to for example stop the insolvency administrator if they decided to continue the commercial activities of the insolvent firm. This makes the fast recovery of aid impossible and perpetuates the competition distortion created by the unlawful State aid.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid; None – Claim rejected

Please note – the claim was only partially successful – the recovery order only related to a part of the unlawful/incompatible aid. The claim was further partially dismissed on procedural grounds.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-142/87, Kingdom of Belgium v Commission of the European Communities (1990) ECLI:EU:C:1990:125
- 78/76, Steinike & Weinlig v Federal Republic of Germany (1977) ECLI:EU:C:1977:52
- 77/72, Carmine Capolongo v Azienda Agricole Maya (1973) ECLI:EU:C:1973:65
- C-301/87, French Republic v Commission of the European Communities (1990) ECLI:EU:C:1990:67
- 120/73, Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz (1973) ECLI:EU:C:1973:152
- 94/87, Commission of the European Communities v Federal Republic of Germany (1989) ECLI:EU:C:1989:46
- C-480/98, Kingdom of Spain v Commission of the European Communities (2000) ECLI:EU:C:2000:559
- C-404/00, Commission of the European Communities v Kingdom of Spain (2003) ECLI:EU:C:2003:373
- C-415/03, Commission of the European Communities v Hellenic Republic (2005) ECLI:EU:C:2005:287
- C-350/93, Commission of the European Communities v Italian Republic (1995) ECLI:EU:C:1995:96
- C-334/99, Federal Republic of Germany v Commission of the European Communities (2003) ECLI:EU:C:2003:55
- C-328/99, Italian Republic and SIM 2 Multimedia SpA v Commission of the European Communities (2003) ECLI:EU:C:2003:252
- C-209/00, Commission of the European Communities v Federal Republic of Germany (2002) ECLI:EU:C:2002:747
- C- 142/87, Kingdom of Belgium v Commission of the European Communities (1990) ECLI:EU:C:1990:125
- C-39/94, Syndicat français de l'Express international (SFEI) and others v La Poste and others (1996) ECLI:EU:C:1996:285
- C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic (1991) ECLI:EU:C:1991:440
- C-232/05, Commission of the European Communities v French Republic (2006) ECLI:EU:C:2006:651
- 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (1982) ECLI:EU:C:1982:335
- C-24/95, Land Rheinland-Pfalz v Alcan Deutschland GmbH (1997) ECLI:EU:C:1997:163

National case law:
- Decision II ZR 231/98 BGH, 21.02.2000
- Decision IX ZR 165/02 BGH, 23.10.2003
- Decision 2 BvR 197/83 BverfG, 22.10.1986
- Decision V ZR 314/02 BGH, 04.04.2003
- Decision IX ZR 131/04 BGH, 12.01.2006
- Decision 5 O 92/04 LG Magdeburg, 08.12.2004
- Decision 5 U 5/05 OLG Naumburg, 18.05.2005
- Decision V ZR 89/80 BGH, 22.12.1982
- Decision III ZR 77/81 BGH,11.11.1982
- Decision 1 BvL 10/91 BverfG 28.01.1992
- Decision V ZR 246/02 BGH, 31.10.2003
- Decision 5 U 5/05 OLG Hamburg, 03.03.2006
- Decision 5 O 92/04 LG Aurich, 10.08.2005
- Decision V ZR 48/03 BGH, 24.10.2003
- Decision 6 U 906/04 OLG Jena, 30.11.2005
- Decision II ZA 9/02 BGH, 27.10.2003
- Decision IX ZR 172/87 BGH, 23.06.1988
- Decision VII ZR 339/88 BGH, 12.10.1989
- Decision 2 BvR 808/82 BverfG, 09.11.1987
- Decision III ZR 2/86 BGH, 19.03.1987
- Decision II ZR 270/93 BGH, 07.11.1994
- Decision C-277/00 EuGH, 29.04.2004
- Decision IX ZR 249/95 BGH, 19.09.1996
- Decision 2 BvR 687/85 BverfG, 08.04.1987
- Decision 1 BvR 1025/82 BverfG, 28.01.1992
- Decision V ZR 314/02 BGH, 04.04.2003
- Decision IX ZB 160/04 BGH, 09.02.2006
- Decision IX ZR 131/04 BGH, 12.01.2006
- Decision IX ZB 135/03 BGH 15.12.2005
- Decision II ZR 231/98 BGH, 21.02.2000
- Decision 2 BvR 197/83 (Solange II), BverfG, 22.10.1986

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on 'equivalence'

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Commission decision of 9 April 2002

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

11.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Landgericht Bad Kreuznach	Regional Court Bad Kreuznach	Lower court (civil/commercial)	ECLI:DE:LGBDKRE:2007:0516.2O441.06.0A	16/05/2007	Private enforcement	None - Claim rejected	Paragraph 823(2) BGB (German Civil Code) in conjunction with Article 88(3) of the EC Treaty (current Article 108(3) TFEU) should not be interpreted as constituting protection laws within the meaning of Section 823(2) BGB, which are intended to protect competitors.		This is a first instance judgment, for which the Federal Court of Justice judgment is included (1 ZR 136/09), followed by another Federal Court of Justice judgment (ECLI:DE:BGH:2017:010617BIZB4.16.0).
Landgericht Trier	Regional Court Trier	Lower court (civil/commercial)	DE:VGTRIER:2008:1202.1K533.08.TR.0A	02/12/2008	Private enforcement	Other remedy imposed	The Court ruled that according to Section 9 of the association regulations, from 2009 onwards the defendant will need prior approval by the Commission to raise levies in the way it was doing until now. The rest of the claim was rejected. The Court ruled that the prohibition contained in Article 88(3) of the EC Treaty (current Article 108(3) TFEU), against introducing a measure which constitutes State aid within the meaning of Article 87 of the EC Treaty (current Article 107 TFEU) prior to Commission approval is directly applicable. Therefore, it justifies the rights of individuals to protection against infringements of this prohibition. It is for the national courts to uphold the rights of individuals in breach of the prohibition on implementation in accordance with Article 88(3) of the EC Treaty (current Article 108(3) TFEU). An administrative court procedure, with which an individual defends itself against the disregard of the implementation prohibition, is not to be suspended according to Section 94 VwGO until a final decision of the Commission.	The Court also stated that if the levying of an apportionment by a municipal special purpose association violates the prohibition contained in Article 88(3) of the EC Treaty (current Article 108(3) TFEU), competitors may have a claim against the trade association for reimbursement of the apportionment to the members of the association. However, the repayment claim shall be annulled if exceptional circumstances exist which do not make the repayment obligation appear too burdensome.	This is the first instance court judgment, in relation to which the appeal judgment is ruling 6 A 10113/09.
OLG Koblenz	Higher Regional Court of Koblenz	Second to last instance court (civil/commercial)	4 U 759/07	25/02/2009	Private enforcement	None - Claim rejected	The Court of Appeal held that there is no basis for the claims of the plaintiff against the airport. In particular, Article 88(3) of the EC Treaty (current Article 108(3) TFEU), according to which Member States may not execute aid measures without the Commission's approval, is not eligible as a basis of entitlement. Therefore, no decision is required as to whether the airport has actually granted aid to Ryanair.		This is the Court of Appeal judgment in case ECLI:DE:LGBDKRE:2007:0516.2O441.06.0A, for which the Federal Court of Justice judgment is also included (I ZR 136/09), followed by another Federal Court of Justice judgment - ECLI:DE:BGH:2017:010617BIZB4.16.0.
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	VII ZR 183/08	01/10/2009	Private enforcement	Other remedy imposed	The defendant is obliged to repay the aid to the plaintiff (plus interest). In general, the legislature intended to allow for a scheme to enable State aid for animal carcass rendering systems in the agricultural sector, TSE tests, and fallen stock and slaughterhouse waste, in accordance with the EU Framework for State aid of up to 75% of the costs.	Please note this is not a State aid recovery order as in a case like this, State aid of up to 75% is allowed. The case is nevertheless included in the list as the Court develops the notion of State aid.	The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Regional Court of Kleve.
Oberverwaltungsgericht Koblenz	Higher Administrative Court Koblenz	Second to last instance court (administrative)	6 A 10113/09	24/11/2009	Private enforcement	None - Claim rejected	The Higher Administrative Court rejected the appeals, meaning the judgment of the first instance court - which rejected the claim - remains in place. The first instance court ruled that even though the aid granted constituted State aid, issuing a recovery order in the circumstances of this case would prove too burdensome for the defendant. The Court explained that under some circumstances indeed a recovery order may be considered too big a burden - in this specific case the Court ruled a recovery order would put in question the proper fulfilment of the public service mission entrusted to the defendant for the disposal of animal by-products. The Court referred to Article 11 of the Council Regulation (EC) No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, which allows the Court to take into consideration, when deciding on the recovery order, the burden the recovery order would place on the defendant. A violation of the prohibition of granting State aid before approval by the Commission (a breach of Article 88(3) of the EC Treaty; current Article 108(3) TFEU) may result in violations of the rights of market participants as they may be affected by the distortion of competition caused by granting of the aid. National courts are responsible for protecting such rights. Aid received by a company which is a market participant for commercial purposes (in addition to its public obligations) may constitute State aid. This is the case when the key parameters, on which the compensation for the tasks it undertakes in the public interest are based, are not stated in advance in a clear and objective manner. The measures undertaken by the national courts in case of State aid granted in breach of Article 88(3) of the EC Treaty; current Article 108(3) TFEU need to be aimed at eliminating the consequences of the unlawful aid by fixing the distortion of competition which has been created.		This is an appeal in a case that was considered by the Administrative Court (as the court of first instance).
Oberverwaltungsgericht Rheinland-Pfalz	Higher Administrative Court Rheinland-Pfalz	Second to last instance court (administrative)	6 A 10113/09	24/11/2009	Private enforcement	None - Claim rejected	The appeals remain without success. The Court decided that the Administrative Court had rightly dismissed the action and stated that the defendant may raise the levy charges according to the domestic law in the current manner only after prior approval by the Commission.	The Court also stated that the infringement of the prohibition stemming from Article 88(3) EC Treaty (current Article 108(3) TFEU) to grant State aid prior to a Commission decision may adversely affect the rights of market operators. Protection of these rights is ensured by national courts. The Court also stated that any contribution paid by its members to an association which, in addition to performing its public duties, is also a	This is the appeal judgment, the first instance judgment was delivered by the regional court of Trier.

								commercial undertaking on the market, shall qualify as State aid within the meaning of Article 87 EC Treaty (current Article 107 TFEU) if conditions on which the compensation is based for the performance of public service tasks have not previously been defined objectively and transparently (see case C-280/00 Altmark Trans [2003] ECR I-07747) (paragraph 38)). The Court finally underlined that the remedies to be ordered by the national courts in the event of a breach of the prohibition of implementing Article 88(3) EC Treaty (current Article 108(3) TFEU) must ensure that the effects of the aid granted are effectively eliminated by counteracting the distortion of competition which has arisen.	
Finanzgericht Köln 13. Senat	Finance Court Cologne	Lower court (finance)	13 K 3181/05	09/03/2010	Private enforcement	Other remedy imposed	Even if it is assumed that the new legal provision concerns aid within the meaning of Article 107(1) TFEU, the notification obligation stemming from Article 108(3) TFEU does not apply, because the content of the new legislation reflects in fact the old legal situation. The tax advantages to be categorised as subsidies in the group of municipal undertakings are based on the interpretation and application of rules on public taxation, which have existed in this form since the 1925.	The Court when rendering the judgment quoted some CJEU case law (C-222/04 Cassa di Risparmio di Firenze and Others EU:C:2006:8; C-280/00 - Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415). At the same time, the Court underlined there was no need to refer a request for a preliminary ruling to the CJEU.	
Landgericht Bonn	Regional Court Bonn	Lower court (civil/commercial)	1 O 510/05	26/03/2010	Private enforcement	Other remedy imposed	Purchase agreement for the sale of a section of the D Pipeline system on route N - R I is declared void. According to Section 134 of the German Civil Code, legal transactions are void, if they violate a legal prohibition. Article 108(3) TFEU constitutes such a prohibition as it forbids Member States from granting State aid prior to receiving a Commission decision declaring the aid compatible. Under Article 108(3) TFEU, a Member State may not implement a State aid measure within the meaning of Article 107 TFEU before the Commission has taken a final decision. The actions of the defendants in this case have continued to affect trade between Member States and there is a risk of distortion of competition and therefore constituted State aid granted unlawfully (due to the lack of notification to the Commission). Hence, the purchase agreement violated State aid rules and is declared void.	The Court decided that although there was no present legal relationship between the parties themselves, a third party may have a standing to lodge a claim, if a sufficient interest is proven. This is the case here as only after the judicial establishment of the nullity of the existing contract can the plaintiff conclude a sales contract with the defendant over the disputed line.	This is the first instance court judgment. The appeal ruling is 5 U 51/10, the last instance judgment I ZR 92/11, and the judgment following re-assessment is 5 U 51/10.
Bundesverwaltungsgericht	Federal Administrative Court	Last instance court (administrative)	ECLI:DE:BVerwG:2010:161210U3C44.09.0	16/12/2010	Private enforcement	None - Claim rejected	The Federal Administrative Court in this case amended the judgment of the Administrative Court of Appeal. According to the Federal Administrative Court, the levy in question did not constitute State aid which would require approval from the Commission. The Court ruled that in the circumstances of the case, the special purpose of the surcharge is to compensate the levy only for expenditures incurred in connection with the performance of public service obligations in the field of animal carcass disposal. The levy therefore grants no financial advantage, which improves the competitive position compared to competitors, and as a result should not be classified as State aid. In this case, the Court ruled that the claim of the competitor of an aid beneficiary for the repayment of interest of unlawful aid granted in breach of the prohibition on implementation Article 108(3) TFEU is enforceable before the authorities and courts of the Member State, in accordance with the national procedural law on Member State level. If the aid has been granted by administrative act, the right to repayment will not arise until the act has been annulled.	The Commission initiated formal State aid proceedings, which began during the time period in which the Federal Administrative Court was dealing with this case. The CJEU referred to this judgment in its own judgment of 16 July 2014, T 309/12 and stated that the Federal Administrative Court had acted manifestly against Union law. It is noteworthy that this judgment of the Federal Administrative Court was later declared null and void by the German Constitutional Court, however for reasons not related to State aid rules (in the Constitutional Court judgment 2 BvR 1493/11).	The case was referred to the Supreme Administrative Court from the Higher Administrative Court of Rheinland-Pfalz. The final judgment in this case was delivered on 19 September 2016, DE:BVerwG:2016:190916B3C22.15.0. However, this lawsuit was settled. As a consequence, the judgments of the lower courts are ineffective and the procedure is set.
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	I ZR 213/08	10/02/2011	Private enforcement	Case sent back to the lower court for re-assessment	The Federal Court of Justice decided to annul the judgment of the Higher Regional Court and ordered the Higher Regional Court to rule in this case again.	This is one of the main State aid cases in Germany, concerning State aid granted to Ryanair in the form of discounts/offers/payments in relation to its business at the Luebeck Blankensee airport. Following the delivery of this first instance judgment, the Commission, in a letter dating 10 July 2007, opened a formal investigation into possible unlawful State aid.	The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Higher Regional Court of Schleswig-Holstein. The lower instance court (Higher Regional Court of Schleswig Holstein) referred a request for a preliminary ruling to the CJEU. The CJEU ruled in the case in the Schleswig Holstein judgment (6 U 54/06), and an appeal was made to the Federal Court again which in the ruling of 9 February 2017 sent the case back to the lower court for re-assessment. The subsequent ruling from the lower court is not yet available.
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	I ZR 136/09	10/02/2011	Private enforcement	Case sent back to the lower court for re-assessment;	This case concerned State aid granted to Ryanair in relation to its business at Frankfurt Hahn airport. The plaintiff in this case, Lufthansa, claimed, *inter alia*, that discounts offered to Ryanair by the airport constituted unlawful State aid.	This case concerned State aid granted to Ryanair in relation to its business at Frankfurt Hahn airport.	The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Higher Regional Court of Bad Kreuznach.

						None - Claim rejected	The Federal Court of Justice decided to annul the judgment of the Higher Regional Court and ordered the Higher Regional Court to rule on this case again. The Federal Court of Justice overturned the judgment of the appeal court. It can be considered that the claims of Lufthansa are based on the law of tort (paragraph 823 Abs. 2 BGB). The prohibition of State aid pursuant to Article 108(3) TFEU is a protective law which also exists in the interest of the beneficiary's competitors. Additionally, it is a market conduct regulation within the meaning of Section 4 No. 11 UWG. Anyone who infringes the implementation ban can therefore be prosecuted under tort and competition law for injunctive relief, information, elimination of damage and compensation. However, the competition law claim lapses in principle within six months (Section 11 UWG), while for a claim under tort law (Section 823 paragraph 2 BGB), a limitation period of three years applies.	By letter of 17 June 2008, the Commission opened a formal examination of possible State aid.	The lower instance court (Higher Regional Court of Koblenz) referred a request for a preliminary ruling to the CJEU which ruled on the case. The judgment of the Higher Regional Court of Koblenz followed and the appeal was launched to the Federal Court which in the final judgment rejected the claim (see the judgment of 1 June 2017).
Landgericht Berlin Brandenburg	Regional Court of Berlin Brandenburg	Lower court (civil/commercial)	ECLI:DE:LGBE:2011:0314.90O107.08.0A; 90 O 107/08	14/03/2011	Private enforcement	None - Claim rejected	The court of first instance dismissed the claims against the BVVG's (Land reclamation and administration) price determination. The Court considers the pricing of BVVG to be "compatible with the law" in view of the market value determination and the justified inclusion of comparative values. The Court emphasised that the concept of market value, in accordance with State aid rules, represents any "achievable" price. The market value is "the price which a private investor acting under market conditions could have fixed."		This case was firstly considered by the Regional Court of Berlin Brandenburg on 18.06.2009 - 90 O 107/08. The Court decided to refer a request for a preliminary ruling to the CJEU, which ruled on the matter on 16 December 2010 in case C-239/09. This judgment is the follow up at national level.
Oberlandesgericht Köln	Court of Appeal in Cologne	Second to last instance court (civil/commercial)	ECLI:DE:OLGK:2011:0427.5U51.10.00	27/04/2011	Private enforcement	None - Claim rejected	Even if the aid in question were considered State aid, there would be no infringement of Article 107 TFEU, since the aid would not affect trade between Member States. The decisive factor is not that the plaintiff and the defendant are undertakings active throughout Europe, but that the sale is a local situation which has no connection with the EU and which has an exclusive effect on competition within a Member State.	The plaintiff seeks annulment of a contract of sale concluded between the defendant and a third party in 2005 for the sale of a part of the Central Europe Pipeline System for the route N. - I. due to the alleged breach of State aid rules.	This is the appeal judgment; the first instance judgment was delivered by the regional Court of Bonn.
Bundesgerichtshof 1. Zivilsenat	Federal Court of Justice	Last instance court (civil/commercial)	I ZR 209/09	21/07/2011	Private enforcement	None - Claim rejected	The plaintiff argued that the airlines EasyJet and RyanAir were receiving unlawful State Aid in relation to their operations conducted on the Schoenefeld Airport. The Court decided that the plaintiff, however, did not have legal standing in relation to claims concerning Article 108 TFEU due to the fact that its planes have not been using Schoenefeld Airport since 2006. Hence, the plaintiff and RyanAir/EasyJet were not competing for the same group of passengers so the plaintiff's economic interest was not interfered with in this case.	The case concerned a complaint of an airline against an airport operator for the conclusion of restrictive and anti-competitive agreements concerning the fees to be paid by competing airlines.	This is the last instance judgment. The Administrative Court of Weimar acted as first instance Court, and the Administrative Court of Appeal in Thueringen was the appeal court.
Verwaltungsgericht Berlin 20. Kammer	Administrative Court Berlin	Lower court (administrative)	20 A 369.08	21/02/2012	Private enforcement	None - Claim rejected	The institutional funding of the Goethe-Institut as an intermediary organisation of foreign cultural policy by the Federal Republic of Germany does not constitute State aid within the meaning of Article 107(1) TFEU and can therefore be carried out without the prior authorisation of the Commission. The financing practice of the German state does not violate the prohibition of implementing Article 108(3) TFEU.	The Goethe-Institute is not an enterprise within the meaning of Article 107(1) TFEU insofar as it operates within the framework of institutional support. This is because the activities it has undertaken in the field of foreign cultural and educational work are not economic in nature. This also applies to the organisation of language courses and training seminars for foreign scholarship holders at domestic cultural institutes of the Goethe-Institute. This teaching activity cannot be separated from the other institutionally funded activities of the Goethe-Institute in the required functional approach.	This is a lower court judgment.
Bundesverwaltungsgericht	Administrative Court of Justice	Last instance court (administrative)	DE:BVerwG:2012:310512U3C12.11.0	31/05/2012	Private enforcement	None - Claim rejected	The claim was rejected as far as the State aid aspect was concerned. The plaintiff claimed that they had a claim for damages against the defendant in the amount of the claim for reimbursement, because the latter did not indicate the possible State aid character of the aid granted and as such prevented the plaintiff from taking a loan under equal conditions. Such a claim was unsuccessful because, according to the CJEU case law, it was for the plaintiff to ascertain whether the notification procedure had been carried out pursuant to the first sentence of Article 108(3) TFEU. Hence, the plaintiff cannot invoke a legitimate expectation against a recovery of the granted aid.	This case concerned the question of whether a bid by a public development bank to grant a loan to refinance a low-interest loan to be granted to the plaintiff includes a grant in favour of the plaintiff who submitted the application for support through his bank to the public development bank.	This is the last instance judgment. The Administrative Court of Weimar acted as first instance Court, and the Administrative Court of Appeal in Thueringen was the appeal court.
Bundesfinanzhof 7. Senat	Federal Finance Court	Last instance court (finance)	VII R 19/11	19/06/2012	Private enforcement	None - Claim rejected	The Court discussed the issue of overcompensation; it underlined that overcompensation of the additional costs associated with the production of biofuels is not allowed under both national and Union law (Directive 2003/96/EG). Due to the EU prohibition of overcompensation, the State aid issues and the conducted review as foreseen by the law on the tax concession on any overcompensation, a prudent and level-headed economic operator should have expected short-term changes in the biofuel taxation framework from the beginning of the tax incentive. The Court agreed with the CJEU which in its judgment of [2008] ECR I-8343 indicated that if a prudent and level-headed trader could have foreseen the adoption of an EU measure likely to affect his interests (here: exemption regime for biofuels may be adjusted or even repealed by the national authorities in order to take account of the evolution of certain external circumstances), they cannot plead the principle of legitimate expectation if the measure is adopted.	Limiting the preferential treatment of biofuels to pure biofuels only under energy tax law and the taxation of diesel fuel blended vegetable oils with effect from 1 January 2007 by amending Section 50(1) Energy Tax Act does not violate the Union law principles of legal certainty and the protection of legitimate expectations.	
Oberlandesgericht des Landes Sachsen-Anhalt Senat für Landwirtschaftssachen	Higher Regional Court Sachsen-Anhalt	Second to last instance court (civil/commercial)	2 Ww 12/10	30/07/2012	Private enforcement	None - Claim rejected	The scope of the Land Traffic Act extends to all private real estate sales, its restrictions do not apply specifically to the land transactions of the public sector. When the State deals at the level of private law in its actions and participates in a general property transaction as a legal person under private law, it must observe the laws applicable to everyone. Therefore when acting as a legal person in compliance with the laws applicable to all private law subjects, the state cannot at the same time grant unlawful State aid under EU public law provisions.	The case concerned a ground traffic permit: refusal due to gross mismatch between the agreed purchase price and the agricultural market value.	It is an appeal judgment.

Bundesverwaltungsgericht	Federal Administrative Court	Last instance court (administrative)	DE:BVerwG:2012:101012U7C11.10.0	10/10/2012	Private enforcement	None - Claim rejected	The Federal Administrative Court in this case rejected the appeal raised. The reduction schemes of the Allocation Act 2012 relating to energy systems are inherent in emissions trading with the aim of reducing greenhouse gases globally, and therefore do not constitute aid within the meaning of Article 107 TFEU. In the case of unlawful aid, neither EU nor national law requires equal treatment between the competitor and the aid recipient.		The case was referred to the Federal Administrative Court after the judgment of the Regional Administrative Court of Berlin.
Oberlandesgericht Düsseldorf	Higher Regional Court of Düsseldorf	Second to last instance court (civil/commercial)	VI-3 Kart 65/12 (V)	14/11/2012	Private enforcement	Other remedy imposed	It was alleged that the exemption and compensation for the resulting loss of revenue by means of an apportionment constituted unlawful aid within the meaning of Article 107 TFEU. The Court decided that the Ordinance to exempt power-intensive companies from network costs should be declared void, and therefore repealed the implementing provisions of the Federal Network Agency issued pursuant to this Ordinance.	This is not a predominantly State aid case but the Court does elaborate on the notion of State aid.	
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	I ZR 92/11	05/12/2012	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The Court decided to annul the ruling of the Higher Regional Court and decided the case should be re-considered at the level of Higher Regional Court again.	A breach of the ban on State aid does not automatically result, under EU or German law, in the total annulment of the sales contract granting that aid. If the purchase price constitutes State aid, it is sufficient to remove the unlawful competitive advantage. This means it suffices that the beneficiary pays the difference between the agreed upon and the higher (aid-free) price, plus the interest incurred until recovery. This judgment somewhat marks the end of the development (at least in civil law) of the rule that an infringement of the duty to notify according to Article 108 TFEU leads to the underlying contract becoming null and void according to Section 134 of the BGB (German Civil Code). This principle was first established in the judgments of the Federal Court of Justice from 2000-2003 (which fall outside the time scope of this project and as such are not included) - for example the judgment of the Federal Court of Justice of 24 September 2002 - KZR 10/01 or the judgment of 4 April 2003 - V ZR 314/02.	The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Higher Regional Court of Cologne. The final judgment in this case (regarding the costs): Oberlandesgericht Koeln, http://www.justiz.nrw.de/nrwe/olgs/koeln/j2014/5_U_51_10_Beschluss_20140417.html, 17.04.2014 - 5 U 51/10.
Verwaltungsgericht Berlin 21. Kammer	Administrative Court Berlin	Lower court (administrative)	21 K 260.12	11/12/2012	Private enforcement	None - Claim rejected	According to Article 2(2) of the EU *de minimis* Regulation, the total amount of *de minimis* aid granted to a company over a period of three tax years may not exceed EUR 200,000. Several legally independent companies - in this case numerous CineStar cinema companies - are to be regarded as a company within the meaning of the competition law or State aid rules of the EU if they form an economic unit. This is the case, for example, with wholly-owned subsidiaries which cannot autonomously determine their market behaviour, but whose market behaviour can be determined by the parent company. There is a rebuttable presumption that the parent company has a decisive influence on a wholly-owned subsidiary.	The case concerned aid granted to cinemas for digitalisation. In this case the Court also relied upon *de minimis* Regulation.	This is a lower court judgment.
Oberlandesgericht Düsseldorf	Higher Regional Court of Düsseldorf	Second to last instance court (civil/commercial)	DE:OLGD:2013:0306.VI3KART14.12V.00	06/03/2013	Private enforcement	Other remedy imposed	The Court decided that the amendment did not comply with the limits set by the authorisation and it was also incompatible with national law, hence it was left open whether unlawful State aid was received according to Article 107 TFEU, or it infringed Article 34 TFEU.	This was not strictly a State aid case, yet it is included here as the Court briefly considered the notion of State aid.	This is a Court of Appeal judgment - the Federal Court of Justice in its judgment did not analyse State aid elements which is why that judgment is not described here.
Bundessozialgericht 1. Senat	Federal Social Court	Last instance court (social)	B 1 A 2/12 R	12/03/2013	Private enforcement	None - Claim rejected	The ban on State aid does not give rise to the plaintiff's standing in this case. The prohibition of State aid under Union law does not change the fact that the third party seeking to start an action in relation to the unlawful State aid needs to fulfil the requirement that their interests are affected. In this case, the Court ruled that the pre-existing laws and regulations do not constitute unlawful State aid within the meaning of Union law.		This is an appeal judgment.
Verwaltungsgericht Berlin 4. Kammer	Administrative Court Berlin	Lower court (administrative)	4 K 40.12	17/05/2013	Private enforcement	None - Claim rejected	The parties argue about the special payment notification for 2011 over EUR 46,362.33 which - in the plaintiff's opinion - constituted State aid. The Court decided there was no State aid in this case. The Court stated that under Article 107(1) TFEU, State aid which distorts or threatens to distort competition by favouring certain undertakings or industries is incompatible with the internal market in so far as it affects trade between Member States. State loans can indeed be such aid. However, they must be granted to a company (or branch of production). According to the Court, this was missing in this case.	The Court did not decide that the payment of compensation to depositors did not constitute State aid. The Court referred to related cases in other Member States and in the CJEU. The Court noted that the CJEU Landsbanki dispute shows that State compensation payments to depositors are not considered State aid under Union law. The Court also noted that both Netherlands and the UK provided these services, and discussed an Irish CJEU case in this field.	This is a lower court judgment.
Bundesfinanzhof 1. Senat	Federal Finance Court	Last instance court (finance)	I R 82/12	31/07/2013	Private enforcement	None - Claim rejected	The exemptions for welfare institutions are existing State aid ('old State aid'), to which the prohibition of granting State aid according to Article 108(3) TFEU does not apply.	This case concerned the corporate tax exemption for dispensing cytotoxic drugs through a hospital pharmacy. It is similar to ruling I R 17/12, yet it differs in the result hence both cases are included. In	This is an appeal judgment. Case similar to the following cases (deleted accordingly): I R 31/12

								relation to the State aid element, the conclusion is the same.	
Bundesfinanzhof 1. Senat	Federal Finance Court	Last instance court (finance)	I R 17/12	27/11/2013	Private enforcement	None - Claim rejected	The exemptions for welfare institutions constitute existing State aid ('old State aid'), for which the standstill obligation according to Article 108(3) TFEU does not apply.	Whether the granting of the tax exemptions in the course of the year in question infringes the prohibition of granting State aid in Article 107 TFEU should not be examined in the present proceedings. It is not for the national court to decide whether State aid is compatible with the internal market. The prohibition of granting State aid (Article 108(3)TFEU) cannot lead to the dismissal of this application. According to Article 108(3) TFEU, a Member State may not introduce or alter aid before the Commission has adopted a final decision. This prohibition applies only to new aid; whereas existing aid may be implemented on a regular basis until the Commission has established its unlawfulness with the EU. Based on these rules, the prohibition on implementation is not applicable in case of dispute. State aid in question is an existing aid ('old aid') for which the ban on implementation does not apply. The exemptions existed before the entry into force of the Treaty establishing the EEC.	This an appeal judgment.
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	BLw 2/12	29/11/2013	Private enforcement	Other remedy imposed	Prior to ruling in this case, the Court decided to refer a request for a preliminary ruling to the CJEU, pursuant to Article 267 TFEU. The Federal Court decided to formulate the following question to the CJEU: "Does Article 107(1) TFEU preclude a national provision such as paragraph 9(1)(3) of the GrdstVG which, for the improvement of agricultural structures, effectively prohibits an emanation of the State, such as BVVG, from selling to the highest bidder in a public call for tenders for agricultural land available for sale, if the highest bid is grossly disproportionate to the value of the land?"		The case was referred to the Federal Court in the extra ordinary revision procedure, after the judgment of the Higher Regional Court of Naumburg.
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	IX ZR 23/10	13/03/2014	Private enforcement	None - Claim rejected	The Court decided that in this case there was no breach of the notification requirement prescribed in Article 108(3) TFEU because the aid in question constituted a *de minimis* aid and as such the requirement to notify it to the Commission did not exist.		The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Regional Court of Dresden.
Oberlandesgericht Köln	Higher Administrative Court Cologne	Second to last instance court (administrative)	5 U 51/10 ECLI:DE:OLGK:2014:0417.5U51.10.00	17/04/2014	Private enforcement	None - Claim rejected	The claim of the defendant's intervener to amend or supplement the Senate's decision on costs of 29 January 2014 is rejected. The Court referred to the established case law of the Federal Court of Justice that, in case of mutual costs cancellation, the costs of the intervener are to be borne by the intervener in their entirety.		This is a decision on costs in the State aid ruling I ZR 92/11.
Hanseatisches Oberlandesgericht Hamburg 3. Zivilsenat	Higher Regional Court of Hamburg	Second to last instance court (civil/commercial)	3 u 8/12	31/07/2014	Private enforcement	None - Claim rejected	A federation of private concert organisers is not entitled to assert a violation of State aid rules (Section 823, paragraph 2, 1004 BGB (German Civil Code) in conjunction with Article 107 TFEU) occurring as a result of the State providing aid for the concert activity. This is because such a federation does not itself participate in the competition of the concert organisers. Therefore a possible breach of the State aid ban under Article 108(3) TFEU would not affect its competitive interests. Hence, such a federation does not have the legal standing to rely on the violation of guaranteed legal protection.		This is a Court of Appeal ruling.
Verwaltungsgericht Minden 10. Kammer	Administrative Court Minden	Lower court (administrative)	10 K 2545/11	25/09/2014	Private enforcement	None - Claim rejected	The defendant's decision of 27 May 2014 is lawful and does not infringe the plaintiff's rights. In the case of public service compensation, over-compensation in breach of State aid rules needs to be avoided. Only then are the Member States exempted under Article 9 Regulation (EC) No 1370/2007 from the obligation to notify under Article 108(3) TFEU the granting of State aid. From this it is clear that the avoidance of overcompensation which is the aim of the decision at hand is ultimately also rooted in State aid rules - Regulation (EC) 1370/07 also serves to regulate the market in public transport.	The case concerned the compensation for public services in public transport.	This is a lower court judgment. This is the most relevant case out of a sequence of relevant cases (removed accordingly): 10 K 2537/11, 2 U 11/14.
Oberlandesgericht Stuttgart 2. Zivilsenat	Higher Regional Court of Stuttgart	Second to last instance court (civil/commercial)	2 U 11/14	20/11/2014	Private enforcement	None - Claim rejected	Compensation for deficits, investment grants and the granting of guarantees, included in the district hospital plan in accordance with Section 4 of the Regional Hospitals Law of Baden-Wurttemberg (Landeskrankenhausgesetz Baden-Württemberg) district hospitals, are according to Article 106(2) TFEU in conjunction with the exemption decision (2005/842/EC) exempted from the notification obligation.	This case concerned unfair competition in the public sector: exemption from the obligation to notify about State aid in case of assumption of annual deficits and guarantees in favour of district hospitals.	The case was then appealed to the Federal Court of Justice which ruled on 24 March 2016 in the case DE:Bundesgerichtshof:2016:240316UIZR263.14.0 This is the most relevant case out of a sequence of relevant cases (removed accordingly): 5 O 72/13, ECLI:DE:OLGSTUT:2014:1120.2U11.14.0A
Oberverwaltungsgericht Berlin-Brandenburg 6. Senat	Higher Administrative Court Berlin-Brandenburg	Second to last instance court (administrative)	OVG 6 B 24.14	18/02/2015	Private enforcement	None - Claim rejected	The rental contract in question violates the prohibition on granting State aid under Article 108(3)TFEU which requires that the EC issues a decision on compatibility of the planned State aid with the internal market prior to the granting of that aid. In this case, State aid within the meaning of Article 107(1) TFEU for the period in question was granted, without first awaiting the compatibility decision as provided for by the first sentence of Article 108(3) TFEU.	This case concerned the financing of sport; subsequent compatibility decision of the Commission; and the binding effect of the Commission decision against which a claim was lodged with the CJEU.	This is the Court of Appeal judgment. The cassation judgment of the Federal Administrative Court in this case is ruling DE:BVerwG:2016:261016U10C3.15.0.
Bundesfinanzhof	Federal Finance Court	Last instance court (finance)	X R 23/13	25/03/2015	Private enforcement	Other remedy imposed	The Court decided the case at hand did not entail State aid. Whether the so-called restructuring clause qualifies as aid depends on whether it specifically or selectively	In reaching the judgment the Court pointed that there was no definitive case	

							favours certain companies. The existence of State aid is confirmed if the measure in question constitutes an exception to the general tax system in favour of certain undertakings and is not justified by the guiding principles of the tax code. According to the German income tax law, restructuring profits are generally taxable as increases in business assets and the so-called restructuring remission exempts these profits from taxation. This derogation is not selective and does not favour certain undertakings or branches of production in relation to other undertakings or production sectors which are in a comparable factual and legal situation with regard to the restructuring order. In particular, it should be noted that the so-called Restructuring Decree finds its justification in the basic principles of the tax code and must therefore be regarded as justified. The Restructuring Ordinance only benefits distressed companies and helps ensure that taxation is based on economic efficiency and that the excess ban is respected.	law or Commission decisions to decide whether restructuring clauses constitute State aid and that different opinions are also present in academia. The Court refers to the judgment of the CFI (current GC), HAMSA v Commission, 11 July 2002 T-152/99.	
Schleswig-Holsteinisches Verwaltungsgericht 6. Zivilsenat	Administrative Court Schleswig-Holstein	Lower court (administrative)	6 U 54/06	08/04/2015	Private enforcement	None - Claim rejected	Action brought by an airline against an airport operator concerning the granting of special conditions for a competitor, considered by the plaintiff as unlawful State aid. The Court analysed the protective nature of EU aid schemes, the binding effect of a preliminary ruling by the CJEU on the referring court; the effects of a preliminary review procedure by the Commission on the granting of aid contrary to Union law; scope of the decision-making of the appeal court after challenge of a first-instance partial judgment on a request for information. The Court ruled that a national court needs to consider a measure for which the Commission initiated an investigation under Article 108 TFEU as State aid until the end of such a procedure. The Court ruled that Article 108(3)(3) TFEU is a Protection Act within the meaning of Section 823 Abs. 2 German Civil Code (paragraph 823 German Civil Code discusses the Liability for Damages).	In the re-opened appeal, the Court of Appeal asked the Commission, *inter alia*, to state whether the measures referred to by the Commission in the opening decision constituted State aid within the meaning of the third sentence of Article 108(3) TFEU. The Commission stated, by letter of 8 March 2012 that the aid granted on 29 May 2000 between the intervener and Flughafen Lübeck GmbH constituted *prima facie* State aid.	The first case in this litigation was issued by the regional Court of Kiel on 28/07/2006 (14 O Kart 176/04), and the appeal was decided upon by the Court of Appeal in Schleswig Holstein on 20 May 2008 (6 U 54/06), and the cassation claim was considered by the Federal Court of Justice on 10 February 2011 (I ZR 213/08). The Federal Court of Justice sent the case for reassessment to the Court of Appeal which on 14 January 2013 (6 u 65/06) referred a request for a preliminary ruling to the CJEU. Following the CJEU preliminary ruling (C-27/13), the Schleswig Holstein Court of Appeal delivered a judgment on 8 April 2016 (6 U 54/06 – the ruling at hand). The Federal Court of Justice considered a cassation claim on 9 February 2017 (I ZR 91/15).
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	VIII ZR 56/14	06/05/2015	Private enforcement	None - Claim rejected	The Federal Court of Justice rejected the extraordinary revision claim in this case. It decided it was not a case of unlawful State aid. Neither the TSO's claim for information against the electricity supplier (according to Section 14 Abs. 6 EEG 2004 and Section 14(a) Abs. 5, 7 EEG 2006), nor the compensation claim nor the nationwide compensation scheme (according to Section 14 EEG 2004 and Section 14 EEG 2006) are to be considered State aid according to Article 107(1) TFEU.		The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Higher Regional Court of Naumburg.
Schleswig-Holsteinisches Verwaltungsgericht 4. Kammer	Administrative Court Schleswig-Holstein	Lower court (administrative)	4 A 291/13	26/11/2015	Private enforcement	None - Claim rejected	The broadcasting contribution is not in breach of State aid rules. This is because it does not constitute State aid in favour of public service broadcasting which should have been notified in advance under Article 108(3) TFEU. The Court held that the broadcasting contribution in place is the old equipment-based financing scheme, which the Commission treated in 2007 as existing State aid without any concerns about the "common market". In that sense, neither the nature of the benefit, the source of the funding nor the objective of the aid are affected. Hence the Court rejected the plaintiff's claim based on the argument that the broadcasting contribution constituted unlawful State aid.	While the Court did not directly cooperate with the Commission in the present case, it relied on the Commission decision from 2007, according to which the broadcasting contribution was an equipment-based scheme which did not constitute unlawful State aid within the meaning of State aid rules.	Ruling from a lower court. This case is similar to the following cases: 27 K 7686/14, 9 K 2889/16, 2 A 2286/15, 6 C 15/16, 2 A 1777/15, 2 A 188/15.
Bundesfinanzhof	Federal Finance Court	Last instance court (finance)	VII R 55/13	01/12/2015	Private enforcement	None - Claim rejected	The claim for an injunctive relief was rejected as such reliefs are only allowed if granting effective legal protection is absolutely necessary and a high degree of probability of success is also foreseen in the main proceedings.	The Court also noted that if, as in the case at issue, measures are taken to implement the prohibition of State aid according to Article 108(3) TFEU and the Commission has not yet opened a formal investigation procedure pursuant to Article 108(2) TFEU, the national courts must consider the concept of State aid. The national courts need to interpret and apply the concept themselves in order to determine whether the Commission should be informed of these measures	
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	DE:BGH:2016:240316UIZR263.14.0	24/03/2016	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The Federal Court of Justice annulled the judgment of the Higher Regional Court and ruled that the case should be re-considered at the level of Higher Regional Court. The transparency criteria of Article 4 of decision 2005/842/EC and of decision 2012/21/EU are not purely formal regulations. Non-compliance with them will lead to legal consequences. State aid in the form of compensation is exempt from the duty of prior notification to the Commission only if the conditions set out in Article 4 of the decisions are fulfilled.		The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Higher Regional Court of Stuttgart. The claim was rejected in the judgment of the Higher Regional Court of Stuttgart, 23.3.2017, 2 U 11/14, meaning that the first instance judgment of the Court of Tuebingen remains in place, which also rejected the claim (23.12.2013 - 5 O 72/13).
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	DE:BGH:2016:290416BBLW2.12.0	29/04/2016	Private enforcement	Case sent back to the lower court for re-assessment	The Federal Court of Justice in its first judgment (29.11.2013 - BLw 2/12) referred a request for a preliminary ruling to the CJEU. It asked whether Article 107(1) TFEU precludes national legislation such as Article 9(1)(3) of the Land Tax Act (on the improvement of the agricultural structure of an entity attributable to the State), and prohibits selling to the highest bidder in a public tender if the maximum bid is grossly mismatched with the value of the property. Based on the CJEU judgment issued in the case C-39/14, the German Federal Court of Justice decided that a refusal to sell to the highest bidder in an open, transparent and unconditional		This is the Federal Court of Justice ruling, following a CJEU judgment C-39/14 from 16 July 2015, issued in reply to the Federal Court of Justice's preliminary question (29.11.2013 - BLw 2/12). The subsequent ruling from the lower court is not yet available.

							bidding process based on a gross mismatch between the price and the value of the land is lawful only if the maximum bid does not reflect market value but is speculatively excessive. The bids submitted in the respective procedure are considered a decisive criterion regarding the mismatch. This is to be examined in the approval procedure according to Section 9 Abs. 1 No. 3 GrdstVG. Since the necessary findings regarding the bidding process carried out by the parties are missing, the Court could not have made a final decision, and sent the case back to the Court of Appeal.		
Verwaltungsgerichtshof Baden-württemberg	Higher Administrative Court Baden-Württemberg	Second to last instance court (administrative)	10 S 1307/15	13/05/2016	Private enforcement	Other remedy imposed	The Court held that the present case is unproblematic in terms of State aid rules: no State aid is granted here, hence the remedy granted in this case was not a State aid remedy. The allocation of waste to SAD Billigheim, which is operated by H GmbH, with the result that the waste producers concerned and the waste owners have to pay the disposal fees specified by H GmbH, does not fulfil the State aid requirements of Article 107(1) TFEU. There can be no question of using state resources within the meaning of State aid rules.		This is an appeal judgment.
Oberverwaltungsgericht Lüneburg	Higher Administrative Court Niedersachsen	Second to last instance court (administrative)	9 LA 186/15	18/05/2016	Private enforcement	None - Claim rejected	The reduction of the casino tax levied by public casinos on the sales tax due and paid according to the turnover tax law due to turnover caused by the operation of the casino does not constitute unlawful State aid within the meaning of Article 107 TFEU.	The case examined the lawfulness of the municipal entertainment tax. The Court made references to the VAT Directive.	
Oberverwaltungsgericht Berlin-Brandenburg 6. Senat	Higher Administrative Court Berlin-Brandenburg	Second to last instance court (administrative)	OVG 6 S 54.15	07/06/2016	Private enforcement	None - Claim rejected	This case (in the preliminary legal proceedings) concerned the question of whether the lease-free transfer of a built-up property to an institution of the free youth welfare service, constitutes unlawful State aid within the meaning of Article 107(1) TFEU, if investment and maintenance obligations were imposed upon the institution of the free youth welfare service in return for the leased property. Even though the unlawful State aid was confirmed, the plaintiff's application for a temporary injunction was rejected. The application was rejected because the Court decided the plaintiff had neither the right to impose provisional measures to secure the ban on construction of the youth hostel or the payment of a provisional market interest (application 1) nor to claim recovery of the saved lease expenses for the period from 1 February 2014 (application 2). An injunction can only be granted if specific provision for granting effective legal protection is absolutely necessary and there is a high degree of probability of success in the main proceedings. The Court decided these conditions were not met in this case.	According to the summary assessment of the claim - the only assessment which is possible and offered in the preliminary legal proceedings - it is unclear whether the plaintiff (who remains in a competitive relationship with the defendant) will win in the main proceedings	
Oberlandesgericht Düsseldorf	Higher Regional Court Düsseldorf	Second to last instance court (civil/commercial)	VI-U (Kart) 2/16, U (Kart) 2/16	12/10/2016	Private enforcement	None - Claim rejected	The Court underlined that State aid rules are provisions that were introduced to protect the public interest. Hence the shareholders' resolutions do not violate Articles 107(1), 108(3) TFEU. The defendant rightly pointed out that the prohibition of implementing Article 108(3) in conjunction with Article 107(1) TFEU is not infringed until the State aid has actually been granted, and the amendments to the statutes discussed in this case only open the possibility of granting State aid. Moreover, the plaintiff has submitted nothing or nothing substantive in relation to the other constituent elements of Article 107(1).	It was a case concerning antitrust infringement of amendments to a contract of association of a public transport operator: conditions for direct granting of service concessions to an internal operator in vertical joint ventures.	
Bundesverwaltungsgericht	Federal Administrative Court	Last instance court (administrative)	ECLI:DE:BVerwG:2016:261016U10C3.15.0	26/10/2016	Private enforcement	Case sent back to the lower court for re-assessment	The parties disputed the legitimacy of a sport promotion measure - the alleged unlawful State aid - for the period prior to a favourable State aid Commission decision. The Federal Administrative Court summarised here that the Higher Administrative Court tookthe view that the national courts were bound by the Commission's findings concerning the State aid nature of the measure when examining the EU's State aid ban and therefore the Higher Administrative Court only required limited substantive and judicial review. Due to the fact that it has unjustifiably reduced the scope of assessment and since it cannot be ruled out that the detailed in-depth examination would lead to a different result, the Court ordered the case to be sent back to the Higher Administrative Court for further trial and decision.	The national courts must independently and comprehensively examine the existence of notifiable State aid in the application of the prohibition of implementation under Article 108(3) TFEU. The scope of the audit is not reduced by the fact that the Commission issued a decision in which it did not to raise any objections as to the conditions for granting the State aid.	The case was previously heard before the Berlin Administrative Court and the Administrative Court of Berlin - Brandenburg. Subsequent decision from the lower court not available.
Bundesverwaltungsgericht	Federal Administrative Court	Last instance court (administrative)	DE:BVerwG:2016:261016U10C3.15.0	26/10/2016	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The Federal Administrative Court annulled the judgment of the second instance and ruled that that the case should be re-considered at the level of the Higher Administrative Court (Oberverwaltungsgericht Berlin-Brandenburg). The Court rules that national courts must independently and comprehensively examine the existence of aid to be notified under Article 108(3) TFEU. The scope of the audit is not reduced by the fact that the Commission in its decision did not to raise any objections regarding the conditions for granting the aid.	The parties were arguing over the lawfulness of aid for sport promotion for the period prior to a favourable State aid decision by the Commission.	The case was referred to the Supreme Administrative Court from the Higher Administrative Court of Berlin-Brandenburg. The subsequent ruling from the Higher Regional Administrative Court: DE:OVGBEBB:2017:1218.6B3.17.00.
Verwaltungsgericht Freiburg (Breisgau)	Administrative Court Freiburg (Breisgau)	Lower court (administrative)	3 K 2814/14	29/11/2016	Private enforcement	Recovery order in relation to unlawful aid	The defendant is obliged to recover the subsidy it granted for the provision of broadband services in the municipality. The competitor of an aid beneficiary is entitled to an interest-bearing repayment of unlawful aid for breach of the prohibition on implementation (Article 108(3) TFEU) if it is affected by the resulting distortion of competition, without having to participate in the selection procedure for granting of the aid. Insufficient basic broadband coverage within the meaning of State aid rules ('white spots') can already be assumed if the supply does not reach 100% of the citizens in the area to be supplied.		
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	DE:BGH:2017:090217UIZR91.15.0	09/02/2017	Private enforcement	Case sent back to the lower court for re-assessment	The Federal Court of Justice annulled the judgments of the previous instances and ruled that the case should be considered at the Regional Court (first instance court). The Court states that the recovery of a grant on the basis of a provisional classification as State aid granted by the Commission may prove disproportionate. An unduly long duration of the proceedings shall also be included. In individual	This is one of the main State aid cases in Germany, concerning State aid granted to Air Berlin in relation to its business on Luebeck airport.	The case was referred to the Federal Court of Justice from the Higher Regional Court (OLG) in Stuttgart. The OLG referred a request for a preliminary ruling to the CJEU concerning this case and upon receiving the answer ruled on the matter. This judgment was then referred to the Federal Court of Justice.

							cases, this examination is the responsibility of the German courts dealing with a recovery request.		The subsequent ruling from the lower court is not yet available.
BFH	Federal Finance Court	Last instance court (finance)	ECLI:DE:BFH:2017:VE.300517.IIR62.14.0	30/05/2017	Private enforcement	Other remedy imposed	The question in this case arises in the context of a dispute between A-Brauerei and Finanzamt B (the tax office, Germany) concerning the latter's decision to exclude the absorption by A-Brauerei of its subsidiary T-GmbH from the benefit of the exemption provided for in paragraph 6a of the Grunderwerbsteuergesetz (German Law on taxation of the acquisition of land, in the version of 26 February 1997, BGBl. I, page 418, 1804, as last amended by paragraph 12(1) of the Law of 22 June 2011, BGBl. I, page 1126; 'the GrEStG'). In essence, that provision exempts from the GrEStG certain transformation procedures carried out within a group of companies. The Court takes the view that the merger of T-GmbH with A-Brauerei is covered by paragraph 6(a) of the GrEStG and, therefore, must be exempted from the real property transfer tax. The Court does, however, ask whether that exemption must be classified as 'State aid' within the meaning of Article 107(1) TFEU. It notes that classification as State aid in the context of the dispute in the main proceedings will turn primarily on the interpretation of the condition of selectivity. Nevertheless, the Court is of the opinion that the exemption provided for in paragraph 6(a) of the GrEStG is not selective and, therefore, does not constitute State aid.	The case was first analysed by the Financial Court of Nuernberg before it was analysed by the Federal Financial Court which decided to refer request for a preliminary ruling to the CJEU.	
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	ECLI:DE:BGH:2017:010617BIZB4.16.0	01/06/2017	Private enforcement	None - Claim rejected	The Federal Court of Justice rejected the cassation claim in this case. This case is related to ruling ZR 213/08. It concerns the allegedly unlawful State aid granted by the Frankfurt Hahn airport to Ryanair. On 1 October 2014, the Commission adopted a decision by which to open the formal investigation procedure, reaching the conclusion that there was no unlawful State aid in this case. After that, the plaintiff brought this decision before the CJEU. Whilst in principle, in this case the Court acknowledged that a national court is bound by the decision of the Commission to initiate State aid proceedings, it at the same time developed a number of exceptions which basically rendered the principle futile. The Federal Court of Justice also decided that the motion to exclude the judges in this case for bias was unfounded. The Court explained that a judge can only be excluded in case of a wilful misinterpretation, which did not take place here.		The case is part of the German litigation series concerning the alleged State aid granted at the Luebeck airport. The case was referred to the Federal Court in the extra ordinary revision procedure, after the judgment of the Higher Regional Court of Koblenz. The BGH to start with referred the case back to the OLG Koblenz (10 February 2011 - I ZR 136/09), which referred a request for a preliminary ruling to the CJEU (30 May 2012 - 9 U 759/07). Following the CJEU ruling (21 November 2013 - C-284/12), the OLG Koblenz issued its judgment (11 December 2015 - 9 U 759/07) and the case was referred to the Federal Court which rendered its final judgment (1 June 2017 - I ZB 4/16, described here).
Hanseatisches Oberlandesgericht Hamburg	Higher Regional Court of Hamburg	Second to last instance court (civil/commercial)	3 U 220/15 Kart	27/07/2017	Private enforcement	Other remedy imposed	The Court did not find a violation of State aid rules in this case, hence no remedy was imposed. The right to protection of private standards of the copyrights owner is not protected against the infringement by the precautionary principle of competition law (Article 106(1) TFEU in conjunction with Article 102 TFEU). Therefore, the provision in question does not infringe the prohibition of State aid laid down in Article 107(1) TFEU and the standstill obligation under Article 108(3) TFEU.	In more general terms the case concerned a copyright injunction of a German standardisation organisation against the free accessibility of DIN standards on the Internet: Actual presumption of copyright or legal ownership by copyright notice; copyright protection of DIN standards as private standards; objection of constitutional publicity requirements; objection of noticeable restriction of competition by specifications of the European Standardisation Organisations. It is included here nevertheless as the Court to a limited extent examined the State aid aspect.	It is an appeal judgment, the first instance judgment was rendered by the regional Court of Hamburg.
Landgericht Tübingen	District Court Tübingen	Lower court (civil/commercial)	ECLI:DE:LGTUEBI:2017:0803.5T121.17.0A	03/08/2017	Private enforcement	Other remedy imposed	The District Court in Tubingen decided to refer a request for a preliminary ruling to the CJEU in a series of cases which concern the lawfulness of a broadcasting fee. The Court asked, *inter alia*: 1) Is the national … Baden-Württemberg law of 18 October 2011 on the application of the interstate treaty on the broadcasting contribution fee … of 17 December 2010, last amended by Article 4 of the … 19th Treaty amending the interstate broadcasting treaty of 3 December 2015 … incompatible with Union law because the contribution fee unconditionally levied since 1 January 2013 in principle from every adult living in the German Land of Baden-Württemberg to finance the public service broadcasters SWR … and ZDF … represents preferential aid that infringes EU law for the exclusive benefit of the public service broadcasting bodies compared to private broadcasting organisations? Are Articles 107 and 108 TFEU to be interpreted as meaning that the law on the broadcasting contribution fee should have been approved by the Commission and is invalid without that approval? 2) Are Articles 107 and 108 TFEU to be interpreted as encompassing the provision laid down in the national [Land law on the broadcasting contribution fee] under which a contribution fee for the exclusive benefit of official/public service broadcasters is unconditionally levied in principle from every adult living in Baden-Württemberg, because this contribution fee contains preferential aid that infringes EU law with the effect that broadcasters from other EU countries are excluded from certain technology, as the contribution fees are used to set up a competing transmission method (DVB-T2 monopoly) whose use by foreign broadcasters is not provided for? Are Articles 107 and 108 TFEU to be interpreted as encompassing not	The questions asked by the Court to the CJEU concerned the compatibility of the Baden-Württemberg Assent Law with the State Treaty on Broadcasting Contribution with Union law: in relation to the possible unlawful State aid; use of contribution funds to create a DVB-T2 transmission path only for German broadcasters; titling rights of public broadcasters; violation of the freedom of information law; different contribution levels per person as a violation of the prohibition of discrimination; doubling the contribution of second home for professional reasons; contribution obligation only if domiciled in Germany.	The Regional Court of Tubingen issued its next ruling as soon as the decision of the Federal Constitutional Court (Bundesverfassungsgericht) 1 BvR 1675/16, 1 BvR 745/17, 1 BvR 836/17, 1 BvR 981/17 of 18/07/2018 and the CJEU judgment of 13 December 2018 (C-492/17) became available. The Court in Tubingen in its final ruling of 20 December 2018 (5 T 246/17) briefly summarised the two the decisions. The CJEU mostly considered the preliminary legal questions admissible, but in the end found no breach of Union law. The CJEU concluded that State aid rules would be affected, but not a sufficiently relevant change would be introduced compared to the previous state of affairs to confirm a breach of Articles 107-108 TFEU. The replacing the old broadcasting fee with a new one would not have led to a significant increase of the fee. At the same time, although the judgment of the Federal Constitutional Court

							only direct financial aid but also other privileges with economic relevance (right to issue enforcement instruments, authority to act both as an economic undertaking and also as an official body, better position in the calculation of debts)? 3) Is it compatible with the principle of equal treatment and the prohibition of preferential aid if, under a national Baden-Württemberg law, a German television broadcaster which is organised under public law and takes the form of a public body but which at the same time also competes with private broadcasters for advertising is put in a privileged position compared to them, in that, unlike its private competitors, it does not have to go through the ordinary courts to obtain an enforcement instrument for its claims against viewers before being able to enforce these claims, but is itself permitted to create such an instrument equally entitling it to enforcement without the need for a court?'		established the unconstitutionality of the double contribution obligation of a person (for second homes), the Court considered all the other issues constitutional. As a result, the Court in Tubingen did not find a violation of State aid rules in the case at hand. Therefore, the only remedy granted by the Court was the enforcement of the broadcasting fee, to be paid by the plaintiff to the defendant.
Oberverwaltungsgericht NRW (Nordrhein-Westfalen)	Higher Administrative Court Nort Rhein - Westphalia	Second to last instance court (administrative)	4 A 2889/15	10/08/2017	Private enforcement	None - Claim rejected	The Court refused the appeal in this case. It upheld the judgment of the first instance court which decided the measure did not constitute *de minimis* aid. The plaintiff was not entitled to receive the subsidy as the fully signed application documents were not submitted in a timely manner.		
Oberverwaltungsgericht Nordrhein-Westfalen	Higher Administrative Court Nordrhein-Wetfalen	Second to last instance court (administrative)	ECLI:DE:OVGNRW:2017:0925.2A2286.15.00	25/09/2017	Private enforcement	None - Claim rejected	The appeal does not raise serious doubts as to the correctness of the first-instance decision. Doubt in this sense is to be assumed if a single substantive legal provision or a substantial factual finding of the Administrative Court are challenged with conclusive counter-arguments, which is not the case here.	The Administrative Court dismissed the plaintiff's claim for a grant - *de minimis* aid for the 2014 funding period. The Court stated that in the absence of a timely submission of fully-signed application documents, the plaintiff was not entitled to receive the subsidy sought. The plaintiff had not signed the application for subsidy, although the requirement of signature was clear from the application. Therefore, *de minimis* aid could not have been granted.	This is an appeal ruling.
BFH	Federal Finance Court	Last instance court (finance)	ECLI:DE:BFH:2017:U.181017.VR46.16.0	18/10/2017	Private enforcement	None - Claim rejected	The State aid in question was not new State aid but existing aid, as the tax exemption in question was in force even before the entry into force of the EC Treaty in 1958. Hence, the State aid is exempted from the notification requirement from Article 108(3) TFEU.		This is the last instance Court ruling.
Verwaltungsgericht Berlin	Administrative Court Berlin	Lower court (administrative)	ECLI:DE:VGBE:2017:1023.26L741.17.00	23/10/2017	Private enforcement	None - Claim rejected	The parties argued over the provisional completion of a grant award in support of broadband deployment. With the approval of the Commission, the defendant adopted the Framework to support the development of nationwide Next Generation Access (NGA) broadband coverage. It provides for assistance in areas without coverage, i.e. destinations that currently have no NGA coverage and will not have NGA networks in the next three years (NGA white spots). The defendant received a non-repayable donation in the form of project funding for the realisation of the aim of reducing the white spots. The plaintiff lodged the claim to render the decision granting the donation void. The Court ruled the application was unfounded based on the balancing of the conflicting interests to the detriment of the plaintiff. The decision does not violate the rights of the plaintiff. The Court also found no violation of Article 108(3) TFEU.	It was underlined by the Court that it is not an error not to take into account - when determining 'white spots' in broadband coverage - the willingness to expand declared by a company after completion of the State aid application and after the application deadline (for State aid applications). Hence, the defendant in this case successfully claimed that the expression of willingness to expand was expressed too late.	
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	DE:BGH:2017:251017U1STR339.16.0	25/10/2017	Private enforcement	None - Claim rejected	The Court did not grant any remedies in the part of the case related to (unlawful) State aid, as it ruled this should not fall under criminal jurisdiction. The District Court acquitted the accused of the charge of subsidy fraud for legal reasons. Criminal fraud did not arise in this case, according to the Federal Court of Justice.		The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Regional Court of Rostock.
Oberlandesgericht Nürnberg	Higher Regional Court Nürnberg	Second to last instance court (civil/commercial)	3 U 134/17	21/11/2017	Private enforcement	None - Claim rejected	The Court of Appeal, in this ruling, upheld the judgment of the court of first instance, that donations from a county-level city to an old people's / nursing home - which has a local catchment area, offers standard care and whose inhabitants are not from other Member States - do not constitute State aid within the meaning of Article 107(1) TFEU. These are purely local support measures without any effect on trade between Member States.	In delivering this judgment, the Court referred to other domestic courts' judgments in State aid cases, such as the judgment of the Federal Court of Justice I ZR 263/14 - Kreiskliniken Calw.	This is an appeal in a case that was considered by the Court of Regensburg (as the court of first instance).
Oberverwaltungsgericht des Landes Sachsen-Anhalt 1. Senat	Higher Administrative Court Sachsen-Anhalt	Second to last instance court (administrative)	1 L 75/16	18/12/2017	Private enforcement	None - Claim rejected	The obligation to re-submit a subsidy application on the basis of eligibility rules that have since expired does not constitute an intention to introduce / re-draft any State aid and therefore does not require the preliminary examination procedure under Article 108(3) TFEU. It does not constitute new State aid.		This is an appeal judgment.
Oberverwaltungsgericht Berlin-Brandenburg	Higher Administrative Court Berlin - Brandenburg	Second to last instance court (administrative)	DE:OVGBEBB:2017:1218.6B3.17.00	18/12/2017	Private enforcement	None - Claim rejected	The Court in this case dealt with the question of the existence of aid within the meaning of Article 107(1) TFEU by allowing a climbing gym of the German Alpine Club to pay a considerably lower rent than the market rent, in the context of sports promotion. The Court rejected the claim that according to Article 55 of the Block Exemption Regulation, State aid granted to sports infrastructures shall be compatible with the internal market and should not be subject to the EU notification requirement. The Court agreed with earlier judgments according to which the EU notification requirement still applies in such cases and therefore only State aid granted after the notification was issued constitutes lawful State aid.	The Commission used its right to cooperate with the courts of the Member States under the *amicus curiae* instrument referred to in Article 29 of Council Regulation (EU) 2015/1589. By letter of 5 December 2017, the Commission found that the conditions for receiving aid within the meaning of Union law were fulfilled. A 'cure' of the breach of the notification obligation under Article 108(3) TFEU, however, is out of the question as this is not applicable retroactively.	This is the latest judgment in the case in which the earlier judgments were issued by the Higher Regional Court Berlin-Brandenburg of 18 February 2015 (OVG 6 B 24.14) and the Federal Administrative Court of 26 October 2016 (10 C 3.15).
Landgericht Münster	Regional Court Münster	Lower court (civil/commercial)	11 O 334/12	21/06/2018	Private enforcement	None - Claim rejected	The court of first instance dismissed the claim.		This case the last ruling in a series of litigation in North-Rhine Westphalia which

			ECLI:DE:LGMS:2018:0621.011O334.12.00				The case concerned obligations under contracts to buy timber - the contracts were agreed in 2007 after the 'Kyrill' storm. The Land North Rhein Westphalia as a forest owner was - at that time - selling timber at a reduced price which raised the question as to whether or not this constituted unlawful State aid.		also led to the preliminary ruling of the CJEU in the case EuGH, 11 November 2015 - C-505/14.
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	IX ZR 256/06	05/07/2007	Public enforcement	Case sent back to the lower court for re-assessment	The Court decided to annul the judgment of the Higher Regional Court and ruled the case should be re-considered at the level of Higher Regional Court. The Court ruled the insolvency creditor may reclaim from the State aid which was granted from the debtor, following a relevant Commission decision- this is not contrary to the insolvency proceedings.		The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Higher Regional Court of Jena. The subsequent judgment was also issued by the Court of Appeal in Jena of 24 November 2010 (6 U 906/04). This judgment was issued because the plaintiff and the defendant have indicated that they intend to make a settlement to conclude on the contested claims and the settlement negotiations were close to completion. The intervener (interested party) considers the conclusion of the proposed settlement between the plaintiff and the defendant would constitute an unlawful creditor disadvantage and fulfil the offence of Section 266 German Criminal Code (embezzlement and abuse of trust). Furthermore, the interested party argues that any settlement that would restrict / annul / otherwise change the claim of the plaintiff against the defendant is void under Section 134 German Civil Code (Statutory Prohibition). The Court dismissed the interested party's claim as inadmissible. In the last decision in this case, The Federal Court of Justice on 29 September 2011 (II ZR 256/10), sets the litigation value.
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	IX ZR 221/05	05/07/2007	Public enforcement	Recovery order of the unlawful/incompatible aid; None - Claim rejected	The claim was only partially successful – the recovery order only related to part of the unlawful/incompatible aid. The claim was further partially dismissed on procedural grounds. The judgments of the previous instances were altered in relation to the declaratory action regarding the claims registered as loans and interest. The Court decided that if the shareholder reports an equity-replacing loan to the bankruptcy table, yet the contract is declared void due to the breach of the rules on the implementation of State aid, the loan claim is inadmissible. In such cases, the claim needs to be registered anew.	If Germany is obliged by a decision of the Commission to recover State aid, the recovery is an insolvency claim pursuant to § 38 InsO (Insolvency Regulation), regardless of whether it is subject to the rules on equity replacing loans.	The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Higher Regional Court of Naumburg.
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	III ZR 279/07	06/11/2008	Public enforcement	None - Claim rejected	The recovery order was granted in the first instance yet the second instance court overturned this judgment. This was then upheld in the highest court (as this court refused the extraordinary revision in this case). According to the Court, if an authority grants State aid without notifying the Commission as required by Article 88(3) of the EC Treaty (current Article 108(3) TFEU), or does not wait for the Commission decision, it needs to inform the persons concerned that a recovery order may be issued should the State aid later be deemed unlawful. If the authority fails to provide this information, and claims the recovery of the State aid, the party which needs to return the State aid may succeed in a claim for damages.		The case was referred to the Federal Court in the extraordinary revision procedure, by the public authority - party to the conflict, after the judgment of the Higher Regional Court of Brandenburg.
Bundesfinanzhof	Federal Finance Court	Last instance court (finance)	VII B 180/08	30/01/2009	Public enforcement	Recovery order of the unlawful/incompatible aid	The Court found: 1) The mineral oil tax concession for greenhouse cultivation granted in accordance with the domestic law, and introduced for reasons of competition policy, constitutes a selective tax measure and thus unlawful State aid within the meaning of Article 87(1) of the EC Treaty (current Article 107(1) TFEU); 2) The recovery of the unlawful State aid is necessary for overriding reasons of public interest, so that even the assumption of genuine retroactive effects would be justified and constitutionally unobjectionable; 3) If the Federal Government fails to provide the necessary notification of aid and thereby fails to comply with the procedure foreseen in Article 88 of the EC Treaty (current Article 108 TFEU), a beneficiary undertaking cannot generally rely on the correctness of the aid granted to it in breach of Union law; 4) The primacy of Union law requires that, in order to recover excise duty allowances that are contrary to Union law, Article 169 of the Regulation of Taxation should not be applied.		This is the last instance judgment by the Federal Finance Court. The first instance ruling was provided by the Finance Court of Dusseldorf.
Bundesverwaltungsgericht 3. Senat	Federal Administrative Court	Last instance court (administrative)	3 C 44/09	16/12/2010	Public enforcement	None - Claim rejected	The claim of an aid beneficiary to interest on repayment of unlawful aid for breach of the prohibition on implementation (Article 108(3) TFEU) is to be lodged before the authorities and courts of the Member State in accordance with the national rules of procedural and enforcement law. If the State aid has been granted by an administrative act, the right to repayment will not arise until the administrative act is annulled.	In parallel, the plaintiffs lodged an application for aid with the Commission in 2008. The Commission launched formal State aid proceedings and has issued a call for opinion by letter dated 20 July 2010 (2010 / C 289/07, OJ C 289, page 8, 26 October 2010).	This judgment was the cassation for the earlier judgments of the Regional Administrative Court of Trier and Higher Administrative Court of Rheinland-Pfalz.
Finanzgericht Münster	Finance Court Münster	Lower court (finance)	9 V 357/11 K,G	01/08/2011	Public enforcement	Other remedy imposed	The case concerned the question of whether the restructuring clause of Section 8c (1a) Corporate Tax Act (KStG) should be banned as it caused a breach of the prohibition on State aid laid down in Article 107(1) TFEU, and whether Section 8c	The Commission informed the Federal Government by letter of 24 February 2010 (official notice in OJE of 8 April	The Court has admitted the appeal to the Federal Fiscal Court (Bundesfinanzhof) because of its fundamental importance (I B

							(1) Corporate Tax Act (KStG) constituted a violation of Article 3(1) of the German Constitution. The Court expressed doubts as to whether the so-called restructuring clause of Section 8c (1a) Corporate Tax Act (KStG) in fact constituted unlawful State aid, as the Commission had found. The Court suspended the execution of corporation tax assessments in cases referring to this clause.	2010 No C 90, page 8 et seq) that it had doubts about the compatibility of the restructuring clause of Section 8c paragraph 1a Corporate Tax Act (KStG) with Article 107 TFEU. The Commission therefore initiated a formal investigation procedure under Article 108(2) TFEU. The Commission found Section 8c (1a) Corporate Tax Act (KStG) to be an aid incompatible with the internal market. On the basis of the corresponding Commission decision of 26 January 2011, the German tax authorities are generally no longer allowed to apply the restructuring clause - despite the action for annulment brought by the Federal Government in this regard before the CJEU.	150/11). Eventually, the second instance court did not clarify the question of the lawfulness of the restructuring clause, and it decided not to rule on the case and cleared the case from the registry after the bankruptcy proceedings on the assets of the plaintiff had been opened. The German Constitutional Court (Bundesverfassungsgericht) ruled on the compatibility of the restructuring clause with the German Constitution on 29 March 2018. The Court ruled that the restructuring clause included in paragraph 8c KStG is incompatible with Article 3 paragraph 1 of the German Constitution (GG) in the following circumstances: 1) Insofar as the direct transfer within five years concerns more than 25 percent of the subscribed capital of a corporation to a transferee (harmful acquisition); and 2) Insofar as the negative income (unused losses) is no longer deductible and has not been compensated or deducted before the harmful acquisition of ownership.
Bundesgerichtshof	Federal Court of Justice	Last instance court (civil/commercial)	III ZB 3/12	13/09/2012	Public enforcement	None - Claim rejected	The Federal Court of Justice decided to annul the judgment of the Higher Regional Court. The legal dispute relating to a recovery order in relation to a violation of the obligation to notify the Commission about any unlawful aid (Article 108(3) TFEU) may in principle not be suspended until there is a final decision of the Commission or the CJEU on the substantive compatibility of the grant with the internal market.		The case was referred to the Federal Court in the extraordinary revision procedure, after the judgment of the Higher Regional Court of Jena.
Oberverwaltungsgericht Koblenz	Higher Administrative Court Koblenz	Second to last instance court (administrative)	6 B 10351/13	10/06/2013	Public enforcement	None - Claim rejected	The plaintiff appealed against the decision of the Administrative Court of Trier to deposit the amount of State aid received in a separate account. The Court rejected the appeal meaning that the interim measures remained in place.	In the lower instance, 1 L 83/13. TR, the Regional Court of Trier in the judgment of 12 March 2013, decided that the defendant was obliged to put an amount into a special saving account as a security guarantee until the court delivers its judgment in the main proceedings. The defendant lodged a claim against the Commission decision which decided the aid granted constituted unlawful State aid and therefore needed to be recovered. The Court decided that the amount of the aid should be kept in a separate account until the national court rules in the main proceedings.	This is the court of appeal case in which the first instance court case is described in ruling 1 L 83/13 TR of 12 March 2013.
Verwaltungsgericht Trier 1. Kammer	Administrative Court Trier	Lower court (administrative)	1 K 1053/12.TR	19/11/2013	Public enforcement	Recovery order of the unlawful/incompatible aid	Taking account of the considerations of the Higher Regional Court of Rheinland-Pfalz in the appeal proceedings (Ref.: 6 B 10351 / 13.OVG) and the defendant's submission, the Court established there were no serious doubts as to the legality of the Commission decision finding unlawful State aid. In its legal assessment and the subsequent decision of 25 April 2012, the Commission decided with due regard to all relevant criteria and objections that the levies imposed by the defendant constituted State aid within the meaning of Article 107(1) TFEU by favouring some associations over others, distorting or threatening to distort competition, being incompatible with the internal market and affecting or threatening to affect trade between Member States and therefore needs to be recovered. The EU interest in maintaining a uniform EU Competition Law requires the withdrawal of unlawful State aid levy decisions.	When rendering the judgment, the Court noted that the transfer of a compulsory public service task - in this case carcass disposal - by the provincial legislature to a special purpose association is not equivalent to the fulfilment of a public service obligation (contrary to what the defendant argued).	
Verwaltungsgericht Bremen	Administriative Court Bremen	Lower court (administrative)	ECLI:DE:VGHB:2018:0911.5V1502.18.00	11/09/2018	Private enforcement	None - Claim rejected	The plaintiff seeks an injunction against the sale of land by the defendant to the third party. The claim was rejected. In an injunctive relief procedure such as the one at hand, the interim measure can only be granted if the brief / summary examination conducted by the Court reveals a highly probable breach of State aid rules and therefore the success of the main proceedings is highly probable. The Court was of the opinion this was not the case here.	The prohibition on implementing State aid set out in Article 108(3) TFEU protects the rights of the competitors against unlawful State aid, which can also be directly supported by a public claim for injunctive relief. The mere competition for the acquisition of a piece of land by the public authorities does not give rise to a specific competitive relationship between the interested parties provided for by Article 107(1) TFEU. The plaintiff as a service provider for transport and logistics companies is not at a competitive disadvantage from the sale of the property to an association that plans to implement cultural projects on the property.	This is a lower court ruling.

12. Greece

12.1 Country report

Name national legal expert

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Date

05/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

The competent courts in cases concerning the public enforcement of State aid rules are the same as those concerning the private enforcement of these rules (as below). There is thus neither a specialised court nor a specific court that hears a clear majority of cases involving the public enforcement of State aid rules.

Most cases of public enforcement of State aid rules fall under the competence of administrative courts. They are competent when an action is filed against the administrative procedure of State aid recovery, in case the aid was granted by the State in the context of conducting public policies.

Civil courts are competent in relation to public enforcement when an action is filed against the administrative procedure of State aid recovery, in case the aid was granted by the State (or a State-owned entity functioning under private law), acting as an individual, by economic transactions under terms that do not comply with the MEOP.

Under Greek law, namely, the application of the administrative procedure by the State against its debtors (Code of Collection of Public Revenue) does not necessarily entail the jurisdiction of administrative courts. In some cases, civil courts may also be competent. Specifically, the State always applies the procedure provided by the Code of Collection of Public Revenue against its debtors, but the legal dispute that arises therefrom may be brought either before administrative courts or before civil courts, whereas an entity owned by the State and functioning under private law cannot use the procedure provided by the Code of Collection of Public Revenue. In the latter case, the enforcement of a recovery decision shall be governed by private law and the legal dispute arising from the recovery decision shall be brought before the civil courts.

A description of the procedural framework applicable in public enforcement of State aid rules

Pursuant to subparagraphs B2–B11 of Law 4152/2013,[159] the Central State Aid Unit (CSAU) is designated as the competent authority for State aid in Greece, and is responsible for coordinating the recovery of unlawful State aid, in cooperation with the Decentralised State Aid Units (DSAU). The CSAU is a directorate-level organisational unit of the Ministry of Finance, which pertains to the General Directorate of Economic Policy, while the DSAU are the services in each ministry that are competent on State aid issues.

When informed of a Commission decision, the CSAU coordinates the necessary actions for recovery of the unlawful State aid and asks the DSAU to take action immediately. The DSAU are obligated to undertake the effective and immediate recovery of the unlawful State aid within the prescribed deadline and to report back to the CSAU on the results. The CSAU then informs the Commission of the measures taken towards the recovery of the unlawful State aid and continues to provide information during the course of the recovery procedure.

If either the State aid amount or the aid beneficiary of the unlawful State aid are not specified in the Commission decision, they are specified by the DSAU, under the guidance of the CSAU, according to Commission Notice 2007/C 272/05 — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid OJ C 272, 15.11.2007.

State aid beneficiaries are obligated to repay the unlawful State aid, plus interest, in accordance with the procedures set out in Article 22 of Law 4002/2011.[160]

The State aid to be recovered is considered as public revenue, so it is collected under the procedure set out in the Code of Collection of Public Revenue (Legislative Decree 356/1974).[161] Under this administrative procedure, the Public Revenue Authority (body responsible for the enforcement of a recovery decision) issues a payment notice, which is addressed to the State aid beneficiary, sets the amount to be repaid by the aid beneficiary, according to the recovery decision by the Commission, and indicates the due date for the payment. In case the aid beneficiary does not comply, the authority proceeds to the actions provided for the enforcement of the payment notice, such as confiscation of assets and sale by public auctions, as well as the penal prosecution of the person liable for the payment. This procedure can be challenged before the administrative courts. The only case of non-application of the Code of Collection of Public Revenue would be when the recovery is carried out by an entity owned by the State and functioning under private entity law, in which case the relevant provisions of the Code of Civil Procedure are applied, and consequently, in case the actions for the recovery are challenged before courts, civil courts shall be competent. As mentioned above, under Greek law, the application of the

[159] Νόμος 4152/2013, Άρθρο Πρώτο, παρ. Β, υποπαρ. Β2., Φ.Ε.Κ. Α΄ 107, «*Επείγοντα μέτρα εφαρμογής των νόμων 4046/2012, 4093/2012 και 4127/2013*» / Law 4152/2013, First Article, par. B, subpar. B2, Government Gazette A' 107 «*Urgent measures of application of laws 4046/2012, 4093/2012 and 4127/2013*». Law 4152/2013 was one of the omnibus bills passed in the context of the recent Economic Adjustment Programs for Greece, so its provisions concern various matters. Subpar. B2 to B11 provide for the establishment of the Central Unit of State Aid within the Ministry of Finance, its competences and cooperation with other public services and the procedure of recovery of State aid.

[160] Νόμος 4002/2011, Άρθρο 22 παρ. 1, υποπαρ. α., Φ.Ε.Κ. Α΄ 180, «*Ρυθμίσεις για την ανάπτυξη και δημοσιονομική εξυγίανση – θέματα αρμοδιότητας Υπουργείων Οικονομικών, Πολιτισμού και Τουρισμού και Εργασίας και Κοινωνικής Ασφάλισης*» / Law 4002/2011, Article 22, par. 1, subpar. a, Government Gazette A' 180. Law 4002/2011 «*Provisions for development and fiscal resolution – Matters of competence of the Ministries of Finance, Civilisation and Tourism, Labour and Social Security*» was one of the bills passed in the context of the recent Economic Adjustment Programs for Greece and its provisions concerned various matters.

[161] "Κώδικας Είσπραξης Δημοσίων Εσόδων" , Νομοθετικό Διάταγμα 356/1974 (Α΄ 90/1974) / Code of Collection of Public Revenue, Legislative Decree 356/1974 (Government Gazzette Α΄ 90/1974).

administrative procedure by the State against its debtors (Code of Collection of Public Revenue) does not necessarily entail the jurisdiction of administrative courts.

Regarding the possibility of challenging before national courts the actions for the public enforcement of a recovery decision, Article 202(4) of the Greek Code of Administrative Procedure (which was introduced by the aforementioned Law 4152/2013) provides that the suspension of an administrative action aiming at the recovery of State aid, consequent to a Commission decision, can be granted by administrative courts, if the following cumulative requirements are fulfilled:
(i) If the argumentation of the action before the national court contests the legality of the Commission decision, an action for the annulment of the Commission decision must also have been filed before the competent Union Court. If the Commission decision has not been challenged before the competent Union Court, then the national court is obligated to refer to the CJEU for a preliminary ruling.
(ii) There seems to be serious grounds for the illegality of either the Commission decision or of the State's action aiming to recover the unlawful State aid.
(iii) The plaintiff proves that it will suffer irreparable damage in case of immediate recovery.
The national court must in any case take into account the interest of the EU, as well as the judgments of the Union Courts on the legality of the Commission decision and any ruling issued under an interim protection procedure.

From the wording of that provision, and lack of any case law that would clarify its application, it is not clear whether the same applies if the argumentation of the action before the national court does not contest the legality of the Commission decision for the recovery, for example, if the plea is based on the non-compliance of the administrative procedure with the provisions set out in the Code of Collection of Public Revenue.

This provision was applied by the national court in a case (Administrative Court of First Instance of Athens, 29.9.2016 - N 2734/2016 (EL4)) where the plaintiff contested the legality of the administrative procedure for the recovery. The Court examined the pleas put forward by the plaintiff, found them unsubstantiated and rejected the claim.

As to the procedure of challenging an action for recovery before civil courts, there is no similar provision to the one mentioned above, allowing for the possibility to request the suspension of the recovery of State aid before administrative courts and the conditions necessary to allow the acceptance of such request. Since there is no similar provision on the procedure before civil courts, a request for the suspension of recovery of State aid shall be considered under the general rules of interim measures. Consequently, it is not certain whether the same conditions will apply before the civil courts (as the ones before administrative courts). This does not exclude the possibility for civil courts to order interim measures to suspend a recovery procedure.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The Greek Constitution establishes three kinds of courts: civil, criminal and administrative. Within the Greek legal system, cases concerning the private enforcement of State aid rules can be brought, depending on the nature of the dispute, before either the civil or the administrative courts.

Civil courts are competent in relation to private enforcement:
(i) when an action by another person, usually a competitor, is directed against the State aid beneficiary and the plaintiff requests restoration of the damage that it suffered because of the grant of State aid to the beneficiary, and
(ii) when an action is filed challenging the administrative procedure of State aid recovery, if the aid was granted by the State (or a State-owned entity), acting as an individual, by economic transactions in terms that do not comply with the MEOP. As explained above, under Greek law, the application of the administrative procedure by the State against its debtors (Code of Collection of Public Revenue) does not necessarily entail the jurisdiction of administrative courts; in some cases, civil courts may also be competent.

Civil courts are first instance courts and courts of appeal; appeal judgments are challenged by a cassation claim before the Supreme Court. A cassation claim can only be filed on legal grounds, all of which are strictly specified by law. First instance courts, single- or multi-member, are the first tier of the civil courts, while the courts of appeal, single- or multi-member, are the second. Certain minor cases are introduced before the small claims courts, whose judgments may be appealed before a single-member first instance court.

Administrative courts are competent in relation to private enforcement in the case of actions filed by a person who has legal interest in the annulment of an administrative act, as well as in cases where the substantive review of an administrative act is requested or a claim for damages is brought against the Greek State or a public law entity.

A similar two-tier system is followed by the administrative courts. Cassation, however, is not filed before the Supreme Court, but before the Council of State. Nevertheless, certain requests for the annulment of administrative acts are filed directly before the Council of State. The Court of Auditors is another institution that acts as a supreme administrative court. Its jurisdiction consists mainly of resolving disputes with reference to the accounts of public law entities.

There is thus neither a specialised court nor a specific court that hears a clear majority of cases involving the private enforcement of State aid rules.

A description of the procedural framework applicable in private enforcement of State aid rules

Jurisdiction in private enforcement

Administrative courts are competent when an action is filed challenging the administrative procedure of State aid recovery, in case the State aid was granted by the State in the context of conducting public policies.

Procedure before civil courts

The procedure before civil courts is regulated by the Civil Procedure Code, which sets out certain formalities. The procedure begins based on a party's initiative of filing a civil action before the court. A person or legal entity that claims to have legal interest (*e.g.* to have suffered damage because of the grant of State aid to the beneficiary) can initiate an action

before civil courts. Civil courts are limited by the parties' claims in the case; the court cannot award any remedies that were not requested by one of the parties in the proceedings. The civil action must contain all essential facts relevant to the plaintiff's claims. It is prohibited to add new facts at any later stage of the procedure. Examples of legal actions before civil courts are requests for prohibition and injunctions, declaratory judgments and compensation payments, based either on unjustified enrichment or tort and *delict*, pursuant to Articles 904 and 914 of the Greek Civil Code. First instance judgments are not enforceable unless they have been declared "provisionally enforceable" by the issuing court.

Against most judgments, an appeal may be filed by the defeated party. The courts of appeal have the power to review the judgment of the first instance court on both facts and law. In appellate proceedings, parties are not allowed to modify their allegations or to submit new allegations, apart from exceptional cases where new evidence may be produced. The appeal judgment produces a *res judicata* effect and constitutes an enforceable title.

A cassation claim may be filed against the appeal judgment. This claim is limited to points of law.

Since ordinary proceedings, as described above, are slow in Greece, proceedings for the issuance of an injunction are of particular interest. Interim measures (injunctions) are granted in cases of emergency or in order to prevent imminent threat to a party's right. The scope of interim measure is broad and they are issued by either a single-member first instance court or the small claims court.

Procedure before administrative courts

The administrative court system is divided into two categories of cases: (i) actions aiming to annul administrative acts and (ii) actions by which the plaintiff seeks either the annulment or the amendment of the challenged act. The two categories can be distinguished in the following way: for the actions falling within the first category, only the legality (compliance with the law and procedural formalities) is checked, while in cases falling under the second category, the court also addresses issues relating to the truth and validity of the facts of the case. Each category of actions has its own structure of court instances and its own set of procedural rules.

In the case of actions filed for the annulment of administrative acts, the action is either filed outright at the Supreme Administrative Court (or before an administrative court of appeals. The latter judgment may then be appealed before the Supreme Administrative Court.

In cases where the substantive review of an administrative act is requested or a claim for damages is brought against the Greek State or a public law entity, the action is initially filed before the first instance administrative court, with the exception of certain categories of cases (*e.g.* actions filed in relation to disputes arising out of public or administrative contracts). The court's ruling may be appealed to the administrative court of appeals having jurisdiction, while the appellate judgment may be subject to an application for cassation before the Supreme Administrative Court.

Persons or legal entities that are entitled to petition against acts of the administration are those affected by and related — in some way recognised by law — to the act under review.

Requests for the annulment of administrative acts, as well as for the cassation of judgments rendered by administrative courts of appeals, delivered under the second category of cases, may be brought on limited grounds, such as, violation of law provisions, violation of formalities governing the issuance of the act, lack of competence by the issuing administrative authority or court, and/or the abuse of public authority.

Main findings based on the case summaries

The requested remedies in the selected cases were about requested grants (Court of Audit, 17.7.2015 - ΕΣ 6026/2015 (EL3)), capital increase (Administrative Court of First Instance of Athens, 29.9.2016 - Ν 2734/2016 (EL4)), social insurance arrangements and guarantees at more favourable terms than market conditions (Administrative Court of First Instance of Athens, 29.9.2016 -Ν 2734/2016 (EL4)) tax exemptions (Council of State, 7.11.2007 - ΣτΕ 3157/2007 (EL5)) or simplified procedures for the registration of a mortgage leading to an advantage (Supreme Court of Greece, 16.5.2017 - ΑΠ 817/2017 (EL1)). The plaintiffs usually claimed the annulment of the effect of the measures (*e.g.* correction of creditor's classification due to the fact that the beneficiary of State aid was granted a selective advantage, which allowed the beneficiary to be classified at a high position (Supreme Court of Greece, 16.5.2017 - ΑΠ 817/2017 (EL1)) or annulment of the limit on the amount of compensation that can be claimed by an employee due to dismissal (Supreme Court of Greece, 13.6.2017 - ΑΠ 998/2017 (EL2)).

The sectors of the economy in which State aid was granted in the selected cases concern financial and insurance — banking activities, where the beneficiary was a State-owned bank (case ΑΠ 817/2017 (EL1)), administrative and support service activities — transportation services, where the beneficiary was a State-owned *société anonyme* (case ΑΠ 998/2017 (EL2)), construction services — naval industry, where the beneficiary was a private company (*société anonyme*) (case Ν 2734/2016 (EL4)), transporting and storage — operation of air services, where the beneficiary was a private company (*société* anonyme) (case ΕΣ 6026/2015 (EL3)) and wholesale and retail trade, where the beneficiary was a private company (*société* anonyme) (case ΣτΕ 3157/2007 (EL5)).

Qualitative assessment of the average time of court proceedings

In 2015, the Hellenic Statistical Authority announced the average time that it takes for Greek courts to reach a decision. There has been no similar announcement for the time period following 2015.

Courts of first instance: from a total of 18,169 cases, from the time when the case was presented to the court until a decision was issued:

- Up to 1 year: 3,500 cases (19.2%)
- 1 to 3 years: 9,478 cases (52.1%)
- 3 or more years: 357 cases (23.09%)
- Information not available: 995 cases (5.47%)

Courts of appeal: from 1,674 cases presented until the decisions were issued:
- Up to 1 year: 301 cases (17.98%)
- 1 to 3 years: 930 cases (55.55%)
- 3 years or more: 357 cases (21.32%)
- Information not available: 86 cases (5.13%)

For the cases summarised, the average duration was 4.2 years. The selected cases derive from courts of different instances.

As a result, it is evident that there are no major differentiations between the time that a case takes in the courts when they are dealing with State aid cases and when they are dealing with any other type of cases.

Qualitative assessment of the remedies awarded by national courts

As one can observe from the study of the selected cases, in only one case was it the national court's decision to award remedies in a State aid case (case ΕΣ 6026/2015 (EL3)). In the remainder of the cases, either the court rejected the action that was filed against an alleged State aid measure (case ΑΠ 817/2017 (EL1)), (case ΑΠ 998/2017 (EL2)) or it ruled upon administrative decisions that had awarded remedies, such as the recovery of State aid (case N 2734/2016 (EL4)), (case ΣτΕ 3157/2007 (EL5)). The remedies awarded by the courts and the administration were either the recovery of the granted State aid (case ΣτΕ 3157/2007 (EL5)), (case N 2734/2016 (EL4)) or the annulment of the effects of the State aid, in case it did not consist of the transfer of money to the aid beneficiary (*e.g.* by preventing the conclusion of an administrative contract between the beneficiary and the Hellenic Republic (case ΕΣ 6026/2015 (EL3)).

From the study of the cases, one can observe that national judges seem to be reluctant to adjudicate on State aid issues, possibly due to lack of expertise in EU matters and particularly in State aid rules. The reason for this is mainly because of the fact that this area of law has quite recently been introduced into the legal discussion in Greece. Moreover, the fact that there are no specialised courts is another obstacle for the proper enforcement of those provisions. Unfortunately, the fact that in Greece there is no digital record of all the judgments issued by the courts, makes it impossible to know the frequency with which national courts issue judgments on State aid issues.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

In the selected cases, there was neither a referral for a preliminary ruling to the CJEU nor a follow-up of such a request. Only one of the summarised rulings (case ΑΠ 817/2017 (EL1)) referred to the judgment issued by the CJEU (2015/c 198/12)[162] after reference for a preliminary ruling in a similar case (C-190/13).[163]

References to CJEU case law relating to the State aid *acquis* can be traced, concerning: (i) the definition of aid under Article 107(1) TFEU; (ii) Article 108(3) TFEU and the private enforcement of State aid rules; and (iii) the public enforcement of State aid rules.

The most referred case among the selected decisions was case *Altmark Trans andRegierungspräsidium Magdeburg*,[164] which appeared in two of the selected cases.

No other reference to the State aid *acquis*, such as Commission Regulation (EU) 651/2014,[165] can be traced in the selected cases.

Qualitative assessment of any other relevant trends in State aid enforcement

No relevant trend concerning the enforcement of State aid can be clearly identified. Nevertheless, as shown by the study of the selected cases, even in the more recent ones such as (ΑΠ 817/2017 (EL1)), although national courts do seem familiar with State aid rules, there seems to be some confusion on the role that national courts are called on to play concerning the enforcement of State aid rules in the context of the Greek legal order (see answer to the question below). National courts seem to be reluctant to introduce practices that would incorporate the State aid *acquis* in a more active way, such as the reference for a preliminary ruling and the issuance of remedies.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

In general, the notion of State aid was properly conducted by the national courts. However, in one judgment of the Supreme Court (ΑΠ 817/2017 EL1)), there was some confusion regarding the differentiation between: (a) the obligation of the national court to enforce the legal consequences that derive from the unlawfulness of the aid measure and (b) the compatibility of the measure with the internal market, which is not necessary for the plaintiff to prove before the national court, nor is the national court obligated to rule on this issue, since it falls within the exclusive competence of the Commission.

Also, in another case (ΑΠ 998 / 2017 EL2), the Supreme Court proceeded to the assessment of the compatibility of the measure that granted State aid under the provisions of Article 107(2) TFEU, despite the fact that this falls within the exclusive competence of the Commission.

Furthermore, national courts have in some cases been reluctant to exercise their competence when faced with a petition for recovery of unlawful State aid. Hence, the national courts have not been aligned with relevant CJEU case law, which clearly indicates that a national court cannot suspend the issuance of its judgment until the Commission decides on the compatibility of State aid with the internal market (cf. the CJEU case *CELF*)[166]

[162] Case C-690/13 T*rapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE) and Pavlos Sidiropoulos* (2015) ECLI:EU:C:2015:235.
[163] Case C-190/13 *Antonio Márquez Samohano contre Universitat Pompeu Fabra* (2014) ECLI:EU:C:2014:146.
[164] Case C-280/2000 *Altmark Trans andRegierungspräsidium Magdeburg* (2003) ECLI:EU:C:2003:415.
[165] Commission Decision (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 TFEU, *op.cit.*
[166] Case C-1/09 *CELF and Ministre de la Culture and de la Communication* (2010), ECLI:EU:C:2010:02099.

Moreover, one of the courts, in case N 2734/2016 (EL4), faced an important challenge when it had to enforce a recovery decision that would lead to the bankruptcy of an undertaking of vital national importance.

Any other relevant comments or findings

Not applicable

12.2 Case summaries

Case summary EL1

Date

04/01/2019

Case identifiers

Member State

Greece

Court which adopted the ruling (national language)

Άρειος Πάγος

Court which adopted the ruling (English)

Areios Pagos (Supreme Court of Greece)

Instance court which adopted the ruling

Last instance court (general jurisdiction)

Official language of the court

Greek

Hyperlink to ruling

http://www.areiospagos.gr/nomologia/apofaseis_DISPLAY.asp?cd=46XDINR87ZMB5TL914TDLB6WFLZOTQ&apof=817_2017&info=%D0%CF%CB%C9%D4%C9%CA%C5%D3%20-%20%20%C12

Case reference

ΑΠ 817 / 2017

Procedural context of the case

The plaintiff brought a cassation claim before the Supreme Court against judgment of the Court of Appeal (second instance court) [ruling Μονομελές Μεταβατικό Εφετείο Αιγαίου 11/2014]. The contested judgment of the Court of Appeal had annulled the judgment of the Court of First Instance [ruling Μονομελές Πρωτοδικείο Σάμου 47/2012].

Before the Court of First Instance, the defendant had contested the status granted to the plaintiff on the list of creditors, claiming that the mortgage that had been registered by the plaintiff infringed Article 107 TFEU and that it should, consequently, be annulled. The mortgage had been registered under an immediate and simplified procedure that had been specifically awarded to the plaintiff by law. The Court of First Instance rejected the claim. As a result of the appeal by the defendant, the judgment of the Court of First Instance was annulled by the Court of Appeal (judgment 11/2014). The Court of Appeal ruled that the aforementioned procedure that had been overturned awarded to the plaintiff constituted unlawful State aid.

The Supreme Court upheld the cassation claim on the grounds that the Court of Appeal wrongfully interpreted Articles 107 and 108 TFEU, the judgment of the Court of Appeal, and held that:
(i) Being a national court, the Court of Appeal did not have the competence to ban the enforcement of existing aid measures based on Article 108 TFEU; and
(ii) The provided privilege cannot be considered as constituting State aid, due to the fact that it is not funded directly or indirectly by the State.

Type of action

Private enforcement

Delivery date of the ruling

16/05/2017

Language

Greek

Headnote

In this ruling, the Court stated that national courts are not competent to adjudicate on whether a new State aid measure is compatible with the internal market.

Parties

Names of the parties to the action

υπό εκκαθάριση ανώνυμης τραπεζικής εταιρίας με την επωνυμία "... ΤΡΑΠΕΖΑ ΕΛΛΑΔΟΣ Α"Ε." (Anonymised)

Versus

ανώνυμης τραπεζικής εταιρείας με την επωνυμ"α "Τράπεζα ... Α"Ε." (Anonymised)

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Competitor

Sector relating to the State aid argument

K - Financial and insurance activities

Banking activities

The type of State aid measure challenged in the court proceedings

Other

Privilege consisting in an immediate and simplified procedure for registration of mortgage on debtors' properties, specifically awarded to the plaintiff

Substance of the case

Facts and parties' main arguments in the case

The plaintiff was a funding institution with social-benefit purpose, which provided grants, loans, etc. for the development of the agricultural sector, and at the same time supervised the agricultural cooperative unions. In order for the plaintiff's rights to be protected, a privilege was specifically established by law (Article 12 of Law 4332/1929), that allowed for an immediate and simplified procedure for registration of mortgage on debtors' properties on behalf of the plaintiff.

In the case at hand, the plaintiff registered themselves in the classification of creditors in a privileged-preferential position. The defendant disputed that privilege requesting to take the plaintiff's position in the classification of creditors, by arguing that the said privilege that had been awarded by law, constituted unlawful State aid, and as such was distorting the competition.

Remedy(ies) sought

Recovery order in relation to unlawful aid

Outcome of the case

Conclusions adopted by the national court

According to the Court, for a measure to be considered as State aid (Articles 107 and 108 TFEU), it had to be granted by the Member State or through State resources, and in consequence affect competition and trade. Those prerequisites have to be fulfilled

cumulatively (Case European Commission v Deutsche Post AG C- 399/08P). The Court continued that the notion of State aid not only contains grants or loans, but it also entails interventions in the form of for example tax exemptions.

The Court stated that Article 108 TFEU provides for different treatment based on whether there is a new State aid or an existing State aid: a new State Aid has to be notified to the Commission (and cannot be enforced until the Commission adjudicates) while an existing State aid can be enforced, as long as the Commission has not issued a decision deeming it unlawful with internal market.

The Court also stated that national courts are not competent to adjudicate if a new State Aid is compatible with the internal market (Case Ministero d'Il'Industria, del Commercio e d'Il'Artigianato v Lucchini SpA C-119/05), but they are merely protecting against State's violations with regard to State aid rules, until the Commission reaches a final decision on the matter.

In case there is a notification of new measures, those cannot be considered as an incompatible State aid until the Commission rules on those measures (Commission Decision CP322/09 P, NDSHT vs Comm of 18 November 2010). The Commission retains the exclusive competence to determine whether a measure constitutes unlawful State aid under Article 107-108 TFEU, not the national courts. The Court concluded that Article 108 TFEU does not provide the national courts with the competence to ban the enforcement of existing aid measures.

Finally, the Court held that the provided privilege cannot be considered as constituting State aid, due to the fact that is not directly or indirectly funded by the State, and as such, the requirement set in Article 107(1) TFEU was not fulfilled. Therefore, it confirmed the ruling reached by the Court of First Instance and overturned the judgment of the Court of Appeal.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-690/13, Trapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE) and Pavlos Sidiropoulos,, (2015) ECLI:EU:C:2015:235
- C-39/94, Syndicat Francais de I' Express international and others v La Poste and others (1996) ECLI:EU:C:1996:285
- C-399/08 P, Commission of the European Communities v Deutsche Post AG (2010) ECLI:EU:C:2010:481
- C-262/11, Kremikovtzi AD v Ministar na ikonomikata (2012) ECLI:EU:C:2012:760
- C-44/93, Namur-Les Assurances du Crédit SA v Office National du Ducroire and the Belgian State (1994) ECLI:EU:C:1994:311
- C-119/05, Ministero d'Il'Industria, del Commercio e d'Il'Artigianato v Lucchini SpA (2007) ECLI:EU:C:2007:434
- C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79
- C-322/09 P, NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v European Commission (2010) ECLI:EU:C:2010:701

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

No

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary EL2

Date

04/01/2019

Case identifiers

Member State

Greece

Court which adopted the ruling (national language)

Άρειος Πάγος (ΑΠ)

Court which adopted the ruling (English)

Areios Pagos (Supreme Court of Greece)

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Greek

Hyperlink to ruling

http://www.areiospagos.gr/nomologia/apofaseis_DISPLAY.asp?cd=W850ATEJ9KAJBDCD3HPEYC6YGDN9L1&apof=998_2017&info=%D0%CF%CB%C9%D4%C9%CA%C5%D3%20-%20%20%C22

Case reference

ΑΠ 998 / 2017

Procedural context of the case

The Court of Appeal with ruling 4537/2013 granted the appeal, reviewed and overturned the judgment of the Court of First Instance and rejected the claim. The Court found that the amount of compensation that cannot exceed the limit set by Law, 993/1979 when an employee is dismissed from a Public Utility Company (SGEI-Services of General Economic Interest) did not constitute unlawful State aid falling under Article 107(1) TFEU. This was due to the fact that the company was entrusted with the performance of a public service, the aid had been established in advance, in an objective and transparent manner, it did not exceed the necessary amount and was granted to counterbalance the costs for the services. The Court stated that the same criteria applied when the Public Utility Company was re-formed to a commercial company, as in the present case, since it is still a Public Utility Company, serving public purposes.

The plaintiff appealed that ruling before the Supreme Court of Greece, Areios Pagos. The Court ruled that the aforementioned limit on the amount of the compensation did not infringe Article 107 TFEU, because there was no distortion on the market among Member States since the Public Utility Company was State-owned and State-funded.

The Supreme Court, therefore, rejected the appeal and confirmed the judgment of the Court of Appeal.

Type of action

Private enforcement

Delivery date of the ruling

13/06/2017

Language

Greek

Headnote

In this ruling, the Court considered that the limit on the amount of compensation granted to the dismissed employees of the Public Utility Company (SGEI), did not infringe State aid rules.

Parties

Names of the parties to the action

Α.Γ. του Δ., κατοίκου … (anonymised)

Versus

ανώνυμη εταιρεία με την επωνυμία «…ΜΕΤΑΦΟΡΕΣ ΜΕΤΑΦΟΡΙΚΕΣ ΥΠΗΡΕΣΙΕΣ ΕΠΙΒΑΤΩΝ ΚΑΙ ΦΟΡΤΙΟΥ ΑΝΩΝΥΜΗ ΣΙΔΗΡΟΔΡΟΜΙΚΗ ΕΤΑΙΡΕΙΑ» και το διακριτικό τίτλο «… Α.Ε.» (anonymised)

The relationship of the plaintiff to the measure

Third party

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

N - Administrative and support service activities

Transportation services

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The plaintiff, a former employee of the defendant, which was a Public Utility Company, claimed that the amount of the compensation owed to her is EUR 27,820.03. Furthermore, they argued that the limit on the amount of compensation that can be claimed, which prohibits compensation over EUR 15,000, is illegal and unconstitutional. More concretely, the plaintiff claimed that the aforementioned limit constituted unlawful indirect State aid (Article 107(1) TFEU) granted to the defendant and as such distorted competition.

The counter-argument by the defendant was that the amount of EUR 15,000 was a limit imposed by Law 993/1979 in order to serve general economic interests linked to the nature of the Public Utility Company.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

In rejecting the appeal, the Court emphasised the public nature of the defendant and concluded that the aid in question was not incompatible with the internal market and did not distort competition. This was due to the fact that the defendant was a Public Utility Company (SGEI) that served public interests and operated under public control. The fact that the SGEI operated under the form of a commercial company did not affect the public nature and scope of this company.

What is more, the measure of limited compensation which is granted to the SGEI, had been set objectively and transparently and did not exceed the necessary amount while at the same time meeting the criteria which were set in Article 107(2) TFEU; thus it was not considered as incompatible State aid.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (2003) ECLI:EU:C:2003:415

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary EL3

Date

04/01/2019

Case identifiers

Member State

Greece

Court which adopted the ruling (national language)

Ελεγκτικό Συνέδριο (ΕΣ)

Court which adopted the ruling (English)

Court of Audit

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Greek

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

ΕΣ 6026/2015

Procedural context of the case

Under the framework of a public tender procedure regarding air services, the Hellenic Republic and the selected contractor concluded a draft administrative contract. The contract was submitted to the Council of Auditors in order to assess the legality of the tender procedure and to conduct an evaluation of the administrative contract, in terms of compliance with the constitutional provisions, governing the conclusion of the administrative contracts.

By Decision 41/2015, the Council of Auditors ruled that the administrative contract could not be signed since the procedure of the procurement was not legal. Due to that ruling, the interested parties lodged a claim, in order to revoke this decision (writ of revision) before the competent VI Department of the Court of Auditors. This claim is a legal remedy provided by law and cannot be considered as an appeal, since the Council of Auditors acted in its capacity as an administrative body and not as an Administrative Court. With Decision 2979/2015, the VI Department of the Court of Auditors concluded that the public procurement procedure took place according to the provided rules and that the Evaluation Committee sufficiently justified the outcomes of the tender procedure; thus, the parties could conclude the administrative contract.

The plaintiff, a competitor of the contractor company, submitted a writ for the revision of that decision before the Court of Audit. According to the plaintiff, the amount paid by the Hellenic Republic to the contractor exceeded the amount necessary to cover the net cost plus a reasonable profit, pursuant to Article 16 and 17 of the Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (OJ L 293, 31.10.2008) on common rules for the operation of air services in the Community. As a result, according to the plaintiff, the compensation constitutes unlawful State aid. The Hellenic Republic and the contractor argued the validity of Decision 2979/2015.

The Court of Audit accepted the claim and revised Decision 2979/2015 of the VI Department of the Court of Auditors and stated that the Evaluation Committee did not carry out the necessary legality check as to whether the paid compensation constitutes prohibited State aid or not, and if it grants a financial advantage to the contractor (overcompensation).

Type of action

Private enforcement

Delivery date of the ruling

17/07/2015

Language

Greek

Headnote

In this ruling, the Court ruled that a legality check is necessary as to whether paid compensation constitutes prohibited State aid and, as such, grants a financial advantage to a subcontractor (overcompensation).

Parties

Names of the parties to the action

της ανώνυμης εταιρείας με την επωνυμία «.....» και διακριτικό τίτλο «.....», που εδρεύει στο ....., η οποία παρέστη με τον πληρεξούσιο δικηγόρο της Ευγένιο Χριστοφιλόπουλο (Α.Μ./Δ.Σ.Α. 24563) (anonymised)

Versus

α) το Ελληνικό Δημόσιο, το οποίο εκπροσωπείται από τους Υπουργούς Οικονομικών, Οικονομί–ς - Υποδομ–ν - Ναυτιλίας και Τουρισμού και το οποίο παρέστη με τον Νικόλαο Καραγιώργη Πάρεδρο του Νομικού Συμβουλίου του Κράτους, και β) Η ανώνυμη εταιρεία με την επωνυμία «.....», που εδρεύει στη ....., η οποία κατέθεσε το από 20.5.2015 υπόμνημα παρέμβασης και παρέστη με τους πληρεξούσιους δικηγόρους της Δημήτριο Κυριακόπουλο (Α.Μ./Δ.Σ.Θεσσαλονίκης 2003) και Νικόλαο Βακουφάρη (Α.Μ./Δ.Σ.Θεσσαλονίκης 3923 (anonymised)

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

H - Transporting and storage

Operation of air services

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

Under the framework of a public tender procedure regarding air services, a draft administrative contract between the Hellenic Republic and the selected contractor was submitted to the Council of Auditors in order to assess the legality of the tender procedure.

Following Decision 41/2015 of the Council of Auditors which ruled that the administrative contract could not be signed since the procedure of the procurement was not legal, the interested parties filled in a claim, in order to revoke this decision (writ of revision) before the competent VI Department of the Court of Auditors. With its ruling 2979/2015 , the VI Department of the Court of Auditors concluded that the public procurement procedure took place according to the provided rules and that the Evaluation Committee sufficiently justified the outcomes of the tender procedure; thus, the parties could conclude the administrative contract.

The plaintiff, a competitor of the contractor company, submitted a writ for the revision of that ruling before the Court of Audit. According to the plaintiff, the amount paid by the Hellenic Republic to the contractor exceeded the amount necessary to cover the net cost plus a reasonable profit, pursuant to Article 16 and 17 of the Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community. As a result, according to the plaintiff, the compensation constituted an unlawful State aid measure. The Hellenic Republic and the contractor argued the validity of the ruling 2979/2015.

The Court of Audit accepted the claim and revised ruling 2979/2015 of the VI Department of the Court of Auditors and stated that the Evaluation Committee had not carried out the necessary legality check as to whether the paid compensation constituted prohibited State aid or not, and if it granted a financial advantage to the contractor (overcompensation).

Remedy(ies) sought

Other remedy sought

The revision of the decision 2979/2015 of the VI Department of the Council of Audit which ruled that the contract under review is legal and is not granting unlawful State aid to the contractor

Outcome of the case

Conclusions adopted by the national court

The Court of Audit accepted the claim of the plaintiff that the compensation paid by the Hellenic Republic to the selected contractor constituted prohibited State aid, since it exceeded the amount necessary to cover the net cost plus a reasonable profit, pursuant to Article 16 and 17 of the Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

More specifically, the Court found that, if a compensation is paid by the Member State to the operator in order to fulfil its public service obligation, that compensation must not exceed the amount necessary to cover the net cost of that obligation and a reasonable profit. Compliance with this obligation is necessary to ensure that a beneficiary is not granted a financial advantage which distorts or threatens to distort competition by strengthening its competitive position so that the compensation paid does not constitute State aid incompatible with the Treaty (Article 107-108 TFEU). As a result, it ruled that the Evaluation Committee of the tender procedure did not carry out the necessary legitimacy control of whether the paid compensation exceeded the amount necessary. Consequently, it constituted an unlawful State aid measure granting of a financial advantage to the contractor (overcompensation).

For these reasons, the Court accepted the claim, revised the 2979/2015 Decision of the VI Department of the Court of Auditors and held that the administrative contract cannot be concluded between the parties.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The Court revised the Decision 2979/2015 of the VI Department of the Council of Audit and held that the administrative contract cannot be concluded between the parties.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (2003) ECLI:EU:C:2003:415
- C-451/03, Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori (2005) ECLI:EU:C:2005:410
- C-140/09, Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri (2010) ECLI:EU:C:2010:335
- C-206/06, Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV, and in the indemnification proceedings Aluminium Delfzijl BV v Staat der Nederlanden and in the indemnification proceedings Essent Netwerk Noord BV v Nederlands Elektriciteit Administratiekantoor BV and Saranne BV (2008) ECLI:EU:C:2008:413

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Regulation (EC) No 1008/2008 of the European Parliament and of the Council on common rules for the operation of air services in the Community, Article–6 – 17, OJ L 293, 31.10.2008

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary EL4

Date

04/01/2019

Case identifiers

Member State

Greece

Court which adopted the ruling (national language)

Διοικητικό Πρωτοδικείο Αθηνών (Τμήμα 19ο, Μονομελές)

Court which adopted the ruling (English)

Administrative Court of First Instance of Athens (19th district, single member formation)

Instance court which adopted the ruling

Lower court (administrative)

Official language of the court

Greek

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

N 2734/2016

Procedural context of the case

The Commission, with the Recovery Decision 2009/610/EC, ordered the recovery of the unlawful and incompatible State aid that was granted to the plaintiff by the Hellenic Republic.

The Hellenic Republic, the Commission and the plaintiff (Shipyard 'Skaramagkas') initiated political negotiations in order to prevent the enforcement of the recovery decision. All three members acknowledged the fact that a possible enforcement would lead to the bankruptcy of the Shipyard, which is an integral part of Greece's national interest and military activities. The political negotiations between the three parties lead to a 'military agreement' in December of 2010, according to which, instead of the enforcement of the recovery decision, all the non-military related property of the plaintiff must be divested within six months and all commercial activities must be aborted.

In the meantime, the plaintiff filed a complaint against the recovery decision before the GC (Case Ellinika Nafpigeia AE v European Commission T-391/08) and the CJEU (Ellinika Nafpigeia AE v European Commission C-246/12 P). Both complaints were rejected.

The Commission started an infringement action against the Hellenic Republic, that the latter did not uphold neither its obligations with regard to the State aid measure at hand, nor the 'military agreement'.

The CJEU, in its judgment of 28 June 2012, (European Commission v Hellenic Republic C-485/2010,) accepted the Commission's complaint.

Following that, on 27 November 2014, the Commission sent a letter to the Hellenic Republic, that the latter must enforce the recovery decision, otherwise procedure from Article 260 (2) TFEU will be initiated.

That led to the initiation of two orders of payment on behalf of the Hellenic Republic against the Shipyard; one was issued by the Head of Tax Services and the second one by the Head of Industrial Policies Manager of Ministry of Economy, Development and Tourism.

Moreover, the plaintiff petitioned for the suspension of enforcement of those two orders of payment, until a final ruling was issued on that topic, by the present Court, requesting interim judicial protection. On 14 November 2018, the CJEU in its judgment European Commission v Hellenic Republic C-93/17 imposed on Greece a lump sum and penalty payments for its failure to implement the judgment of the CJEU C-485/2010.

Type of action

Public enforcement

Date of the Commission decision

04/12/2015

Delivery date of the ruling

29/09/2016

Language

Greek

Headnote

In this ruling, the Court dismissed a petition for the suspension of two orders for payment issued by the Head of Tax Services in order to recover unlawful aid.

Parties

Names of the parties to the action

«Ελληνικά Ναυπηγεία ΑΕ» (ΕΝΑΕ)

Versus

Ελληνικού Δημοσίου, εκπροσωπούμενου από τον Υπουργό Οικονομικών

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

F - Construction

Construction services (Naval Industry)

The type of State aid measure challenged in the court proceedings

Guarantee at more favourable terms than market conditions; Other (Capital increase); Other (Social insurance arrangements)

Substance of the case

Facts and parties' main arguments in the case

The Commission, with Recovery Decision 2009/610/EC, ordered the recovery of the unlawful and incompatible State aid that was granted to the plaintiff by the Hellenic Republic.

The Hellenic Republic, the Commission and the plaintiff (Shipyard 'Skaramagkas') initiated political negotiations in order to prevent the enforcement of the recovery decision. All three members acknowledged the fact that a possible enforcement would lead to the bankruptcy of the Shipyard, which is an integral part of Greece's national interest and military activities. The political negotiations between the three parties lead to a 'military agreement' in December of 2010, according to which, instead of the enforcement of the recovery decision, all the non-military related property of the plaintiff must be divested within six months and all commercial activities must be aborted.

In the meantime, the plaintiff filed a complaint against the recovery decision before the GC (Case Ellinika Nafpigeia AE v European Commission T-391/08 and the CJEU (Case Ellinika Nafpigeia AE v European Commission C-246/12 P). Both complaints were rejected.

The CJEU, in its judgment of 28 June 2012, (European Commission v Hellenic Republic C-485/2010) accepted the complaint of the Commission against the Hellenic Republic, that the latter did not uphold neither its obligations with regard to the State aid measure at hand, nor the 'military agreement'.

Following that, in 27 November 2014, the Commission sent a letter to the Hellenic Republic, that the latter must enforce the recovery decision, otherwise Article 260 (2) TFEU will be enacted.

That lead to the initiation of two orders of payment on behalf of the Hellenic Republic against the Shipyard; one was issued by the Head of Tax Services and the second one by the Head of Industrial Policies Manager of Ministry of Economy, Development and Tourism.

Moreover, the applicant petitioned for the suspension of enforcement of those two orders of payment, until a final ruling was issued on that topic, by the present Court, requesting interim judicial protection.

The applicant (plaintiff) argued that:

- The application for the suspension of enforcement of those two orders of payment was manifestly well founded in Law 4002/2011, Article 22(1)(a)(Νόμος 4002/2011, Άρθρο 22 παρ. 1, υποπαρ. α., Φ.Ε.Κ. Α΄ 180, «Ρυθμίσεις για την ανάπτυξη και δημοσιονομική εξυγίανση – θέματα αρμοδιότητας Υπουργείων Οικονομικών, Πολιτισμού και Τουρισμού και Εργασίας και Κοινωνικής Ασφάλισης» / Law 4002/2011, Article 22(1)(a). a, Government Gazette A' 180. Law 4002/2011 «Provisions for development and fiscal resolution – Matters of competence of the Ministries of Finance, Civilisation and Tourism, Labour and Social Security» was one of the bills passed in the context of the recent Economic Adjustment Programs for Greece and its provisions concerned various matters) and Law 4152/2013, Article 1(B)(B2), according to which the orders of payment had not been issued by the competent authority, which would be either the Ministry of Defence in cooperation with the Ministry of Finance (Law 4002/2011, Article 22(1)(a)), or the Central Unit of State Aid (Law 4152/2013, Article 1(B)(B2)) (Νόμος 4152/2013, Άρθρο Πρώτο, παρ. Β, υποπαρ. Β2., Φ.Ε.Κ. Α΄ 107, «Επείγοντα μέτρα εφαρμογής των νόμων 4046/2012, 4093/2012 και 4127/2013» / Law 4152/2013, First Article, par. B, subpar. B2, Government Gazette A' 107 «Urgent measures of application of laws 4046/2012, 4093/2012 and 4127/2013». Law 4152/2013 was one of the omnibus bills passed in the context of the recent Economic Adjustment Programs for Greece, so its provisions concern various matters. Subparagraph B2 to B11 provide for the establishment of the Central Unit of State Aid within the Ministry of Finance, its competences and cooperation with other public services and the procedure of recovery of State aid).
- According to the Greek Law, the thirty-day (30) deadline was not reasonable and therefore constituted an abuse of power and an infringement of the proportionality principle.
- The enforcement of the 'military agreement' was obstructed by the Hellenic Republic.
- The recovery was issued in respect not only to the commercial activities of the Shipyard, but also to the military activities and as such the order of payment issued by the Head of Tax Services is excessive. That was based on the argument that the Shipyard did not receive any aid with regard to its military activities.

The defendant argued that the recovery decision was legitimate and well-founded in law (CJEU judgment of 28 February 2013 Case Ellinika Nafpigeia AE v European Commission C-246/12 P). Furthermore, the defendant was bound to enforce the recovery decision, otherwise a fine would have been imposed against the Hellenic Republic. The defendant argued that the distinction introduced between commercial and military activities was lacking any foundation in law.

The Commission intervened before the Court, according to Article 204(2) of Greek Administrative Procedural Law, by filing a memorandum (7 July 2016), in favour of the Hellenic Republic, arguing that the requested suspension of the enforcement of a Commission decision, was not admissible since the decision is verified by the CJEU (Case C-246/2012 P).

Remedy(ies) sought

Other remedy sought

Annulment of imposed orders of payment

Outcome of the case

Conclusions adopted by the national court

The Court referred to the State aid rules in the TFEU, as well as the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU. The Court also referred to Article 73 Ν. 4170/2013 (Α-163), with regard to the rules of a possible suspension of enforcement of a Commission decision. Furthermore, the Court pointed out the requirements that need to be met in order for national courts to adjudicate on measures of protection against State acts that are enforcing Commission decisions with regard to State aid.

The Court accepted all the defendant's arguments as well as the recovery decision and rejected the claim. The Court stated that the plaintiff's argument regarding the distinction on commercial and military activities was indeed lacking any foundation in law, because the order of payment was issued towards the undertaking and not on the undertaking's sub-activities. This differentiation takes place at a later stage – the enforcement of judgment (Article 904 et seq. Greek Civil Law), meaning that the assets related to the military activity of the plaintiff would not be affected. Moreover, the Court continued that the military agreement had never been actually enforced, while the provided deadline was reasonable, since the first recovery decision was issued eight years ago.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

The Court faced difficulties with regard to the enforcement of State aid rules due to the strategic national importance of the shipyard, particularly for military activities.

As stated above, the shipyard is of crucial significance to Greece's national interest and military activities. One of the most important aspects of those activities is the construction and maintenance of the Hellenic naval fleet. It is evident that the Court acknowledged the situation that the recovery and the payment of the two orders of payment will cause the bankruptcy of the Shipyard, which is linked to the defence force of the Hellenic Navy.

Other

References by the court to any CJEU / national case law

CJEU case law:

- C-485/10, European Commission v Hellenic Republic (2012) ECLI:EU:C:2012:395
- C-246/12 P, Ellinika Nafpigeia AE v European Commission (2013) ECLI:EU:C:2013:133
- C-210/09, Scott SA and Kimberly Clark SAS v Ville d'Orléans (2010) ECLI:EU:C:2010:294

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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 (Text with EEA relevance), OJ L 248, 24.9.2015
- Commission Decision 2009/610/EC of 2 July 2008 on the measures C 16/04 (ex NN 29/04, CP 71/02 and CP 133/05) implemented by Greece in favour of Hellenic Shipyards (notified under document C(2008) 3118) (Text with EEA relevance), OJ L 225, 27.8.2009

Cooperation with the EU institutions

The Commission provided the national court with amicus curiae observations (http://ec.europa.eu/competition/court/hellenic_shipyards_amicus_curiae_observation_4_el.pdf; http://ec.europa.eu/competition/court/hellenic_shipyards_amicus_curiae_observation_3_el.pdf; http://ec.europa.eu/competition/court/hellenic_shipyards_amicus_curiae_observation_2_el.pdf; http://ec.europa.eu/competition/court/hellenic_shipyards_amicus_curiae_observation_1_el.pdf)

Preliminary ruling request follow-up

No

Any other comments (optional)

The Commission filed a memorandum (7 July 2016) based on Article 204(2) of Greek Administrative Procedural Law, in favour of the Hellenic Republic. The Commission argued that a requested suspension of the enforcement of the Commission decision through actions of a State (in this case the issue of payments by the Head of Tax Services), is not allowed in cases where the decision is verified by the CJEU (Case C-246/2012 P).

Case summary EL5

Date

06/01/2019

Case identifiers

Member State

Greece

Court which adopted the ruling (national language)

Συμβούλιο της Επικρατείας

Court which adopted the ruling (English)

Council of State

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Greek

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

ΣτΕ 3157/2007

Procedural context of the case

The Court of Appeal confirmed the judgment of the Court of First Instance.

The plaintiff in cassation (Head of Tax Services) initiated proceedings before the Council of State against judgment 18/2002 of the Court of Appeal (administrative).

The Council of State accepted the appeal on the grounds that the Court of Appeal wrongfully interpreted Article 78(2) of the Greek Constitution by considering that the unlawfully granted State aid regarding a levy cannot be recovered due to the Greek Constitution's limitation on back taxes or duties (only allowed for the previous fiscal year).

Eventually, the Council of State reversed the judgment of the Court of Appeal and subsequently sent the case back to the Lower Court for re-assessment.

There was a Commission decision concerning this case (89/659/EEC), stating that the exemption from the exceptional levies on exports earnings imposed on undertakings that operate in Greece during that time constituted an unlawful indirect State aid granted by the Greek Government.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

07/11/2007

Language

Greek

Headnote

In this ruling, the Court stated that the exemption from the exceptional levies on export earnings was incompatible with State aid rules.

Parties

Names of the parties to the action

Προιστάμενος της Δημόσιας Οικονομικής Υπηρεσίας Κομοτηνής (anonymised)

Versus

Ανώνυμη Εταιρεία που εδρεύει στο Ανθοχώρι Κομοτηνής Ν. Ροδόπης. (anonymised)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

G - Wholesale and retail trade; repair of motor vehicles and motorcycles

Tax exemption on import earnings (canned food production and exportation)

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

In 1988, a decision was issued by the Minister of Finance regarding the imposition of a levy on the income of all undertakings, with the exemption of the export earnings.

Commission Decision 89/659/EEC stated that the exemption from the exceptional levies on exports earnings imposed on undertakings that operate in Greece during that time constituted unlawful indirect State aid granted by the Greek Government. According to the Commission's decision, this kind of tax exemption is considered as a boost in the export activity in favour of Greek companies. As a result, such an exemption is directly distorting the 'common market' between Member States by facilitating the export activity of Greek companies in the 'common market'.

The Hellenic Republic did not enforce the aforementioned Commission decision. The Commission initiated proceedings before the CJEU, which verified the Commission decision and the unlawful character of the measure.

The Hellenic Republic argued before the Court that the recovery of the State aid has to be imposed in the form of a back tax, which is in conflict with the Greek Constitution (Article 78 (2)). According to the Court's judgment, the Greek Government is obliged to take any kind of measures in order to recover State aid which has been unlawfully granted in order to comply with EU Competition Law (Case Commission of the European Communities v Hellenic Republic C-183/91).

In 1994, the Hellenic Republic, issued an order for payment (Article 21 N. 2214/1994 Law) for the recovery of the State aid in order to enforce the aforesaid ECJ (current CJEU) ruling.

The defendant, in the case at hand, brought proceedings before the Court of First Instance, which concluded that the recovery order violated the Constitutional provision (Article 78 (2)).

The Hellenic Republic filed for an appeal.

The Court of Appeal, by its judgment 18/2002 confirmed the judgment of the Court of First Instance.

The Hellenic Republic, represented by the competent authority (Head of Tax Services), appealed in cassation before the Council of State against judgment 18/2002 of the Court of Appeal (administrative).

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

In this ruling, the Council of State referred to Commission Decision 89/659/EEC which stated that the exemption from exceptional levies on the net export earnings of the undertakings operating in Greece was incompatible with Union law.

The decision of the Commission, which was fully adopted by the Court, stated that the exceptional levies imposed on undertakings that operate in Greece during that time constituted an unlawful indirect State aid measure granted from the Greek Government. According to the Commission decision, this kind of tax exemption is considered as a boost in the export activity in favour of Greek companies. As a result, such an exemption is directly distorting the 'common market' between Member States by facilitating the export activity of Greek companies in the 'common market'.

The Council of State accepted the appeal on the grounds that the Court of Appeal wrongfully interpreted article 78 (2) of the Greek Constitution, by considering that the recovery of the wrongfully granted State aid after two years violated the Greek Constitution and as a result could not be achieved. The Court ruled that this judgment was from the beginning invalid/void due to the fact that it violated State aid rules.

Eventually, the Council of State annulled the judgment of the Court of Appeal and subsequently sent the case back to the Court of Appeal for re-assessment.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The subsequent ruling from Court of Appeal (Administrative) of Komotini is not available (after re-assessment).

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-183/91 European Committee vs Hellenic Republic (1993) ECLI:EU:C:1993:233

National case law:
- Council of State, ΣτΕ. 1333/2002
- Council of State, ΣτΕ. 1335/2002

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Decision 89/659/EEC of 3 May 1989 relating to Ministerial Decision No E 3789/128 of the Greek Government establishing a special single tax on undertakings, OJ L 394, 30.12.1989

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

12.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Arios Pagos (Άρειος Πάγος)	Supreme Court	Last instance court (civil/commercial)	ΑΠ 194/2008	05/02/2008 (publication date)	Private enforcement	None - Claim rejected	The Court rejected the claim that the measure constituted unlawful State Aid, and no remedies were granted. There is a compensatory limitation by law in cases an employee is dismissed from Public Utility Companies, due to the nature of those companies and the benefit they provide for the society. According to the Court, that was justified due to the necessity of economic sustainability of that type of company. The Court ruled that the aforementioned limitation does not conflict with Articles 87 - 88 of the EC Treaty (current Articles 107 - 108 TFEU), since there is no direct grant from the State.		The court imposes on the plaintiff the defendants' expenditure. The Supreme Court (last instance court) dismisses the appeal; the judgment of the Court of Appeal (second instance court) is therefore in force (this decision is not available).
Συμβούλιο της Επικρατείας	Council of State	Last instance court (administrative)	ΣτΕ 336/2012	30/01/2012 (publication date)	Private enforcement	None - Claim rejected	The Court rejects the appeal and orders the plaintiff to pay costs. The Court concluded that due to the contributory character of the levy which is imposed on the producers in benefit of the Cotton Agency (approved by the Commission), it is not incompatible with Union law, nor does it distort competition. The levy (Article 30(1) of Law 2040/1992) is imposed on 1) the value that is paid to the producer for the cotton seed; and 2) on the amount of EU aid which might be granted to the producers. The Court stated that the levy is compatible with the Greek Constitution and EU Competition Law. The Cotton Agency does not fall within the scope of Articles 107 and 108 TFEU. By its judgment, the Court refused to assess the compatibility of the measure, because: 1) this falls under the exclusive competence of the Commission, which 2) had already ruled upon the issue by its decision dated 20 July 1999 (2000/206/EC).		
Συμβούλιο της Επικρατείας	Council of State	Last instance court (administrative)	ΣτΕ 1864/2012	21/05/2012 (publication date)	Private enforcement	Case sent back to the lower court for re-assessment	The Court partially accepts the appeal. It annuls in part the final decision of the Administrative Court of Appeal and refers the case back for re-assessment. It orders the plaintiff to pay costs. The Court recognises that the way that the 'National Organisation for Medicines' forms its funds does not constitute State aid. However, when this organisation decides to grant these funds to the National Medicine Industry and / or State Medicine Store, this should be classified as the granting of unlawful State aid.		The subsequent ruling from the lower court (Administrative Court of Appeal - 953/2004) is not available.
Συμβούλιο της Επικρατείας	Council of State	Last instance court (administrative)	ΣτΕ 1492/2013	17/04/2013 (publication date)	Private enforcement	None - Claim rejected	The Court rejects the appeal and orders the plaintiff to pay costs. The Court rejected the claim on the basis that the agreed price for the direct transfer of the mines and the exemption of the 'intervener' company from the transfer duties do not constitute State aid.		
Arios Pagos (Άρειος Πάγος)	Supreme Court	Last instance court (civil/commercial)	ΑΠ 2252/2013	20/12/2013 (publication date)	Private enforcement	None - Claim rejected	The claim was rejected by the Court. In Greece, there are two categories of Registrars. The first category receives a state-funded salary and the second category is unpaid, but their income is derived from every transaction carried out by every subcontractor with the Registrars' Office (free market variations). The Court ruled that the aforementioned limitation of the non-State-paid Registrar's salary is not in breach of Articles 107 - 108 TFEU, since there is no direct grant from the State.		The Court imposes on the plaintiff the defendants' expenditure. The Supreme Court (last instance court) dismisses the appeal; the judgment of the Court of Appeal (second instance court), which rejects the appeal as well, is therefore in force.
Συμβούλιο της Επικρατείας	Council of State	Last instance court (administrative)	ΣτΕ 2407/2014	30/06/2014 (publication date)	Private enforcement	None - Claim rejected	The Court rejects the appeal and orders the plaintiff to pay costs. One of the main reasons for rejecting the appeal is that the Extraordinary Solidarity Levy on RES Producers is part of the logic of the existing system of the production of electric power and is not prohibited under Union law (Articles 107-108 TFEU). The Court noted that national courts are not competent to assess the compatibility of the measure.		In the context of a pilot trial, the Supreme Court has ruled on the appeal procedure, which belongs to the lower administrative courts.
Συμβούλιο της Επικρατείας	Council of State	Last instance court (administrative)	ΣτΕ 3013/2014	19/09/2014 (publication date)	Private enforcement	None - Claim rejected	The Court rejects the appeal and orders the plaintiff to pay costs. According to the Court, the national courts are not competent to judge if a new State aid measure is compatible with the internal market. At the same time, the Commission is obliged to rule on the compatibility of the (new) planned State aid measure with the internal market. As such, the Court rejects the claim. The measures in question concern the option of ATE Bank, under the framework of the its resolution procedure, of transferring assets to another credit institution.		Hence, the Court rejected the claim for lack of jurisdiction, based on the argument that it is the exclusive competence of the Commission to rule on the compatibility of a measure entailing State aid with the internal market. However, the relevant paragraph of the judgment states that the appellants had put forward the claim that the measure constituted unlawful State aid, since it had not been duly notified to the Commission as provided in Article 108(3) TFEU.
Συμβούλιο της Επικρατείας	Council of State	Last instance court (administrative)	ΣτΕ 3016/2014	19/09/2014 (publication date)	Private enforcement	None - Claim rejected	The Court rejects the appeal and orders the plaintiff to pay costs. The Court rejects the appeal on the basis that the question of whether a scheme involving the alleviation of credit institutions by transferring such costs to the State, constituted State aid incompatible with the internal market, does not belong to the national courts as this assessment falls under the exclusive competence of the Commission.		See comment ruling ΣτΕ 3013/2014.

Ελεγκτικό Συνέδριο	Court of Audit	Last instance court (administrative)	ΕΣ 6026/2015	17/07/2015 (publication date)	Private enforcement	Other remedy imposed	The Court accepts the claim and revises the 2979/2015 decision of the VI Department of the Court of Auditors. The Court finds that, in case compensation is paid by the Member State to the operator in order to fulfil its public service obligation, that compensation must not exceed the amount necessary to cover the net cost of that obligation. Compliance with this obligation is necessary to ensure that a beneficiary is not granted a financial advantage which distorts or threatens to distort competition by strengthening its competitive position so that the compensation paid does not constitute State aid prohibited under Union law (Articles 107-108 TFEU).		This decision was issued by the Court of Audit in the context of its jurisdiction for pre-contractual control of public procurement.
Εφετείο στην Θράκη	Court of Appeal in Thrace	Second to last instance court (civil/commercial)	Εφετ.Θράκης 17/2016	25/01/2016 (publication date)	Private enforcement	None - Claim rejected	The Court rejects the appeal raised by the plaintiff, since the simplification of the mortgage registration procedure for the Agricultural Bank of Greece, does not constitute State aid and therefore does not conflict with Articles 107 - 108 TFEU, as there is no direct grant from the State resources or a public institution. In any case, according to the Court, the national courts are not competent to judge if new State aid is compatible with the internal market. At the same time, the Commission is obliged to rule on the compatibility of the (new) planned State Aid with the internal market. In case there is a notification of new measures, those cannot be considered as incompatible State aid, since the Commission has not yet ruled on those measures. The aim of this privilege given to the Agricultural Bank is to protect the interests both of the bank and the debtors and to assist the State in the exercise of its agricultural policy.		
Arios Pagos (Άρειος Πάγος)	Supreme Court	Last instance court (civil/commercial)	ΑΠ 817/2017	16/5/2017 (publication date)	Private enforcement	None - Claim rejected	The Court rejected the claim. The Court stated that Article 108 TFEU provides for different treatment based on whether there is a new State aid measure or an existing State aid measure: a new State aid measure has to be notified to the Commission (and cannot be brought into force until the Commission adjudicates) while an existing State aid can be enforced, as long as the Commission has not issued a decision deeming it incompatible with internal market. The Court also explained that national courts are not competent to adjudicate on whether a new State aid measure is compatible with the internal market (Lucchini, C-119/05), but they are merely protecting against a State's violations with regard to State aid rules, until the Commission reaches a final decision on the matter. In case there is a notification of new measures, those cannot be considered as an incompatible State aid, since the Commission has not yet ruled on those measures (decision 18 November 2010, CP322/09 P, NDSHT vs Comm). The Commission retains the exclusive competence to determine whether a measure constitutes incompatible State aid under Articles 107-108 TFEU - not the national courts. The Court concludes that Article 108 TFEU does not provide the national courts with the competence to ban the implementation of existing aid measures.		The Supreme Court accepts the appeal to the Supreme Court and consequently dismisses the appeal to the Court of Appeal (second instance court).
Arios Pagos (Άρειος Πάγος)	Supreme Court	Last instance court (civil/commercial)	ΑΠ 998/2017	13/06/2017 (publication date)	Private enforcement	None - Claim rejected	The Court rejected the claim that there was unlawful State Aid, and no remedies were granted. There is a compensatory limitation by law in cases where an employee is dismissed from Public Utility Companies, due to the nature of those companies and the benefit they provide for the society. According to the Court, that was justified due to the necessity of economic sustainability of that type of company. The Court concluded that the limitation does not infringe Articles 107-108 TFEU, because there is no distortion of the trade among Member-States, while the Public Utility Company is State-owned and State-funded.		The Court imposes on the plaintiff the defendants' expenditure. The Supreme Court (last instance court) dismisses the appeal; the judgment of the Court of Appeal (second instance court) is therefore in force (this decision is not available).
Συμβούλιο της Επικρατείας	Council of State	Last instance court (administrative)	ΣτΕ 3157/2007	07/11/2007 (publication date)	Public enforcement	Case sent back to lower court for re-assessment	The Court accepts the appeal and orders the plaintiff to pay costs. The exemption for the export earnings of undertakings from the levy imposed on the clean income of undertakings was, as a matter of principle, State aid as referred to in Article 107(1) TFEU. The provisions of Article 21 of Law 2214/1994, which provide for the recovery by the undertakings which have not paid it, do not constitute a tax exemption, in violation of Article 78(2) of the Constitution. As a result, the recovery was found to be lawful. Commission Decision 89/659/EEC stated that the measure in question (exemption from the exceptional levies on exports earnings imposed on undertakings that operated in Greece during that time) constituted indirect State aid granted by the Greek Government, which was incompatible with the internal market. Although the Greek Government had brought the measure into force prior to the notification to the Commission, the decision only addresses its compatibility. The Greek Government's action to recover the aid was challenged before national courts on the ground of Article 78(2) of the Greek Constitution, which prohibits the imposition of an economic burden retroactively. The action before the national courts was rejected.		
Μονομελές Διοικητικό Πρωτοδικείο	Single-Judge Administrative Court of First Instance	Lower court (administrative)	N2734/2016	29/09/2016 (publication date)	Public enforcement	None - Claim rejected	The claim was rejected. The case concerns an application for the suspension of the Commission decision to recover unlawful aid. The Court dismissed the application for the suspension of the interim judicial protection claimed against the Commission decision to recover State aid (2009/610/EC).		The plaintiff had appealed to the CJEU against the 2009/610/EC decision to recover State aid. The CJEU has published judgment C-246/2012 rejecting the appeal.
Τριμελές Διοικητικό Πρωτοδικείο	Three-Judge Administrative Court of First Instance	Lower court (administrative)	N2735/2016	29/09/2016 (publication date)	Public enforcement	None - Claim rejected	The case concerns an application for the suspension of the execution of the Ministry of Economy and Development document under the title "decision of the Commission to recover State aid (E2008) final 3118 of 2 July 2008''. The Court dismisses the application for suspension of an interim judicial protection against the decision of the Commission to recover State aid (2009/610/EC) given that the conditions for suspension provided in Article 202(4) of the Code of Administrative Procedure were not satisfied.		The plaintiff had appealed to the CJEU against the 2009/610/EC decision to recover State aid. The CJEU has published judgment C - 246/2012 rejecting the appeal.

13. Hungary

13.1 Country report

Name national legal expert

Prof Tihamér Tóth

Date

04/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

In Hungary, there is no specialised court with jurisdiction to hear cases concerning the public and private enforcement of State aid rules.

If the legal dispute involves the review of an act by a public authority, the litigation is conducted in a specialised section of the general courts, namely, the administrative and labour courts, which have been in existence since 2013. Their decisions can be challenged at the regional courts of appeals, and ultimately, on new questions of law, before the Supreme Court (Curia).

A new law (Act no. CXXX of 2018), which is the legal basis for the enforcement of State aid rules, established a branch of administrative courts within the Hungarian judicial system, placed under the direction of a newly created Supreme Administrative Court. Since January 2018, eight administrative regional courts, with seats in Budapest and in some major towns in Hungary, review acts of the public administration at first instance.

Currently, the Curia is the Supreme Court. The new Supreme Administrative Court will operate from 2020.

A description of the procedural framework applicable in public enforcement of State aid rules

In Hungary, there is no specific law regulating the recovery of unlawful State aid. According to Act CXCV of 2011 on public finances, unlawful aid shall be recovered as if it were taxes due. According to Article 24(2) of Government Decree Number. 37/2011, the minister refers to the body granting the aid to take the necessary steps to recover the aid with interest.

However, in practice these rules have not yet been applied. In Hungary, so far there have been five cases in which the recovery of aid was ordered. In none of these cases has the Commission started an infringement procedure against Hungary for a failure to enforce a recovery decision. According to the information available on the Commission's website, there are two pending cases.[167] In the advertisement tax case,[168] the Hungarian Parliament has already adopted the necessary amendments to the act. In the *Malév* case, which was also discussed in one of the case summaries,[169] the judicial phase of the liquidation procedure is still in progress, but it is rather unlikely that the unlawful aid can ever be recovered due to lack of assets .

Unlawful aid can be recovered in several ways. The most efficient method of recovery is to conclude an agreement between the aid-granting body and the aid beneficiary (*e.g*. *Péti Nitrogénművek* case involving an unlawful State guarantee). [170] If the aid took the form of a tax measure, new legislation (most likely an act of Parliament) is likely to be adopted. For example, in the most recent advertisement tax aid case, Hungary amended the relevant provisions of the legislation with retroactive effect.[171]

The current regulatory system is thus not clear enough. If there is no cooperation from the aid beneficiary, a judge is put in a rather difficult position with regard to the adoption of a timely and effective judgment enforcing the recovery decision.[172]

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

See the answer to the first question above.

A description of the procedural framework applicable in private enforcement of State aid rules

General courts have jurisdiction to hear disputes among private parties concerning unlawful aid. Their seats are in chief towns of the 19 counties and in Budapest. Among these courts, the Budapest-Capitol Regional Court is likely to hear many of the cases at first instance. Judgments can be appealed before one of the five regional courts of appeal. Finally, the Supreme Court can exercise extraordinary judicial control. In some cases, where the first instance decision is handed down by a regional court of appeal, the Supreme Court will act as a normal review court.

Main findings based on the case summaries

The limited number of State aid cases in Hungary does not allow an identification of trends in judicial law enforcement. It is rather difficult to search the general judicial database for cases involving issues related to State aid rules. Neither the State Aid Monitoring Authority,

[167] http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html (last accessed on 22 March 2019).
[168] Commission Decision 2017/329; OJ L 49, 25.02.2017, p. 36
[169] Regional Court of Budapest, 10.11.2016 - 3.G.40.722/2014/96 (HU1).
[170] Here, the State-owned Hungarian Investment Bank and the company modified their agreement within two months. The company challenged the Commission decision, but failed (Case T-387/11 *Nitrogénművek Vegyipari Zrt. v Commission* (2013) ECLI:EU:T:2013:98).
[171] Hungary requested the GC to adopt an interim measure to suspend the recovery decision; however, during the CJEU appeal procedure it nevertheless adopted the necessary amendments to the advertising tax law. C-204/17 P(R) *Hungary v Commission* (2017) ECLI:EU:C:2017:751:.
[172] Staviczky, P "Hungarian experiences and regulations regarding recovery" *Hungarian Yearbook of International Law and European Law,* 2015, p. 591.

nor the Ministry of Justice, receives information from courts about procedures where Articles 107 and 108 TFEU are applied.

There has been no case yet involving a legal dispute about the enforcement of a recovery decision. In the reviewed cases, when the Commission ordered recovery of unlawful aid, the recovery decision was enforced without problems (also including cases when recovery occurred without a financial transaction, like in the Hungarian MVM's stranded costs decision) or the recovery decision was impossible to enforce (*e.g.* the *Malév* case where the company was liquidated).

Private actions involve a wide variety of claims, such as: actions for damages (the *Malév* case (HU1)), reimbursing tax involving unlawful State aid (the *Hervis* case (special tax)),[173] challenging a levy constituting part of a State aid scheme (the *wine marketing surcharge* case),[174] access to public information about tax allowances given to third parties,[175] challenging a radio spectrum allocation decision,[176] etc.

The low number of cases does not allow the identification of economic sectors where the enforcement of State aid rules is particularly significant. The special tax imposed on big companies, mainly multinational companies, in 2011, generated at least three cases, which also involved the CJEU preliminary ruling procedure: Case *Tesco-Global Áruházak,*[177] Case *Vodafone Magyarország,*[178] and Case *Hervis Sport- és Divatkereskedelmi*[179] – the CJEU ruling in the selected case, Kfv.I.35.116/2015 (HU3)). The plaintiffs represented the retail and telecommunication sectors.

Qualitative assessment of the average time of court proceedings

There have been cases in which the European Court of Human Rights (ECHR) has held that court proceedings are too lengthy in Hungary (*e.g.* ECHR *Gazsó v. Hungary*, 16.10.2015, 48322/12.)[180] The Hungarian Parliament only recently adopted new procedural laws for criminal, civil and administrative procedures. Thus, the effects of these new laws on the duration of the proceedings cannot be evaluated yet. In 2016, 88% of the cases were closed within one year. In the same year, the ECHR established the infringement of the principle of fair duration of trials in 16 Hungarian cases.[181]

The number of State aid related court cases does not allow a comparison of the duration of State aid court proceedings with other proceedings on different matters. The cases discussed in the country report did not raise any issues with regard to the duration of the court proceedings. The average duration of court proceedings is about two to three years (for the first and second instance). For example, in the case relating to the special tax, it took about three years for the first instance court to adopt its judgment. This, however, included a CJEU preliminary ruling procedure as well. The second instance review by the Supreme Court took one more year.[182]

Qualitative assessment of the remedies awarded by national courts

It is clear from the case summaries that no remedies were granted. This might be because the parties' lawyers do not possess full awareness of State aid rules. If they do not argue their case properly and if they do not present the facts and CJEU case law accurately, the judges lacking special expertise will not invoke State aid rules *ex officio*. In this regard, it is worth noting the Supreme Court's judgment in the special tax case where it noted that the plaintiff failed to elaborate on its arguments relating to the infringement of State aid rules (in addition to internal market rules).

Qualitative assessment of the application of the State aid *acquis*; preliminary references

In general, it seems that the State aid *acquis* has been properly applied. Lower courts do not refer extensively to CJEU case law or other sources of law. The judgment of the Supreme Court in the wine surcharge case relied on the most case references (Supreme Court, 8.4.2014 - Kfv.37.202/2013/10 (HU2)). In the special tax case involving a CJEU preliminary ruling, the first instance court quoted the CJEU's judgment at length (Supreme Court, 24.9.2015 - Kfv.I.35.116/2015 (HU3)). There have been two preliminary rulings as regards State aid cases in Hungary (Supreme, 24.9.2015 - Kfv.I.35.116/2015 (HU3) (*Hervis*) and Budapest-Capital Regional Court - 3.G.42.116/2017/7 (no judgment available, involving OTP Bank)) and two more are in progress. On average, of the recently acceded countries, Hungarian judges are known for being the most active in referring requests for a preliminary ruling to the CJEU.

Qualitative assessment of any other relevant trends in State aid enforcement

Based on the number of cases concerning the enforcement of State aid rules, further trends cannot be identified. In particular, the limited number of cases does not allow an assessment of whether judges have become more familiar with State aid rules and thus whether the overall quality of national rulings has improved over the period 2007–2017.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

No problems were noted with the manner in which the notion of State aid was interpreted at national level.

Any other relevant comments or findings

Not applicable

[173] Supreme Court, 24.9.2015 - Kfv.I.35.116/2015 (HU3).
[174] Supreme Court, 8.4.2014 - Kfv.37.202/2013/10 (HU2).
[175] Budapest Court of Appeal - Pf.20.163/2016/4.
[176] Supreme Court, 26.2.2013 - Kfv.III.37.666/2012/27.
[177] Case C-323/18 *Tesco-Global Áruházak* within the national case Budapest-Capital Administrative and Labour Court - 16.K.33.199/2017.
[178] Case C-75/18 *Vodafone Magyarország* within the national case Budapest-Capital Administrative and Labour Court 16.K.32.005/20 17.
[179] Case C-385/12 *Hervis Sport- és Divatkereskedelmi* (2014) ECLI:EU:C:2014:47.
[180] ECHR *Gazsó v. Hungary*, 16.10.2015, 48322/12.
[181] Source: 2018/5 Infojegyzet of the Hungarian Parliament, available at http://www.parlament.hu/documents/10181/1479843/Infojegyzet_2018_5_birosagi_eljarasok.pdf/e41e9555-45ff-eaff-9193-737d0958ef59 (last accessed on 4 January 2019).
[182] Supreme Court, 24.9.2015 - Kfv.I.35.116/2015 (HU3).

13.2 Case summaries

Case summary HU1

Date

29/12/2018

Case identifiers

Member State

Hungary

Court which adopted the ruling (national language)

Fővárosi Törvényszék

Court which adopted the ruling (English)

Regional Court of Budapest

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

Hungarian

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

3.G.40.722/2014/96

Procedural context of the case

An action for damages was launched by the former lender and later owner of Malév, a company that had received unlawful State aid over many years. The first instance judgment (discussed in this document), was appealed against the Budapest Court of Appeal (Fővárosi Ítélőtábla) as regards the amount of the costs of the litigation (ruling 16.Gf.40.042/2017/7 of 17 May 2017).

Type of action

Private enforcement

Delivery date of the ruling

10/11/2016

Language

Hungarian

Headnote

In this ruling, the Court held that there was no direct causal link between the failure to prepare a restructuring plan by the State for national airline Malév and the damage suffered by the plaintiff, that had lent money to the former airline.

Parties

Names of the parties to the action

Anonymised

Versus

Anonymised

The relationship of the plaintiff to the measure

Third party

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Airline services

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The facts of the case relate to the privatisation and the renationalisation of the former Hungarian national airline, Malév. After several unsuccessful attempts of privatisation, in 2007 the Hungarian State concluded a sale and purchase agreement with AirBridge. In 2008, VEB, the Russian State-owned Bank of Foreign Economic Activity gained a stake of 49.5% in AirBridge and became Malév's indirect shareholder. On 26 February 2010, a five-party agreement ('the Agreement') was concluded between VEB, AirBridge, the State Holding Company ('MNV'), Malév and the Hungarian Government. According to point 3.2 of the agreement, a restructuring plan had to be prepared and submitted to the Commission for approval. The measures resulting from the Agreement led to the renationalisation of Malév. After the capital increase, the State became a 94.6% shareholder and AirBridge/VEB was diluted. Between May and August 2010, the Hungarian State provided Malév with a number of shareholder loans through MNV totalling HUF 9.2 billion (EUR 34 million). On 24 September 2010, MNV also increased the capital of Malév by injecting a further HUF 5.3 billion (EUR 19.3 million) of cash into the company.

Following a complaint by a competing airline concerning unlawful State aid to Malév, at a meeting on 5 May 2010, the Hungarian authorities indicated to the Commission that they intended to restructure the airline; however, they could not tell how far-reaching this restructuring would be. On 21 December 2010, the Commission opened a formal investigation procedure pursuant Article 108(2) TFEU concerning various alleged State aid measures implemented in favour of Malév. On 9 January 2012, the Commission adopted its decision establishing the incompatibility of various State aid measures and ordered Hungary to recover unlawful State aid to national airline Malév between 2007 and 2010 (Commission Decision SA.30584 (C 38/2010, ex NN 69/2010)).

The Commission found that financing granted to Hungarian flag carrier Malév between 2007 and 2010 in the context of its privatisation and renationalisation constitutes unlawful State aid, as Malév would not have been able to obtain similar financing from the market on the terms conceded by the Hungarian authorities. Companies in difficulty may receive State aid only under strict conditions and the measures in favour of Malév did not meet these criteria, because Malév could not demonstrate how it would become viable again under its current business model. According to the decision, Malév's business plan contained no evidence that a private source would be contributing to the cost of restructuring and the plan contained no compensatory measures to minimise the competition distortions brought about by the significant state support.

The Hungarian authorities were given four months to calculate and recover the amount of unlawful State aid.

On 14 February 2012, a liquidation procedure began against Malév. VEB registered its claim of HUF 36.8 billion. The liquidator informed VEB a few months later that the total amount of claims amounts to HUF 168.7 billion against Malév, and even the costs of the winding-up (HUF 12.4 billion) exceed the value of Malév's assets of HUF 2.4 billion.

The plaintiff asked the Court to award damages in the amount of HUF 36.8 billion plus interest to be paid jointly and severally by the two defendants. It argued, first, that the defendants agreed in February 2016 to prepare a restructuring plan in line with the Commission's guidelines on State aid for rescuing and restructuring firms in difficulty. Even though the plaintiff fulfilled its obligations under the agreement, the restructuring plan was not prepared. As a result, the measures based on the agreement were declared State aid by the Commission, resulting in a recovery decision which led to the liquidation of Malév. Since Malév's assets do not even cover the costs of the liquidation, the plaintiff will not be able to satisfy its claims. Relying on the examples of the Czech and Polish

airlines, it submitted that under exceptional circumstances such as the global economic crisis, an exception to the principle of 'one time, last time' can be granted. The service by the defendants was thus not impossible. Had there been a restructuring plan laid down and submitted to the Commission, Malév's debts, including the plaintiff's claims could have been satisfied.

As a second argument, the plaintiff explained that the II. defendant gave unlawful aid to Malév between 2007 and 2010. At the time when the plaintiff provided the credit facility to Malév, he did not question that the State complied with State aid rules requirements. If he knew that the State did not notify the aid to the Commission, it would not have given loan to a company artificially kept alive by unlawful state funding. The plaintiff recalled that Union law gives standing not only to competitors but also to third parties who suffered damages due to unlawful State aid.

Defendant I. argued that the effect of agreement providing for the reorganisation of Malév was subject to the Commission decision declaring the aid compatible. The statement regarding the restructuring of the airline was not meant to be an obligation towards the plaintiff bank. The agreement was essentially about the defendants taking over the failing airline from the plaintiff in order to avoid its immediate liquidation. Since it informed the Commission about its plans to reorganise Malév, it fulfilled its obligations under the agreement. The parties of the multi-sided agreement were aware that the rescue plan will take effect only if the Commission approves it. The preparation of the restructuring plan would have been a second step in the process. The defendant recalled that the Commission declared that even the rescue measures were incompatible with Article 107(1) TFEU. The very first steps made in line with the agreement, i.e. the capital increase, infringed EU rules as regards the rescuing of failing firms (Commission guidelines No. 2004/C/244/02.). As a result, the defendants were not obliged to prepare a restructuring plan. With that, the implementation of the agreement became impossible. Furthermore, even if the plaintiff suffered damage, it was not caused by the defendants. The position of the plaintiff did not worsen compared to its situation before the agreement, nor would it have become better, had the restructuring plan been prepared.

Defendant II. added that the State was not formally part of the agreement, its representative just countersigned that. In any way, the liquidation of Malév was not caused by the recovery decision. To the contrary, it was the result of a lack of reorganising Malév during the years when the company was under the plaintiff's control. The Court appointed expert established that Malév was insolvent at the time when the agreement was signed. Finally, the plaintiff was aware of the various State aid measures granted to Malév between 2007 and 2010, even if it was not aware of their incompatibility with State aid rules.

Remedy(ies) sought

Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

The Court reminded the parties of the main principles of Commission's guidelines on State aid for rescuing and restructuring firms in difficulty (2004). Rescue aid should be temporary and reversible assistance. Its primary objective is to make it possible to keep an ailing firm afloat for the time needed to work out a restructuring plan. Moreover, the rescue aid must be limited to the minimum necessary. It shall offer a short respite, not exceeding six months, and the aid must consist of reversible liquidity support in the form of loan guarantees or loans. Structural measures which do not require immediate action, such as, the irremediable and automatic participation of the State in the own funds of the firm, cannot be financed through rescue aid.

The Court noted that although the capital increase was meant to rescue the company, yet it could not have been approved by the Commission, because of its form did not constitute temporary and reversible assistance. The Court then established that no restructuring plan was drawn up by defendant I.

The Court stated that the adoption of a restructuring plan was not an impossible service offered by the defendant. It did not make the agreement null and void. Neither did the submission of a complaint, nor the launch of the Commission's investigation made the provision of the restructuring plan impossible. Interpreting the Commission's guidelines, the Court held that the submission of a restructuring plan can occur at the same time with the rescue measures. The Court also noted that the capital increase by the State could have been lawful only if a restructuring plan was presented to the Commission. The Court thus concluded that defendant I. was under an obligation to elaborate a restructuring plan which he failed to provide to the plaintiff.

Next, the Court evaluated whether the plaintiff suffered damages as a result of this breach of the contract. The conclusion of the agreement did not grow the assets of the plaintiff. The fulfilment of the agreement, i.e. the adoption of a viable restructuring plan was a sort of promise to get back its money that had already been lost.

The Court finally looked at the causal link between the damage and the conduct of defendant I. The Court held that causation did not exist. Even if the Commission had approved the restructuring plan, it is not certain that its implementation would have been successful. Considering the failure to restructure Malév in the previous years and the lack of private investors' interest in acquiring the company, the success of the restructuring was rather unlikely. This conclusion was also supported by the Court appointed expert. The causal link between the breach of contract and the plaintiff's prospective loss of profit was so indirect and distant that it was not sufficient to make defendant I. liable for damages.

As to the arguments concerning non-contractual liability, the Court recalled that the unlawful aid measures granted to Malév between 2007-2010 were specific as far as they were booked in the company's accounts and they ought to have been repaid. None of the defendants undertook, as they were not able to undertake it that the Commission would approve the restructuring plan. Although a causal link exists between the submission of a restructuring plan and the repayment of the loans to the plaintiff, this is too distant to support a claim for damages. Moreover, the defendants did not deceive the plaintiff as to the financial conditions of Malév. The State aid measures granted to Malév must have been known to the plaintiff. Being a professional bank, it should have realised the State aid risks involved. Therefore, the plaintiff cannot base its claim on a lack of its own fault.

The Court, refusing its claims, ordered the plaintiff to pay the costs of the defendants in the amount of HUF 15 million plus VAT. This part of the judgment was appealed by the defendants. The second instance Court, taking into account that there were 14 days spent in Court and that many submissions had to be filed, increased the amount of costs to be paid to HUF 25-25 million.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2–17

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary HU2

Date

27/12/2018

Case identifiers

Member State

Hungary

Court which adopted the ruling (national language)

Kúria

Court which adopted the ruling (English)

Curia

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Hungarian

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

Kfv.37.202/2013/10

Procedural context of the case

The plaintiff challenged a decision of the National Food Chain Safety Office (NFCSO) to impose a surcharge and a fine at the first instance court. The first instance court dismissed the claim (judgment of the Regional Court of Budapest of 12 December 2012, No. 25.K.31940/2011/19). The plaintiff lodged an appeal against this ruling to Curia.

Type of action

Private enforcement

Delivery date of the ruling

08/04/2014

Language

Hungarian

Headnote

In this ruling, the Court held that an wine marketing surcharge imposed on a distributor did not amount to State aid, advantageous to local wine makers.

Parties

Names of the parties to the action

Anonymised

Versus

Nemzeti Élelmiszerlánc-biztonsági Hivatal

The relationship of the plaintiff to the measure

Other

Party subject to the levy

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

G - Wholesale and retail trade; repair of motor vehicles and motorcycles

Distribution of wine

The type of State aid measure challenged in the court proceedings

Other

Levy to promote Hungarian wines

Substance of the case

Facts and parties' main arguments in the case

The National Food Chain Safety Office (the defendant) had ordered the payment of a marketing surcharge of HUF 5.58 million and imposed a fine of the same amount to the plaintiff, a Hungarian wine distributor, on wines imported from Member States, on the basis of the Act No. XVIII of 2004 on wines (hereinafter also referred to as: 'the Act'). The Act provides that the person putting wine on the market for public consumption shall pay a certain amount of wine surcharge. The surcharge contributed to the financing of public marketing of Hungarian wine (60%) and the costs of the authority in charge of quality control of wines (40%).

The plaintiff requested the Court to annul the decision to impose the surcharge and the fine. It argued, amongst others and with regard to the State aid issue at hand, that the surcharge constituted an integral part of a state measure of which Hungarian wine producers benefited and which was not notified to the Commission. Without the surcharge, Hungarian producers would have had to cover the costs of national promotion programmes and consumer/quality protection activities themselves. The plaintiff suggested that the Court would refer a request for a preliminary ruling to the CJEU.

The defendant maintained that the plaintiff failed to meet its obligation to pay the surcharge levied on wines imported from Member States.

Remedy(ies) sought

Other remedy sought

Annulment of the decision of the NFCSO ordering the payment of the surcharge and imposing a fine

Outcome of the case

Conclusions adopted by the national court

The Court rejected the arguments of the plaintiff. The Court acknowledged that the wine marketing surcharge was created to strengthen the market position of Hungarian wine which benefited not only producers but also distributors of wine. With regard to the State aid argument, the Court referred to Article 107(1) and Article 108(3) TFEU and to CJEU case law. It considered that, while the measure at hand constitutes a form of parafiscal surcharge which is levied upon undertakings of a certain economic, often agricultural sector to finance the activities of a public or private body established to support this sector, it did not constitute State Aid. The Court contended that, pursuant to current jurisprudence, for a tax to be regarded as forming an integral part of an aid measure, it must be linked to the aid measure under the relevant national rules, in the sense that the revenue from the tax is allocated to the financing of the aid. In the event of such designation, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the internal market. Such direct link between the surcharge and the aid measure is missing in cases where ministers have the authority to decide about the allocation of the surcharge every year, where the amount of the surcharge is spent for other purposes than the promotion of a certain sector, ow where the surcharge is levied on persons not operating in the supported economic sector.

The Court held, without elaborating further on this point, that the wine marketing surcharge was not hypothecated to the measures promoting the Hungarian wine sector.

Furthermore, the Court found that the selectivity element was absent with regard to the payment of the surcharge, since not only domestic, but also other distributors were subject to this surcharge.

With regard to plaintiff's argument that the measure should have been notified to the Commission, the Court referred to Regulation (EC) No 3/2008 of 17 December 2007 on information provision and promotion measures for agricultural products on the internal market and in third countries, according to which national marketing programmes approved by the Commission can be co-financed by surcharges without being subject to the general notification obligation under Article 108(3) TFEU.

The Court decided not to refer a request to the CJEU for a preliminary ruling, since there was case law available to adopt a judgment.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-174/02, Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien (2005) ECLI:EU:C:2005:10
- C-266/04 to C-270/04, C276/04 and C-321/04 to C-325/04, Nazairdis SAS and Others v Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales (Organic) (2005) ECLI:EU:C:2005:657
- C-393/04, Air Liquide Industries Belgium SA v Ville de Seraing (2006) ECLI:EU:C:2006:403
- 526/04, Laboratoires Boiron SA v Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon (2006) ECLI:EU:C:2006:528

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 3/2008 of 17 December 2007 on information provision and promotion measures for agricultural products on the internal market and in third countries, OJ L 3, 5.1.2008

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

It is not entirely clear why the Curia held that the wine marketing surcharge was not hypothecated to the state measures supporting the wine sector. The Court explained that the Hungarian regulation expressly provides that 60% should be allocated on national marketing, 40% should cover the costs of quality control. There were no discretionary decisions given to a minister. The Curia also pointed out that the actual content of the programmes financed by the central marketing agency is irrelevant (the annual marketing plan of this agency was subject to ministerial approval). Even if hypothecation were established, the Curia could have refused the Plaintiff's arguments pointing out that the parafiscal surcharge supporting the Hungarian wine sector were exempt from the general rules of State aid control.

Case summary HU3

Date

01/01/2019

Case identifiers

Member State

Hungary

Court which adopted the ruling (national language)

Kúria

Court which adopted the ruling (English)

Curia

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Hungarian

Hyperlink to ruling

http://www.kuria-birosag.hu/hu/elvhat/32016-szamu-kozigazgatasi-elvi-hatarozat

Case reference

Kúria Kfv.I.35.116/2015

Procedural context of the case

The Administrative and Labour Court of Székesfehérvár annulled decision of the tax authorities (defendant) against Hervis (plaintiff) taken under an unlawfully discriminatory tax aid scheme (decision of 6 November 2014**,** K.27060/2014/24). The plaintiff paid the special tax, (i.e. extraordinary tax introduced by HU to cope with the aftermath of the economic crisis) but submitted a self-correction application reclaiming the paid amount, which was rejected by the tax authority. The Administrative and Labour Court, following a preliminary ruling given by the CJEU, annulled this decision and ordered the tax authority to start a new procedure (an administrative procedure in relation to the claim of Hervis for the reimbursement of unlawful taxes imposed). Following an unsuccessful appeal to the Administrative and Labour Court of Székesfehérvár by the tax authority, it appealed the Curia.

Due to the importance of the ruling, the judgment was delivered in the form of a decision of principle ('elvi határozat') which is meant to promote uniformity of jurisprudence in Hungary.

Type of action

Private enforcement

Delivery date of the ruling

24/09/2015

Language

Hungarian

Headnote

In this ruling, the Court held that the first instance court had correctly established that a sector specific taxation scheme was discriminatory and infringed Union law. The plaintiff was thus entitled to seek reimbursement of the unlawful tax levied on him. The Court based its judgment of free movement rules, omitting the State aid rules related claim.

Parties

Names of the parties to the action

Hervis Sport- és Divatkereskedelmi Kft.

Versus

Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága

The relationship of the plaintiff to the measure

Other

Party subject to the levy

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

G - Wholesale and retail trade; repair of motor vehicles and motorcycles

Retail trade of sporting products

The type of State aid measure challenged in the court proceedings

Other

Special tax (i.e. extraordinary tax introduced by Hungry to cope with the aftermath of the economic crisis)

Substance of the case

Facts and parties' main arguments in the case

On 18 October 2010, the Parliament of the Republic of Hungary adopted an act (law No. XCIV of 2010) imposing a special tax on a number of sectors including retail sales, energy and telecommunications. According to the preamble of the law No. XCIV of 2010, in the context of the adjustment of the budgetary balance, the Parliament established this special tax on taxpayers whose capacity to bear public burdens surpasses the general obligation to pay tax. The tax rate was 0% for the band of the taxable amount up to HUF 500 million, 0.1% for the band between HUF 500 million and HUF 30 billion, 0.4% for the band between HUF 30 billion, and HUF 100 billion, and 2.5% for the band above HUF 100 billion.

Hervis operated sports shops in Hungary. As a subsidiary of SPAR Österreichische Warenhandels AG ('SPAR'), Hervis was part of the SPAR group. On that basis, Hervis was liable to pay a share, in proportion to its turnover, of the special tax payable by all the undertakings belonging to that group on the basis of their overall turnover achieved in Hungary. As a result of the application of the progressive scale of the special tax to the overall turnover of that group, Hervis was subject to an average rate of tax considerably higher than that corresponding to the taxable amount consisting solely of the turnover of its own stores.

Hervis requested the local Administrative and Labour Court of Székesfehérvár to hold that the provisions of the law on the special tax were in breach of Union law. Such a system infringed Articles 18, 49 to 55, 65 and 110 TFEU, and constituted prohibited State aid. Articles 49 TFEU and 54 TFEU preclude a difference in treatment, which is based de jure on the apparently objective criterion of differentiation of the level of turnover, but which disadvantages de facto the subsidiaries of parent companies that have their registered offices in other Member States, in the light of the structure of store retail trade on the Hungarian market, and in particular the fact that retail stores belonging to such companies are generally organised, as is the case of Hervis, in the form of subsidiaries.

Before deciding the case, the Court of Székesfehérvár turned to the CJEU requesting the clarification of various TFEU Articles. The Court did not include Article 107 TFEU, partly disregarding the plaintiff's claim.

In answering that question the CJEU did not follow the advice of AG Kokott who suggested that Article 49 TFEU, in conjunction with Article 54 TFEU, does not preclude the levying of such a tax as described by the referring court. The referring court should rather examine whether the special tax is compatible with Article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

The CJEU stated that the law does not entail any direct discrimination where the special tax on store retail trade is levied in identical circumstances for all the companies exercising that activity in Hungary. However, if it is established that the taxable persons belonging to a group of companies and covered by the highest band of the special tax are, in the majority of cases, linked to companies which have their registered offices in other Member States, the application of the steeply progressive scale of the special tax to a consolidated tax base consisting of turnover is liable to entail indirect discrimination on the basis of the registered office of the companies for the purposes of Articles 49 TFEU and 54 TFEU. Such a restriction is permissible only if it is justified by overriding reasons in the public interest. The restriction should also be appropriate for ensuring the attainment of the objective pursued and not go beyond what is necessary to attain that objective. The CJEU noted that the Hungarian Government did not identify such a public interest goal before the court. Nevertheless, neither the protection of the economy of the country, nor the restoration of budgetary balance by increasing fiscal receipts could justify such discrimination.

Thus, on the 4th of February 2014, the CJEU ruled that Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation relating to tax on the turnover of store retail trade which obliges taxable legal persons constituting, within a group, 'linked undertakings' within the meaning of that legislation, to aggregate their turnover for the purpose of the application of a steeply progressive rate, and then to divide the resulting amount of tax among them in proportion to their actual turnover, if – and it is for the referring court to determine whether this is the case – the taxable persons covered by the highest band of the special tax are 'linked', in the majority of cases, to companies which have their registered office in another Member State.

The Court of Székesfehérvár determined, based on the facts presented by the plaintiff that the national legislation did have the effect of disadvantaging legal persons which belonged to a group of non-Hungarian companies. There were five companies that were subject of the highest tax rate, all of them belonging to a group of companies with a registered office in another Member State. There was no Hungarian company subject to the highest rate. The Court did not identify public interest that could justify such indirect discrimination.

The national Court concluded that, for the purposes of deciding the case at hand, it must set aside that part of the act which regulates the calculation of the tax basis to the disadvantage of foreign undertakings. The plaintiff cannot be relieved from its obligation to pay the special tax, but its basis should be limited to the turnovers achieved by their Hungarian stores. Consequently, it will fall in the 0.1% category instead of paying a 2.5% special tax rate. It thus set aside the decision of the tax authority and ordered a new procedure.

For the national Court the main feature of the special tax law making it incompatible with Union law was the provision on calculating the tax basis for companies belonging to a group of companies. It did not interpret the preliminary ruling given by the CJEU as holding the steeply progressive rate as such unlawful.

Both the defendant and the plaintiff requested the Curia to exercise extraordinary review of the final judgment of the Court of Székesfehérvár. The defendant tax authority argued in essence that it acted in accordance with Hungarian tax laws. Hervis aksed the Curia to change the reasoning of the judgment by declaring that also the rather steep progressive tax rate was incompatible under Union law.

Remedy(ies) sought

Other remedy sought

Annulment of the decision of the tax authority refusing to consider the application of the plaintiff to pay a lower amount of special tax

Outcome of the case

Conclusions adopted by the national court

The Court ruled that the Administrative and Labour Court of Székesfehérvár did not decide on the claim of the plaintiff as regards the breach of State aid rules. However, since the plaintiff did not raise this issue before the it, the Court was not able to rule on this.

Since the parties gave different interpretations to the preliminary ruling given by the CJEU, the Curia also recalled the conclusion and reasoning of the CJEU. As a result, it held that the court of Székesfehérvár interpreted the CJEU judgment correctly and followed the instructions as regards exploring the facts necessary to decide the case.

Since national tax rules do not regulate the procedure to be followed in case of tax rules infringing Union law, the Court was also correct to order the tax authority to reconsider the self-correction submitted by the plaintiff.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

Reimbursement of the taxes paid under a specific tax scheme due to breach with Union law

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:

- C-385/12 Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága; (2014) ECLI:EU:C:2014:47

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-385/12 Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága; (2014) ECLI:EU:C:2014:47 (http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrec=nl&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-385%252F12&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=6292896)

Any other comments (optional)

No other comments

13.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Kúria	Curia	Last instance court (administrative)	Kfv.III.37.666/2012/27	26/02/2013	Private enforcement	None - Claim rejected	The Court rejected the application of telecoms companies challenging a spectrum allocation decision, relying on the plaintiff's State aid arguments.	There is an obligation on administrative courts reviewing administrative decisions to deal with State aid related arguments raised by the parties. Reference to case law and the Commission's notice on co-operation with national judges.	
Kúria	Curia	Last instance court (administrative)	Kfv.37.202/2013/10.	08/04/2014	Private enforcement	None - Claim rejected	The Court dismissed the claim that challenged an order by the customs authority to pay a surcharge and the same amount in penalties. Wine marketing surcharge does not amount to State aid.	Definition of State aid, parafiscal charges, reference to CJEU case law.	
Kúria	Curia	Last instance court (administrative)	Kúria Kfv.I.35.116/2015	24/09/2015	Private enforcement	Other remedy imposed	The Administrative and Labour Court had annulled a tax authority decision which enforced an unlawfully discriminatory tax aid scheme. The plaintiff executed a payment in the form of extraordinary tax, then submitted a self-correction application reclaiming this amount, which was rejected by the tax authority. The Court annulled the decision and ordered the tax authority to start a new procedure. Following an unsuccessful appeal, the Court confirmed the first instance decision.	National law imposing extra tax on certain entities, applying discriminatory rules, infringed Union law. The Court referred a request for a preliminary ruling to the CJEU (case C-385/12). Although the plaintiff's claims included the argument that there was provision of unlawful State aid as well, the national court relied only on Articles 49 and 54 TFEU to establish the discriminatory nature of the extra tax legislation.	In Hungary, there are specialised courts that decide on labour and administrative law cases at first instance. There are two other references for a preliminary ruling regarding the same extra tax legislation before the EUCJ (Tesco and Vodafone), judgments are expected in the course of 2019.
Fővárosi Törvényszék	Budapest-Capital Regional Court	Lower court (civil/commercial)	3.G.40.722/2014/96	10/11/2016	Private enforcement	None - Claim rejected	The Court rejected the claim for damages and dismissed the application of a bank suing a former national airline (Malev) for damages. The Court considered that the plaintiff had not suffered damages since Malev was a bankrupt company. The fact that no restructuring plan was prepared for the Commission did not cause harm to the plaintiff.	The Court referred to the relevant Commission decision and the restructuring guidelines. Private enforcement follow-up to the recovery decision which led to the liquidation of the Hungarian airlines Malev.	
Kúria	Curia	Last instance court (administrative)	Gfv.VII.30.191/2015/11.	09/12/2016	Private enforcement	None - Claim rejected	Applying for a SAPARD-financed aid for construction projects was conditional upon preparing documentation and bills according to the applicable 'construction industry's collection of norms' prepared by a company. An undertaking producing a similar collection of norms sued the ministry allocating the aid for allegedly aiding its competitor. The plaintiff could not prove that trade between Member States was affected and that public resources were involved.		

14. Ireland

14.1 Country report

Name national legal expert

Peter McNally

Date

04/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Rule 4(1) of O. 63B of the Rules of the Superior Courts provides that competition proceedings shall be heard in the Competition List of the High Court. Appeals from the High Court lie to the Court of Appeal, with the possibility of further appeal, in some cases, to the Supreme Court.

However, it should be noted that the Court of Appeal was only established in 2014. Prior to that date, there was no intermediary jurisdiction between the High Court and the Supreme Court.

It should also be noted, in light of the *Dun Laoghaire-Rathdown County Council v West Wood Club Limited* case,[183] a defendant in a case in the lower courts can rely on State aid arguments in those courts in order to defend the claim.

A description of the procedural framework applicable in public enforcement of State aid rules

There is no legislation or procedural rules concerning the public enforcement of State aid rules. Should there be a recovery decision, the State is obliged under Union law to recover the aid. In practice, the authority that disbursed the aid in question takes steps to recover it, by requesting the repayment of the aid from the aid beneficiary and, if necessary, by initiating proceedings in the Competition List of the High Court. If the aid takes the form of a tax break, it may be that the Office of the Revenue Commissioners (Revenue) issues an amended tax assessment, revising upward the amount of tax due.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

Competent courts are the same for private enforcement and public enforcement of State aid rules.

A description of the procedural framework applicable in private enforcement of State aid rules

Ordinarily, to challenge a decision to grant allegedly unlawful State aid, one can initiate judicial review proceedings before the High Court (applying to have the case placed on the competition list).

In order to initiate proceedings in the High Court, the procedural steps are the same as for non-State aid cases: one must file a notice of motion, with a statement of the grounds to be relied on, and an affidavit. The defendant will have an opportunity to file a statement of opposition. Following written submissions, the oral arguments are heard at the trial.

Main findings based on the case summaries

- The main finding is the lack of public enforcement cases in Ireland. This reflects the high rate of compliance with recovery orders. In private enforcement cases, it is notable that in none of the relevant cases was relief granted by the court. The majority of cases concerned requests for judicial review of decisions of public authorities. The remedy, if granted, would be the quashing of the unlawful State aid measure.
- In terms of sectors, there were two cases[184] concerning State aid granted in the context of the financial crisis, when the State took measures to ensure the banking sector was stable and adequately capitalised. The other case concerned the sports and recreation sector.[185] Both cases concerned the manner of implementation of the State aid measure, which was approved by the Commission.
- The main actors identified were third parties who were affected by the State aid measures.

Qualitative assessment of the average time of court proceedings

There do not seem to be any inordinate delays in processing such cases. Generally, the duration of the proceedings reflects the type of case and whether there are appeals or references for preliminary rulings.

For example, the *Dowling v Minister for Finance* case[186] took several years. The initial case was lodged in 2011, and the High Court rendered its judgment in August 2014, referring a request to the CJEU for a preliminary ruling in December 2014. The CJEU published its preliminary ruling in November 2016, and the High Court rendered its final judgment in December 2017. Thus, the case took six years, four in the national court system and two before the CJEU.

By contrast, the *Dellway* case[187] took eight months from start to finish. It was filed at the High Court on 1 July 2010, with the High Court issuing its judgment on 1 November 2010, and the Supreme Court delivering its judgment on 3 February 2011.

[183] High Court, 17.12.2015 - [2015] IEHC 800 (IE2).
[184] Cases *Dellway Investments v NAMA (*Supreme Court, 12.4.2011 - IESC 4 (IE1)); *Dowling v Minister for Finance* (High Court, 31.7.2017 - IEHC 520 (IE3)).
[185] Case IEHC 800 (IE2).
[186] Case IEHC 520 (IE3) .
[187] Supreme Court, 12.4.2011 - 2011 IESC 4.

All the cases concerned private enforcement, so no comparisons between public and private enforcement can be made.

The 2017 Annual Report of the Courts Service[188] indicates that for 2016 and 2017, the average duration from the issuing of the notice of motion to the first return date before the High Court was three weeks. No statistics are provided regarding the overall duration of such cases or the wait until the full hearing. For the general commercial list, the time to the first return date is recorded as immediately available, with the time until full hearing being one week to six months depending on the time required for a hearing.

Part of the reason for establishing the commercial list and the competition list is to expedite such matters.

Qualitative assessment of the remedies awarded by national courts

In *Dun Laoghaire-Rathdown County Council v West Wood Limited*,[189] the High Court remanded the case to the lower court, so in a sense West Wood Limited received a form of remedy, in that the lower court would hear the State aid aspect of its defence. The two cases in the banking sector did not receive remedies. In both cases, as the aid schemes had already been approved by the Commission, the only argument open to the parties was to impugn the manner in which the aid measure was implemented.

In IE1 [2011] IESC 4, [190] the argument was that the inclusion of a particular category of loans (non-impaired loans) in the scheme was not in accordance with the Commission decision approving the aid. As the Commission decision did not explicitly address this issue, the argument was always likely to be an uphill battle. The court held that extraneous documents, such as letters sent subsequent to the Commission decision, might be relevant in certain circumstances to clarify or correct an error or omission, but such documents could not introduce key changes to the decision itself.

In the case IE3 [2017] IEHC 520, the argument was that the direction order implementing the State aid should have contained the option least detrimental to the rights of the shareholders. However, the Commission decision approving the aid had regard to the fact that there was maximum burden-sharing with shareholders. So, this argument was also an uphill battle. It was unlikely that the court would regard a direction order imposing less burden-sharing on shareholders as being in accordance with the Commission decision approving the State aid. If the court had found in favour of the plaintiffs, it is likely the case would have been appealed further to the Supreme Court by the defendant Minister of Finance.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

Although the number of relevant cases is limited, the findings of the court seem to be in line with the State aid *acquis*.

In IE3 [2017] IEHC 520, the court rejected an argument that would have likely made the State aid scheme inconsistent with the Commission decision. The court sent a request for a preliminary ruling to the CJEU. The Court considered the Commission Communication of 1 August 2013 on the application of State aid rules to support measures in favour of banks in the context of the financial crisis.[191]

In IE1 [2011] IESC 4, the court was hesitant to introduce changes to the Commission decision by incorporating content of a letter that was sent after the decision. This seems the correct approach for the national court; if the court had read additional conditions into the Commission decision, it would have risked overstepping its jurisdiction. The court considered Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty,[192] and Commission Notice 2009/C 85/01on the enforcement of State aid law by national courts ().[193]

In IE2 [2015] IEHC 800, the High Court took a broad approach to jurisdiction and concluded that the lower courts could hear State aid arguments raised as a defence. This had the effect of extending the fora available for raising State aid arguments in certain circumstances. In coming to its conclusions, the High Court had regard to the Commission's 2010 handbook on the enforcement of State aid rules by national courts.

Qualitative assessment of any other relevant trends in State aid enforcement

Although the sample is small, one trend that is notable is the prevalence of banking-related cases. However, this also reflects the time period concerned given that these cases arose during the financial crisis. There is no evidence of a lack of expertise among the judiciary at the national level, and the existence of a dedicated competition list may serve to ensure that judges build up expertise in the area. In any event, there is evidence that judges will refer requests to the CJEU for a preliminary ruling, where needed.

Although not referred to in this Study (as it only concerns case law before the national courts) the main current trend in Ireland concerns tax planning, and the Commission has issued a couple of recovery decisions (against Apple and Perrigo).

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

No problems were noted with the manner in which the notion of State aid was interpreted at the national level. Rather, the case law tended to involve the implementation of existing aid schemes. As noted above, the courts' approach to these arguments was satisfactory and relatively predictable.

[188] http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/8000F0BA4F127EE7802582CD00338311/$FILE/Courts%20Service%20Annual%20Report%202017.pdf (last accessed on 4 January 2019).
[189] Case IEHC 800 (IE2).
[190] Supreme Court, 12.4.2011 - 2011 IESC 4.
[191] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), *OJ C 216, 30.7.2013, p. 1–15.*
[192] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit*.
[193] Commission Notice on the enforcement of State aid law by national courts, *OJ C 85, 9.4.2009, p. 1–22.*

Any other relevant comments or findings

Not applicable

14.2 Case summaries

Case summary IE1

Date

03/01/2019

Case identifiers

Member State

Ireland

Court which adopted the ruling (national language)

Cúirt Uachtarach

Court which adopted the ruling (English)

Supreme Court

Instance court which adopted the ruling

Last instance court (general jurisdiction)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IESC/2011/S4.html&query=(dellway)+AND+(investments)

Case reference

[2011] IESC 4

Procedural context of the case

This case was an appeal against an order of the High Court not to grant relief by way of judicial review (ruling Dellway Investment Ltd & Ors -v- National Asset Management Agency & Ors [2010] IEHC 364).

Type of action

Private enforcement

Delivery date of the ruling

03/02/2011

Language

English

Headnote

In this ruling, the Court rejected a claim that the application of the State aid scheme was incompatible with the Commission decision approving the scheme, on the basis that there was nothing in the Commission decision itself indicating that the plaintiff's interpretation was correct.

Parties

Names of the parties to the action

Dellway Investments Limited; Metrospa Limited; Berkley Properties Limited; Maginotgrange Limited; May Property Holdings Limited; Sci 20 Place Vendome; Directdivide Trading Limited; Submitquest Limited; Belfast Office Properties Limited; The Forge Limited Partnership, Finbrook Investments Limited; Connis Property Services Limited; Formcrest Construction Limited; Chesterfield (The Pavements) Subsidiary Limited;, Abey Developments Limited; P. M. (anonymised)

Versus

National Asset Management Agency (NAMA), Ireland; the Attorney General

The relationship of the plaintiff to the measure

Other

Customers of the beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

K - Financial and insurance activities

Banking sector

The type of State aid measure challenged in the court proceedings

Other

NAMA is a statutory body set up by the State to purchase loans from underperforming banks for more than they would receive if they sold them in the private sector

Substance of the case

Facts and parties' main arguments in the case

Pursuant to the collapse of the Irish economy, the State decided to establish an asset management agency which would pay banks money for certain loans, in order to take them off the banks' balance sheet with a view to ensuring the long term shoring up of the banks' balance sheets. In a decision dated 26 February 2010 (N725/2009), the Commission did not raise any objections to the scheme, noting that the scheme includes an adequate burden sharing mechanism through the payment of a transfer price which is no greater than the assets' long-term economic value, and the inclusion of an adequate remuneration for the State in the rate used to discount the assets' long term economic cash flows. The Commission relied on a number of commitments from the Irish authorities to ensure that NAMA, whilst it performs its goal of maximising the recovery value of the purchased assets, would not lead to distortions of competition through the use of some of the specific powers, rights and exemptions granted in the NAMA Act.

The plaintiffs became aware that NAMA intended to acquire the loans of the plaintiffs, and raised the argument that the Commission decision approving the scheme only extended to 'impaired assets', and since their loans were not impaired, the acquisition of the loans by NAMA would not be in accordance with the Commission decision. NAMA, on the other hand, contended that it was not required to give any consideration as to whether the loans were impaired. The plaintiffs placed special reliance on a later letter from the Director General for Competition to an Irish Senator, which is said to contain an explanation of the Commission decision. The plaintiffs claimed that the Commission decision, interpreted in light of this letter, has direct effect.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court held that while it is not possible, at the level of principle, to exclude entirely the possibility of reference to a subsequent letter, for example, to clarify or correct an error or omission, it was not acceptable that the Commission letter in this case could be used in order to make a key and important change or addition to the Commission decision itself. As nothing in the Commission decision required the State aid scheme to be limited to 'impaired assets', the manner in which the State aid scheme was being applied could not be said to be inconsistent with the Commission decision.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- 9/70, Grad v Finanzamt Traunstein (1970) ECLI:EU:C:1970:78
- 6/64, Costa v ENEL (1964) ECLI:EU:C:1964:66

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009 (Commission Enforcement Notice)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary IE2

Date

04/01/2019

Case identifiers

Member State

Ireland

Court which adopted the ruling (national language)

Ard-Chuirt

Court which adopted the ruling (English)

High Court

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2015/H800.html&query=(%222014)+AND+(No.)+AND+(173)+AND+(CA%22)

Case reference

[2015] IEHC 800

Procedural context of the case

This case was an appeal from a lower court (circuit court) on the preliminary issue of the jurisdiction of that court to consider issues relating to State aid in the context of a claim for the payment of commercial rates.

Subsequently, the High Court referred a case to the Court of Appeal on a number of questions. The Court of Appeal delivered its judgment on 25 July 2017 (ruling [2017] IECA 213)

Type of action

Private enforcement

Delivery date of the ruling

17/12/2015

Language

English

Headnote

In this ruling, the Court considered the circumstances in which a defendant has the right to rely on a State aid argument.

Parties

Names of the parties to the action

West Wood Club Limited

Versus

Dun Laoghaire-Rathdown County Council

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

R - Arts, entertainment and recreation

Sport and recreation

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The plaintiff, having not paid commercial rates, was pursued in the courts by the local authority. In its defence to the local authority's claim, the plaintiff asserted that the receipt of rates from the plaintiff as well as the receipt of State grants from the Exchequer by the defendant, and the subsequent expenditure of that income on leisure centres owned and operated by the defendant in competition with the privately owned and non-State subsidised leisure centres operated by the plaintiff amounts to unlawful State aid. The Circuit Court agreed with the defendant that it did not have jurisdiction to hear the issue.

On appeal to the High Court, the plaintiff relied on the constitutional provision guaranteeing primacy of Union law. The prohibition on the implementation of new aid has direct effect. Therefore, it is a fundamental rule, developed throughout the jurisprudence of the EU, that in such circumstances national courts must give remedies for individuals who are adversely affected by a breach of EU rules and that rules of national law which may stand in the way of such remedies must be set aside. The plaintiff accepted that if the national court was satisfied that the aid in question constituted State aid, it had no jurisdiction to decide whether or not the aid was compatible with the Treaty. That is the exclusive function of the Commission. However, if the aid had not been notified to the Commission, the Court must, it was submitted, devise whatever remedy is necessary to nullify the effect of the breach. This is so even if the appropriate remedy is not one that normally falls within the procedures of the Court dealing with the matter, since the principle imposes a duty on national courts at all levels.

The defendant's position on appeal changed. It subsequently accepted that the Circuit Court has jurisdiction to deal with certain matters under the provisions of the Competition Act 2002. However, it argued that State aid was not a matter of competition law covered by that Act, and that the Circuit Court has not been conferred with jurisdiction to consider State aid issues.

Remedy(ies) sought

Other remedy sought

The remedy sought in this case is a finding by the High Court that the Circuit Court has jurisdiction to hear the case.

Outcome of the case

Conclusions adopted by the national court

The Court considered the handbook on the enforcement of State aid rules by national courts, published by the Commission in 2010. Amongst the remedies available to a competitor or other third party affected by unlawful State aid was the prevention of the payment of the aid, where there has been a breach of Article 108(3) TFEU. There may also be a claim for damages, although it is noted that this is usually directed at the State authority granting the aid, rather than at the recipient of the aid. A claim against the latter would only succeed if substantive national law permits it – there is no Union law basis for such a claim. The handbook provides guidance for the assessment of such cases.

The handbook noted that where national courts are obliged to enforce State aid rules to protect the rights of individuals, national procedural rules apply subject to the requirement that (a) such rules are not less favourable than those governing claims under

domestic law and (b) they do not render excessively difficult or practically impossible the exercise of the rights conferred by Union law. If either of these principles would be violated, the national court must disapply the national procedural rule.

The Court ruled that a defendant would be entitled to rely upon Constitutional principles or upon national legislation, if applicable, to defeat a claim of any nature made against it in any forum. Having regard to the authorities, the right to invoke the protection of Union law could not be made subject to more restrictive rules, and the defendant (the plaintiff in this case) could not be compelled to institute separate proceedings to vindicate any applicable rights. The defendant (the plaintiff in this case) was, therefore, entitled to make the argument that the rates sought to be collected from it are a species of unlawful State aid which affected its interests.

The Court allowed the appeal and remitted the matter for hearing by the Circuit Court.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The subsequent ruling from this Circuit Court is not available.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- 6/64, Costa v. ENEL (1964) ECLI:EU:C:1964:66
- C-354/90, Federation Nationale du Commerce Exterieur des Produits Alimentaires and Syndicat National des Negociants et Transformateurs de Saumon v French Republic (1991) ECLI:EU:C:1991:440
- C-301/87, French Republic v Commission of the European Communities (1990) EU:C:1990:67
- C- 39/94, Syndicat français de l'Express international (SFEI) and others v La Poste and others (1996) ECLI:EU:C:1996:285
- C-53/00, Ferring v. ACOSS (2001) ECLI:EU:C:2001:627
- C-811/79, Administrazione delle Finanze dello Stato v Ariete SpA (1980) ECLI:EU:C:1980:195
- C-368/04, Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644
- C-126/01, Ministre de l'économie, des finances et de l'industrie v. Gemo SA (2003) ECLI:EU:C:2003:622
- C-174/02, Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën (2005) ECLI:EU:C:2005:10
- C-487/06, British Aggregates Association v Commission (2008) ECR I-10505
- C-393/04, and C-41/05, Air Liquide Industries Belgium SA v Ville de Seraing (C-393/04) and Province de Liège (C-41/05) (2006) ECLI:EU:C:2006:403
- C- 266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, Nazairdis SAS, now Distribution Casino France SAS and Others v Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales (Organic) (2005) ECLI:EU:C:2005:657

√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on 'equivalence'
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- The handbook on the enforcement of EU State aid rules by national courts, Commission in 2010, ISBN 978-92-79-14556-8

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary IE3

Date

04/01/2019

Case identifiers

Member State

Ireland

Court which adopted the ruling (national language)

Ard-Chuirt

Court which adopted the ruling (English)

High Court

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/ie/cases/IEHC/2017/H520.html

Case reference

[2017] IEHC 520

Procedural context of the case

This ruling was a follow-up to the High Court ruling of 15 August 2014 (2014 IEHC 418) concerning the same parties. In that case, the Court decided to refer a request for a preliminary ruling from the CJEU. The CJEU delivered its ruling on 8 November 2016. The present case followed that.

Type of action

Private enforcement

Delivery date of the ruling

31/07/2017

Language

English

Headnote

In this ruling, the Court rejected a claim challenging a State aid measure based on the argument that a measure which was less detrimental to shareholders should have been chosen, noting that the Commission approved the aid in the first place on the basis that burden-sharing would limit the distortion to what was necessary.

Parties

Names of the parties to the action

G. D. (anonymised); P. M. (anonymised); P. S. (anonymised); Scotchstone Capital Fund Limited

Versus

The Minister for Finance

The relationship of the plaintiff to the measure

Other

Shareholders in the beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

K - Financial and insurance activities

Banking sector

The type of State aid measure challenged in the court proceedings

Other

Injection of capital into the bank in order to ensure its stability, which was accompanied by 'burden-sharing' by stakeholders

Substance of the case

Facts and parties' main arguments in the case

In the wake of the financial crisis, the State decided to recapitalise the bank. The plan for the proposed recapitalisation was submitted to the Commission for approval. The Commission granted temporary approval, deferring a final decision until the submission by the State of a new restructuring plan. The Commission decided that the restructuring did constitute State aid but accepted that it was necessary to avoid a serious disturbance in the Irish economy. The Commission found the aid to be proportional on the basis that burden-sharing with ordinary shareholders was "close to maximum". The Minister executed the restructuring by means of a Direction Order.

The plaintiffs challenged the Direction Order which imposed burden-sharing on shareholders, arguing a breach of EU company law. The Court referred a question to the CJEU, in order to determine whether the Irish Government breached central provisions of EU company law (particularly Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31.1.1977)) when it took control of the bank. The CJEU considered that on a proper construction of Articles 8, 25 and 29 of Directive 77/91/EEC, those provisions do not preclude legislation of a Member State according to which, in order to address the disruption to the economy and the financial system and the threat to the stability of certain credit institutions in that Member State and the financial system generally as well as minimising the risk of spread to other Member States, a court may order a public limited liability company to which that directive applies, which is of systemic importance to the economy of that Member State and which cannot, of its own volition, meet the regulatory requirements imposed by that Member State relating to the prudential supervision of financial institutions, to be taken over by the Government without the consent of the general meeting. However, that Member State must employ means which, while enabling it effectively to attain the objectives pursued by the abovementioned legislation, are the least detrimental to the objectives and the principles laid down by Directive 77/91/EEC. That is a matter for the national courts to verify.

In the present case, the plaintiffs relied on the principle of proportionality and the requirement to adopt the measure that is "least detrimental" or "least restrictive" vis-a-vis the rights at issue. They argued that the proportionality principle implies that the disputed measure must be necessary, and that this in turn implies that there is no other measure available that would be adequate for the attainment of the objective but less restrictive of rights. Arguments from the defendants are not referred to by the Court.

Remedy(ies) sought

Other remedy sought

The annulment of the aid measure

Outcome of the case

Conclusions adopted by the national court

The High Court rejected the plaintiffs' argument. It noted that shareholders must fully bear the risks of their investments. Where State aid is granted, in circumstances in which such aid is permissible, a measure that requires the shareholders to contribute to the absorption of the losses suffered by the Bank to the same extent as if there were no State aid is not an attack on their rights. In any event, they would suffer the same loss if there was no State aid and the Bank failed.

The price proposed by the Minister was considered by the Commission to be "very significant" in its decision to grant approval precisely because of the level of dilution of the shareholders. Furthermore, the same fact contributed to the finding that the proposed aid was proportionate, because in State aid terms the degree of burden-sharing by the shareholders was "very material". The Court noted that it was impossible to see how a price in the range suggested by the plaintiffs would have been approved by the Commission or could be regarded as legally necessary for the protection of the plaintiffs' rights.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-526/14, Kotnik and Others v. Slovenia (2016) ECLI:EU:C:2016:570
- C-41/15, Gerard Dowling and Others v Minister for Finance (2016) ECLI:EU:C:2016:836

√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Implementing Decision 2011/77/EU of 7 December 2010 on granting Union financial assistance to Ireland, OJ L 30, 4.2.2011
- Communication from the Commission on the application 2013/C 216/01 of 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 216, 30.7.2013 ('Banking Communication')

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-41/15 Dowling v Minister for Finance (2016) ECLI:EU:C:2016:836 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-41/15)

Any other comments (optional)

No other comments

14.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Cúirt Uachtarach	Supreme Court	Last instance court (general jurisdiction)	396/10 (Neutral Citation [2011] IESC 4)	03/02/2011	Private enforcement	None - Claim rejected	The Court rejected the claim that the application of the State aid scheme was in breach of the Commission decision approving the scheme. The plaintiffs argued that the State aid scheme was cleared by the Commission on the basis that it applied to 'impaired borrowers' only. They sought to rely on a letter from the Commission to clarify the scope of its decision. The Court held that while it is not possible, at the level of principle, to exclude entirely the possibility of reference to a subsequent letter, for example, to clarify or correct an error or omission, it is not acceptable that the Commission letter in this case could be used in order to make a key and important change or addition to the Commission decision itself. As nothing in the Commission decision required the State aid scheme to be limited to 'impaired assets', the manner in which the State aid scheme was being applied could not be said to be inconsistent with the Commission decision.		
Ard-Chuirt	High Court	Second to last instance court (general jurisdiction)	12012 No.760 JR.	11/12/2013	Private enforcement	None - Claim rejected	No aid had actually been granted yet, so there could not be a breach of the standstill procedure. The case involved a challenge to a tariff decision of the Energy Regulator which purported to include the cost of stranded assets in tariff calculation. The plaintiff claimed this was State aid, as it would have the result cross-subsidising the incumbent, which had invested in stranded assets. The Court noted that, even if it did constitute State aid, no actual aid had been granted, so that it could not hold that there was a breach of the standstill procedure (the new tariff calculation would not apply for another year or so).		The case was appealed to the Supreme Court, but was ultimately withdrawn. It should be noted that the State aid issue was just one of several issues raised in the case.
Ard-Chuirt	High Court	Second to last instance court (general jurisdiction)	2014 No. 173 CA (Neutral Citation [2015] IEHC 800)	17/12/2015	Private enforcement	Case sent back to lower court for re-assessment	On appeal from the Circuit Court (CC), the High Court (HC) established that a defendant to any claim at a lower court is entitled to raise State aid rules as a defence in that arena, and should not be obliged to institute proceedings in a higher court in order to vindicate its rights. Regarding damages, while the CC's monetary jurisdiction is lower than HC's, the HC in this case left open the question of whether the CC could be seised of a counterclaim for breach of State aid, where the claim exceeded its jurisdiction. In the actual case at hand, the counterclaim for State aid was in fact just a tax case (however, it raises an interesting point of law regarding the jurisdiction of lower courts to hear counterclaims).	The case concerns the sort of tax issue that ordinarily would bring it outside the scope of the Study, but the Court makes mention of a couple of interesting points apply to State aid claims which do fall within the scope of the Study.	
Ard-Chuirt	High Court	Second to last instance court (general jurisdiction)	Record No. 2011/239 MCA (Neutral Citation: [2017] IEHC 520)	31/07/2017	Private enforcement	None - Claim rejected	The Court held that the legitimate expectation claim should not succeed as the Commission approved the aid in the first place on the basis that burden-sharing would limit the distortion to what was necessary. The case involved a challenge to the requirement for 'burden-sharing' by bondholders in the context of State aid for the banking sector. The plaintiffs sought to challenge the Minister's Direction Order, arguing a breach of legitimate expectation, but the Court cited existing CJEU case law stating that "burden-sharing measures were essential in order that State aid in the banking sector should be limited to the minimum necessary and that any distortions of competition in the internal market should be limited." The High Court referred to the fact that the Commission only approved the aid in the first place on the basis of finding the proposed aid to be proportionate, because in State aid terms the degree of burden-sharing by the shareholders was "very material".		

15. Italy

15.1 Country report

Name national legal expert

Avv. Federico Macchi LLM

Date

15/02/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

In general, administrative courts have exclusive competence to hear cases concerning public enforcement of State aid rules, following the introduction of Article 49(2) of Law number 234 of 24 December 2012, [194] which modified Article 133 of Legislative Decree number 104 of 2 July 2010 *(Codice del Processo Amministrativo)*.[195]

In particular, in the Italian system, the administrative courts are:
- The Regional Administrative Tribunal (*Tribunale Amministrativo Regionale* (TAR)) for the first instance; and
- The Council of State (*Consiglio di Stato*) for the second instance.

The new rules on exclusive competence apply to the proceedings started after the entry into force of Law number 234/2012 on 19 January 2013.

Despite the new provision of Article 49 of Law number 234/2012, according to generally applicable procedural law, civil courts — which are the tribunals (*Tribunale*), the Court of Appeal (*Corte d'Appello*) and the Supreme Court (*Corte di Cassazione*) — keep their competence for certain types of proceedings. In particular:
- The *Tribunale* as *Giudice esecutivo* is competent for claims regarding the enforcement of the recovery order issued by national authorities.[196]
- The *Tribunale Fallimentare* is competent for most of the issues regarding recovery in the context of insolvency procedure (*e.g.* registration of the claim in the schedule of liabilities of the aid beneficiary under the insolvency procedure and related counterclaims).

Before the introduction of Article 49 of Law number 234/2012, cases of public enforcement of State aid rules could be heard by civil and administrative courts following general principles. Specialised tax courts were competent on issues regarding recovery of fiscal aid, according to Article 47-*bis* of Legislative Decree number 546 of 31 December 1992[197] (today, even issues regarding recovery of fiscal aid fall within the jurisdiction of the administrative courts, as Article 61(5) of Law number 234/2012 abrogated Article 47-*bis* of Legislative Decree number 546/1992). Yet, *de facto*, even before the introduction of Law number 234/2012, administrative courts heard the majority of cases concerning the public enforcement of State aid rules, as aid beneficiaries' claims usually aimed at setting aside the recovery order or other administrative acts adopted during the recovery process.

A description of the procedural framework applicable in public enforcement of State aid rules

The entities involved in public enforcement of State aid rules are central government, local authorities (if they were the grantor of the aid), the national tax debt collector and national courts.

The main stages of the recovery procedure at the national level are set out by Article 48 of Law number 234/2012.

In particular, within 45 days from the adoption of a recovery decision by the Commission, the competent minister issues a decree, in which it (i) identifies — if necessary — the entity liable for repaying the aid, (ii) calculates the aid amount to be recovered and (iii) provides terms and conditions for the repayment.

If more than one minister is competent, the President of the Council of Ministers appoints an extraordinary commissioner, who becomes responsible for the recovery process.

If the aid was not granted by the central government, the local granting authority (*e.g.* a region) is responsible for the recovery.

The national authority for tax debt collection (*Agenzia delle entrate – Riscossione),* which succeeded the company *Equitalia S.p.A.* from 1 July 2017, is responsible for collecting the unlawful aid amounts, as quantified in the ministerial recovery decree.

The aid beneficiary, or other parties directly affected by the recovery procedure, can challenge recovery orders issued by national authorities before national courts, according to the rules explained above (see answer to the previous question).

Challenges brought against recovery actions do not have the automatic effect of suspending the recovery procedure or the recovery decision. To obtain *ad interim* suspension of a recovery order, plaintiffs or aid beneficiaries have to file a motivated precautionary claim, according to established national and Union law (*e.g.* Regional Administrative Tribunal of Sardinia, 7.8.2017 - 243/2017 (IT 5)).

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

In general, administrative courts have exclusive competence to hear cases of private enforcement of State aid rules, following the introduction of Article 49(2) of Law number

[194] *Legge (Law) no. 234.*
[195] *Decreto Legislativo n. 104 del 2 luglio 2010 (*Legislative Decreet no 104 of 2 July 2010).
[196] See Gottuso, F., *La riforma della L. 234/2012 con riferimento agli aiuti di Stato,* in *Dizionario Sistematico del diritto della concorrenza*, a cura di Lorenzo F. Pace, Jovene Editore, 2013.
[197] *Decreto Legislativo no 546 del 31 dicembre 1992.*

234 of 24 December 2012, which modified Article 133 of Legislative Decree number 104 of 2 July 2010 *(Codice del Processo Amministrativo)*.

The new rules on exclusive competence apply to proceedings started after the entry into force of Law number 234/2012 on 19 January 2013.

Despite the new provision of Article 49 of Law number 234/2012, according to general principles, civil courts have kept their competence regarding certain types of claims.

In particular:

- Claims for damages following Commission decisions, which are brought by competitors of an aid beneficiary against national authorities, fall under the competence of civil courts, mostly because there is no administrative act to be challenged (see Supreme Court 25516/2016).
- Standalone claims for damages are likely to fall under the exclusive competence of administrative courts, as also claims seeking the invalidation of the administrative act granting the aid.
- Potential damage claims brought by the competitor against the aid beneficiary fall under the competence of civil courts.

In general, any claims brought against public authorities regarding State aid issues when the administrative act cannot be challenged, due to the expiration of the time period during which the act can be challenged, could potentially be heard by civil courts.

It seems that the exact boundaries of the competences of administrative and civil courts in private enforcement cases are not completely settled. In the near future, one might expect more national judgments on the interpretation of Article 49 of Law number 234/2012. In particular, courts could sometimes limit the exclusive competence of administrative courts. For instance, according to certain authors, the exclusive competence of administrative courts on all cases of private enforcement might lead to a breach of Article 103(1) of the Italian Constitution, as it over extends the power of administrative courts.[198]

Before the introduction of Law number 234/2012, there was no *ad hoc* rule on the competence of cases of private enforcement of State aid rules and general principles thus applied (see, *inter alia*, Council of State number 6/2014). Yet, *de facto*, the majority of cases of private enforcement of State aid rules were heard by administrative courts.

A description of the procedural framework applicable in private enforcement of State aid rules

There are no *ad hoc* rules for the private enforcement of State aid rules in Italy, except for Article 49 of Law number 234/2012 regarding jurisdictional competence (see answer to the previous question). General rules and legal principles thus apply.

Private parties can challenge the validity of an administrative act granting unlawful aid in accordance with the procedural rules, mainly provided by the *Codice del Processo Amministrativo.* Plaintiffs have the burden to prove: (i) the existence of State aid under Article 107(1) TFEU; (ii) the violation of the standstill obligation as set out in Article 108(3) TFEU and (iii) the causal link between the aid and the damage.

With the annulment action, plaintiffs can also seek compensation for damages caused by the violation of Article 108(3) TFEU, according to established EU principles and Article 30 of *Codice del Processo Amministrativo*. [199]

Moreover, plaintiffs can request interim measures, both before and after the start of the main proceedings, in accordance with common rules. For instance, they can request the provisional suspension of the execution of the administrative act granting the aid.

Main findings based on the case summaries

First, it should be noted that there is a higher number of public enforcement cases. This could be due to the relatively high number of recovery decisions against Italy, vis-à-vis other comparably sized Member States,[200] as well as to a still limited familiarity with State aid rules within the Italian Bar Association.

Second, there is an important trend of cases dealing with different forms of tax measures. In particular, private parties and national authorities sometimes rely on State aid arguments to contest tax exemptions granted to certain undertakings. In one of the case summaries analysed, the Supreme Court upheld the claim of the tax authority, which refused to extend a tax exemption as it would have been in contrast with State aid rules (Supreme Court, 16.7.2010 - 16721/2010 (IT4)).

Third, a number of cases do not seem to fall under the categorisation of private or public enforcement, as defined by the present Study. In particular, in certain rulings, State aid arguments were discussed incidentally, or the existence of State aid was used as a mere prerequisite for the claim. For example, in Supreme Court, 14223/2010 - 14223/2010 (IT3), the plaintiff was the creditor of an undertaking undergoing a special insolvency procedure (it. *Amministrazione Straordinaria)*, under which creditors could no longer enforce their claims. The plaintiff argued that the special treatment granted to the company under *Amministrazione Straordinaria* constituted State aid, and thus its credit claim should be enforced.

[198] See Martinelli, M, "Commento all'art. 133, Comma 1 Lett. Z-sexies) C.P.A"., in *Codice della Giustizia Amministrativa*, a cura di Giuseppe Morbidelli, III, Giuffrè, 2015, 1318; Cioffi, A., "Il riparto di giurisdizione per l'applicazione degli artt. 107 e 108 § 3 TFUE", in *Dizionario sistematico del diritto della concorrenza*, a cura di Lorenzo F. Pace, Jovene editore, 2013, 724; Altieri, E., "Prime impressioni sulla giurisdizione del giudice amministrativo in materia di aiuti di Stato", *Riv. Dir. Trib*., 2, 2013, 197.

[199] Regarding substantial law, claims for damages in State aid cases are mostly brought following with generally applicable tort law principles. The central provision of Italian tort law is Article 2043 of the Civil Code, providing that "any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages".

[200] According to the data available on the electronic database of the Commission (http://ec.europa.eu/competition/elojade/isef/), since 2007 until today, the Commission adopted 38 recovery decisions with recovery against Italy, while, in the same period, the Commission adopted 18 recovery decisions against France, 14 against Germany, 15 against Spain and 6 against the UK.

Fourth, the central government sometimes takes a role in assessing the compliance of regional legislation with State aid rules. This is possible thanks to the tool provided by Article 127 of the Italian Constitution, according to which the central government can ask the Constitutional Court to set aside regional law that is contrary to constitutional law. And, according to settled case law, Union law is generally included within constitutional law principles (pursuant to Article 117 of the Constitution). For instance, the Constitutional Court ruled in judgment Constitutional Court, 17.6.2010 - 216/2010 (IT1) on an action brought by the President of the Council of Ministers against a Law of the Sardinia Region establishing a tax on stopovers of tourist aircrafts levied only on operators whose tax domicile was outside the territory of the region.

Fifth, the judgments of the sample are quite evenly spread throughout national industries. However, as regards public enforcement, there seems to be a certain degree of concentration of national judgments in sectors in which the Commission was more active, such as energy (*e.g.* Regional Administrative Tribunal of Lombardia, 9.2.2014 - 2297/2014 (IT8)) and transport (*e.g*. Regional Administrative Tribunal of Lombardia, 25.9.213 - 553/2013 (IT7) and Regional Administrative Tribunal of Sardinia, 7.8.2017 - 243/2017 (IT5)).[201]

Sixth, the national courts sometimes hear cases dealing with the statute of limitation. For instance, in Supreme Court, 3.5.2012 - 6671/2012 (IT11), the Supreme Court stated that the recovery obligation of national authorities is subject to the ordinary limitation period of ten years from the notification of the decision to the Member State (another similar case is Supreme Court, 4.5.2012 - 6756/2012). In this trend of cases, the arguments based on the statute of limitation were unsuccessful, as the Supreme Court rejected the claim of the aid beneficiary and confirmed the recovery order.

Last, as regards public enforcement, a substantial part of the national litigation stems from aid schemes. For example, in Council of State, 13.5.2015 - 2401/2015 (IT9), national courts were involved in the assessment of recovery orders following Commission Decision 2000/394/CE of 25 November 1999 () on social security charges reduction and exoneration in Venezia and Chioggia.[202] In that case, the Council of State quashed the judgment of the first instance court, which had annulled the recovery order; thus, upholding the recovery of the unlawful State aid.

Qualitative assessment of the average time of court proceedings

As private enforcement follows generally applicable national procedural law, the average duration of a private enforcement case can be considered equal to the overall average duration of national judicial proceedings.

In particular:

- The average duration of administrative proceedings is about six years (approximately three years for the first instance and three years for the second instance).
- The average duration of civil proceedings is about eight years (approximately three years for the first instance, two years for the second instance and three years for the Supreme Court).[203]

It seems that the average duration of cases of private enforcement has been slowly but constantly decreasing over the period covered by the present Study. This could be mainly due to two factors: (i) the overall trend of the average duration of civil and administrative proceedings in Italy and (ii) the introduction of Law number 234/2012, which increased the number of cases decided by administrative courts, which are on average quicker than civil courts. However, this trend might be tempered by restrictive interpretations of the exclusive jurisdiction of administrative courts introduced by Article 49 of Law number 234/2012 (as mentioned above, see, *e.g.* Supreme Court number 25516/2016).

As regards public enforcement, the whole recovery process can take up to several months, often beyond the four-month period granted by the Commission. The duration of the recovery process could also be affected by external factors, such as the political and economic situation.

Yet, it seems that the introduction of Law number 234/2012 has improved legal certainty on the administrative procedures for issuing the recovery order. Article 48 of Law number 234/2012 defines all steps of the recovery procedure at the national level. For instance, it is now easier to identify the responsible minister/local authority, as detailed above in the description of the procedural framework applicable in public enforcement of State aid rules. In turn, this could lead to a shorter period for issuance and enforcement of recovery orders, and also to less room for manoeuvre left for potential judicial claims that could suspend or delay recovery.

Finally, as regards judicial proceedings in the context of public enforcement, they usually do not affect the duration of recovery, except in rare cases of provisional suspension of the recovery order. The duration of judicial proceedings in public enforcement is similar to private enforcement (see the figures reported above on private enforcement).

Qualitative assessment of the remedies awarded by national courts

It is clear from the case summaries that the number of rulings in which the Italian courts granted remedies is relatively low. For instance:

- In some of the rulings identified under this Study, national courts ordered the recovery of aid (*e.g*. Supreme Court, 3.5.2012 6671/2012 (IT11), Supreme Court, 15.5.2008 - 12168/2008 (IT2).

[201] According to the data available on the electronic database of the Commission (http://ec.europa.eu/competition/elojade/isef/), since 2007 until today, the Commission adopted five recovery decisions against Italy regarding the energy sector and 13 recovery decisions regarding the transportation sector.

[202] 2000/394/EC: Commission decision of 25 November 1999 on aid to firms in Venice and Chioggia by way of relief from social security contributions under Laws Nos 30/1997 and 206/1995, *OJ L 150, 23.6.2000, p. 50–63.*

[203] The information provided is based on: Article on *Affari & Finanza* (Business & Finance), *Regional Administrative Tribunal (Tar) and Council of State, there is a big congestion: six years for a case,* 19 February 2018 (available at https://www.repubblica.it/economia/affari-e-finanza/2018/02/19/news/tar_e_consiglio_di_stato_c_il_grande_ingorgo_sei_anni_per_una_causa-189202908/); Study of the Chamber of Deputies (*Camera dei Deputati*), Study Service, *Efficiency in civil proceedings*, 22 March 2017 (available at http://www.camera.it/temiap/documentazione/temi/pdf/1105209.pdf); Study of the Supreme Court, Civil Division, *Statistical annual report 2017* (available at http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/ANNUARIO_CIVILE_2017.pdf).

- In Tribunal of Rome, 11.2.2016 - 2897/2016 (IT10), the Court annulled the recovery order, recalculated the aid amount, which was found to be equal to zero and, as a result, ordered national authorities to return the amount of aid already recovered.
- In Supreme Court, 16.7.2010 - 16721/2010 (IT4), the Court ordered the tax authority to recover a tax exemption, (also) because it constituted unlawful aid.
- In Constitutional Court, 17.6.2010 - 216/2010 (IT1), the Court declared the unconstitutionality of a regional legislation introducing a tax exemption. Although the judgment did not specifically mandate the recovery of the unlawful State aid, as the Constitutional Court's rulings have *ex tunc* effects, the national authority should have taken the necessary steps to recover the unlawful State aid.
- In Regional Administrative Tribunal of Lombardia, 25.9.2013 - 553/2013 (IT7), the Court provisionally suspended the effects of a recovery decision.

The low number of remedies granted by national court might be due to several factors, such as:

- Procedural issues which are preliminary with respect to substantive issues, like the lack of competence or jurisdiction, especially before the introduction of Law number 234/2012.
- Claims brought before national courts are generally not well-founded: they often do not meet the conditions provided for by Union law (*e.g.* in case Regional Administrative Tribunal of Sardinia, 7.8.2017 - 243/2017 (IT5) — upheld by the Council of State in judgment 4922/2017 — the Court rejected the claim to provisionally suspend the recovery order in accordance with EU general principles).
- Reluctance by national courts to enforce State aid rules (*e.g.* in Cagliari Court of Appeal, 13.6.2017 - 517/2017 (IT6), the Court awarded compensation for the damage suffered by the aid beneficiary as a consequence of its recovery; thus, trying to mitigate the harsh consequences of the enforcement of a recovery decision by. In particular, the Court specified that even if the quantum of the compensation was equal to that of the aid to be recovered, there would be no indirect State aid, because those amounts would have a different origin and nature).[204]

Qualitative assessment of the application of the State aid *acquis*; preliminary references

It seems that errors in applying Union law are more frequent at the level of lower courts than the higher courts. The Supreme Court and the Council of State can generally guarantee uniform and correct application of Union law and State aid rules, by quashing judgments of the lower courts if need be. For instance, in Council of State, 13.5.2015 - 2401/2015 (IT9), the Court annulled the judgment of the Regional Administrative Tribunal of Veneto (lower instance court), which had erroneously set aside the recovery order; thereby, the Council of State reinstated the primacy of Commission decisions over national legislation.

As regards certain issues, it seems that during the period 2007–2017, national courts have progressively adapted their case law to EU rules. For example, in the past, national courts were slightly keener to grant interim relief against recovery orders, in contrast with *Zuckerfabrik/Atlanta* jurisprudence (*e.g.* Regional Administrative Tribunal of Lombardia, 25.9.2013 - 553/2013 (IT7), in which the Court provisionally suspended the effect of the Commission decision). Today, national courts are more cautious in suspending recovery orders, in compliance with EU principles (*e.g.* Regional Administrative Tribunal of Lombardia, 7.8.2017 - 243/2017 (IT5).

On the basis of the sample of judgments, it seems that national courts have made fair use of referring requests to the CJEU for a preliminary ruling. In particular, Italian higher courts — and in particular the Council of State — tend to rule on settled State aid issues, while referring cases to the CJEU only when the matter is new or legal principles are not settled.

Yet, in *Ferrovie del Sud Est*,[205] the Council of State referred to the CJEU a question regarding the contribution made by a public entity in favour of a railway regional company in difficulty, despite the matter not being particularly new or unsettled).

By and large, the Supreme Court is very careful in assessing the implementation of the principles spelled out by the CJEU. For example, in Supreme Court, 14.6.2010 - 14223/2010 (IT3), the Court annulled the second instance court's judgment for errors in applying the principles provided by the preliminary ruling in the same case.

In other cases, the outcome of the application of the principles of preliminary rulings by lower courts was less straightforward. In the context of the recovery of the State aid granted to *Mediaset* (IT10), the Tribunal of Rome — following the CJEU's judgment C-69/13[206] — quantified the aid to be recovered as 'zero'.

Qualitative assessment of any other relevant trends in State aid enforcement

Italian courts — especially the higher courts — have generally become more familiar with State aid rules and, thus, the overall quality of national rulings has improved during the period 2007–2017.

Moreover, the introduction of Law number 234/2012 strengthened legal certainty both on jurisdictional and substantial issues.

The improvement in the quality of national judgments might also be due to more centralisation, as administrative courts — led by the Council of State — are becoming specialised courts for State aid issues. Yet, this positive trend is limited to certain areas, as other matters still remain outside the exclusive jurisdiction of administrative courts (such as the execution of the recovery order or insolvency issues) and there are still uncertainties on the competence to hear certain State aid enforcement cases (as specified above in the answers regarding jurisdictional issues).

Furthermore, as regards trends in private enforcement, claims for damages brought by competitors of an aid beneficiary seem to be quite rare. Yet, interestingly, in one case the competitor sought compensation for damage against the authority granting the State aid

[204] For further details on this judgment, see Salerno F., Macchi F., "Italian Court Awards Damages to Beneficiaries for Unlawful Implementation of Aid, Court of Appeal of Cagliari of 13 June 2017", *European State Aid Law Quarterly*, Volume 17, Issue 2 (2018), p. 311 – 315.

[205] Council of State - 3123/2018.

[206] Case C-69/13 *Mediaset SpA v Ministero dello Sviluppo economic* (2014) ECLI:EU:C:2014:71.

after the Commission declared the aid was incompatible with the internal market (see Supreme Court n. 25516/2016).

The reasons for the scarcity of competitor actions could be the following:
- Limited familiarity with State aid rules, as the possibility to be compensated for harm suffered due to the grant of unlawful aid is (relatively) new;
- In cases regarding aid schemes, usually all the operators have benefitted from the aid; thus, none of them would be entitled to be compensated;
- The burden of proof on the plaintiff can be very onerous: the plaintiff needs to prove the existence of advantage to the aid beneficiary (*e.g.* running the MEOP test) and the causal link between the State aid paid and the harm suffered;
- The national judicial proceedings are generally longer than in other Member States; thus, adding a layer of uncertainty for the plaintiff;
- The cost of judicial procedures is often higher than the cost of filing a claim with the Commission, hoping for the opening of a formal investigation.[207]

In theory, private plaintiffs could also base their claims for damages on the rules of unfair competition provided for by Article 2598 of the Italian Civil Code.[208] This provision only applies to disputes among undertakings. Thus, this type of action could be directed at obtaining damage compensation from aid beneficiaries, not from national authorities. In particular, unfair competition claims can be brought when an undertaking "makes use, directly or indirectly, of any means going against the principles of professional fairness, which could likely damage another undertaking". The breach of this provision can also lead to injunctive relief (Article 2599 of the Italian Civil Code). However, in practice, no claim for damages against State aid beneficiaries under unfair competition rules has been reported.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

In general, Italian courts have correctly assessed the notion of aid. In case of doubts, national courts refer to the CJEU. Yet, as mentioned above, there are differences among different courts, with the higher courts usually being more accurate.

Some of the challenges faced by national courts in assessing the existence of aid regarded:
- Advantage, and notably running the MEOP test in cases involving investments made with public resources *(e.g.* Council of State n. 3123/2018);
- Selectivity issues in case of fiscal measures (*e.g.* Supreme Court, 16.7.2010 - 16721/2010 (IT4), in which the Court interpreted a tax exemption restrictively, as a broad interpretation would have led to qualifying the measure as unlawful aid; see also Constitutional Court, 17.6.2010 - 216/2010 (IT1));
- The existence of the distortion of competition in the context of recovery regarding State aid measures (*e.g.* in Council of State, 13.5.2015 - 2401/2015 (IT9), the Court upheld the simplified evaluation system for the distortion of competition set up by national authority in order to accelerate the recovery of aid amounts from several beneficiaries).

Any other relevant comments or findings

Not applicable

[207] See Calzolari, L., "La responsabilità delle amministrazioni nazionali e delle imprese beneficiarie per la violazione degli art. 107 e 108 TFUE fra diritto dell'Unione e autonomia procedurale degli ordinamenti nazionali", in *Diritto del Commercio Internazionale*, 1, 223.

[208] Article 2598 Civil Code provides for strict liability rule. Plaintiffs thus enjoy a more favorable *onus probandi,* than under the ordinary regime provided by Article 2043 c.c., mostly based on negligent liability. For an overview of rules on unfair competition, see Campobasso G.F., *Diritto Commerciale – Diritto dell'impresa,* UTET, 7th ed. 2013, p. 244.

15.2 Case summaries

Case summary IT1

Date

06/01/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Corte Costituzionale

Court which adopted the ruling (English)

Constitutional Court

Instance court which adopted the ruling

Constitutional Court

Official language of the court

Italian

Hyperlink to ruling

https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2016&numero=216

Case reference

ECLI:IT:COST:2010:216

Procedural context of the case

In 2006 and 2007, the President of the Council of Ministers brought two actions before the Constitutional Court, both concerning the issue of constitutionality of Article 2-3-4 of Sardinian Regional Law No 4/2006 and Article 5 of Sardinian Regional Law No 2/2007. Those provisions introduced different types of regional taxes. In particular, Article 4 of the Sardinia Regional Law No 4/2006 established a tax on stopovers of tourist aircrafts levied only on operators whose tax domicile was outside the territory of the region.

In judgment of 15 April 2008 (ruling ECLI:IT:COST:2008:102), the Constitutional Court rejected most of the claims raised by the actions of 2006 and 2007, except for the violation of Article 117(1) of the Constitution and Article 49 of the EC Treaty and 87 of the EC Treaty (current Article 107 TFEU) by Article 4 of the Sardinia Regional Law No 4/2006. It therefore disjoined the claims and referred a request for a preliminary ruling to the ECJ (current CJEU) on the interpretation of Articles 49 of the EC Treaty and 87 of the EC Treaty (current Article 107 TFEU) (Case Presidente del Consiglio dei Ministri v Regione Sardegna C-169/08,).

Type of action

Private enforcement

Delivery date of the ruling

17/06/2010

Language

Italian

Headnote

In this ruling, the Court held that the legislation adopted by Sardinia which established a tax on stopovers of tourist aircrafts levied only on operators whose tax domicile was outside the territory of the region, constituted unlawful State aid and thus had to be considered void, contrary to constitutional principles.

Parties

Names of the parties to the action

Presidente del Consiglio dei Ministri

Versus

Regione Sardegna

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

K - Financial and insurance activities

Regional taxation

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The President of the Council of Ministers challenged Article 2-3-4 of Sardinian Regional Law No 4/2006 and Article 5 of Sardinian Regional Law No 2/2007 before the Constitutional Court, as contrary to the national Constitution (it should be noted that, according to Article 127 of the Italian Constitution, the Central Government can ask the Constitutional Court to set aside regional law in contrast with constitutional law). Those provisions provided for regional tax on stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, imposed only on operators whose tax domicile is outside the territory of that region. The plaintiff argued, in particular, that according to Article 117(1) of the Constitution, regional lawmakers have to comply with Union law and the regional tax introduced by Sardinia Region infringed (i) Articles 49 EC and 81 of the EC Treaty on the freedom of movement of services; and (ii) Article 107 TFEU, as the tax unreasonably discriminate certain undertakings based on the location of their tax domicile outside the Region of Sardinia.

Remedy(ies) sought

Other remedy sought

Unconstitutionality of the regional legislation introducing a tax

Outcome of the case

Conclusions adopted by the national court

The Constitutional Court, following the preliminary ruling given by the ECJ (current CJEU) (C-169/08), held that the regional legislation of Sardinia, which established a tax on stopovers of tourist aircrafts levied only on operators whose tax domicile was outside the territory of the region constituted unlawful State aid in favour of regional undertakings, and was thus against Article 117(1) of the Italian Constitution. In particular, the Court held that the tax measure was (i) granted through State resources; and (ii) selective, as any user of airport stopover services in Sardinia is in the same objective situation, regardless of the location of its domicile. Moreover, the Court found a violation of the principle of freedom of movement of services provided by Article 56 TFEU.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The Court held that the regional tax was void, as it was contrary to the Italian Constitution.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-169/08, Presidente del Consiglio dei Ministri v Regione Sardegna (2009) ECLI:EU:C:2009:709

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-169/08 Presidente del Consiglio dei Ministri v Regione Sardegna (2009) ECLI:EU:C:2009:709. (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-169/08)

Any other comments (optional)

No other comments

Case summary IT2

Date

06/01/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Corte di Cassazione Sezione V

Court which adopted the ruling (English)

Supreme Court (5th Section)

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Italian

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

12168/2008

Procedural context of the case

The Amministrazione Finanziara (the Italian Finance Administration), the plaintiff in the ruling, appealed the Regional Tax Commission of region Emilia Romagna's decision before the Supreme Court. The Regional Tax Commission of Emilia Romagna upheld the appeal of the bank Cassa di Rasparmio di Ravenna stating that pursuant to Amato Law, 218/1990, as the company had become a Societá per azioni, public limited liability company, had to pay mortgage taxes, cadastral taxes, stamp duties for a maximum amount of L 100,000,000 (approximately EUR 51,650).

Type of action

Private enforcement

Delivery date of the ruling

15/05/2008

Language

Italian

Headnote

In this ruling, the Court held that tax advantages granted to a bank constituted State aid measure.

Parties

Names of the parties to the action

Amministrazione delle Finanze; Agenzia delle Entrate

Versus

Cassa Risparmio di Ravenna S.P.A.

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

K - Financial and insurance activities

Banking sector

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The plaintiff argued the applicability of tax advantages (a tax reduction providing a maximum amount of taxes to pay) provided for by the Amato Law on the reform of the banking system, to Cassa di Rismarmio di Ravenna when it became a public limited liability company.

The defendant claimed the applicability of the special tax regime as provided by Article 7 of the Directive 69/335/EEC concerning indirect taxes on the raising of capital, as modified by Council Directive 73/79/EEC of 9 April 1973 varying the field of application of the reduced rate of capital duty provided for in respect of certain company reconstruction operations by Article 7(1)(b) of the Directive concerning indirect taxes on the raising of capital (OJ L 103, 18.4.1973) and Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335/EEC concerning indirect taxes on the raising of capital (OJ L 156, 15.6.1985).

Remedy(ies) sought

Recovery order in relation to unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Supreme Court, overturning the lower instance court and quoting ECJ (current CJEU) case C-148/04, held that the tax exemptions granted to banks constituted State aid. The plaintiff did not meet the requirements to receive the aid, so the decision to annul the recovery order was overturned. The Court ordered the recovery of the unlawful aid equivalent to the tax exemption granted to Cassa di Risparmio di Ravenna.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order in relation to unlawful aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-148/04, Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1 (2005), ECLI:EU:C:2005:774

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy, OJ L 184, 13.7.2002

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary IT3

Date

06/01/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Corte di Cassazione (Sezione I)

Court which adopted the ruling (English)

Supreme Court (1st Section)

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Italian

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

14223/2010

Procedural context of the case

The proceeding concerns a debt of 149,108,190 L (approximately EUR 77,000) of Altiforni e Ferriere di Servóla S.p.A. ('AFS') in favour of Ecotrade S.r.l. Both companies were active in the steel manufacturing industry. On 30 July 1992, Ecotrade asked the national court to enforce its claim and AFS repaid its debt.

Yet, on 28 August 1992, AFS informed Ecotrade that it had been placed under the insolvency proceeding 'amminstrazione straordinaria,' by Ministerial Decree of 23 July 1992, pursuant to Law No 95/79 of 3 April 1979, with the authorisation to continue its activity trading, and asked the restitution of the amount previously paid, because the debt claimed by Ecotrade should have not been enforced, following Article 4 of Law No 544/81 of 2 October 1981 which prohibits any individual actions for enforcement after the initiation of the insolvency proceeding.

Therefore, Ecotrade (the defendant in the ruling discussed in this summary) brought an action before the Tribunale of Trieste (First Instance Court), arguing that Ministerial Decree of 23 July 1992 was contrary to Union law, and AFS's claim for repayment was unfounded (AFS, is the plaintiff in the ruling discussed in this summary). The Tribunale rejected Ecotrade's claim and upheld AFS's counterclaim for reimbursement. The judgment was upheld by the Court of Appeal of Trieste. Ecotrade appealed the second instance judgment before the Supreme Court of Cassation.

The Supreme Court of Cassation referred a request to the ECJ (current CJEU) for a preliminary ruling on the question of the interpretation of Article 92 of the EC Treaty (Case Ecotrade Srl v Altiforni e Ferriefe di Serviola SpA (AFS) C-200/97,).

Following the judgment of the ECJ (current CJEU), the Supreme Court, by judgment 9681/99, quashed the judgment of the lower court, sending the case back to the Court of Appel of Trieste.

The Court of Appeal of Trieste by judgment 88/04 of February 2004 reversed the ruling of the first instance court, upholding Ecotrade's claim and ordering AFS to repay the amount of EUR 129,407.98.

Finally, AFS appealed the judgment of the Court of Appeal of Trieste before the Supreme Court. The Supreme Court, following the ECJ (current CJEU) ruling C-200/97, quashed the ruling and sent the case back again to the lower court for re-assessment. The subsequent ruling from the lower court (Trieste Court of Appeal) is not available.

Type of action

Private enforcement

Delivery date of the ruling

14/06/2010

Language

Italian

Headnote

In this ruling, the Court stated that the provision which allows for the continuation of business activities during insolvency proceedings did not constitute State aid in itself.

Parties

Names of the parties to the action

Altiforni e Ferriere di Servola S.p.A.

Versus

Ecotrade S.p.A.

The relationship of the plaintiff to the measure

Other

Debtor of the defendant / alleged State aid beneficiary

The relationship of the defendant to the measure

Other

Creditor of the plaintiff

Sector relating to the State aid argument

C - Manufacturing

Steel industry

The type of State aid measure challenged in the court proceedings

Other

Insolvency procedure of 'extraordinary administration'

Substance of the case

Facts and parties' main arguments in the case

The plaintiff AFS argued that the procedure of extraordinary administration under which the company was placed did not constitute State aid, as it did not represent a selective advantage compared with normal insolvency procedures, and thus Ecotrade could not have enforced its credit claim after the start of the procedure. Thus AFS claimed that its request to be repaid addressed to Ecotrade S.p,A. was lawful.

Remedy(ies) sought

Other remedy sought

The enforcement of the claim brought by the creditor of an alleged beneficiary of State aid

Outcome of the case

Conclusions adopted by the national court

The Supreme Court, following the ECJ (current CJEU) preliminary ruling of 1 December 1998 in C-200/97, reversed the lower instance court judgment, applying the following principle: the continuation of business during insolvency proceedings and the possible loss of tax revenue for the State as a result of the derogation from the rules of ordinary insolvency law do not constitute State aid in themselves. As a result, the Court found that Ecotrade could not have enforced its credit claim after the lawful start of the procedure of amministrazione straordinaria.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The subsequent ruling from the lower court is not available.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-200/97, Ecotrade Srl v Altiforni e Ferriere di Servola SpA (AFS) (1998) ECLI:EU:C:1998:579

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary IT4

In this ruling, the Court held that a broad interpretation of tax relief laws would constitute unlawful State aid.

Date

06/01/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Corte di Cassazione (Sezione V)

Court which adopted the ruling (English)

Supreme Court (5th Section)

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Italian

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

16721/2010

Procedural context of the case

The company TO.RE.MAR. (Toscana Regionale Marittima S.p.A.) challenged the act of the tax authority rejecting its request for reimbursement of the I.R.A.P. (a corporate income tax) for the year 1998 before the Provincial Tax Commission of Livorno ('C.T.P.', namely the first instance tax court). TO.RE.MAR. claimed that the tax authority erroneously included a grant of the Ministry of Infrastructure and Transport within the taxable income.

The C.T.P. upheld the claim and ordered the reimbursement of the tax.

The tax authority appealed the ruling before the Regional Tax Commission ('C.T.R.'; the second instance tax court), arguing that, following generally applicable rules, the grant of the Ministry of Infrastructure and Transport should be included within the regional corporation tax (Imposta Regionale sulle Attività Produttive or 'I.R.A.P'). The C.T.R. rejected the appeal, confirming the judgment of the first instance court.

The tax authority appealed this ruling before the Supreme Court (the ruling discussed in this summary).

Type of action

Private enforcement

Delivery date of the ruling

16/07/2010

Language

Italian

Headnote

Parties

Names of the parties to the action

Ministero dell'Economia e delle Finanze, Agenzia delle Entrate

Versus

TO.RE.MAR. (Toscana Regionale Marittima S.p.A.)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

H - Transporting and storage

Sea and coastal passenger water transport

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

TO.RE.MAR. claimed that the tax authority erroneously included a grant of the Ministry of Infrastructure and Transport within the taxable income.

The tax authority argued that following generally applicable national tax law, the grant of the Ministry of Infrastructure and Transport should be included within the I.R.A.P.

Remedy(ies) sought

Other remedy sought

Enforcement of a tax exemption considered as unlawful aid by national authority

Outcome of the case

Conclusions adopted by the national court

The Supreme Court, overturning the lower instance court judgments, stated that national law providing for tax relief, if broadly interpreted, could constitute unlawful State aid. Such an extensive interpretation would indeed entail an economic advantage that would (i) be selective; (ii) be granted through State resources; and (iii) distort competition.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order in relation to unlawful aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

State aid rules are used to interpret a national tax provision.

Case summary IT5

Date

06/01/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Tribunale Amministrativo Regionale per la Sardegna (Prima Sezione)

Court which adopted the ruling (English)

Regional Administrative Tribunal of Sardinia (1st Section)

Instance court which adopted the ruling

Lower court (administrative)

Official language of the court

Italian

Hyperlink to ruling

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=tar_ca&nrg=201700490&nomeFile=201700243_05.html&subDir=Provvedimenti

Case reference

243/2017

Procedural context of the case

Pursuant to Article 3 of Regional Law of Sardinia of 13 April 2010, No. 10, the Region of Sardinia provided for funding in the form of compensation for public service obligations to operators - including Volotea - of airports located in Sardinia, with the aim of strengthening and developing air transport.

On 29 July 2016, the Commission adopted a decision ordering Italy to recover the aid granted to airline companies operating in Olbia and Cagliari airports, on the basis of Law 10/2010 (Commission Decision (EU)2017/1861).

Following the recovery decision, the Region of Sardinia notified the decision to the plaintiff, starting the recovery process.

Volotea S.A. brought an action before the Regional Administrative Tribunal of Sardinia against the recovery order of the Region of Sardinia.

Type of action

Public enforcement

Date of the Commission decision

12/06/2017

Delivery date of the ruling

07/08/2017

Language

Italian

Headnote

In this ruling, the Court rejected a claim and did not suspend a recovery order as to avoid a breach of the obligation to recover aid imposed on the national authorities by a recovery decision.

Parties

Names of the parties to the action

Volotea S.A.

Versus

Regione Autonoma della Sardegna

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Air transportation / Aviation sector

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The Region of Sardinia notified the Commission Decision (EU)2017/1861 to Volotea, ordering the recovery of the incompatible aid.

The plaintiff (Volotea) claimed the interim suspension of the recovery order and related acts, including the Commission decision.

Remedy(ies) sought

Other remedy sought

Interim measures to suspend the recovery order

Outcome of the case

Conclusions adopted by the national court

The Regional Administrative Tribunal of Sardinia, rejected the claim of the plaintiff and did not suspend the recovery order of the Region of Sardinia, by applying the ordinary national legal principles for the assessment of claims for interim reliefs.

The Court also mentioned EU principles of immediate and effective implementation of the recovery decisions, specifying that those principles also apply to national courts.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-305/09, European Commission v Italian Republic (2011) ECLI:EU:C:2011:274
- C - 301/87, French Republic v Commission of the European Communities (1990) ECLI:EU:C:1990:67
- C- 232/05, Commission of the European Communities v French Republic (2006) ECLI:EU:C:2006:651
- C 142/87, Kingdom of Belgium v Commission of the European Communities (1990) ECLI:EU:C:1990:125
- C - 404/97, Commission of the European Communities v Portuguese Republic (2002) ECLI:EU:C:2000:345
- C-310/99, Italian Republic v Commission of the European Communities (2002) ECLI:EU:C:2002:143
- C-214/2007, Commission of the European Communities v French Republic Court of Justice (2008) ECLI:EU:C:2008:619

National case law:
- Regione Sardegna v Banco di Sardegna Spa 2014, 2014/501

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Decision (EU) 2017/1861 of 29 July 2016 on State aid SA33983 (2013/C) (ex 2012/NN) (ex 2011/N) — Italy — Compensation to Sardinian airports for public service obligations (SGEI) (notified under document C(2016) 4862), OJ L 268, 18.10.2017

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary IT6

Date

06/01/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Corte di Appello di Cagliari (Sezione Civile Prima)

Court which adopted the ruling (English)

Cagliari Court of Appeal (First Civil Law Section)

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

Italian

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

517/2017

Procedural context of the case

The original measure was approved in April 1998 by Regione Sardegna. It consisted of a law granting incentives for hotels to undertake renovation works. The incentives took the form of grants and subsidised loans.

Regione Sardegna notified the aid to the Commission for State aid clearance. In November 1998, the Commission decided not to raise objections on the notified measure. The Commission decision was published in the OJ. The full decision set out the proviso that, for the measure to have an incentive effect, the beneficiaries needed to request the aid before making the investment.

In December 1998, Regione Sardegna adopted implementing measures. However, these measures also enlarged the circle of aid beneficiaries to projects for which the investments had already been made prior to the application for aid.

In 2000, Regione Sardegna adopted further implementing measures: one repealed the 1998 implementing measure in favour of investments made prior to the application for aid; but the other one (d.G.R. 33/6) did the opposite, thus ultimately endorsing aid for investments made prior to the application for aid.

As a result, in 2002 projects that had been started before the date of the application for aid received approximately EUR 24 million.

In 2003, the Commission received a complaint and in 2004 it opened a formal investigation into the possible misuse of the approved aid measure. In 2006, having received further information, the Commission corrected the legal basis of the investigation into a case of non-notified new aid, taking the position that the aid had been granted on the basis of a measure (d.G.R. 33/6) which was different from the notified measure.

In 2008, the Commission concluded the investigation, finding that aid granted to projects started before the application for aid was unlawful and incompatible, and ordered its recovery.

Regione Sardegna and a number of beneficiaries challenged the decision before the GC. In dismissing the applications, the GC reiterated the usual – restrictive – approach to legitimate expectations. The ECJ confirmed the lower court judgment.

In 2012, beneficiaries of the aid that was found to be unlawful by the Commission in 2008 started civil law proceedings seeking the annulment of the recovery order and damages from Regione Sardegna.

Overturning a lower court negative judgment, in 2017 the Court of Appeal of Cagliari granted the beneficiaries' request and awarded damages.

Type of action

Public enforcement

Date of the Commission decision

02/07/2008

Delivery date of the ruling

13/06/2017

Language

Italian

Headnote

In this ruling, the Court overturned the lower instance court judgment, annulling the recovery order as national authorities breached the legitimate expectation of the beneficiary with regards to the lawfulness of the State aid, finding that beneficiaries could be entitled to compensation.

Parties

Names of the parties to the action

Coghene Costruzioni S.R.L.

Versus

Regione Autonoma della Sardegna

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

I - Accommodation and food service activities

Hotel industry / tourism sector

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The plaintiff claimed that the granting authority (Sardinia Region) breached the legitimate expectation of the beneficiary with regards to the lawfulness of the State aid received, and should thus be compensated for the damages caused by the violation of Union law.

The defendant held that the issue of legitimate expectations was already discussed by the Commission and the CJEU. Therefore, national courts should comply with those decisions.

Remedy(ies) sought

Other remedy sought

Annulment of the recovery order and compensation for damages

Outcome of the case

Conclusions adopted by the national court

The Court of Appeal annulled the recovery order, finding that national authorities breached the legitimate expectation of the beneficiaries. In particular, the Court found that the beneficiaries entertained valid national legitimate expectations because the Region induced the beneficiaries to believe that the subsidies were compatible with Article 107 TFEU. To support this view, the Court recalled that the Region circulated only a partial text of the Commission decision declaring the aid compatible, withdrew the administrative act granting the incompatible aid, but simultaneously issued a new act re-granting that aid to meet the expectations of the beneficiaries (allegedly to avoid potential future litigation), and admitted, also during the Commission formal investigation, that it had induced legitimate expectations, affecting the decision of the beneficiaries to opt for the subsidies, also through public statements made by political actors.

Moreover, the Court of Appeal held that the case at hand featured some exceptional circumstances, which triggered the liability of the Region for the breach of Union law (in particular, Article 108 TFEU). In particular, the Court of Appeal admitted that the requirements of Francovich case law were present. As a result, the Court allowed a set-off between the amount to be recovered and the amount of damages for which the standard of proof was met.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-630/11 P to C-633/11 P, HGA and Others v Commission (2013) ECLI:EU:C:2013:387
- 106 to 120/87 Asteris, AE and others v Hellenic Republic and European Economic Community (1988) ECLI:EU:C:1988:457

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Commission Decision 2008/854/EC of 2 July 2008

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary IT7

Date

15/03/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Consiglio di Stato (Sezione Quarta)

Court which adopted the ruling (English)

Council of State (Fourth Section)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Italian

Hyperlink to ruling

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=cds&nrg=201306032&nomeFile=201303756_15.html&subDir=Provvedimenti

Case reference

3756/2013

Procedural context of the case

In 2012, the Commission found that the payment of EUR 360 million made between 2002 and 2010 by SEA S.p.A., owned by the Municipality of Milan, to its subsidiary SEA Handling, the ground handling operator in Milan airports, constituted incompatible State aid (Commission Decision (EU) 2015/1225 of 19 December 2012 (C14/2010)). The Commission thus ordered Italy to recover the aid from SEA Handling.

In 2013, the Municipality of Milan, as major shareholder of SEA S.p.A., brought an action before the Regional Administrative Tribunal of Lombardia for the suspension of: (i) the recovery order issued by the Presidency of the Council of Ministries to recover the aid; (ii) the communication of the Presidency of the Council of Ministries sent to the Commission with information on the quantification of aid to be recovered; (iii) other related acts, such as the Recovery Decision.

The Court granted the ad interim relief, by suspending the Commission decision of 19 December 2012 (SA.21420 (C14/2010)).

With judgment 3756 of 24 September 2013, the Council of State upheld the appeal of the Presidency of the Council of Ministries and quashed the first instance court judgment.

Type of action

Public enforcement

Date of the Commission decision

04/03/2013

Delivery date of the ruling

25/09/2013

Language

Italian

Headnote

In this ruling, the Court annulled a decision of a first instance court which suspended the effects of the recovery decisions issued by the Commission.

Parties

Names of the parties to the action

Presidenza del Consiglio dei Ministri

Versus

Comune di Milano

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Air transportation

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

In the first instance court proceeding, the Municipality of Milan claimed the ad interim suspension of the order to recover the aid of the Presidency of the Council of Ministries, and related acts, because the capital injection was carried out by SEA S.p.A. in favour of its subsidiary SEA Handling, while the Municipality was SEA's shareholder. The Court granted the ad interim relief, by suspending the recovery decision.

In particular, the first instance Court assessed the claim under generally applicable procedural rules, which require the presence of two conditions: (i) periculum in mora; and (ii) fumus boni juris. Accordingly, the Tribunal held that (i) the recovery could have jeopardised the financial stability of the Municipality of Milan, which would have had to reimburse a large amount of money within a short period (and if the Municipality then claimed the amount from SEA companies, this could have led them to bankruptcy); (ii) the claim was credible, as the recovery order was not addressed to the exact same entity defined as beneficiary by the Commission decision.

The Presidency of the Council of Ministries appealed the order, as breaching established national and EU principles.

Remedy(ies) sought

Other remedy sought

Request of aid recovery suspension

Outcome of the case

Conclusions adopted by the national court

The Council of State upheld the appeal of the Presidency of the Council of Ministries and quashed the first instance court judgment.

In particular, the Court found that the interim suspension constituted a breach of Article 108(2) TFEU, as impeding the effectiveness of recovery, and that it could not be justified in the light of the different public interests at stake.

Moreover, as regards the fumus boni iuris, the Court reported that the question of the imputability of the operation constituting aid had already been assessed by the Commission in its recovery decision.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed (Ad interim relief - suspension of the effects of the Commission decision); Requests of aid recovery suspension

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission Decision (EU) 2015/1225 of 19 December 2012 (C14/2010)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary IT8

Date

06/01/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Tribunale Amministrativo Regionale Milano (Lombardia) (Sezione II)

Court which adopted the ruling (English)

Regional Administrative Tribunal of Milan (Lombardy) (2nd Section)

Instance court which adopted the ruling

Lower court (administrative)

Official language of the court

Italian

Hyperlink to ruling

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=tar_mi&nrg=201300948&nomeFile=201402297_01.html&subDir=Provvedimenti

Case reference

2297/2014

Procedural context of the case

Alcoa Trasformazioni s.r.l. (owner of two aluminium production plants, one located in the Veneto Region (Fusina) and the other in the Sardinia Region (Portovesme)) brought an action before the Regional Administrative Tribunal of Milan against the recovery order issued on 12 February 2013 by the Italian Electricity Industry Equalisation Fund (Cassa conguaglio per il settore elettrico, or 'CCSE'). CCSE requested the restitution of the amount paid by CCSE to Alcoa as a compensatory grant for the electricity cost borne by the company for the operation of the two mentioned factories. The payment requested by CCSE followed: (i) Commission Decision C(2009) 5497 of 19 November 2009, which qualified the aforementioned contribution as incompatible aid; and (ii) the ruling of the Italian Council of State (No. 6356/2011) rejecting an appeal against the decision of the Authority for Electricity and Gas ('AEEG') to reduce the amount of the contribution. Alcoa also appealed the methods used by CCSE to calculate the amount to be recovered, including interest.

The background facts of the case are as follows.

In 1995, a Ministry Decree introduced a special tariff ('Alumix Tariff') for the purchase of electricity made by Alcoa from the former State monopoly ENEL. The measure was applicable for 10 years.

The Commission, in its decision of 4 December 1996 (97/1/EC), found the tariff did not constitute incompatible State aid.

In 1999, with the liberalisation process of the electricity sector, Alcoa was free to choose its seller of electricity. In turn, Alcoa received an ex post contribution.

In 2004, the AEEG, with Decision No. 148/2004, entrusted the CCSE with providing Alcoa with the contribution. In particular, the contribution paid to Alcoa had to be proportionally reduced to ensure that the price of electricity ultimately paid by Alcoa was not lower than the Alumix Tariff.

Alcoa appealed the AEEG Decision No. 148/2008 before the Regional Administrative Tribunal of Milan, which upheld the claim (judgment 1195/2006). In 2005, Article 11 (11) of Law Decree of 14 March 2005, No. 35 (converted by Law 14 May 2005 No. 80) extended the period of the contribution until 2010.

In 2009, with Commission Decision C(2009)5497, the Commission ordered Italian authorities to stop paying the contribution to Alcoa and to recover the amounts paid after 2005. The aid granted in connection with the plant in Portovesme had to be recovered only for the period between 1 January 2006 until 18 January 2007, as on 19 January 2007 the Commission sent a letter to Alcoa confirming the potential lawfulness of the aid granted.

In 2011, after the recovery decision was issued by the Commission, the Council of State quashed the judgment 1195/2006 of Regional Administrative Tribunal of Milan, thus reinstating AEEG Decision No. 148/2008.

Type of action

Public enforcement

Date of the Commission decision

12/02/2013

Delivery date of the ruling

09/02/2014

Language

Italian

Headnote

In this ruling, the Court held that the recovery order against a beneficiary was unlawful, as it was not covered by the recovery decision of the Commission.

Parties

Names of the parties to the action

Alcoa Trasformazioni srl

Versus

Autorita per l'energia elettrica e il gas (AEEG); Cassa Conguaglio per il settore elettrico (CCSE)

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Electricity

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The CCSE and the AEEG had ordered Alcoa to repay the amounts received as a compensatory contribution after 1 January 2006 for the smelters of Fusina and Portovesme. Regarding the latter, the defendants also requested part of the amounts paid between 19 January 2007 and 19 November 2009 (period for which, the Commission in Commission Decision C(2009)5497 had excluded recovery). In particular, for this period, national authorities requested the repayment of the amounts corresponding to the difference between the full amount of the compensatory contribution (received by Alcoa following the first instance ruling No. 1195/2006 annulling resolution No. 148 of 2004), and the lower amount of the same contribution as determined by resolution No. 148/2004 (which, following the judgment of the appeal judge, regained its effectiveness). The plaintiff claimed that the recovery requests of the defendants were unlawful.

Remedy(ies) sought

Other remedy sought

Annulment of the recovery order

Outcome of the case

Conclusions adopted by the national court

The Court found that the recovery order by the Italian Electricity Industry Equalisation Fund against the aid beneficiary Alcoa was unlawful, for the period from 19 January 2007 to 19 November 2009, as it was not covered by the recovery decision of the Commission.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission decision of 4 December 1996 (97/1/EC)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary IT9

Date

06/01/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Consiglio di Stato (Sezione III)

Court which adopted the ruling (English)

Council of State (3rd Section)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Italian

Hyperlink to ruling

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=cds&nrg=201407839&nomeFile=201502401_11.html&subDir=Provvedimenti

Case reference

2401/2015

Procedural context of the case

The Italian Ministerial Decree of 5 August 1994 – notified to the Commission and declared compatible aid subject to certain conditions – lays down the allocation criteria for the relief from social security contributions due to the Istituto Nazionale de la Previdenza Sociale ('INPS') (National Institute of Social Insurance) by employers in the South of Italy for the period 1994-1996 ('the Mezzogiorno scheme').

By Article 5-bis of Decree Law 96/95, converted into Law 206/95, and by Article 27 of Decree Law 669/96, converted into Law 30/97, 'the Mezzogiorno scheme' was extended to undertakings established on the island territory of Venice and Chioggia for the period 1995-1997. The Italian authorities did not notify the extension of the scheme to the Commission, which decided to start a formal investigation on 17 December 1997 (Decision 2000/394/EC). By Commission Decision 2000/394/EC, the Commission declared such aid incompatible with the internal market, if it was granted to undertakings which were not SMEs and were located outside certain areas eligible for exemption under Article 87(3)(c) of the EC Treaty (current Article 107(3) TFEU).

In 2000, fifty-nine actions against the Commission decision were brought before the GC. By its judgment of 28 November 2008 Hotel Cipriani SpA and Others v Commission of the European Communities T-254/00, the GC rejected the claim in the pilot case.

The plaintiffs (including the defendant in the ruling at issue) appealed the judgment of the GC before the CJEU. In 2011, the CJEU rejected the claim in the pilot case.

Meanwhile, the GC examined and rejected the other actions (different from the pilot actions). The orders of the GC were appealed before the CJEU which, in 2014, rejected the appeals. In particular, the CJEU restated the principle according to which, in aid schemes, national authorities should assess each individual case, in order to verify whether the advantage lead to a distortion of competition and affected trade between Member States.

Following the Commission Decision 2000/394/EC, INPS started the recovery by sending tax notices ('cartelle esattoriali'). The tax notices were challenged before the first instance civil court of Venice. Meanwhile, Article 1, paragraph 351 of Law No. 228/2012 invalidated the recovery already carried out by INPS. INPS thus sent out a questionnaire to interested undertakings in order to assess the existence of the conditions specified by the Commission decision.

The plaintiff brought an action before the Regional Administrative Tribunal of Veneto against the recovery carried out by INPS, inter alia, for the violation of Article 1, paragraph 351, Law No. 228/2012. The plaintiffs claimed that INPS did not verify the compatibility conditions of the aid before ordering its recovery.

By its judgment 896/2014, the Regional Administrative Tribunal of Veneto upheld the claim. INPS appealed the ruling of the Regional Administrative Tribunal of Veneto before the Council of State (ruling described in this summary).

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

13/05/2015

Language

Italian

Headnote

In this ruling, the Court discussed several issues stemming from the recovery process related to aid schemes, confirming the primacy of recovery decisions by the Commission over national legislation and the exclusive competence of the Commission in assessing compatibility of State aid.

Parties

Names of the parties to the action

Inps - Istituto Nazionale della Previdenza Sociale

Versus

Hotel Cipriani S.r.l.

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

I - Accommodation and food service activities

Hotel industry

The type of State aid measure challenged in the court proceedings

Other

Reductions in social security contributions

Substance of the case

Facts and parties' main arguments in the case

INPS appealed the judgment of the Regional Administrative Tribunal of Veneto, finding that the investigation activities carried out by national authorities to identify the beneficiaries subject to recovery were insufficient. In particular, INPS argued that the questionnaire submitted by national authorities for evaluating the existence of compatibility criteria was adequately drafted, following meetings with interested parties and with the support of the Italian Competition Authority.

The defendant argued that INPS while proceeding with the recovery violated Article 1, paragraph 351, Law No 228/2012, and did not verify the compatibility conditions of the aid measures before ordering the recovery.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

The Court overturning the lower instance court held that the recovery measures were sufficiently motivated and lawful. Therefore, they should not have been annulled by the first instance court. In particular, the Council of State held that:
(i) In line with settled CJEU, Supreme Court and Constitutional case law, national courts must enforce recovery decisions, because the Commission has exclusive competence in assessing the compatibility of State aid measures;
(ii) As the principle of effectiveness of Union law overtakes the principle of res judicata, the Member States' recovery obligations cannot be impeded by conflicting national judgments;
(iii) Beneficiaries of unlawful State aid which is then declared incompatible by the Commission cannot rely on legitimate expectation;
(iv) The investigations carried out by national authorities in order to verify whether the activity carried out by beneficiaries could lead to a distortion of competition do not have a discretionary nature, they are rather a mere execution of the Commission decision.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid; Identification of the aid beneficiary

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-119/05, Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA (2007) ECLI:EU:C:2007:434
- C-2/08, Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl (2009) ECLI:EU:C:2009:506
- C- 399/08P, Commission v Deutsche Post AG (2010) ECLI:EU:C:2010:481
- C-71/09, Comitato 'Venezia vuole vivere' and Others v Commission (2011) ECLI:EU:C:2011:368
- C-148/04, Unicredito Italiano Spa v Agenzia delle Entrate, Ufficio Genova 1 (2005) ECLI:EU:C:2005:774
- C-222/04, Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA (2006) ECLI:EU:C:2006:8
- C-197/11 and C-203/11 Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11) (2013) ECLI:EU:C:2013:288

National case law:
- Supreme Court (2010) 23418/2010
- Supreme Court (2006) 26948/2006; Supreme Court (2012) 6756/2012; Supreme Court (2012) 6538/2012; Supreme Court (2013) 7162/2013
- Supreme Court (2003) 2013/4354

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- EU Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- 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
- Commission Decision 2000/394/EC of 25 November 1999 on aid to firms in Venice and Chioggia by way of relief from social security contributions under Laws Nos 30/1997 and 206/1995 (notified under document number C(1999) 4268) OJ L 150, 23.6.2000 (Commission Recovery Notice Decision)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary IT10

Date

06/01/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Tribunale di Roma (Seconda Sezione Civile)

Court which adopted the ruling (English)

Tribunal of Rome (Second Civil Section)

Instance court which adopted the ruling

Lower court (civil/commercial)

Official language of the court

Italian

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

2897/2016

Procedural context of the case

This is a first instance court judgment; a follow up of the C-69/13 CJEU ruling (ECLI:EU:C:2014:71).

The investigation of the Commission started with the complaint of the television companies Centro Europa 7 S.r.l. and Sky Italia regarding State subsidies granted to consumers for purchasing or leasing digital decoders. With Commission Decision 2007/374/EC, the Commission declared the scheme as an incompatible State aid and ordered Italy to recover the incompatible aid. However, given the scheme's complexity, the Commission did not quantify the aid to be recovered in its final decision and instead offered some guidelines on how to calculate this amount (recitals 196 to 205 of the decision). Following a number of exchanges with the Commission, Italian authorities quantified the aid and ordered the payment to the main beneficiary Mediaset (the plaintiff in the case discussed in this summary).

Mediaset challenged the recovery order before the Tribunale civile di Roma, arguing that the method used by national authorities to calculate the aid amount was wrong. The Court required an independent expert to assess the method used by national authority. The expert cast doubts on the existence of an advantage in favour of Mediaset. Hence the Court decided to refer a request to the CJEU for a preliminary ruling, asking if a national court could quantify the aid recovery amount as 'zero'.

Type of action

Public enforcement

Date of the Commission decision

12/11/2009

Delivery date of the ruling

11/02/2016

Language

Italian

Headnote

In this ruling, the Court, following the preliminary ruling given by the CJEU (C-69/13) and recalculated the aid amount to be recovered, which was found to be equal to 'zero'.

Parties

Names of the parties to the action

Mediaset S.P.A.

Versus

Ministero dello Sviluppo Economico

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

Television sector

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

Mediaset (the main commercial broadcaster in terrestrial television in Italy) challenged the national recovery order before the first instance Court of Rome seeking the annulment of the order and the reduction of the amount to be recovered. The plaintiff argued that the criteria laid down in the Commission Decision 2007/374/EC to calculate the aid were incorrectly applied. In particular, the inaccuracy of the calculation concerned the quantification of the additional profit generated by the subsidy.

The defendant argued that the quantification of the amount to be payed was correct.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

The national court, following the CJEU preliminary ruling Mediaset SpA v Ministero dello Sviluppo economic (C-69/13), annulled the recovery order and recalculated the aid amount, which was found to be equal to zero. As a result, the Court ordered national authorities to repay the amount of aid already recovered.

In particular, the Court argued that, in the light of the economic analysis of the appointed independent expert, Mediaset obtained no advantage from the aid, because the additional profit in terms of new costumers resulting from the subsidisation of purchase of decoder was found to be zero.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-177/07 Mediaset SpA v Commission, ECLI:EU:T:2010:233
- C-69/13, Mediaset SpA v Ministero dello Sviluppo economic, ECLI:EU:C:2014:71
- C-403/10 P Mediaset SPA v Commission, ECLI:EU:C:2011:533

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Commission Decision 2007/374/EC of 24 January 2007 on State aid C 52/2005 (ex NN 88/2005, ex CP 101/2004) implemented by the Italian Republic for the subsidised purchase of digital decoders (notified under document number C(2006) 6634) OJ L 147, 8.6.2007

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-69/13 Mediaset SpA v Ministero dello Sviluppo economico ECLI:EU:C:2014:71 (http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-69/13&td=ALL)

Any other comments (optional)

No other comments

Case summary IT11

Date

06/01/2019

Case identifiers

Member State

Italy

Court which adopted the ruling (national language)

Corte di Cassazione Sezione IV

Court which adopted the ruling (English)

Supreme Court 4th Section

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Italian

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

6671/2012

Procedural context of the case

The plaintiff (TNT Global Express S.p.A.) brought an action before the Supreme Court against a ruling of the Cagliari Court of Appeal, Sassari Section of 5 October 2009 that upheld the claim of INPS (i.e. the Italian National Institute for Social Security). INPS was seeking the recovery of the social security contribution exemption with respect to training and work-experience contracts (i.e. CFL, contratti di formazione e lavoro) granted to the plaintiff between 1995 and 2001, as the Commission, with Commission Decision 2000/128/EC of 11 May 1999, found this not to be compatible with the internal market.

The Court of Appeal of Cagliari stated that the burden of proving to be entitled to contribution exemptions was on the beneficiary of the aid and this proof was not provided.

Furthermore, the plaintiff claimed the invalidity of the recovery order as time barred. The Court rejected the claim because the statute of limitation for the recovery of contributions was five years, as set out by national rules, and it started with the ECJ (current CJEU), ruling issued on 7 March 2002 (Case Italy v. Commission C-310/99), rejecting the challenge and confirming the legitimacy of the Commission decision.

Moreover, the Court of Appeal pointed out that in any case the statute of limitation of ten years provided by Article 15, Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999) could apply also to recovery procedure.

Type of action

Public enforcement

Date of the Commission decision

27/06/2005

Delivery date of the ruling

03/05/2012

Language

Italian

Headnote

In this ruling, the Court held that the statute of limitation for the recovery of unlawful State aid is ten years from the notification of the recovery decision by the Commission to the Italian authorities.

Parties

Names of the parties to the action

TNT Global Express S.P.A.

Versus

I.N.P.S. – Istituto Nazionale della Previdenza Sociale

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Logistics services

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The case concerned the recovery of social security contribution exemptions granted to TNT Global Express SPA with respect to training and work-experience contracts (i.e. CFL, contratti di formazione e lavoro) between 1995 and 2001.

The plaintiff claimed that the statute of limitation for the recovery of contributions set out by national rules was 5 years, starting with the Commission Decision 128/2000 of 11 May 1999, which is directly applicable (rather than the ECJ (current CJEU) ruling issued on 7 March 2002). The plaintiff also claimed the violation and misapplication of Articles 14 and 15, EC Regulation No, 659/1999, as the statute of limitation is provided for by national rules and not by EU rules.

Furthermore, the plaintiff claimed that the burden of proof concerning the right to receive the contribution breaks was on INPS.

The plaintiff also argued that its contribution breaks met the compatibility conditions spelled out by the Commission decision.

Finally, the plaintiff claimed a violation and misapplication of national rules with regard to the *de minimis* rule.

The defendant referred to Articles 15 and 14 of EC Regulation No 659/1999 and argued that the statute of limitation provided by the EC Regulation (10 years, and not five years as provided by national rules) was applicable to the recovery sought by the INPS.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

Firstly, the Supreme Court, partially following the lower instance court, held that the statute of limitation for the recovery of unlawful State aid measures is 10 years, as provided by generally applicable rules (Article 2946 of Italian Civil Code). The period starts from the notification of the recovery decision by the Commission to the Italian authorities.

Secondly, the Court established that, in case of aid schemes, beneficiaries bear the burden of proving the compliance with (i) aid granting requirements set out by the Commission; or (ii) the applicability of the *de minimis* exemption. In the case at stake, the beneficiary did not fulfil the burden of proof, and thus the recovery order was upheld.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-310/99, Italy v. Commission of the European Communities (2002) ECR I-2299
- C-408/04 P, Commission of the European Communities v Salzgitter AG (2008) ECLI:EU:C:2008:236
- C-142/87, Kingdom of Belgium v Commission of the European Communities (1990) ECLI:EU:C:1990:125
- C-5/89 Commission of the European Communities v Federal Republic of Germany (1990) ECLI:EU:C:1990:320
- C-343/96 Dilexport Srl v Amministrazione delle Finanze dello Stato (1999) ECLI:EU:C:1999:59
- C-390/98 H.J. Banks & Co. Ltd v The Coal Authority and Secretary of State for Trade and Industry (2001) ECLI:EU:C:2001:456
- C-368/04 Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on 'equivalence'

References by the court to other relevant aspect of the EU acquis

- 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 (*de minimis* Regulation)
- Commission Decision 2000/128/EC of 11 May 1999 concerning aid granted by Italy to promote employment (Notified under document number C(1999) 1364), OJ L 42, 15.2.2000

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

15.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Corte di Cassazione (Sezione I)	Supreme Court (1st Section)	Last instance court (civil/commercial)	12313/2007	25/05/2007	Private enforcement	None - Claim rejected	The Supreme Court, confirming the decision of the lower instance court, ruled that clawback actions ('azioni revocatorie') undertaken during insolvency proceedings do not constitute State aid. In fact, such legal actions have no selective character.	The judgment is important because it set a precedent followed in several subsequent cases.	Similar cases: Supreme Court (1st Section) 7986/2011 of 7 April 2011 and Supreme Court (1st Section) 19729/2015 of 2 October 2015.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	12168/2008	15/05/2008	Private enforcement	Recovery order in relation to unlawful aid	The Supreme Court, overturning the ruling of the lower instance court and citing case C-148/04, held that the tax benefits in question constituted State aid measures. In fact, because of the breach of the standstill obligation such benefits could not be granted to the defendant. The undertaking did not meet the requirements to receive the aid, so the decision to annul the recovery order was overturned.		The ruling refers to ECJ (current CJEU) judgment of 15 December 2005 in case C-148/04. Cited in 2009 Commission Summaries of State aid judgments at national level.
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	4692/2008	27/05/2008	Private enforcement	Other remedy imposed	Breach of standstill obligation and annulment of Ministerial Decree 3.1.2002 granting the State aid. This case reversed the first instance court ruling regarding the breach of the standstill obligation. The Ministry of Agriculture established a special taxation regime for specific fertilisers, the proceedings of which were devoted to the promotion of organic agriculture. The Commission declared that the tax had an effect equivalent to a customs duty, but the Italian State did not await the conclusion of the compatibility assessment according to Article 88 of the EC Treaty (current Article 108 TFEU). Accordingly, the Council of State annulled Ministerial Decree that instituted the State aid regime.		
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	3959/2009	17/06/2009	Private enforcement	Other remedy imposed	The Council of State annulled the lower instance judgment and held that the undertakings met the requirements to be granted the State aid. Therefore, the Council ordered the grant of the aid to the plaintiff. The Council of State, overturning the decision of lower instance court and following the Commission decision of 12 July 2000 in case 715/99, stated that the plaintiff complied with the conditions for receiving the State aid, which therefore should have been granted.		
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	4236/2009	30/06/2009	Private enforcement	None - Claim rejected	The Council of State, confirming the decision of the lower instance court, held that the winner of a public tender (a not-for-profit organisation receiving public funding) lawfully participated in the tender as the State aid received was compatible with the 'common market'.		
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	2592/2010	04/02/2010	Private enforcement	Other remedy imposed	The Supreme Court, overturning the lower instance court, clarified that banking foundations can benefit from certain tax exemptions, if they exclusively promote specific social goals, such as charity, education or scientific research. In the case at stake, the beneficiary did not meet the conditions to benefit from the aid.	The ruling is important because banking foundations in Italy benefit from several tax advantages compared to for-profit banks which would otherwise be considered State aid measures.	The most important precedent in the same vein, albeit dating before the period of interest, is Supreme Court (Joint Chambers) 27619/2006 of 29 December 2006. There are many subsequent similar cases: Supreme Court (5th Section) cases 2593 to 2596 of 4 February 2010, Supreme Court (5th Section) cases 2817-2822 of 9 February 2010, or Supreme Court (5th Section) case 19231/2012 of 7 November 2012.
	Council of State (6th Section)	Last instance court (administrative)	646/2010	09/02/2010	Private enforcement	None - Claim rejected	The State aid was lawful. The Council of State, following the lower instance court, stated that the purchase of land prior to the commencement of a real estate development, did not constitute the commencement of an investment program for which the State aid was requested. Accordingly, the real estate development aid could be granted even if the land was acquired before the application for such State aid.		Similar case: Council of State (6th Section) 2358/2014 of 30 April 2014.
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	1199/2010	02/03/2010	Private enforcement	None - Claim rejected	The regional aid was lawful as it was granted in compliance with all conditions imposed by the relevant statute. The administration must pay the lawful aid. The aid was granted in compliance with the principle of necessity imposed by the relevant statute (the beneficiary would not have made the investment without the incentive). The ownership of land does not constitute the commencement of the investment for which the aid was sought.		The ruling refers to Commission decisions of 2 August 2000 and 12 July 2007 (01/47/CE).
Corte di Cassazione (Sezione I)	Supreme Court (1st Section)	Last instance court (civil/commercial)	14223/2010	14/06/2010	Private enforcement	Case sent back to the lower court for re-assessment	The Supreme Court, following the CJEU preliminary ruling of 1 December 1998 in C-200/97, reversed the decision of the lower instance court, affirming that the continuation of business during insolvency proceedings does not constitute State aid.	The ruling is important because the Supreme Court stated that the provision which allows the continuation of the business activity during insolvency proceedings does not constitute State aid.	The subsequent ruling from the lower court (Trieste Court of Appeal) is not available.
Corte Costituzionale	Constitutional Court	Constitutional Court	ECLI:IT:COST:2010:216	17/06/2010	Private enforcement	Other remedy imposed	The Constitutional Court, following the CJEU preliminary ruling of 17 November 09 in case C-169/08, held that the regional legislation of Sardinia, which established a tax on stopovers for tourist purposes by aircraft owned by undertakings whose tax domicile was outside Sardinia, was contrary to the Italian Constitution and unlawful. Despite recognising that such a tax would constitute State aid, the Court		Follow-up judgment to Regione Sardegna preliminary ruling C-169/08.

							based its decision on the principle of freedom to provide services according to Article 56 TFEU.		
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	16728/2010	16/07/2010	Private enforcement	None - Claim rejected	Ecclesiastical institutions engaging in business activity cannot benefit from tax exemptions. The Supreme Court recognised that the municipal real-estate tax exemption awarded to ecclesiastical institutions would amount to State aid if these institutions were to engage in business activity.	The ruling is important because ecclesiastical institutions in Italy benefit from several economic advantages. In this sense see Commission Decision C(2012) 9461, OJ L166/24.	
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	16721/2010	16/07/2010	Private enforcement	Recovery order in relation to unlawful aid	The Supreme Court, overturning the decision of the lower instance court, stated that tax relief laws, if broadly interpreted, could constitute unlawful State aid. Indeed, such extensive interpretation would determine economic advantages that would be selective, indirectly linked to State resources and distorting competition on the market. Broad interpretation of tax relief measures would constitute unlawful State aid measures.		Similar case: Supreme Court (5th Section) 18504/2010 of 10 August 2010.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	26289/2010	29/12/2010	Private enforcement	None - Claim rejected	The plaintiff cannot benefit from reduced excise duty fees that have been amended by supervening laws. The Supreme Court states that the entry into force of Directive 92/81/CEE harmonising excise duties obliged Member States to notify to the Commission not only new State aid measures relating to excise duties, but also existing State aid measures and amendments to existing State aid measures.	The ruling is important as it considered existing State aid.	
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	1305/2011	02/03/2011	Private enforcement	None - Claim rejected	The Council of State, confirming the decision of the lower court, stated that the promotion by the Ministry for Cultural Goods and Activities of the Italian cinema industry through a publicly-held company did not constitute State aid.		
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	4388/2011	27/07/2011	Private enforcement	None - Claim rejected	The challenged provision did not constitute State aid. The Council of State, confirming the decision of the lower instance court, found that heavier duties on energy undertakings with a turnover above a certain ceiling did not constitute a State aid scheme. Such duties did not meet the selectivity criterion.		Similar case: Council of State (6th Section) 5151/2011 of 15 September 2011.
Corte di Cassazione (Sezione I)	Supreme Court (1st Section)	Last instance court (civil/commercial)	4776/2012	26/03/2012	Private enforcement	None - Claim rejected	The Supreme Court, following the Commission Note E/9 of 19 April 2005, found that the Italian broadcasting fee led to a transfer of resources which constituted existing aid, and that such aid had to be considered "legitimate", unless the Commission declared it to be incompatible. Moreover, State aid measures that compensate costs incurred for carrying out services of general economic interest are lawful in light of CJEU judgments in cases C-290/00, C-34/01 and C-38/01.	The ruling is important as it considered existing State aid.	
Corte di Cassazione (Sezioni Unite Civili)	Supreme Court (Joint Civil Chambers)	Last instance court (civil/commercial)	6494/2012	26/04/2012	Private enforcement	None - Claim rejected	The plaintiff has the right to receive the State aid. The Supreme Court, confirming the decision of the lower instance court, required the public administration to grant the State aid to the defendant. In fact, such aid was considered lawful by the Commission decision of 14 November 1995 as also interpreted by the CJEU in its judgment of 20 May 2010 (C-138/09).	The ruling is important as it recognised that undertakings eligible to receive State aid have the right to receive it as soon as the Commission decides on its lawfulness.	
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	4483/2012	06/08/2012	Private enforcement	None - Claim rejected	The challenged measure did not constitute State aid. The Supreme Court distinguished the compatibility assessment of a State aid regime from the lawfulness of the concrete State aid granted. On the one hand, a State aid regime might be declared unlawful by the Commission, but an individual aid granted might be below the *de minimis* amount and so might be compatible. On the other hand, a State aid scheme declared compatible with Union law does not prevent the unlawfulness of a concrete aid granted, which might in practice disregard the scheme procedures.	The ruling is important because the Council of State stated that an incompatibility assessment by the Commission of a national law providing for certain public subsidies does not imply the unlawfulness of the State aid concretely granted.	
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	387/2013	23/01/2013	Private enforcement	None - Claim rejected	The public tender that granted the concession was lawful. The Council of State, overturning the decision of the lower instance court, affirmed that not-for-profit organisations, such as charitable associations, can apply for public tenders. Moreover, undertakings that receive lawful State aid can apply for public tenders as well.		
Consiglio di Stato (Sezione III)	Council of State (3rd Section)	Last instance court (administrative)	4583/2013	17/09/2013	Private enforcement	None - Claim rejected	The Court ruled that since the new *de minimis* rules applied retroactively to applications regarding the granting of aid filed before their entry into force, the aid could not be considered to meet the criteria set out in Article 107(1) TFEU and could therefore not be considered to constitute State aid. Thus, the administration was ordered to pay the aid. The Council of State rejected the appeal and, following Commission decision of 17 December 2013, clarified that the new *de minimis rules* established by Commission Notice 2009/C 83/01 of 7 April 2008, retroactively applied to all agricultural aid applications filed since 2009.		
Corte di Cassazione (Sezione III)	Supreme Court (3rd Section)	Last instance court (civil/commercial)	7521/2014	09/01/2014	Private enforcement	None - Claim rejected	The Supreme Court, confirming the decision of the lower instance court, stated that the exclusion of the liability of the directors and secretaries of political parties for the latter's financial obligations does not constitute State aid. In fact, political parties are not undertakings according to Article 107 TFEU. The Supreme Court also rejects the request by the plaintiff to refer the question of whether political parties should be qualified as undertakings to the CJEU for a preliminary ruling.	The ruling is important because the Supreme Court excluded political parties from the notion of undertaking.	
Consiglio di Stato (Adunanza plenaria)	Council of State (Plenary session)	Last instance court (administrative)	6/2014	29/01/2014	Private enforcement	None - Claim rejected	The beneficiary did not comply with the requirements to receive a tax exemption. The Council clarified that the jurisdiction regarding matters of State aid measures is allocated between civil and administrative courts depending on the generally applicable criterion of the subjective legal situation at hand. Accordingly, civil courts have jurisdiction when State aid is directly recognised by statutes meaning public administrations do not have discretion regarding its grant. Additionally, civil courts have jurisdiction when State aid measures are recovered due to a fault of	The ruling concerns the allocation of jurisdiction over State aid matters between the civil and administrative courts. It is important as it is a precedent highly cited in similar cases. See, for example Council of State (3rd Section) 3173/2014 of 23 June 2014 or Council of	

							the beneficiary. On the contrary, administrative courts have jurisdiction over procedural matters preceding the order granting or refusing the aid, and over the annulment of the State aid grant due to reasons other than the fault of the beneficiary.	State (5th Section) 3058/2015 of 17 June 2015.	
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	9125/2014	13/02/2014	Private enforcement	None - Claim rejected	The State aid was lawful. The Supreme Court, following the lower instance court, recognised that the prohibition on combining the special tax credit for investments in underdeveloped areas with other State aid measures was aimed at the principle of effectiveness. Accordingly, since the beneficiary did not benefit from any other aid, the tax credit it received was lawful.		Similar case: Supreme Court (5th Section) 200/2014 of 9 January 2014.
Consiglio di Stato (Sezione IV)	Council of State (4th Section)	Last instance court (administrative)	1020/2014	04/03/2014	Private enforcement	None - Claim rejected	The Council of State, confirming the decision of the lower instance court ruling, upheld the decision of the public administration according to which the defendant did not meet the requirements of a small or medium size enterprise as defined by the Commission Recommendation 2003/361/EC; the defendant did not qualify as small or medium size enterprise - therefore, the public administration correctly did not grant him the relevant State aid.	The qualification of undertakings as SMEs is a frequent matter at lower instance court, see for example Regional Administrative Tribunal of Palermo 1600/2011 of 7 September 2011.	
Tribunale Amministrativo Regionale Roma (Sezione III)	Regional Administrative Tribunal of Rome (3rd Section)	Lower court (administrative)	7035/2014	02/07/2014	Private enforcement	None - Claim rejected	The plaintiff's application to receive State aid was lawfully rejected. The Tribunal emphasised that State aid measures are granted and that the application to receive State aid does not - in itself - impact on competition in the market. Usually, the grant of aid must be notified to the Commission and not the prior application to receive it.	The ruling, despite being from a lower court, is important because it considers when the State should notify the aid it intends to grant.	
Consiglio di Giustizia Amministrativa Per La Regione Siciliana	Administrative Justice Council for the Sicilian Region	Last instance court (administrative)	641/2014	28/11/2014	Private enforcement	Other remedy imposed	The Court wanted guidance from the Commission regarding the qualification of a financial contribution as State aid. Therefore, it requested a Commission opinion under Section 3 of Commission Notice on the enforcement of State aid rules by national courts OJ 2009 C-85/1. Suspending the case, the court asked the Commission for an opinion regarding the lawfulness of the financial contribution that the defendant refused to the plaintiff.	The Court considered the complementary roles of national judges and of the Commission in order to apply State aid rules. It also stressed the obligation of both judges and the Commission to cooperate in good faith.	The ruling comes from the Administrative Justice Council for the Sicilian Region, which is the last instance administrative court for Sicily, which is one of the Italian Regions that has a special status and a special Regional Statute.
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	823/2015	18/02/2015	Private enforcement	None - Claim rejected	The Council of State, confirming the decision of the lower instance court, stated that the fair compensation to be attributed to copyright holders, and concretely determined by the SIAE (the Italian Collective Management Society for Authors and Editors) does not constitute State aid.	The ruling is important because the Council of State repeated the four cumulative criteria for a grant of State aid to be prohibited under 107 TFEU. The Council referred two questions for a preliminary ruling to the CJEU regarding copyright law. Several references to CJEU cases: C521/11, C222/07, C-82/77.	
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	6686/2015	02/04/2015	Private enforcement	None - Claim rejected	The State aid scheme was correctly suspended by the public administration. The Supreme Court, confirming the decision of the lower instance court, stated that the provision which suspended the grant of specific benefits to tax payers affected by a natural disaster simply reinforces the already existing standstill obligation stemming from the Commission assessment procedure.	The ruling considers the standstill obligation.	
Consiglio di Stato (Sezione V)	Council of State (5th Section)	Last instance court (administrative)	3616/2015	21/07/2015	Private enforcement	None - Claim rejected	The challenged public tender did not involve a State aid measure, not even an indirect one. The Council of State, confirming the decision of the lower instance court, stated that the participation of public universities in partnerships that applied in a call for tender did not represent unlawful State aid. The ruling, in line with Commission Communication 2006/C 323/01 explained that public research organisations are considered undertakings regardless of their legal or economic status, if they offer goods or services on a market.		
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	143/2016	18/01/2016	Private enforcement	None - Claim rejected	The Council of State, confirming the decision of the lower instance court, stated that procuring authorities, establishing that an offer is abnormally cheap because the offeror benefitted from State aid, may reject such offer only if the bidders cannot demonstrate that the aid received was lawful and compatible.	Procuring authorities can reject abnormally cheap offers from State aid beneficiaries only if these bidders received unlawful State aid.	
Consiglio di Stato (Sezione V)	Council of State (5th Section)	Last instance court (administrative)	341/2016	28/01/2016	Private enforcement	None - Claim rejected	The Council of State, overturning the decision of the lower instance court, held that the plaintiff correctly refused to grant the State aid to the undertaking, as it did not file the appropriate application to receive the lawful State aid within the deadline.		Similar case: Council of State (5th Section) 5079/2017 of 2 November 2017.
Corte di Cassazione (Sezione IV)	Supreme Court (4th Section)	Last instance court (civil/commercial)	13458/2016	05/04/2016	Private enforcement	Case sent back to the lower court for re-assessment	The Supreme Court, confirming the decision of the lower instance court and following Commission Decision 2016/195 of 14 August 2015, held that the State measures for certain undertakings affected by natural disasters were unlawful if they were over the *de minimis* ceiling or if they did not respect the requirements of Article 107(2) TFEU. The lower instance court must verify whether the aid granted to the beneficiary was below the *de minimis* ceiling.		The subsequent ruling from the lower court (Turin Court of Appeal) is not available.
Corte di Cassazione (Sezione III)	Supreme Court (3rd Section)	Last instance court (civil/commercial)	16870/2016	11/04/2016	Private enforcement	None - Claim rejected	The Supreme Court, confirming the decision of the lower instance court, stated that beneficiaries of unlawful State aid cannot claim damages for having relied on the legitimate expectation that the aid they received was lawful. Only competitors of beneficiaries of unlawful aid can claim damages against the State. Additionally, the Court held that the principle of the legitimate expectation applies within State aid rules only when the expectation is attributable to Commission behaviour.		Similar case: Supreme Court (3rd Section) 16871/2016 of 10 August 2016.
Corte di Cassazione (Sezioni Unite Civili)	Supreme Court (Joint Civil Chambers)	Last instance court (civil/commercial)	25516/2016	13/12/2016	Private enforcement	Case sent back to the lower court for re-assessment	The Supreme Court stated that damage claims against the State brought by competitors of the beneficiary of State aid for violation of Article 107-108 TFEU shall be heard by civil court, also after the introduction of Article 49 of Law 234/2012.	The case concerns a damage claim brought by the competitor of the beneficiary of State aid declared unlawful and incompatible by the Commission. In that context, the Supreme Court stated on jurisdictional issues after the entry into force of Law 234/2012.	The subsequent ruling from the lower court (ordinary civil Tribunal of Milan) is not yet available.

Consiglio di Stato (Sezione V)	Council of State (5th Section)	Last instance court (administrative)	4675/2017	13/12/2016	Private enforcement	None - Claim rejected	The challenged measure did not constitute State aid. The Council of State recognised that the ministerial decree on traffic distribution between Milan airports did not involve a State aid measure. However, according to Reg. CE 1008/2008, Member States must hear interested stakeholders and inform the Commission about the project of flight traffic distribution before implementing it.		
Tribunale Amministrativo Regionale Roma (Sezione III)	Regional Administrative Tribunal of Rome (3rd Section)	Lower court (administrative)	9777/2017	14/06/2017	Private enforcement	None - Claim rejected	The Italian system of green certificates was found not to be contrary to State aid rules. As a consequence the claim was rejected.	The ruling, despite being from a lower court, is important because it might not be in line with the Commission's line of reasoning in previous decisions regarding the green certificates system.	
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	4458/2017	22/06/2017	Private enforcement	None - Claim rejected	The Council of State, confirming the decision of the lower instance court and following the Commission Notices of 18 July 2014 and 31 October 2016, stated that the exemption of undertakings with an annual turnover of less than EUR 50 million from the obligation to pay a contribution to the Italian Competition Authority did not constitute a State aid scheme. In fact, such an administrative charge was neither selective nor had an impact on trade between Member States.		
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	22497/2017	20/09/2017	Private enforcement	None - Claim rejected	The tax credit was considered unlawful State aid. In particular, the Supreme Court, confirming the decision of the lower instance court, stated that the tax exemption aiming to increase employment constituted State aid if not in line with the *de minimis* rule.		
Consiglio di Stato (Sezione III)	Council of State (3rd Section)	Last instance court (administrative)	6053/2017	16/11/2017	Private enforcement	None - Claim rejected	The undertaking did not meet the requirements to receive the aid. In particular, the Council of State, confirming the decision of the lower instance court, held that the undertaking was not entitled to receive funds as part of the State aid scheme for the improvement of processing and marketing conditions for agricultural products. In fact, the undertaking did not carry out any agricultural activity among those listed in the Annex I to the EC Treaty.		
Consiglio di Stato (Sezione V)	Council of State (5th Section)	Last instance court (administrative)	5386/2017	16/11/2017	Private enforcement	None - Claim rejected	The Council of State, confirming the decision of the lower instance court, held that the decision by the Rome in-house public transport company to employ all the personnel of another transport company did not constitute State aid, as it met the requirements of the MEIP. In fact, another undertaking made equivalent investments in the same transport company.		
Consiglio di Stato (Sezione V)	Council of State (5th Section)	Last instance court (administrative)	3123/2018	24/05/2018	Private enforcement	Other remedy imposed	The Council of State referred a request for a preliminary ruling to the CJEU regarding the financial contribution to the company Ferrovie del Sud Est which was in financial difficulty.		
Tribunale di Roma (Sezione Lavoro)	Court of First Instance of Rome (Labour Division)	Lower court (civil/commercial)	N.A.	21/12/2007	Public enforcement	Recovery order of the unlawful/incompatible aid	The court of first instance, pursuant to Commission Decision 2000/128/EC of 11 May 1999, confirmed the recovery of unlawful pension contribution breaks with respect to work and formation contracts granted by Law No. 335/1995. According to the Court, the limitation period of ten years set forth by Article 15 of Reg. 695/1999 prevails over the national limitation period of five years. The undertaking did not meet the requirements to receive the aid, so the recovery order was upheld.		Only found in 2009 Commission Summaries of State aid judgments at national level.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	2428/2010	03/02/2010	Public enforcement	Case sent back to the lower court for re-assessment	The Supreme Court, overturning the decision of the lower instance court and following the Commission Decision 2003/193/CE of 05 June 2002, affirmed the primacy of Union law over national law. In so doing, it annulled the lower court judgment that prevented the recovery order.	The ruling considers the principle of primacy of Union law over national law and the vertical direct effect of State aid Commission decisions.	Similar cases: Supreme Court (5th Section) 15207/2012 of 12 September 2012, and Supreme Court (5th Section) 16352/2012 of 26 September 2012. The subsequent ruling from the lower court (Regional Tax Commission of Emilia Romagna) is not available.
Corte di Cassazione (Sezioni Unite Civili)	Supreme Court (Joint Civil Chambers)	Last instance court (civil/commercial)	3674/2010	17/02/2010	Public enforcement	Case sent back to the lower court for re-assessment	The Supreme Court, following the ECJ (current CJEU) judgment of 17 July 2008 in C-132/06, held the provision of Law No. 289/2002 that allows the remission of VAT due by paying only 25% of the total amount to be inapplicable, due to being contrary to Directive 77/388/CEE. Accordingly, the Supreme Court overturned the decision of the lower instance court that annulled the recovery order of the total VAT amounts due from the beneficiary.		Follow-up judgment to Commission v. Italy ruling 132/06. Similar cases: Supreme Court (Joint Civil Chambers) cases 3673 to 3677 of 17 February 2010. The subsequent ruling from the lower court (Regional Tax Commission of Lombardy) is not available.
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	3046/2010	17/05/2010	Public enforcement	None - Claim rejected	The State aid had to be revoked and recovered since it had not been notified to the Commission. This case confirmed the first instance court ruling regarding the recovery of a subsidy granted to a steel company for a modernisation project of its factory which had not been notified to the Commission by the public administration. Furthermore, the Council of State also rejected the plaintiff's request for damages based on the annulment of the recovery in question.		Similar case: Council of State (4th Section) 4441/2010 of 9 July 2010.
Corte di Cassazione (Sezione I)	Supreme Court (1st Section)	Last instance court (civil/commercial)	15980/2010	06/07/2010	Public enforcement	Case sent back to the lower court for re-assessment	The Supreme Court stated that Recovery Decision 2000/536/EC, as confirmed by CJEU judgment of 8 May 2003 in C-328/99 and C-399/00, regarding the partial write-off of a loan granted by a State-owned undertaking to Seleco s.p.a., could not be applied by analogy to an equivalent transaction between different parties.		The subsequent ruling from the lower court (Trieste Court of Appeal) is not available.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	22318/2010	03/11/2010	Public enforcement	Recovery order of the unlawful/incompatible aid	The Supreme Court, overturning the decision of the lower instance court and following the Commission Decisions 93/496/CEE of 8 June 1993 and 97/270/CE of 22 October 1996, recognised the unlawfulness of the tax credit awarded to road hauliers. Indeed, it recognised the direct effect of Commission decisions on State aid. The defendant must return the unlawful State aid.	The ruling is important because it acknowledges the binding force of Commission decisions on State aid.	Similar cases: Supreme Court (5th Section) 16349/2012 of 26 September 2012, Supreme Court (4th Section) 20413/2013 of 5 September 2013, Supreme Court (4th Section) 15354/2014 of 4 July 2014.

Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	23414/2010	19/11/2010	Public enforcement	Recovery order of the unlawful/incompatible aid	The Supreme Court, overturning the decision of the lower instance court, following Commission Decision 2003/193/CE and the subsequent CJEU judgment of 1 June 2006 in C-207/05, recognised that the State had the obligation to recover unlawful concessions granted to corporations the majority of whose equity was publicly owned. Such recovery was only excluded if the aid measures were compliant with the *de minimis* rules. In addition, aid beneficiaries had the burden of proving the compliance of the aid measures received with the *de minimis* rules. The lower instance court was wrong in annulling the recovery order as this was sufficiently motivated and grounded. Therefore, the Supreme Court annulled the judgment that annulled the recovery order.	The ruling is important as it treats recovery orders and the burden of proof in establishing compliance with *de minimis* requirements.	Similar case: Supreme Court (5th Section) 6538/2012 of 27 April 2012.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	26286/2010	19/12/2010	Public enforcement	Case sent back to the lower court for re-assessment	The Supreme Court, overturning the lower instance, held that, because of the principle of effectiveness of Union law, the Italian general statute of limitations does not apply to the recovery of State aid measures which have been declared unlawful by the Commission. Moreover, only exceptional circumstances totally impeding the recovery might preclude Member States' obligations to comply with Commission prohibition decisions. The statute of limitations did not apply given that there was a recovery decision. Therefore, the Supreme Court annulled the judgment that annulled the recovery order.		Similar case: Supreme Court (5th Section) 23418/2010 of 19 November 2012. The subsequent ruling from the lower court (Regional Tax Commission of Lombardy) is not available.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	26285/2010	29/12/2010	Public enforcement	Case sent back to the lower court for re-assessment	The appeal against the judgment which annulled the recovery order respected the time-limits of the Statute of limitations. Therefore, the Supreme Court annulled the judgment which annulled the recovery order. The Supreme Court recognised that the aid recovery might be suspended only in exceptional circumstances, namely when 1) there is the danger of imminent and irreparable harm; 2) the recovery order appears unlawful; or 3) the aid quantification is clearly wrong.		Similar cases: Supreme Court (5th Section) 6539/2012 of 17 April 2012, Supreme Court (6th Section) 28162/2013 of 17 December 2013, Supreme Court (5th Section) 10880/2015 of 27 May 2015. The subsequent ruling from the lower court (Regional Tax Commission of Tuscany) is not available.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	11228/2011	20/05/2011	Public enforcement	Recovery order of the unlawful/incompatible aid	The Supreme Court, overturning the decision of the lower instance court, held that the aid exceeded the *de minimis* rules and therefore its recovery involved the whole amount, not only the part of the aid that was over the *de minimis* ceiling. The aid exceeded the *de minimis* ceiling, so the Court annulled the judgment that annulled the recovery order.		Similar cases: Supreme Court (5th Section) 21992/2014 of 17 October 2014.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	13067/2011	15/06/2011	Public enforcement	Other remedy imposed	The State aid was unlawful so the Court annulled the judgment that annulled the recovery order. The Supreme Court, overturning the lower instance court and following the CJEU case law, affirmed the principle of primacy of Union law and of the direct effect of Commission decisions on State aid. Accordingly, the lower court was wrong in applying the national law providing for VAT exemptions for certain banking transactions, as these were held to constitute unlawful State aid by both the Commission and the CJEU.		The ruling refers to Commission decision of 11 December 2001 in 2002/581/CE and to CJEU judgment of 15 December in C-66/02. Similar case: Supreme Court (5th Section) 6893/2013 of 20 March 2013.
Corte di Cassazione (Sezione IV)	Supreme Court (4th Section)	Last instance court (civil/commercial)	6671/2012	03/05/2012	Public enforcement	Recovery order of the unlawful/incompatible aid	The case concerned the recovery of tax reductions granted to Italian undertakings that hired new employees with special employment contracts. The Supreme Court, following the lower instance court, held that the limitation period for the recovery of unlawful State aid measures is ten years from the grant. Secondly, the Court held that beneficiaries of unlawful aid might rely on the principle of legitimate expectations to prevent recovery only if the expectations are induced by the Commission. Finally, the Court ruled that beneficiaries bear the burden of proving the compliance with aid granting requirements, or the applicability of *de minimis* exemption. The beneficiary did not fulfil the burden of proving its compliance with State aid granting conditions, so the recovery order was upheld.		The ruling refers to Commission decision of 4 June 1999 No. SG/99 D/4068. Similar case: Supreme Court (4th Section) 6756/2012 of 4 May 2012.
Corte di Cassazione (Sezione IV)	Supreme Court (4th Section)	Last instance court (civil/commercial)	6756/2012	04/05/2012	Public enforcement	Recovery order of the unlawful/incompatible aid	The case concerned the recovery of tax reductions granted to Italian undertakings that hired new employees with special employment contracts. The Supreme Court, following the ruling of the lower instance court, held that the limitation period for the recovery of unlawful State aid is ten years from the grant. Second, the court admitted that beneficiaries of unlawful State aid might rely on the principle of legitimate expectations to prevent recovery only if the expectations are induced by the Commission. Finally, the Court ruled that beneficiaries bear the burden of proving compliance with aid granting requirements, or the applicability of *de minimis* exemption. The beneficiary did not fulfil the burden of proving its compliance with State aid granting conditions - therefore the recovery order was upheld.		The ruling cites the Commission decision 2000/128/CE of 11 May 1999 and subsequent CJEU judgment of 7 March 2002 in C-310/99. Several subsequent cases concerning the same issue: e.g. Supreme Court (4th Section) 14385/2012 of 10 August 2012, Supreme Court (4th Section) 6512/2013 of 14 March 2013, Supreme Court (4th Section) 2631/2014 of 5 February 2014.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	7662/2012	16/05/2012	Public enforcement	Recovery order of the unlawful/incompatible aid	The Supreme Court, overturning the lower court and following Commission decision 2005/315/EC, stated that the aid beneficiary did not submit the appropriate documentation in order for the State to make sure that the granted aid complied with Union law. In particular, the undertaking did not comply with the procedural framework which was introduced by the national authorities in order to assess the existence of the conditions to receive the aid (in the form of tax exemptions). Thus, the Supreme Court quashed the judgment that annulled the recovery order.		Similar cases: Supreme Court (5th Section) 8329/2012 of 25 May 2012, Supreme Court (5th Section) 27495/2014 of 30 December 2014, and Supreme Court (5th Section) 10880/2015 of 27 May 2015.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	8817/2012	01/06/2012	Public enforcement	Case sent back to the lower court for re-assessment	The Commission prohibited the State aid in decision 2003/193/EC. Therefore, the Supreme Court annulled the judgment which annulled the recovery order. The Supreme Court, given the principles of primacy and effectiveness of Union law, held that the lower instance court wrongly disregarded the binding nature of the Recovery decision 2003/193/EC. Therefore, the tax exemptions, unlawfully granted, had to be recovered from the beneficiary.		Similar case: Supreme Court (5th Section) 8108/2012 of 23 May 2012. The subsequent ruling from the lower court (Regional Tax Commission of Friuli Venezia Giulia) is not available.
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	3898/2012	04/07/2012	Public enforcement	None - Claim rejected	The administrative measure was lawful. The Council of State, following the ruling of the lower instance court, confirmed the		Similar cases: Council of State (6th Section) 2898/2012 of 4 July 2012 and Council of

							lawfulness of the resolution of the Italian Regulatory Authority for Electricity and Gas, which required certain aid beneficiaries to provide adequate bank guarantees during the time of the Commission compatibility assessment of the State aid in question. The Court declared these guarantees legitimate and referred to the Commission decision that declared that special tariffs provided to the plaintiffs constitute incompatible State aid measures to be recovered. The breach of the standstill obligation is not raised in the ruling.		State (3rd Section) 1280/2014 of 14 March 2014.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	11972/2012	13/07/2012	Public enforcement	Case sent back to the lower court for re-assessment	The Supreme Court, overturning the decision of the lower instance court, annulled the decision to annul the recovery order. Despite referring a request for a preliminary ruling to the CJEU, the Court did not consider the CJEU Judgment of 03 September 2011 in C-78/08 and C-80/08. In fact, regardless of the tax benefits being qualified as State aid, the case involved the assessment of compliance by the beneficiary with national tax law. The lower court did not sufficiently assess whether the beneficiary had met all conditions to lawfully receive the tax benefits, therefore its decision was annulled.		Follow-up judgment to Paint Graphos ruling C-78/08. The subsequent ruling from the lower court (Regional Tax Commission of Basilicata) is not available.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	14019/2012	03/08/2012	Public enforcement	Recovery order of the unlawful/incompatible aid	The Supreme Court, partially overturning the lower instance court decision, affirmed that the applicable recovery interest was simple and not compound, as Regulation 794/2004/EC only applies to recovery decisions notified after the entry into force of the same regulation. Compound interest is due for recovery decisions notified after the entry into force of Regulation 794/2004/EC. The Court amended the recovery order with regard to the interest due.		The ruling refers to Commission Decision 2003/193/CE of 7 June 2002.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	23418/2010	19/11/2012	Public enforcement	Case sent back to the lower court for re-assessment	The ten year time-limit of the statute of limitations for the recovery of unlawful State aid measures had not expired. Therefore, the Supreme Court annulled the judgment which annulled the recovery order. The Supreme Court, overturning the lower instance, held that because of the principle of effectiveness of Union law, the Italian general statute of limitations does not apply to the recovery of State aid measures found to be incompatible by the Commission. Moreover, only exceptional circumstances totally impeding the recovery might preclude Member States' obligations to comply with Commission recovery decisions.		The ruling cites Commission decision 2003/193/CE and CJEU judgment of 1 June 2006 in C-207/05. Several subsequent cases concerning the same issue: e.g. Supreme Court (5th Section) 7659/2012 of 16 May 2012, Supreme Court (5th Section) 15207/2012 of 12 September 2012, Supreme Court (5th Section) 15416/2015 of 22 July 2015. The subsequent ruling from the lower court (Regional Tax Commission of Lazio) is not available.
Tribunale Amministrativo Lombardia (Sezione III)	Regional Administrative Tribunal of Lombardia (3rd Section)	Lower court (administrative)	553/2013	22/05/2013	Public enforcement	Request of aid recovery suspension	The Court held that 1) the recovery could have jeopardised the financial stability of the alleged beneficiary (*periculum in mora*); and 2) the claim was credible, as the recovery decision was addressed to another entity (*fumus boni iuris*).	The case concerns the recovery proceeding of the aid granted to the company SEA Handling, declared unlawful and incompatible by the Commission decision of 19 December 2012 (SA.21420).	
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	24919/2013	11/06/2013	Public enforcement	None - Claim rejected	The Supreme Court, confirming the lower instance court decision and following the CJEU judgment of 11 December 2008 in C-174/07, held the provision of Law No. 289/2002 that allows the remission of VAT due by paying only 25% of the total amount to be inapplicable due to being contrary to Directive 77/388/EEC. Accordingly, the Supreme Court upheld the recovery order of the Italian Internal Revenue Service.		Follow-up judgment to Commission v. Italy ruling C-174/07.
Consiglio di Stato (Sezione V)	Council of State (5th Section)	Last instance court (administrative)	3820/2013	15/07/2013	Public enforcement	None - Claim rejected	Recovery decisions overcome the *res iudicata* principle of national judgments. The Council of State, citing the CJEU judgment of 18 July 2007 in C-119/05, recognised that the *res iudicata* principle cannot impede the recovery of unlawful State aid imposed by the Commission.	The ruling is important as it recognises that the Italian principle of *res iudicata* affirmed by Article 2909 of the Civil Code, does not prevent the recovery of unlawful and incompatible State aid.	
Consiglio di Stato (Sezione Quarta)	Council of State	Last instance court (administrative)	3756/2013	25/09/2013	Public enforcement	Other remedy imposed; Requests of aid recovery suspension	The Court quashed the first instance court judgment (553/2013) and found that the interim suspension (of the order to recover the aid) constituted a breach of Article 108(2) TFEU impeded the effectiveness of recovery, and that it could not be justified in the light of the different public interests at stake. Furthermore the Court suspended the effects of the recovery decisions issued by the Commission. Lastly, with regard to the *fumus boni iuris*, the Court reported that the question of the imputability of the operation constituting aid had already been assessed by the Commission in its recovery decision.		
Tribunale Amministrativo Regionale Cagliari (Sardegna)	Regional Administrative Tribunal of Cagliari (Sardinia) (3rd Section)	Lower court (administrative)	501/2014	15/01/2014	Public enforcement	None - Claim rejected	The recovery order was lawful. The Court, following the CJEU case law, stated that beneficiaries of incompatible aid can rely on the principle of legitimate expectations to prevent recovery only if the expectations are induced by the Commission. Moreover, Commission recovery decisions are mandatory in all their elements and Member States must effectively and promptly comply with them, except in case of impossibility of recovery. Neither institutional, legal or financial difficulties nor beneficiaries' legitimate expectations generated by national authorities constitute grounds to justify the impossibility of recovery.		Follow-up judgment to Commission v. Italy ruling 304/09.
Corte di Cassazione (Sezione IV)	Supreme Court (4th Section)	Last instance court (civil/commercial)	15354/2014	30/01/2014	Public enforcement	Case sent back to the lower court for re-assessment	The Supreme Court, overturning the decision of the lower instance court, held that the beneficiary, at the time he applied for the aid, lawfully met the granting requirements. Their legitimate expectations had to be respected so the recovery order was annulled. The beneficiary was entitled to the State aid, thus the Supreme Court annulled the recovery order.	The ruling refers to Commission Decision SG/99/D/2482 of 3 March 1999.	Similar case: Supreme Court (4th Section) 13966/2015 of 7 July 2015. The subsequent ruling from the lower court (Rome Court of Appeal) is not available.
Tribunale Amministrativo Regionale Milano	Regional Administrative Tribunal of Milan	Lower court (administrative)	2297/2014	09/02/2014	Public enforcement	None - Claim rejected	The Tribunal, following Commission Decision C(2009) 5497, held that the recovery order by the Italian Electricity Industry Equalisation Fund against the beneficiary Alcoa, for the period from 19 January 2007 to 19 November 2009, was unlawful in light of decision 148/2004 of the Italian Regulatory Authority for Electricity and Gas.		Follow-up judgment to Alcoa CJEU ruling C-344/12.

(Lombardia) (Sezione II)	(Lombardy) (2nd Section)								
Consiglio di Stato (Sezione III)	Council of State (3rd Section)	Last instance court (administrative)	1280/2014	14/03/2014	Public enforcement	Recovery order of the unlawful/incompatible aid	Offsetting debts is a lawful way of recovering unlawful State aid, therefore the Council of State annulled the lower instance court judgment that annulled the recovery order.	In this case, the Council of State - deciding on the recovery of incompatible aid previously implemented by the Region of Sardinia - declared that compensation is one of the valid ways of extinguishing an obligation, also in accordance with the CJEU case law (case C-369/07). The CJEU ruled that the aid has to be recovered in compliance with the procedures established by national law. Furthermore, the Council of State held that the aid beneficiary cannot rely on aid implemented in breach of the standstill obligation.	
Consiglio di Stato (Sezione III)	Council of State (3rd Section)	Last instance court (administrative)	1553/2014	31/03/2014	Public enforcement	Other remedy imposed	The Council upheld the lower instance court ruling, which annulled the recovery order, because the public administration did not comply with the time-limits to lodge the appeal.		The ruling cites Commission Decision 2000/394/CE of 25 November 1999.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	4084/2015	16/01/2015	Public enforcement	Recovery order of the unlawful/incompatible aid	The Supreme Court, overturning the decision of the lower court, recognises that tax credits, even when they are judged to be lawful State aid measures by the Commission, cannot be added to other lawful State aid measures that pertain to the same goods. The undertaking could not accrue several State aid measures pertaining to the same goods.		
Consiglio di Stato (Sezione III)	Council of State (3rd Section)	Last instance court (administrative)	2401/2015	13/05/2015	Public enforcement	Recovery order of the unlawful/incompatible aid	The recovery measures were sufficiently reasoned and lawful, therefore they should not have been annulled by the first instance court.	The Council of State, in line with the CJEU case law and the Supreme Court case law, stated that national judges must enforce recovery decisions. Moreover, the Council reaffirmed that the Commission has exclusive competence in assessing the compatibility of State aid measures with the internal market. Additionally, because the principle of effectiveness of Union law overtakes the principle of *res iudicata*, the Member States' recovery obligations cannot be impeded by conflicting national judgments.	The ruling refers to Commission Decision 2000/394/CE and to CJEU judgment of 9 June 2011 in C-71/09. Similar case: Council of State (3rd Section) 3596/2015 of 21 July 2015. Follow-up judgment to Venezia vuole vivere ruling C-71/09.
Consiglio di Stato (Sezione III)	Council of State (3rd Section)	Last instance court (administrative)	3036/2015	16/06/2015	Public enforcement	Recovery order of the unlawful/incompatible aid; Identification of the aid beneficiary; Requests of aid recovery suspension	The Council of State reversed the decision of the first instance court, which previously annulled the recovery measures adopted by the State. The recovery measures were sufficiently reasoned and lawful, therefore they should have not be annulled by the first instance court.	The ruling is important because the Council of State extensively discussed several State aid issues, such as the notion of State aid, the definition of undertaking and selectivity.	The ruling refers to significant CJEU cases such as C-148/04, C-197/11, C.203/11, C-158/13. Similar cases: Council of State (5th Section) 3030/2017 of 16 June 2015 and Council of State (3rd Section) 3679/2015 of 27 July 2015.
Consiglio di Stato (Sezione V)	Council of State (5th Section)	Last instance court (administrative)	2846/2015	06/10/2015	Public enforcement	None - Claim rejected	The State aid, as decided by Commission decision 854 of 2 July 2008, confirmed by both the GC and by the ECJ, was unlawful, therefore its recovery was necessary. The Council confirmed the lower instance court ruling, imposing the recovery of the unlawful State aid. It also stated that the recovery comprises the revocation of the State aid for the future. Additionally, the Council stated that the principle of the legitimate expectation applies within State aid rules only when the expectation is attributable to Commission behaviour.	The ruling is important as it involves State aid found to be unlawful by the Commission, the GC and by the ECJ. It also considers the principle of legitimate expectation.	Similar case: Council of State (5th Section) 1551/2017 of 4 April 2017. Follow-up judgment to CJEU ruling C-243/10.
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	292/2016	28/01/2016	Public enforcement	Other remedy imposed	The public funding scheme used a wrong subjective criterion to identify the State aid beneficiaries. Therefore, the Court annulled the judgment that upheld the recovery order. The Council of State, overturning the ruling of the lower instance court, annulled the public funding scheme that gave priority to not-for-profit schools over for-profit ones. In fact, the ministerial decree regulating the funding scheme distinguished aid beneficiaries only in a formalistic way (according to the legal status of the school).	The Court reaffirmed the principle of State aid rules according to which an undertaking is any entity that offers goods or services on a market, besides any consideration on the legal or financial status of the entity.	The ruling refers to Commission decision of 19 December 2012 in C-26/10.
Tribunale di Roma	Tribunal of Rome	Lower court (administrative)	2897/2016	11/02/2016	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered	As the Commission did not fix the amount to be recovered in its decision, the Tribunale di Roma reviewed the recovery order regarding the quantum, finding that the national authority applied a wrong methodology.	The case concerns the recovery proceedure for unlawful and incompatible aid granted to Mediaset, following Commission decision 374/2007.	
Corte di Cassazione (Sezione IV)	Supreme Court (4th Section)	Last instance court (civil/commercial)	13459/2016	05/04/2016	Public enforcement	Case sent back to the lower court for re-assessment	The Supreme Court, overturning the decision of the lower instance court and following Commission decision 2016/195 of 14 August 2015, held that the State measures for certain undertakings affected by natural disasters were unlawful if they were above the *de minimis* ceiling or if they did not meet the requirements of Article 107(2) TFEU. The lower instance court must verify whether 1) the amount of the measure was below the *de minimis* ceiling; or 2) the undertaking met the requirements to be granted the lawful State aid.		The subsequent ruling from the lower court (Turin Court of Appeal) is not available.

Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	21145/2016	19/10/2016	Public enforcement	Recovery order of the unlawful/incompatible aid	The Supreme Court, overturning the decision of the lower instance court, stated that the tax credit aiming to increase employment constituted State aid. Specifically, the beneficiary benefited from a tax credit in excess of the *de minimis* ceiling. The tax credit constituted unlawful State aid, so the Court annulled the judgment that annulled the recovery order.		
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	23797/2016	23/11/2016	Public enforcement	None - Claim rejected	The recovery order of both the nominal value of the aid plus compound interest was lawful. The Supreme Court, confirming the lower instance court and following Commission Decision 2003/193/EC of 5 June 2002, held that the public administration correctly recovered compound interest. In fact, with regard to recovery decisions notified before the entry into force of Regulation 794/2004/EC, Member States could choose whether to apply simple or compound interest rates.		Follow-up judgment to CJEU ruling C-496/09. Similar case: Supreme Court (5th Section) 17240/2017 of 13 July 2017.
Corte di Cassazione (Sezione V)	Supreme Court (5th Section)	Last instance court (civil/commercial)	23949/2016	23/11/2016	Public enforcement	None - Claim rejected	The recovery order of both the nominal value of the aid plus the compound interest was lawful. The Supreme Court, confirming the lower instance court, held that the public administration correctly recovered compound interest. In fact, with regard to recovery decisions notified before the entry into force of Regulation 794/2004/EC, Member States could choose whether to apply simple or compound interest.		The ruling refers to Commission Decision 2003/193/CE.
Consiglio di Stato (Sezione III)	Council of State (3rd Section)	Last instance court (administrative)	2163/2017	20/04/2017	Public enforcement	Other remedy imposed	The applicable recovery interest was simple and not compound. Thus, the Council upheld the recovery order and amended it with regard to the interest due. The Council of State, following the CJEU judgment of 3 September 2015 in Case C-89/14, stated that the public administration had to recover unlawful tax reductions together with simple interest instead of compound interest.		Similar case: Council of State (3rd Section) 2580/2017 of 4 May 2017
Consiglio di Stato (Sezione III)	Council of State (3rd Section)	Last instance court (administrative)	2538/2017	04/05/2017	Public enforcement	Other remedy imposed	The beneficiary met the requirements to receive the compatible State aid. Therefore, the Council of State annulled the recovery order. The Council of State, taking into consideration the email of the Commission (DG COMP – Unit H4 – State aid enforcement and monitoring) of 11 April 2017 which anticipated the decision to exclude the beneficiary from the recovery order, decided that the dispute had come to an end. Accordingly, the beneficiary lawfully received the aid.		The ruling took into consideration an email of the Commission provided during the compatibility assessment procedure. Similar cases: Council of State (3rd Section) 2670/2017 of 05.06.2017, Council of State (3rd Section) 5969/2017 of 19 December 2017.
Consiglio di Stato (Sezione VI)	Council of State (6th Section)	Last instance court (administrative)	4072/2017	08/06/2017	Public enforcement	None - Claim rejected	The beneficiary met the requirements to receive the compatible State aid, so the recovery order was annulled. The Council of State, confirming the decision of the lower instance court, held that the beneficiary met the requirements to receive the compatible State aid. In particular, the fact that the beneficiary made a down payment before applying for the aid did not mean that this constituted the commencement of the investment for which the aid was sought.		
Corte di Cassazione (Sezione IV)	Supreme Court (4th Section)	Last instance court (civil/commercial)	14574/2017	12/06/2017	Public enforcement	Recovery order of the unlawful/incompatible aid	The *de minimis* ceiling was wrongly applied by the lower court. Therefore the Supreme Court annulled the judgment which annulled the recovery order. The Supreme Court, overturning the decision of the lower instance court and following Commission decision 2000/128/EC of 11 May 1999, stated that aid measures benefit from the *de minimis* rule only if they are below the ceiling over the three-year time period.		
Corte d'Appello di Cagliari (Sezione Civile Prima)	Cagliari Court of Appeal (First Civil Law Section)	Second to last instance court (civil/commercial)	517/2017	13/06/2017	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered	The recovery order was modified with regard to the interest due because of the breach of the beneficiary's legitimate expectation. The Cagliari Court of Appeal, overturning the decision of the lower instance court, modified the preceding recovery order because the granting authority breached the legitimate expectation of the beneficiary with regard to the lawfulness of the State aid received. Specifically, the Court lowered the recovery of the interest, which was due only since the date of service of the recovery order and not from the day the aid was unlawfully granted. Additionally, the Court recognised that the beneficiary would have been entitled to compensation from the granting authority for the breach of its legitimate expectation. However, because no evidence of the damage was provided by the beneficiary, the Court could not rule in this regard.		Follow-up judgment to CJEU ruling C-630/11, C-631/11, C-632/11, C-633/11.
Consiglio di Stato (Sezione III)	Council of State (3rd Section)	Last instance court (administrative)	3969/2017	27/07/2017	Public enforcement	Recovery order of the unlawful/incompatible aid	The beneficiary was not entitled to receive the lawful State aid so the recovery order was upheld. The Council of State, following Commission decision 2000/394/EC of 25 November 1999 and CJEU judgment of 9.06.2011 in joint cases C-71/09P, C-73/09P and C-76/09P, stated that the beneficiary unlawfully received the aid since it operated on a liberalised market that was open to competition. On the contrary, other companies operating on monopolistic and local markets were granted lawful subsidies that could not have an affect on trade between Member States.		
Consiglio di Stato (Sezione III)	Council of State (3rd Section)	Last instance court (administrative)	3969/2017	27/07/2017	Public enforcement	Recovery order of the unlawful/incompatible aid	The beneficiary was not entitled to receive the lawful State aid so the recovery order was upheld. The Council of State, following Commission Decision 2000/394/EC of 25 November 1999 and CJEU judgment of 9 June 2011 in joint cases C-71/09P, C-73/09P and C-76/09P, stated that the beneficiary unlawfully received the aid since it operated on a liberalised market that was open to competition. On the contrary, other companies operating on monopolistic and local markets were granted lawful subsidies that could not have an affect on trade between Member States.		

Tribunale Amministrativo Regionale per la Sardegna (Prima Sezione)	Regional Administrative Tribunal of Sardinia (1st Section)	Lower court (administrative)	243/2017	07/08/2017	Public enforcement	None - Claim rejected	The Court did not provisionally suspend the recovery order so as to avoid a breach of the obligation to recover the aid imposed on the national authorities by the recovery decision. In particular, the interim measure could have violated the recovery obligation.	The case follows Commission Decision 4862/2016 on aid to Sardinian airport and airlines.	The judgment was upheld by the Consiglio di Stato (No. 4922 of 17 December 2017)

16. Latvia

16.1 Country report

Name national legal expert

Daiga Lagzdina

Date

03/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Potentially, courts of all instances:[209]
- District courts that are courts of first instance in civil, criminal and administrative cases.
- Regional courts that are appellate (second instance) in civil, criminal and administrative cases.

The Supreme Court, which consists of the Department of Administrative Cases, the Department of Civil Cases and the Department of Criminal Cases, is the cassation court (third instance).

State aid cases may be considered in courts as civil and administrative cases. All cases are dealt within the general procedural order according to the Civil Procedure Law[210] and Administrative Procedure Law.[211] There are no State aid recovery cases for Latvia to date. Thus, it is not possible to present more precise information, but it could be presumed that most of the recovery cases would go to administrative proceedings since the majority of State aid grants are based on administrative acts (grant decisions). Only if State aid was granted pursuant to a civil law contract, enforcement of the recovery decision potentially would be executed through civil proceedings.

Criminal proceedings are theoretically possible, if a person deliberately (intentionally) or through negligence committed an offence that is set out in the Criminal Law.[212]

There are no specialised courts with the competence to hear cases of competition, including State aid cases.

A description of the procedural framework applicable in public enforcement of State aid rules

The Ministry of Finance is in charge of performing the initial State aid control in Latvia. It is also the body responsible for official communication with the Commission (DG Competition). Official information exchange with the Commission (DG Competition), takes place *via* the official electronic mailing system set up by the Commission and operational since 2006. Decisions of the Commission are channelled to the Ministry of Finance with the intermediation of Latvia's mission to the EU.

The Law on Control of Aid for Commercial Activity[213] (Section 18) prescribes that the recovery of unlawful aid shall be enforced in accordance with the procedures specified in the Administrative Procedure Law or the Civil Procedure Law "and other relevant laws and regulations", if applicable. The Law on Control of Aid for Commercial Activity is not directly linked to enforcement and regulates the competences of various bodies, prescribing who is responsible to execute recovery and outlining the procedure. The correctness of the application of the procedure is verified by the courts.

Furthermore, according to Section 18 of the Law on Control of Aid for Commercial Activity, the public authority granting the aid shall take a decision regarding the recovery of unlawful aid and the recovery shall take place in accordance with the Administrative Procedural Law, unless State aid was granted pursuant to a civil legal contract. In case of State aid granted pursuant to a civil legal contract, recovery shall be enforced in accordance with Civil Procedure Law. Therefore, it could be argued that the direct effect of the Article 108(3) TFEU decisions is not recognised. However, this has not been verified in practice as no recovery decisions have been issued for Latvia yet. Therefore, the procedures described in this question remain purely theoretical at this point and can only be verified in practice when the first recovery decision regarding Latvia is issued and executed.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

Courts of all instances:
- District courts that are courts of first instance in civil, criminal and administrative cases.
- Regional courts that are appellate courts (second instance) in civil, criminal and administrative cases.
- The Supreme Court, which consists of the Department of Administrative Cases, the Department of Civil Cases and the Department of Criminal Cases, is the cassation court (third instance).

State aid cases may be considered in courts as civil and administrative cases.

[209] Likums par tiesu varu / Law on Judicial Power, available at https://likumi.lv/doc.php?id=62847 (last accessed on 3 January 2019).
[210] Civilprocesa likums: available at https://likumi.lv/doc.php?id=50500 (last accessed on 3 January 2019).
[211] Administratīvā procesa likums, available at https://likumi.lv/doc.php?id=55567 (last accessed on 3 January 2019).
[212] Krimināllikums: available at https://likumi.lv/doc.php?id=88966 (last accessed on 3 January 2019).
Potential Sections of the Criminal Law that could be of use: Section 210. Fraudulent Obtaining and Use of Credit and Other Loans (for the State aid recipient); Section 318. Using Official Position in Bad Faith and Section 319. Failure to Act by a Public Official (for the State aid granting body's officials)

[213] Komercdarbības atbalsta kontroles likums, available at https://likumi.lv/doc.php?id=267199 (last accessed on 3 January 2019).

Civil courts review cases initiated by interested parties for damages, more likely, according to the Civil Law,[214] Part 4, Chapter 8 — Losses and their Compensation. 'Interested party' in State aid claims shall be understood as defined in Article 1(h) of the State aid Procedural Regulation (Council Regulation (EU) 2015/1589 of 13 July 2015).[215] An interested party may, potentially, submit claims for damages against the State aid granting body, as well as the State aid beneficiary.

Cases for the annulment of the administrative act that was issued fall within the competence of administrative courts. According to Section 25(2) of the Administrative Procedure Law, the addressee of an administrative act or legal person affected by the administrative act (third party) may submit the claim.

In addition, the Constitutional Court deals with the compliance of laws and other regulatory enactments with the Constitution of the Republic of Latvia.[216] Section 1(1) of the Constitutional Court Law defines the competence of the Constitutional Court to adjudicate on matters regarding the conformity of laws and other regulatory enactments with the Constitution. According to Section 32(1) and (2) of the Constitution, the Constitutional Court's judgments are final, and the judgments and the manner of interpreting the relevant legal norms analysed in the judgments is binding on all State and local government authorities, including courts and their officials, as well as natural and legal persons.

There are no specialised courts with the competence to hear cases of competition, including State aid cases. All cases are dealt with as part of the general procedural order.

A description of the procedural framework applicable in private enforcement of State aid rules

The Administrative Procedure Law[217] or the Civil Procedure Law[218] and other relevant laws and regulations are applicable.

General legislation is applied to all cases. There are no special provisions applied only to claims arising from the breach of State aid rules. Legal standing is justified directly based on Union law (*e.g.* breach of the notification obligation set out in Article 108(3) TFEU)).[219] In deciding whether a person has legal standing in the case, most likely, definition of 'interested party' in Article 1(h) of the State aid Procedural Regulation (Regulation (EU) 2015/1589) would be used.

Constitutional Court Law is applied in matters regarding the conformity of laws and other regulatory enactments with the Constitution of the Republic of Latvia. Section 17 of the Constitutional Court Law defines the scope of persons that have rights to submit an application regarding initiation of a matter regarding the compliance of laws and other regulatory enactments with the Constitution of the Republic of Latvia.

Main findings based on the case summaries

All State aid enforcement cases to date fall into the category of private enforcement, as there were no recovery decisions regarding State aid granted in Latvia to date.

Cases so far dealt with by the national courts are linked to a few different sectors. The majority of cases relate to the financial sector (see cases Supreme Court of the Republic of Latvia, 27.6.2018 - C04433312 (LV3) and Constitutional Court of the Republic of Latvia, 13.10.2015 - 2014-36-01 (LV1)), while some cases also relate to energy generation from renewable energy sources (see case Supreme Court of the Republic of Latvia, 7.2.2018 - A43007911 (LV2)).

Parties involved in the national court proceedings of the cases summarised can be grouped as follows:

- State aid beneficiaries or holders of (subordinated) shares of State aid beneficiaries;
- Entities potentially qualifying as State aid beneficiaries, if the damages claimed within the court proceedings would qualify as State aid; and
- Entities that could potentially become grantors of State aid if the court satisfied claims for damages that are qualified as State aid.

As for the remedies requested by the parties in the national courts, in the majority of cases, State aid did not constitute the main aspect of the proceedings, and the remedies requested were usually not State aid remedies.

Qualitative assessment of the average time of court proceedings

Average duration of court proceedings at first and second instance courts (average 2015–2018):[220]

- Administrative cases: district courts (first instance) ~7.5 months; regional courts (second instance) ~10 months.
- Civil/commercial cases: district courts (first instance) ~ 9 months; regional courts (second instance) ~ 4 months.

Average duration of court proceedings at third instance courts (in 2016):[221]

- Administrative cases: Supreme Court, ~10 months.
- Civil/ commercial cases: Supreme Court, ~6 months.

Practice shows that the duration of court proceedings involving State aid issues is much longer. In administrative proceedings it may go up to four years, in civil/ commercial proceedings, up to 2.5 years. However, in a few cases, the court rendered its judgment within ~2 months.

For the Constitutional Court, the average duration of court proceedings for matters addressing State aid issues has been ~10 months.

[214] Civillikums: available at https://likumi.lv/doc.php?id=225418 (last accessed on 3 January 2019).
[215] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*
[216] Satversmes tiesas likums / Constitutional Court Law, available at https://likumi.lv/doc.php?id=63354 (last accessed on 3 January 2019).
[217] Administratīvā procesa likums, available at https://likumi.lv/doc.php?id=55567 (last accessed on 3 January 2019).
[218] Civilprocesa likums: available at https://likumi.lv/doc.php?id=50500 (last accessed on 3 January 2019).
[219] Following the principles established with the Commission Notice on the enforcement of State aid law by national courts (2009/C 85/01).
[220] Unofficial data received from the Secretariat of the Council for the Judiciary (structure under the Supreme Court), December 2018.
[221] Source: the 2018 EU justice scoreboard: /https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf/ .

Qualitative assessment of the remedies awarded by national courts

In the current court cases involving the enforcement of State aid rules, satisfaction of the claims would entail the granting of potentially unlawful aid. In order to avoid the granting of unlawful aid, the court must be able to assess whether the requested damages (both in administrative and civil proceedings) would not constitute State aid. For more details, see case summaries for case A43007911 (LV2) and C04433312 (LV3).

It may therefore happen that certain claims are accepted by national courts, which, as a consequence may result in the granting of unlawful aid. For more details, see case summary for case C04433312 (LV3).

As mentioned above, in the majority of the cases, State aid does not constitute the main aspect of the proceedings. Therefore, the remedies granted are usually not the State aid remedies.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

Latvian courts have never turned to the CJEU to request a preliminary ruling, but they have systematically applied CJEU case law, State aid rules and individual Commission decisions approving State aid in cases addressed to Latvia. At the same time, the Latvian courts did not refer to the GBER or the *de minimis* Regulation in any of the identified State aid cases.

It may be argued on the basis of the summarised cases, that national courts experience some difficulties with the analysis of the existence of State aid as defined in Article 107(1) TFEU. The national courts, usually without an in-depth analysis of the State aid criteria, immediately address the question of compatibility of State aid (*e.g.* with environmental aid; see case summary for case A43007911 (LV2)). The Supreme Court observed that when reassessing a case, the court must assess whether the right to compensation under a liberalised market situation can be recognised as State aid. The lower court had not adequately analysed whether the amount of compensation to be paid should be categorised as State aid within the meaning of Article 107(1) TFEU.

In order to conclude that compensation for damage constitutes unlawful State aid, the court must examine these arguments in substance. And this should be done by analysing the definition of State aid according to Article 107(1) TFEU. The division of competences between national courts and EU institutions is not always clearly marked in the judgments of Latvian courts. For example, national courts have the competence to assess the presence of aid and whether the relevant procedures for granting State aid are respected; whereas, the Commission has the competence to assess compatibility once the presence of State aid is identified.

Qualitative assessment of any other relevant trends in State aid enforcement

State aid rules are a relatively new field for national courts in Latvia. A majority of the judgments concerning State aid issues were rendered in 2014 or later.

The Supreme Court, as the last instance court, takes careful account of State aid rules, which can especially be seen in its the judgments of 2018 (see case summaries for case A43007911 (LV2) and C04433312 (LV3)).

Also, the Constitutional Court, in all matters regarding the conformity of laws and other regulatory enactments with the Constitution of the Republic of Latvia, carefully considered the observations made by the parties on the application of State aid rules in these cases.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

The division of competences between national courts and EU institutions seems to pose challenges in Latvian State aid cases. For example, national courts have the competence to assess the presence of State aid and whether the relevant procedures for granting State aid are respected; whereas, the Commission has the competence to assess compatibility once the presence of State aid is identified.

Any other relevant comments or findings

Not applicable

16.2 Case summaries

Case summary LV1

Date

06/01/2019

Case identifiers

Member State

Latvia

Court which adopted the ruling (national language)

Latvijas Republikas Satversmes Tiesa

Court which adopted the ruling (English)

Constitutional Court of the Republic of Latvia

Instance court which adopted the ruling

Last instance court (general jurisdiction)

Official language of the court

Latvian

Hyperlink to ruling

http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf

Case reference

2014-36-01

Procedural context of the case

Section 1, paragraph 1 of the Constitutional Court Law defines the competence of the Constitutional Court to adjudicate on matters regarding the conformity of laws and other regulatory enactments with the Constitution.
According to Section 32, paragraphs 1 and 2 of the Constitutional Law, a Constitutional Court's judgments are final and the judgment and the interpretation of the relevant legal norm analysed in the judgment is binding for all State and local government authorities, including courts and their officials, as well as natural and legal persons.

Accordingly, if courts, when deciding the case, face the same facts and legal aspects decided by the Constitutional Court in the Case No. 2014-36-01 (ruling of 13 October 2015), ruling of the Constitutional court is binding on other courts.

Type of action

Private enforcement

Delivery date of the ruling

13/10/2015

Language

Latvian

Headnote

In this ruling, the Court acknowledged that the principle of burden-sharing, as laid down in Union law for assessing compatibility of State aid for restructuring firms in difficulties, is not in conflict with the Latvian Constitution guaranteeing the protection of a person's property rights.

Parties

Names of the parties to the action

M. K. (anonymised); V. K. (anonymised)

Versus

Saeima

The relationship of the plaintiff to the measure

Other

Subordinated share-holder of the State aid beneficiary in the case involving restructuring of JSC Parex banka

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

K - Financial and insurance activities

Financial services / banking sector

The type of State aid measure challenged in the court proceedings

Other

Suspension of monthly payment of interest arising from term-deposit agreements

Substance of the case

Facts and parties' main arguments in the case

The plaintiffs applied for the annulment of Article 8(1) of the Law on the control of commercial aid from the time of its adoption, as it is contrary to the right to property guaranteed by the Constitution.

The plaintiffs are the owners (legal successors) of term-deposits that were placed in the JSC Parex banka (beneficiary of restructuring State aid) and later transferred to the bank for use as subordinated capital. The plaintiffs argued that the suspension of their monthly interest payments arising from the term deposit agreements owned by them was unlawful. The suspension entered into force as a result of the contested legal provision. The plaintiffs claimed that pursuant to the contested provision they are forcibly deprived of their property rights, in breach of the national Constitution. Under Article 105 of the Constitution, property may only be forcibly taken away in the public interest, in exceptional cases, on the basis of a specific law and against a fair compensation. In the opinion of the plaintiffs, there is no public interest that would justify the expropriation of their property.

According to Saeima (the Parliament of the Republic of Latvia), the intention of the legislator was not to forcibly diminish the rights to property, but only to temporarily limit such rights in the public interest. The disputed legal provision sets out the limitation of the use of property only for the duration of the aid, to ensure that State aid granted to an undertaking is primarily used to restore the viability of an undertaking rather than to safeguard the property interests of individuals (e.g. shareholders). Latvia has committed to complying with the burden sharing principle in accordance with the decision of the Commission of 9 July 2014 (SA.36612), regarding the support it has granted to Parex.

The following stakeholders were invited to express an opinion relevant for the consideration of the case : the Ministry of Finance, the Ministry of Justice, the Association of Latvian Commercial Banks (now: Finance Latvia Association), the Financial and Capital Market Commission, the Ombudsman of Latvia, and the following legal experts: Dr. iur. Maris Onzevs, Dr. iur. Aivars Losmanis and Mg. iur. Solvita Harbacevica.

All abovementioned stakeholders supported the view that the disputed legal provision was adopted to ensure the protection of a significant public interest and taxpayers. The contested legal provision has a legitimate aim to ensure that undertakings which have received or plan to receive State aid and which have subordinated obligations, primarily take care of the repayment of State aid

received, and not of the fulfilment of the subordinated obligations. The stakeholders also emphasised that the contested legal provision complies with the EU legal framework in the field of State aid and that it helps to ensure implementation of the 'burden sharing' principle, which is crucial to ensure compliance with Commission decision regarding State aid granted to Parex.

Please note that JSC Parex Banka (the beneficiary of the State aid) had benefited from rescue and restructuring State aid from 2008. In 2010, the Commission approved the restructuring plan for JSC Parex banka, of which modifications in the implementation were subsequently approved by the Commission in 2012 and 2014. In these decisions, the Commission laid down the principle of 'burden sharing' with respect to the State aid beneficiary. As a result of the restructuring, the JSC Parex banka was divided into two parts: JSC Citadele banka, which took over all core assets and certain non-core assets, and JSC Reverta, which took over non-core assets and non-performing assets. Property rights arising from the agreement touched in this case was transferred to JSC Reverta.

Remedy(ies) sought

Other remedy sought

The abolition of the challenged legal provision (Section 8, paragraph 1) of the Law on Control of Aid for Commercial Activity from the moment of its adoption

Outcome of the case

Conclusions adopted by the national court

The Constitutional Court assessed the temporary limitation of the right to property established under Latvian Law, considering Union law and guidelines (rescue and restructuring aid guidelines*). The Court recognised the obligation of Latvia as a Member State to comply with the provisions of the TFEU and the competence of the Commission to determine legally binding State aid obligations and to decide on the compatibility of State aid with the internal market.

Compliance with the burden-sharing principle is an essential condition for granting State aid to a firm in difficulty. The disputed provision has the objective to ensure that State aid granted in order to rescue and restructure an undertaking is used in the public interest and subsequently repaid to the State. The Court concluded that the disputed rules have the legitimate aim of ensuring the welfare of the society which constitutes a legitimate public interest. The Court further stated the rules are suitable for achieving this goal, and that there are no other means capable of achieving the legitimate objective in the same manner.

The Constitutional Court therefore declared that the contested legal provision (Section 8, paragraph 1 of the Law on Control of Aid for Commercial Activity) complies with Article 105 of the Constitution of the Republic of Latvia.

* This includes Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01) and Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (2009/C 195/04).

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

National case law:
- Ruling of the Constitutional Court of the Republic of Latvia of 19 October 2011, case No. 2010-71-01

References by the court to other relevant aspect of the EU acquis

- Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, 2014/C 249/01, OJ C 249, 31.7.2014
- Decision of the Commission of 9 July 2015 in the State aid case SA.36612 - 2014/C (ex 2013/NN) on State aid implemented by LATVIA for PAREX, OJ L 27, 3.2.2015

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary LV2

Date

06/01/2019

Case identifiers

Member State

Latvia

Court which adopted the ruling (national language)

Latvijas Republikas Augstākā Tiesa

Court which adopted the ruling (English)

Supreme Court of the Republic of Latvia

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Latvian

Hyperlink to ruling

https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi
Link to the start-page of the national data base of the court rulings that provides search tools. Judgment may be found by filling-in search criteria 'atlasīt pēc lietas numura' and entering the exact case number.

Case reference

ECLI:LV:AT:2018:0207:A43007911.2.S; A43007911

Procedural context of the case

The Supreme Court with its ruling of 7 February 2018 (summarised in this document) revoked the Administrative Regional Court's judgment of 12 March 2014 (ruling A43007911) and sent the case back for a new hearing. The Administrative Regional Court had not adequately analysed whether the amount of compensation to be paid should be categorised as State aid within the meaning of Article 107(1) TFEU. The Supreme Court decided that in re-assessing the case, the Administrative Regional Court must assess whether the right to compensation under a liberalised market situation can be recognised as State aid. Additionally, the Supreme Court indicated that, in reviewing the case again, the Court may comparatively use analyses provided in the Commission decision of 24 April 2017 (SA.43140), where the Commission has analysed existing State aid scheme for support to renewable energy in Latvia. The claim for compensation in this case covered the period between March 2003 and March 2010, but the Commission decision to which the Court makes a reference covered the period starting from 1 April 2010. However, since the Commission decision includes assessment of the presence of State aid, it can be used as guidance by the courts when assessing whether the right to compensation can be recognised as State aid in the court-case concerned.

Type of action

Private enforcement

Delivery date of the ruling

07/02/2018

Language

Latvian

Headnote

In this ruling, the Court considered whether the payment of compensation of damages for failure to receive statutory remuneration would entail unlawful State aid.

Parties

Names of the parties to the action

SIA 'Grev'

Versus

Sabiedrisko pakalpojumu regulēšanas komisija

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Production of electricity from renewable energy sources

The type of State aid measure challenged in the court proceedings

Other

Compensation of losses

Substance of the case

Facts and parties' main arguments in the case

The plaintiff requested the Court to order the defendant to compensate for the losses incurred by the plaintiff due to the fact that during the period from 1 March 2006 to 1 April 2010, the defendant had not established average tariffs for electricity sales, i.e. tariffs for which, according to the Electricity Market Law (hereinafter also referred to as: 'the Law'), manufacturers using renewable energy for the production of electricity were entitled to sell electricity to public traders.

There was a dispute between the parties about the methodology to be used for setting a renewable electricity sales tariff. Historically the average electricity tariff was associated with JSC Latvenergo final tariffs and electricity consumption at different voltage levels (in Latvia, there was a monopoly in the electricity market for a long time, in which all functions - electricity generation, transmission, distribution and sale - were executed by JSC Latvenergo). In determining the amount of the subsidy (with a guaranteed tariff), there was no economic link between the amount of the State subsidy granted and the actual costs and profitability (cost of capital) of the subsidised electricity producers. If the production costs of JSC Latvenergo are used in the calculation of the tariff, incl. investment costs, the plaintiff's profit may rise unreasonably. This would lead to a systemic error and an unjustified increase in the amount of aid over a long period.

The plaintiff argued that in accordance with the Law, the defendant had an obligation to approve the tariff based on the Law. The defendant is not entitled to determine a different amount of support than is prescribed by law. According to the plaintiff, the Law on Control of State Aid for Commercial Activity (in force till 1 May 2004, i.e. Latvia's accession date to the EU) was not applicable to the plaintiff because the criteria to qualify compensation as State aid (as defined in Article 107(1) TFEU) are not complied with. Furthermore, the Court had not provided assessment and conclusions on the presence of State aid. The plaintiff did not request an increase in the amount of State aid but compensation of the statutory payments.

The defendant (the Public Utilities Commission) considers that the earlier judgment of the Administrative Regional Court was well-founded. Indeed, application of the average tariff for electricity trading to the plaintiff is not justified since such tariff is not related to the plaintiff's production costs. Following the principles of the legal acts governing granting of State aid for the environmental objectives, State aid could be granted as a difference between the plaintiff's (State aid beneficiary's) production costs and market price of the electricity. Consequently, the compensation (subsidy as a guaranteed tariff) would be permissible only to the extent that it justified by the costs of electricity production of the economic operator concerned.

Remedy(ies) sought

Other remedy sought

Compensation of losses arising because there was no established average electricity tariff between 1 March 2006 and 1 April 2010, for which producers who use renewable energy sources for electricity production were entitled to sell electricity to a public trader.

Outcome of the case

Conclusions adopted by the national court

The Supreme Court acknowledged that the issue of State aid in the proceedings may be considered, but this should be done through the proper and systematic application of the State aid regulatory framework.

In accordance with valid national court rulings acknowledging of the obligation of the defendant to approve tariffs, the plaintiff has the right to compensation. The court case at hand arose since compensation was not paid and the plaintiff claimed damages. In the Court's opinion, however, if compensation would entail State aid, compensation of loss, i.e. the claim for damages, would also result in unlawful State aid. The rulings of the national courts cannot be used to grant unlawful State aid.

The Court claimed that in the liberalised market the compensation that the plaintiff is demanding could be potentially classified as State aid. The formal conversion of the disputed amount into compensation for damages does not change the nature of the amount due. If tariffs would be calculated in time and this amount would form part of the State aid amount, then the qualification of this amount as State aid would not change over the time even if granted with a court ruling declaring this amount of aid as compensation for damages.

Therefore, the Court went on to conclude that compensation for damages constituted State aid within the meaning of Article 107(1) TFEU. The Regional Court did not analyse whether the damages constituted State aid. Rather, the Court immediately concluded that compensation for damages constitutes unlawful State aid. The case was, therefore, sent back to the lower court (Administrative Regional Court) for re-assessment.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

No final ruling issued yet.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-78/76, Firma Steinike und Weinlig v. the Federal Republic of Germany (1977) ECLI:EU:C:1977:52
- C-505/14, Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen (2015) ECLI:EU:C:2015:742

√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission decision of 24 April 2017 in State aid case SA.43140 (2015/NN) – Support to renewable energy and CHP

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary LV3

Date

06/01/2019

Case identifiers

Member State

Latvia

Court which adopted the ruling (national language)

Latvijas Republikas Augstākā Tiesa

Court which adopted the ruling (English)

Supreme Court of the Republic of Latvia

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Latvian

Hyperlink to ruling

https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi
Link to the start-page of the national data base of the court rulings that provides search tools. Judgment may be found by filling-in search criteria 'atlasīt pēc lietas numura' and entering the exact case number.

Case reference

ECLI:LV:AT:2018:0627.C04433312.2.S; C04433312

Procedural context of the case

- On November 21, 2012, pers. B/ (person B) (the defendant)* brought an action in the first instance court (Riga Regional Court) requesting termination of the concluded agreement on term-deposit acceptance and servicing. Person B asked JSC Reverta (the plaintiff) to repay the principal amount of term-deposits. The Court satisfied the claim with the ruling of 29 May 2013 (ruling C04433312).
- JSC Reverta appealed against this judgment (and therefore became the plaintiff in the Supreme Court case). The Supreme Court (acting as the second instance court) with its ruling of 13 June 2016 (ruling C04433312) agreed with the ruling of the lower court and satisfied the claim requiring JSC Reverta to repay the principal amount of term-deposits.
- JSC Reverta (i.e the plaintiff also in this instance) lodged a cassation appeal to the Supreme Court requesting annulment of the ruling of 13 June 2016 (in part) and referral of the case back for a new assessment. The cassation claim was based on the arguments that the Court did not assess the facts and arguments put forward by the plaintiff (JSC Reverta) regarding application of the EU rules on rescue and restructuring State aid, nor the decisions taken by the Commission approving the granting of State aid to the JSC Parex banka.** Additionally, the plaintiff (JSC Reverta) argued that the Court in its judgment failed to take into consideration the ruling of the Constitutional Court of 13 October 2015 (ruling 2014-36-01) establishing that the national rules adopted to comply with State aid rules and the decisions of the Commission approving the granting of State aid to defendant are compliant with the Constitution of the Republic of Latvia.
- The Supreme Court overturned the ruling of the lower court concerning the part which envisages the satisfaction of the claim*** and sent the case for a new hearing to the Regional Court (collegium of civil matters) (the court of appeal according to the changes to the judicial system of Latvia). ****
- In accordance with Article 29 (2) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015), the Commission intervened in this case (amicus curiae), in order to ensure the uniform application of Union law in the field of State aid.
- The subsequent ruling of the Regional Court (collegium of civil matters) is not yet available.

* Please note that in the original (first instance) case Person B is a plaintiff, and Reverta is the defendant. In the second instance the roles of the parties changed: Reverta challenged the ruling of the Riga Regional Court and therefore became the plaintiff. The Second instance court accepted the arguments of Person B. Reverta challenged the ruling of the second instance (Supreme Court) too, therefore becoming the plaintiff also in the last instance proceedings (summarised here). Person B became, as a consequence, the defendant in the second and last instance.
** JSC Parex banka – beneficiary of State aid. JSC Parex Banka has benefited from rescue and restructuring state aid from 2008. In 2010, the EC approved the restructuring plan for JSC Parex banka, of which modifications in the implementation were subsequently approved by the European Commission in 2012 and 2014. In these decisions, the EC laid down the principle of 'burden sharing' with respect to the State aid beneficiary. JSC Reverta was created within the framework of the JSC Parex banka division process.
*** The original claim (of 2012) was to terminate the concluded agreement on term-deposit acceptance and servicing as well as to request from JSC Reverta repayment of the principal amount of term-deposits. The original claim was supplemented with the claim for compensation of monthly interest payments arising from term deposit agreements, which were not paid out from 2014.
**** Please note that in this case the Supreme Court acted as the second instance court when the first instance court was appealed against. However, when the Supreme Court – acting in its last instance capacity – sent the case back to the second instance court, it was sent to the Regional Court. This was due to the changes in the judicial system of Latvia took place in 2013-2014 with transitional arrangements remaining in place till the end of 2016 for civil proceedings. The ruling of the Supreme Court was issued once the transitional arrangements ended. From 2015 all cassation appeal cases from the Supreme Court were reverted to the Regional Court as second instance, which is why it was the Regional Court which considered this case as the second instance court for the second time.

Type of action

Private enforcement

Delivery date of the ruling

27/06/2018

Language

Latvian

Headnote

In this ruling, the Court ruled that national authorities and national courts are obliged to respect the requirements imposed by the Commission decisions on the compatibility of State aid with Union law.

Parties

Names of the parties to the action

A/S 'Reverta'

Versus

/pers. B/ (anonymised)

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Other

Subordinated share-holder of the beneficiary

Sector relating to the State aid argument

K - Financial and insurance activities

Banking sector

The type of State aid measure challenged in the court proceedings

Other

A ban on the pay-out of interest payments on placed deposits and on the repayment of the principal deposit

Substance of the case

Facts and parties' main arguments in the case

In May 2008, /per. C/ (the defendant's mother company) and JSC Parex banka signed an agreement on placing and servicing a term-deposit.

With an additional agreement signed in May 2008, /per. C/ accepted that the term-deposit was used as a subordinated capital of the bank. In 2012, /pers. C/ transferred to her son /pers. B/ (defendant) rights to term-deposit and rights to receive interest payments on a regular basis. The defendant is the owner (legal successor) of term deposits that were placed in the bank and later transferred to the bank for a use as a subordinated capital.

In October 2008 JSC Parex banka ran into financial difficulties, which resulted in the State taking over share ownership of the bank as well as providing different types of rescue aid. Accordingly, between 2008 and 2010, Latvia notified rescue aid measures to the Commission, which temporarily approved them under the condition of Latvia's commitment to submit a restructuring plan. In 2010, the Commission approved the restructuring plan for JSC Parex banka, of which alterations in the implementation were subsequently approved by the Commission in 2012 and 2014. In these decisions, the Commission laid down the principle of 'burden sharing' with respect to the defendant. As a result of the restructuring, the JSC Parex banka was divided into two parts: JSC Citadele banka, which took over all core assets and certain non-core assets, and JSC Reverta, which took over non-core assets and non-performing assets. The agreement between defendant and JSC Parex banka was transferred to JSC Reverta (the plaintiff).

In order to fulfil Latvia's undertaken commitments with regards 'burden sharing' as approved with the 2015 Commission Decision of 9 July 2014 (SA.36612 - 2014/C (ex 2013/NN)), the Law on the Control of Aid for Commercial Activity (Section 8, paragraph 1) contains requirements on burden sharing arising from State aid rules for rescue and restructuring. This provision was introduced specifically in order to fulfil Latvia's commitments with regard to burden sharing. The compliance of this norm with Article 105 of the Constitution of the Republic of Latvia was recognised by the Constitutional Court in its judgment of 13 October 2015, ruling 2014-36-01.

In cassation, the plaintiff (JSC Reverta) argued that any State aid measure needs to be notified to the Commission pursuant to Article 108(3) TFEU and cannot enter into force before the Commission has approved it. Since the abovementioned rules are binding on the courts of the Member States, according to the plaintiff the Court of Appeal has, by satisfying the claim, breached State aid rules. With its ruling, it had put defendant in a more favourable position than would have been possible if State aid to JSC Parex banka would not have been provided and JSC Parex banka would have be recognised as insolvent.

The Commission in accordance with Article 29 (2) of Regulation No. 2015 / 1589 lodged observations, intervening as amicus curiae in the case, in order to ensure the uniform application of Union law in the field of State aid. The Commission provided explanations on its decisions regarding State aid for the restructuring of JSC Parex banka and on the legitimacy of the burden sharing principle in accordance with the requirements of Union law. The Commission reiterated that following its 2014 decision, Latvia has an obligation, as part of the 'burden sharing' requirements, to ensure that JSC Reverta (the plaintiff) does not pay the principal amount of subordinated loans to the subordinated creditors, such as to / pers. B/ (the defendant). This provision is not applicable to the capital invested by the Latvian state and the EBRD.

Remedy(ies) sought

Other remedy sought

A reinstatement of the ban on the pay-out of interest payments on placed deposits and on the repayment of the principal deposit, in accordance with the decisions of the Commission as part of a 'burden sharing' obligation imposed on the State aid beneficiary.

Outcome of the case

Conclusions adopted by the national court

The Supreme Court recognised the competence of the Commission to decide on the compatibility of State aid with the internal market. The Court also confirmed the responsibility of national authorities and national courts to respect the Commission decisions that declare State aid compatible.

The Supreme Court referred to a ruling of the Constitutional Court, in which it ruled that restrictions imposed by national law on undertakings that receive State aid for rescue or restructuring are compatible with the Constitution of the Republic of Latvia. By not considering the ruling of the Constitutional Court the Court of Appeal has violated Constitutional Court Law (Section 32, paragraph 2).

The Supreme Court agreed with the plaintiff's view, that the Court of Appeal was wrong to disregard State aid rules in the case.

The Supreme Court overturned the ruling of the Court of Appeal concerning aspects which envisages the satisfaction of the plaintiff's claim and sent the case for a new hearing to the Regional Court (collegium of civil matters) (the court of appeal according to the changes to the judicial system of Latvia).

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

Subsequent ruling not available yet.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-526/14, Tadej Kotnik and Others v Državni zbor Republike Slovenije (2016) ECLI:EU:C:2016:570

National case law:
- Ruling of the Constitutional Court of the Republic of Latvia from 13 October 2015, case No 2014-36-01

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'equivalence'

References by the court to other relevant aspect of the EU acquis

- Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195, 19.08.2009, p. 9-20
- Decision of the Commission 2011/364/EU of 15 September 2010 in State aid case C26/2009 (ex N289/2009) on the State aid which Latvia is planning to implement for the restructuring of AS Parex banka, OJ L 163, 23.6.2011
- Decision of the Commission of 10 august 2012 in the State aid case SA.34747 (2012/NN) - Amendments to Parex restructuring plan, OJ C 273 21.9.2013
- Decision of the Commission of 9 July 2014 in the State aid case SA.36612 - 2014/C (ex 2013/NN) on State aid implemented by LATVIA for PAREX, OJ L 27, 3.2.2015

Cooperation with the EU institutions

The Commission provided the national court with amicus curiae observations (no hyperlink available)

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

16.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Latvijas Republikas Augstākā tiesa	Supreme Court of the Republic of Latvia	Last instance court (administrative)	A7019910	22/11/2010	Private enforcement	Case sent back to the lower court for re-assessment; Other remedy imposed	The relevant undertaking is exempt from the applicable State fees for the re-use of information. The defendant argues that services provided by the undertaking are to be regarded as services of general interest in accordance with Commission Decision 2005/842/EC of 28 November 2005 on State aid in the form of public service compensation. In the Court's view, when examining the merits of the case, it is necessary to examine whether the benefit granted to the undertaking under the contract constitutes State aid. The Supreme Court revoked the Administrative Regional Court's decision and sent the case for a new hearing to the Administrative District Court. The Supreme Court orders the lower court to adjudicate on the substance of the case.		The lower court refused to initiate the case. The Court decided that according to the law the plaintiff has no legal standing. Therefore, no subsequent ruling is available.
Latvijas Republikas Satversmes tiesa	Constitutional Court of the Republic of Latvia	Constitutional Court	2010-71-01	19/10/2011	Private enforcement	Other remedy imposed	The plaintiffs requested that the provision of the Law on Credit Institutions which restricts shareholders' rights to decide on the increase of the credit institution's share capital be declared unconstitutional. The Court acknowledged that the restriction was set for the sake of important interests. The legitimate aim of the legal provision is the quick and effective recapitalisation of a systemically important credit institution in financial difficulty, including the possibility of adopting a decision to increase equity capital in line with the rules on State aid. The Court took into consideration Union law in the field of State aid, as well as the decisions the Commission regarding State aid. The Court declared the disputed provision of the law to be unconstitutional as it conflicted with the Constitution of the Republic of Latvia. The Court annulled the provision from the day it pronounced the ruling, not from the date of the adoption, as was requested by the plaintiffs.		
Rīgas pilsētas Ziemeļu rajona tiesa	City of Rīga Northern District Court	Lower court (civil/commercial)	C32324414	11/12/2014	Private enforcement	None - Claim rejected	The Court declared the application for the declaration of insolvency of an undertaking to be unfounded, as there is a dispute over the application of national laws, one of which is prescribing rules in the field of State aid. The defendant did not pay interest in accordance with the contracts which had been agreed. The interest payment has been terminated in accordance with the limitations imposed by the law. The law imposes a restriction on an undertaking in financial difficulty, to which State aid is granted (which is approved by the Commission), on the implementation of subordinated obligations throughout the entire period of State aid.		Previous rulings from the lower court - case C04433312 from 13 June 2016 (not available in the open database; the ruling was obtained following a request made to the Supreme Court).
Latvijas Republikas Satversmes tiesa	Constitutional Court of the Republic of Latvia	Constitutional Court	2014-36-01	13/10/2015	Private enforcement	None - Claim rejected	The plaintiffs requested the abolition of provisions of the Law on Control of Aid for Commercial Activity, which include requirements on burden sharing arising from State aid rules for rescue and restructuring. The disputed legal provision sets out the limitation on the use of property from the moment of the granting of State aid until the end of its duration, to ensure that State aid granted to an undertaking is primarily used to restore the viability of an undertaking rather than to safeguard the property interests of individuals (for example shareholders). Compliance with the burden-sharing principle is an essential condition for granting State aid to a firm in difficulty. The disputed provisions can ensure that State aid granted for rescuing and restructuring an undertaking is used in the public interest and repaid to the State. Thus, the Court concluded that the disputed rules have the legitimate aim of ensuring the welfare of society, are suitable for achieving this goal, and that there are no other means capable of achieving the legitimate objective in the same manner. The Court acknowledged that the principles of burden-sharing established under Union law do not contradict the principles of protection of property rights established in the Constitution of the Member State.		The reference to the ruling in this case is one of the essential arguments in the Supreme Court judgment of 27 June 2018 in case C04433312.
Latvijas Republikas Augstākā tiesa	Supreme Court of the Republic of Latvia	Last instance court (civil/commercial)	C04333212	23/12/2015	Private enforcement	None - Claim rejected	The case concerns the termination of a contract and the repayment of funds. The court rejected the claim. The case concerns subordinated investment and interest payments on subordinated debt. The plaintiff invested in subordinated capital of Undertaking Y, which subsequently received rescuing and restructuring State aid. All support measures were approved by the Commission. All the approval decisions of the Commission obliged the Member State to ensure that the original shareholders and holders of the subordinated capital bore the burden for the financial difficulties of Undertaking Y. The part of the claim asking for the addition of unpaid interest payments to the amount of the basic debt was not considered by the court, as non-payment of interest was based on the limitations imposed by the Commission decision and national law.		This is considered private enforcement since, although the measure was notified, the Commission decisions imposed certain restrictions on private shareholders. They went to court with claims based on their contractual rights, which were limited by Commission decisions. Thus, granting remedies (accepting the claim) would lead to the granting of unlawful State aid subject to recovery at a later stage.
Latvijas Republikas Augstākā tiesa	Supreme Court of the Republic of Latvia	Last instance court (administrative)	ECLI:LV:AT:2018:0207.A43007911.2.S / A43007911	07/02/2018	Private enforcement	Case sent back to the lower court for re-assessment	The Supreme Court revoked the Administrative Regional Court's decision and sent the case back for a new hearing. In re-assessing the case, the Court must assess whether the right to compensation under a liberalised market situation can be recognised as State aid. The lower court had not adequately analysed whether the amount of compensation to be paid should be categorised as State aid within the meaning of Article 107(1) TFEU.		The subsequent ruling from the Administrative Regional Court is not yet available. Previous ruling of the lower court: case A43007911 from 12 March 2014 (https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi). The lower court had rejected the

									claim based on the argument that, by accepting the claim, a higher amount of State aid could be granted and such aid would be unlawful.
Latvijas Republikas Augstākā tiesa	Supreme Court of the Republic of Latvia	Last instance court (civil/commercial)	ECLI:LV:AT:2018:0627.C04433312.2.S / C04433312	27/06/2018	Private enforcement	Case sent back to the lower court for re-assessment	The appeal (cassation claim) was based on the fact that the appellate court did not take into account the considerations and arguments put forward by the defendant (Undertaking Y) regarding EU rules on rescue and restructuring State aid, as well as the decisions taken by the Commission approving the granting of State aid to the defendant (Undertaking Y). The Court of Appeal also failed to take into consideration the decision of the Constitutional Court that the national rules adopted to comply with State aid rules, the decision of the Commission approving the granting of State aid to Undertaking Y and which limit the property rights of the plaintiff, are compliant with the Constitution of the Republic of Latvia. Thus, the national court had violated Constitutional Law. The Supreme Court overturned the ruling of the lower court concerning the part which envisages the satisfaction of the plaintiff's claim, and sent the case for a new hearing to the Regional Court (collegium of civil matters) - the Court of Appeal according to the changes to the judicial system of Latvia.	In accordance with Article 29(2) of Regulation No. 2015 / 1589, the Commission lodged an application to intervene in the case (*amicus curiae*), in order to ensure the uniform application of Union law in the field of State aid.	The subsequent ruling of the Regional Court (collegium of civil matters) is not yet available. Previous ruling of the lower court: case C04433312 from 13 June 2016 (not publicly available; the ruling was obtained following a request made to the Supreme Court). This case is linked with the ruling of the Constitutional Court in case 2014-36-01.

17. Lithuania

17.1 Country report

Name national legal expert

Dr Karolis Kačerauskas

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10/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Both administrative courts and courts of general competence can hear cases concerning the public and private enforcement of State aid rules. Administrative courts are authorised to take decisions in disputes between institutions of public administration and private persons (legal or natural).[222] In State aid cases, administrative courts are usually invited to take a decision on the validity of administrative acts establishing State aid measures. Courts of general competence hear any other types of disputes.[223] Thus, courts of general competence may be invited to rule on State aid matters in any kind of disputes referred to them.

In particular, in the Lithuanian system, the administrative courts and the courts of general competence are:

Administrative courts

- Regional administrative courts (*Apygardos administracinis teismas*) (courts of first instance), and
- Supreme administrative court (*Lietuvos vyriausiasis administarcinis teismas)* (court of last instance).

Courts of general competence

- District courts (*Apylinkės teismas*) (courts of first instance);
- County courts (*Apygardos teismas*) (courts of first instance for higher value and specialised cases and courts of appeal for cases heard by the district courts);
- Court of Appeals of Lithuania (*Lietuvos apeliacinis teismas*) (court of appeal); and
- Supreme Court of Lithuania (*Lietuvos aukščiausiasis teismas*) (court of cassation).

There is thus neither a specialised court nor a specific court that hears a clear majority of cases involving the public enforcement of State aid rules.

A description of the procedural framework applicable in public enforcement of State aid rules

Lithuanian law does not include any legal provisions specifically regulating recovery of State aid. Recovery is based on the general provisions of law regulating consequences of illegal actions of State authorities (claim requesting for the regulation of consequences of an invalid contract or administrative act, *e.g.* application of restitution,[224] a finding of unjust enrichment,[225] return of property received without proper legal basis,[226] restitution of situation existing prior to invalidation of administrative act[227]). However, certain adjustments have to be made to implement general principles regulating recovery of State aid at the EU level (*e.g.* limitation period, inability to recover State aid or the absence of legitimate expectations).

There are no institutions in Lithuania that are specifically appointed to enforce State aid recovery decisions. Therefore, recovery is done either by the institutions that granted the aid (claim requesting for regulation of the consequences of an invalid contract or administrative act) or by the public prosecutor office in defence of the general interest.[228] It could also be that recovery of State aid is based on a claim submitted by a party whose interests have been infringed by the State aid granted.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

As mentioned above, there are two types of courts in Lithuania that can hear cases concerning the private enforcement of State aid rules: administrative courts and courts of general competence.

There is thus neither a specialised court nor a specific court that hears a clear majority of cases involving the private enforcement of State aid rules

A description of the procedural framework applicable in private enforcement of State aid rules

There are no specific civil and or administrative procedural rules applicable in a case of private enforcement of State aid rules. Thus, the same rules that were described above in the section *'A description of the procedural framework applicable in public enforcement of State aid rules'* apply.

Main findings based on the case summaries

It is clear from the case summaries as well as from the list of relevant rulings for Lithuania that infringement of State aid rules are invoked mostly on the initiative of private parties. Furthermore, such infringements are mostly invoked as a supplemental argument to the

[222] Art. 17(1) of the Law on Administrative Procedure No VIII-1029 (Lietuvos Respublikos administracinių bylų teisenos įstatymas).
[223] Art. 12 of the Law on Courts No I-480 (Lietuvos Respublikos teismų įstatymas).
[224] Art. 6.145 of Civil Code.
[225] Art. 6.242 of Civil Code.
[226] Art. 6.237 of Civil Code.
[227] Art. 91 and 94 of the Law on Administrative Procedure.
[228] Art. 55 of the Law on Administrative Procedure, Art. 49 of the Code of Civil Procedure.

main legal arguments (*i.e.* there are no cases where State aid arguments played a leading role).

The sectors relating to the selected rulings on State aid enforcement are very diverse and range from natural gas to construction, to insurance and banking. Nonetheless, all State aid cases considered in Lithuania can be more or less attributed to one of the three following categories:

- Cases concerning restructuring processes. As a general rule, in such cases the State tax inspectorate claims that deferral of taxes for a company under restructuring procedures amounts to State aid, which needs to be coordinated with State aid rules;
- Cases related to distribution of EU funds: the disputes usually concern the relationship between the EU funding and State aid measures; in these cases, one of the parties is usually the institution granting EU funds, while the other is the beneficiary of such funds; and
- Cases related to levies used to finance electricity and natural gas projects. All such cases are initiated by AB 'Achema' (major consumer of natural gas and electricity), questioning whether the obligation to pay a levy is compatible with State aid rules.

Qualitative assessment of the average time of court proceedings

Analysis of case law suggests that State aid arguments have been raised in national courts at a rather basic level; mostly, the infringement of State aid rules was mentioned as one of the infringements by the authorities. For this reason, State aid arguments have not had any noticeable effect on the duration of court proceedings. There are no official statistics suggesting the presence of a correlation between State aid arguments invoked in a case and the duration of court proceedings.

The average duration of administrative proceedings in all court instances is about 486 days (118 days for the first instance and 368 days for the appeals);[229] while civil proceedings can last between 398 and 646 days, and the actual duration depends on the court hearing the case as a court of first instance.

In 2017, according to the Annual Report of National court administration the average duration of civil proceedings differed between the courts of various instances:

- District courts (as courts of first instance) was about 91 days;
- County courts (as courts of first instance) was about 279 days.

In the same year, the average duration of civil proceedings in:

- County courts (as a courts of appeals) was about 120 days;
- Court of Appeals was about 180 days; and
- The Supreme Court of Lithuania was about 187 days.

At the same time, it should be noted that there are many unresolved cases in administrative courts considering compliance of the special levy used to finance natural gas and electricity projects. Natural gas cases are suspended waiting for the GC judgment (see *Achemos Grupė and Achema v Commission*)[230] on the Commission decision to clear the State aid and waiting for preliminary rulings from the CJEU (see Case *Achema and others*. (pending)).[231] Such suspension is related to State aid proceedings (disputes at EU level) and influences the duration of proceedings. However, general conclusions cannot be drawn from such cases, since all of them were initiated by the same undertakings (AB Achema, AB Lifosa and/or AB ORLEN Lietuva) and contain a similar line of argumentation.

Qualitative assessment of the remedies awarded by national courts

The courts are still reluctant to order recovery of unlawful State aid (no recovery has taken place on the basis of infringement of State aid rules so far). There are two reasons for that: Firstly, allegations on infringement of State aid rules are mostly mentioned *inter alia* among other arguments and are not given appropriate attention. Even when allegations on infringement of State aid rules constitute the main argument raised by the plaintiff, such arguments normally contain major flaws in interpretation of State aid rules. In other words, there is a lack of experience in private enforcement of State aid rules. Secondly, the courts do not seem very confident in awarding remedies. The courts either try to resolve legal problems by invoking provisions of national law (*e.g*. Constitution) or reject infringements of State aid rules by accepting ill-founded justifications (*e.g.* recognise compliance with *Altmark* criteria without requesting too much evidence).

Qualitative assessment of the application of the State aid *acquis*; preliminary references

As a general rule, State aid case law during the period 2007–2017 considered rather straightforward questions on State aid. The State aid *acquis* was mostly mentioned as a background, rather than analysed in detail. In particular, case law considered application of the following *acquis*:

- *The de minimis* Regulations 1998/2006 and 1407/2013 (see, *e.g*. Court of Appeals, 18.3.1010 - 2-399/2010; Court of Appeals, 14.4.2011 - 2-909/2011; Vilnius Region Administrative Court, 26.6.2015 - I-5040-596/2015) and the GBER 800/2008 (see, *e.g*. Supreme Administrative Court, 3.1.2011 - A-261-1743-10; Supreme Administrative Court, 14.10.2010 - A822-1296/2010). These were usually mentioned in a context to explain that distribution of EU funds under a specific measure was made under the *de minimis* Regulation or provisions of the GBER. There were also several cases where *de minimis* was used to explain that the State measures were too minor from the perspective of the *de minimis* Regulation to consider them as State aid.
- Commission Regulation (EC) 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the sector of agricultural production (see, *e.g.* Vilnius Regional Administrative Court, 26.6.2015 - I-5040-596/2015). It is usually mentioned in a context to explain that distribution of EU funds under a specific measure is made under the Regulation.
- Council Regulation (EC) 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion

[229] Data from 2017 Annual Report of National court administration, available at https://www.teismai.lt/data/public/uploads/2018/04/galutine-ataskaita-10.pdf (last accessed on 10 January 2019).
[230] Case T-417/16 *Achemos Grupė and Achema v Commission*.
[231] Case C-706/17 *Achema and others.*

Fund and repealing Regulation (EC) 1260/1999[232] (see, *e.g.* Court of Appeals, 30.10.2013 - I-3595-244/2013). It is usually mentioned in a context to explain that distribution of EU funds under a specific measure is made in compliance with the Regulation.

- Commission Notice 2009/C 85/01on the enforcement of State aid law by national courts[233] (see, *e.g.* Court of Appeals, 22.12.2009 - 2-1383/2009 (LT2); Court of Appeals, 22.4.2010 - 2-639/2010). It is usually mentioned as a basis for the competence of national courts to apply State aid rules, mentioning the possibility of referring the case to the CJEU for a preliminary ruling or of receiving *amicus curiae* observations from the Commission, and stating that the Commission holds exclusive competence to decide on the compatibility of State aid.
- Community Guidelines on State aid for rescuing and restructuring firms in difficulty. The Guidelines are usually mentioned in a context to question whether a State measure complies with the MEIP and/or exceeds the *de minimis* ceiling to be considered as State aid, which is subject to the application of the Guidelines (see, *e.g.* Court of Appeals, 22.6.2010 - 2-901/2010; Court of Appeals, 14.4.2011 - 2-909/2011).

Thus, there have been no misconceptions of State aid rules in the court decisions. At the same time, on-going disputes in courts suggest that in complicated State aid disputes courts may become rather unpredictable (*e.g.* provision of aid could be considered compatible with the internal market on the basis of *Altmark* criteria, without placing adequate burden of proof).

In many cases, which consider State aid elements, requests to refer the case to the CJEU are submitted. However, over the period 2007–2017, reference to the CJEU for explanations of State aid rules was made only once — in CJEU Case *Achema and others*. Interestingly, the latter reference was made by the Supreme Administrative Court mostly as a request to approve conclusions made by the court, rather than for explanations of Union law (this was also highlighted in AG Nils Wahl's opinion, delivered in the *Achema and others* case.)

Qualitative assessment of any other relevant trends in State aid enforcement

Importance of State aid rules in national case law is growing. In recent years there have been more cases involving State aid matters and the disputes are becoming more complex. Awareness of State aid rules has been mostly raised by plaintiffs (AB Achema, AB Lifosa and/or AB ORLEN Lietuva) operating in the energy sector. These plaintiffs are subject to special natural gas and electricity levies, which are used by the State to finance various energy projects. To avoid their duty to pay such levies, the plaintiffs initiated a number of court actions, covering different time periods. They claimed that the levies constitute unlawful and incompatible State aid, for instance, *Achema v. Amber grid* case,[234] the *Achema v. Baltpool* case, *Achema v. Baltpool* case,[235] and A-686-525/2017 the *Achema, ORLEN Lietuva and Lifosa v. National Regulatory Agency* case (VKKEK),[236] considered by the Supreme Administrative Court and referred to the CJEU for a preliminary ruling in Case *Achema and others*. There is also a number of other State aid cases initiated by the same group of plaintiffs in various courts, which are currently suspended, waiting for CJEU judgments in Case *Achema and others* and Case *Achema, ORLEN Lietuva and Lifosa v. National Regulatory Agency* (VKKEK), considered by the Supreme Administrative Court. Decisions in those cases shall likely provide interesting precedents, which shall encourage courts to apply State aid rules.

The growing number of State aid cases makes the courts more confident in applying State aid rules and assessing State aid issues. In this regard, it should be mentioned that administrative courts consider State aid issues from the first instance, since the scope of disputes referred to such courts is narrower (*i.e.* disputes on legality of administrative acts) and enables them to focus on State aid legal practice within a smaller number of courts (*i.e.* a smaller number of courts consider State aid cases more frequently). At the same time, meaningful considerations of State aid issues in courts of general competence, normally begins in the Court of Appeals of Lithuania or the Lithuanian Supreme Court (*i.e.* appellate or cassation instance). This is probably because courts of general competence must deal with a variety of legal disputes, while concentration of practice in cases relating to State aid issues, which is still sufficiently novel in Lithuanian practice, begins only in the Court of Appeals of Lithuania and the Lithuanian Supreme Court.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

National courts mostly considered basic State aid issues (*e.g.* notion of advantage in Court of Appeals of Lithuania, 22.12.2009 – 2-1383/2009 (LT2) or notion of undertaking in Court of Appeals of Lithuania, 23.12.2014 – 2-2205/2014 (LT3), both considered by the Court of Appeals of Lithuania). Thus, the notion of State aid was applied without major misconceptions. However, this may change, due to more complicated State aid issues which are considered by the administrative courts (see in this regard case *Achema, ORLEN Lietuva and Lifosa v. National Regulatory Agency* (VKKEK), considered by the Supreme Administrative Court (pending)).

The quality of the decisions on State aid cases could be improved by adopting the following measures:

- Increasing the knowledge of judges or their assistants through specialised training on State aid rules;
- Increasing practical experience by allocating State aid cases to specialised judges;
- Increasing the competence or involvement of expert institutions submitting opinions to the court (*e.g.* the national competition authority), but such an option should be considered carefully in order to avoid cases where courts mostly rely on the opinion issued by such expert institution without even hearing the parties;
- Encouraging courts to apply State aid rules. The main obstacle for wider application of State aid rules seems to be the lack of understanding of State aid rules and/or the

[232] Council Regulation Council Regulation (EC) 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, *OJ L 210, 31.7.2006, p. 25–78, as replaced by* Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, *OJ L 347, 20.12.2013, p. 320–469.*

[233] Commission Notice on the enforcement of State aid law by national courts, *op.cit.*

[234] Supreme Court of Lithuania, 5.2.2016 - 3K-3-24-313/2016 (LT1).

[235] Court of Appeal, 28.6.2017 - 2A-377-236/2017.

[236] Court of Appeal, A-686-525/2017.

lack of confidence in understanding State aid rules. Therefore, the courts should be encouraged to apply for *amicus curiae* observations of the Commission and/or refer questions to the CJEU for preliminary rulings.

Any other relevant comments or findings

Not applicable

17.2 Case summaries

Case summary LT1

Date

06/01/2019

Case identifiers

Member State

Lithuania

Court which adopted the ruling (national language)

Lietuvos aukščiausiasis teismas

Court which adopted the ruling (English)

Supreme Court of Lithuania

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Lithuanian

Hyperlink to ruling

http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=f798b2fc-dced-46d0-9692-13d09af1ddd4

Case reference

3K-3-24-313/2016

Procedural context of the case

The case originated from the debt recovery action taken by AB 'Amber Grid' against AB 'Achema'.

According to the law, all entities using natural gas must pay a levy, which is used to finance the development and operation of the natural gas import infrastructure – the LNG terminal. Administration (the collection and disbursement to the beneficiary of the aid – AB 'Klaipėdos nafta') of such levy was entrusted on AB 'Ambergrid'. AB 'Achema' failed to pay the levy for the period from 1 January 2013 to 20 November 2013. Thus, AB 'Ambergrid' initiated an action for the recovery of the debt in the value of EUR 11 million and interest for delayed payments in the amount of EUR 0.5 million.

On 12 January 2013, the court of first instance awarded this recovery (case reference not available). This ruling was appealed by AB 'Achema', which inter alia claimed that levy amounted to unlawful State aid. On 2 July 2015, the Lithuanian Court of Appeals rejected the appeal submitted by AB 'Achema' (ruling 2A-40-407/2015). With respect to the allegations on the provision of unlawful State aid, the Court noted that the State aid provided to the LNG terminal was already cleared by the Commission on 20 November 2013 (Commission Decision SA.36740 (2013/NN)). Thus, the provision of State aid to the LNG terminal and collection of levy was compatible. In other words, appeal was dismissed on the basis of the Commission decision declaring unlawful State aid compatible.

AB 'Achema' appealed this ruling to the Supreme Court of Lithuania. The ruling of the Supreme Court of Lithuania is summarised here.

Type of action

Private enforcement

Delivery date of the ruling

05/02/2016

Language

Lithuanian

Headnote

In this ruling, the Court held that decision of Commission to declare unlawful State aid compatible eliminates the possibility to recover unlawful State aid.

Parties

Names of the parties to the action

AB 'Achema'

Versus

AB 'Amber Grid'

The relationship of the plaintiff to the measure

Other

Party subject to the levy

The relationship of the defendant to the measure

Other

Party entrusted with the function of collection and disbursement of levy

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Natural gas import infrastructure (LNG terminal)

The type of State aid measure challenged in the court proceedings

Other

Levy used to finance an aid measure

Substance of the case

Facts and parties' main arguments in the case

The case originated from the debt recovery action taken by AB 'Amber Grid' against AB 'Achema'.

According to the law, all entities using natural gas must pay a levy, which is used to finance the development and operation of the natural gas import infrastructure – LNG terminal. Administration (collection and disbursement) of this levy was entrusted to AB 'Amber Grid'. The levy was collected for 8 months before the decision of the Commission declaring the aid compatible.

AB 'Achema' inter alia claimed, before the Supreme Court, that decision of the Commission could justify the collection of the levy in the future (i.e. from the moment of the adoption of the Commission decision clearing the measure). However, the decision of the Commission could not justify the unlawful collection of levy for the period preceding the decision.

AB 'Achema' also asked the Supreme Court of Lithuania to refer a request to the CJEU for a preliminary ruling. Inter alia, AB 'Achema' proposed to ask CJEU whether the State aid provided to the LNG terminal was lawful.

AB 'Amber Grid' claimed that:

- The levy cannot be considered unlawful State aid after the decision to clear the State aid taken by the Commission.
- Until 2015, the levy was not actually paid to AB 'Klaipėdos nafta'. Referring to the ECJ (current CJEU) judgment in the case Wienstrom GmbH v Bundesminister für Wirtschaft und Arbeit C-384/07, AB 'Ambergrid' claimed State aid is awarded only when the respective payments are made to the beneficiary, which was not the case with regard to the support provided to AB

'Klaipėdos nafta' case (the levy was collected from AB 'Achema' to the account of Ambergrid, yet was not disbursed to the beneficiary).

Remedy(ies) sought

Reimbursement of the taxes paid for financing an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court rejected the arguments put forward by AB 'Achema' and expanded the effect of a decision of the Commission to declare unlawful State aid compatible.

According to the Court, assessment of the compatibility of State aid falls within the exclusive competence of the Commission. Its decisions cannot be reviewed by national courts. The Court also noted that the Commission accepted that Lithuania granted unlawful State aid (i.e. there was an infringement of Article 108(3) TFEU). Still, the Commission decided that the State aid provided to LNG terminal operated by AB 'Klaipėdos nafta' was compatible with Union law.

Then the court went on to analyse whether a decision of the Commission to declare unlawful State aid compatible may be applied retroactively.

The Court recognised that early cases of the CJEU stipulated that a decision, which declares unlawful State aid compatible, does not legalise State aid measures being granted a posteriori (in this respect the Court cited paragraphs 40-41 of the ECJ (current CJEU) judgment in Case Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others C-368/04). However, the Court went on to state that this practice has been developed by the ECJ (current CJEU) in the Case Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)C-199/06, in which the ECJ (current CJEU) made it clear that the obligation to recover unlawful State aid ceases once the Commission adopts a decision finding State aid compatible (in this respect, the Court cited paragraphs 41, 49, 52 of ECJ (current CJEU) judgment in CELF case (above)).

In this context, the Supreme Court of Lithuania rejected the arguments put forward by AB 'Achema'. The Court declared that AB 'Achema' misinterpreted the principle stating that the decision of the Commission declaring the compatibility of aid does not make unlawful State aid legal. According to the Court, the CJEU judgment in the CELF case explains that in such a case, it cannot be held that any unlawful State aid must be recovered from the beneficiary.

The Supreme Court of Lithuania also rejected the possibility to request a preliminary ruling from the CJEU. The Court declared that the CJEU already established clear rules on the obligation to recover unlawful State aid following a decision of Commission declaring the aid compatible. The Court also noted that the CJEU cannot review decisions of the Commission in the preliminary ruling procedure. Therefore, any objections expressed by AB 'Achema' with regard to the Commission decision clearing State aid provided to AB 'Klaipedos nafta' could not be referred for a preliminary ruling.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-368/04, Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644
- C-199/06, entre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008) ECLI:EU:C:2008:79
- C-39/94, Syndicat Français de l'Express International (SFEI) Others v La Poste and Others (1996) ECLI:EU:C:1999:116

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary LT2

Date

06/01/2019

Case identifiers

Member State

Lithuania

Court which adopted the ruling (national language)

Lietuvos apeliacinis teismas

Court which adopted the ruling (English)

Court of Appeal of Lithuania

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

Lithuanian

Hyperlink to ruling

http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=59b0c94e-1448-45ee-925c-3eea7fa89d3b

Case reference

2-1383/2009

Procedural context of the case

The case originated from the restructuring of construction company Ranga IV.

In the case summarised here, the tax authority appealed against two rulings of the court of first instance. Firstly, the rejection of a claim regarding the approval of the restructuring plan by the creditors of Ranga IV (by the ruling of the Court of 9 July 2009, B2-2009-578/2009). Secondly, the approval of the Court of the restructuring plan provided by Ranga IV (ruling of 10 July 2009, B2-2009-578/2009).

Type of action

Private enforcement

Delivery date of the ruling

22/12/2009

Language

Lithuanian

Headnote

In this ruling, the Court concluded that a tax deferral does not amount to State aid by applying the private creditor test.

Parties

Names of the parties to the action

Vilniaus apskrities valstybinė mokesčių inspekcija

Versus

UAB 'Ranga IV'

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

F - Construction

Construction

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The case originated from the restructuring of construction company Ranga IV. According to the law, different restructuring procedures apply in the case that a restructuring plan contains provisions of State aid to the company under restructuring. One of the measures contained in the restructuring plan of Ranga IV was a deferral of tax payments. The dispute concerned the necessity to consider such a deferral as a State aid measure, which in turn, must comply with the Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004).

The plaintiff (tax authority) claimed that:

- The tax deferral amounted to State aid. Therefore, the approval of the restructuring plan containing such a tax deferral must comply with the Community guidelines on State aid for rescuing and restructuring firms in difficulty. The tax authority claimed that the tax deferral did not meet the requirements of these guidelines.
- The tax debt of Ranga IV exceeded the EUR 200,000 *de minimis* ceiling, thus the deferring of taxes should be notified to the Commission and receive its clearance.
- The national court could apply to the Commission for an amicus curia opinion in the case as provided in the Commission notice on the enforcement of State aid rules by national courts (OJ C 85, 9.4.2009) or refer a request to the CJEU for a preliminary ruling.

The defendant (Ranga IV) claimed that the tax deferral does not amount to State aid. The defendant claimed that the MEOP test should be applied to determine whether it receives State aid (the defendant relied on ECJ (current CJEU) judgment in Case Déménagements-Manutention Transport SA (DMT) C-256/97,). In this regard, the defendant drew attention to the fact that the tax authority did not provide better conditions than the one provided by private creditors in the restructuring process.

Remedy(ies) sought

Other remedy sought

The suspension of tax deferral

Outcome of the case

Conclusions adopted by the national court

The dispute concerned the necessity to consider the deferral of tax liabilities of a company under restructuring as State aid. Referring to ECJ (current CJEU) Case Déménagements-Manutention Transport SA (DMT) C-256/97, the Court of Appeal of Lithuania considered that the presence of State aid in this case should be assessed by applying the MEOP test – more specifically, the private creditor test. According to the Court, no State aid exists in cases where the deferral of taxes is made by the tax authority under the same circumstances and conditions as a private creditor.

In this respect the Court noted that the deferral of taxes was not only made by the tax authority, but also by private creditors (e.g. banks) on the same conditions. The Court also noted that the decision to defer the payment of the tax debt was made on the basis

of the law regulating the restructuring process and was not subject to any special treatment from tax authorities, which also confirms that Ranga IV did not get any special treatment from the State, that was different from other creditors of a company. In this respect, the Court considered that no State aid was provided by the tax authority to the company under restructuring.

Therefore, the Court did not find it necessary to analyse further compliance of such tax deferral with various EU guidelines and regulations, which were mentioned in the arguments put forward by the plaintiff (i.e. the *de minimis* Regulation and Community guidelines on State aid for rescuing and restructuring firms in difficulty).

The Court also rejected the request to involve the Commission in the case on the basis of amicus curia. The Court noted that national courts are given the competence to interpret and apply the notion of State aid. At the same time, the Court does not find necessity to apply to the Commission or refer a question to the ECJ (current CJEU) for a preliminary ruling, since the interpretation of Union law necessary for the resolution of the case was clear from the preliminary ruling given by the ECJ (current CJEU) in Déménagements-Manutention Transport SA (DMT) (C-256/97).

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-256/97, Déménagements-Manutention Transport SA (DMT) (1999), ECLI:EU:C:1999:332

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2
- Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5
- Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009 (Commission Enforcement Notice)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary LT3

Date

06/01/2019

Case identifiers

Member State

Lithuania

Court which adopted the ruling (national language)

Lietuvos apeliacinis teismas

Court which adopted the ruling (English)

Court of Appeal of Lithuania

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

Lithuanian

Hyperlink to ruling

http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=74add7f1-5d7b-482e-9123-9181cc4ed631

Case reference

2-2205/2014

Procedural context of the case

The case originated from bankruptcy procedures. By ruling of 2 May 2013, the court of first instance (Kauno apygardos teismas) initiated a bankruptcy case against the banking institution AB 'Ūkio bankas' (ruling B2-745-254/2014). By ruling of 16 September 2014, the Court decided to include VĮ 'Indelių ir investicijų draudimas', which provides mandatory insurance of deposits of all banks registered in Lithuania, into the second line of creditors.

The plaintiff in the case – UAB 'Fisanta' – appealed to the Court of Appeals of Lithuania with the request to annul this ruling.

Type of action

Private enforcement

Delivery date of the ruling

23/12/2014

Language

Lithuanian

Headnote

In this ruling, the Court held that State aid rules only apply to 'undertakings' in the sense of Article 107(1) TFEU.

Parties

Names of the parties to the action

UAB 'Fisanta'

Versus

VĮ 'Indėlių ir investicijų draudimas'

The relationship of the plaintiff to the measure

Third party

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

K - Financial and insurance activities

Insurance / banking sector

The type of State aid measure challenged in the court proceedings

Other

Inclusion into higher line of creditors

Substance of the case

Facts and parties' main arguments in the case

The case originated from the bankruptcy procedures of a bank. UAB 'Fisanta' (plaintiff) alleged that State aid was provided in the form of an economic advantage, which was given to VĮ 'Indėlių ir investicijų draudimas' (defendant), by including that company into a higher line of creditors. The plaintiff claimed that the defendant's inclusion into a higher line of creditors in the bankruptcy procedures amounts to State aid prohibited by Article 107(1) of TFEU.

VĮ 'Indėlių ir investicijų draudimas' (defendant) claimed that State aid rules do not apply to them, since VĮ 'Indėlių ir investicijų draudimas' is not considered to be an undertaking.

Remedy(ies) sought

Recovery order in relation to unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court of Appeal of Lithuania declared that the prohibition laid down in Article 107(1) of TFEU applies only to measures which satisfy all the legal elements of State aid (in this respect, the Court referred to the judgment of the ECJ (current CJEU) in Case Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri C-140/09). In this context, the Court noted that State aid, in the sense of Article 107(1) TFEU, may be provided only to 'undertakings'. The Court concluded that State owned company VĮ 'Indėlių ir investicijų draudimas', which provides obligatory insurance of all deposits held in banks registered in Lithuania, cannot be considered as an 'undertaking'. Respectively, the Court concluded that the decision to include the defendant into higher line of creditors in the bankruptcy procedures does not amount to State aid.

The Court also rejected the request to refer the case to the CJEU for a preliminary ruling. The Court considered that the Union law to be applied in respect of this case was clear enough.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-140/09 Fallimento Traghetti del Mediterraneo SpA. v. Presidenza del Consiglio dei Ministri (2010) ECLI:EU:C:2010:335
- C-387/92, Banco Exterior de España v Ayuntamiento de Valencia (1994) ECLI:EU:C:1994:100
- C-6/97, Italian Republic v Commission of the European Communities (1999) ECLI:EU:C:1999:251
- C-39/94, Syndicat Français de l'Express International (SFEI) Others v La Poste and Others (1996) ECLI:EU:C:1999:116
- C-487/06 P, British Aggregates v Commission of the European Communities (2008) ECLI:EU:C:2008:757
- C-458/09 P, Italian Republic v European Commission (2011) ECLI:EU:C:2011:769

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

17.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Lietuvos apeliacinis teismas	Court of Appeal of Lithuania	Second to last instance court (civil/commercial)	2-1383/2009	22/12/2009	Private enforcement	None - Claim rejected	The plaintiff requested the Court to apply State aid rules and decide on the possible existence of State aid. The Court stated that such rules are not applicable in this case since no State aid was granted, and there were thus no grounds for remedies. The case concerned a situation in which the defendant was restructuring a firm in difficulty according to the Commission Guidelines No 2004/C 244/02. The Court did not consider that, applying the criteria of the hypothetical private creditor, the rebate of tax arrears provided by the State Tax Inspectorate constituted State aid according to Article 87 of the EC Treaty (current Article 107 TFEU).	The Court also clarified that national courts of Member States have the right to request clarification from the Commission in order to identify whether a particular measure entails State aid.	
Lietuvos apeliacinis teismas	Court of Appeal of Lithuania	Second to last instance court (civil/commercial)	2-399/2010	18/03/2010	Private enforcement	None - Claim rejected	The plaintiff requested the Court to apply State aid rules and to decide on the possible existence of State aid. The Court stated that such rules are not relevant to this case since no State aid was granted, and there were thus no grounds for remedies.	The case clarifies that the rebate of tax arrears provided by the State Tax Inspectorate does not entail State aid, as it is provided according to Commission Regulation No. 1998/2006 (Article 8).	
Lietuvos apeliacinis teismas	Court of Appeal of Lithuania	Second to last instance court (civil/commercial)	2-639/2010	22/04/2010	Private enforcement	Case sent back to the lower court for re-assessment	The plaintiff requested the Court to apply State aid rules and decide on the possible existence of State aid. The Court did not provide a final decision as the case was sent back to the lower court to examine the substance of the case.	The case clarifies that the national courts of Member States have the right to assess whether the respective measure meets the concept of 'State aid'. While the Commission has the right not only to assess whether a given measure entails State aid but also whether that State aid is compatible with Union law (according to Article 107 TFEU).	The subsequent ruling from the lower court is not available. However, the same question, whether the State Tax Inspectorate's decision, as creditor, to grant a rebate of tax arrears in the process of restructuring could be considered as State aid, was subject to several other cases, in which the Court decided that such actions of a public authority could not be considered as State aid since the same conditions could be received from a private creditor.
Lietuvos Aukščiausiasis Teismas	Supreme Court of Lithuania	Last instance court (civil/commercial)	3K-3-270/2010	18/06/2010	Private enforcement	None - Claim rejected	The plaintiff requested the Court to apply State aid rules and decide on the possible existence of State aid. The Court stated that such rules were not applicable in this case, and there were thus no grounds for remedies. The case concerned a situation in which the defendant was restructuring a firm in difficulty according to the Commission Guidelines No 2004/C 244/02. The Court did not consider that, applying the criteria of the hypothetical private creditor, the rebate in respect of tax arrears provided by the State Tax Inspectorate was State aid according to Article 107 TFEU.		
Lietuvos apeliacinis teismas	Court of Appeal of Lithuania	Second to last instance court (civil/commercial)	2-901/2010	22/06/2010	Private enforcement	None - Claim rejected	The plaintiff requested the Court to apply State aid rules and decide on the possible State aid. The Court stated that such rules are not applicable in this case since no State aid was granted, and there were thus no grounds for remedies. The Court decided that the State Tax Inspectorate's (as the creditor) decision to rebate the tax arrears in the procedure of restructuring did not entail State aid if the same conditions could be obtained from private creditor. The Court applied the criteria of the hypothetical private creditor.	The case clarifies that according to the Commission Notice No 2009/C 85/01, national courts have the right to interpret the concept of 'State aid' as well as decide on whether the respective measure could be considered as State aid.	
Lietuvos vyriausiasis administracinis teismas	Supreme Administrative Court of Lithuania	Last instance court (administrative)	A822-1296/2010	14/10/2010	Private enforcement	None - Claim rejected	The plaintiffs asked for a re-assessment of the decision to reject their application to receive support from the EU funds. In this case, the plaintiffs interpreted EU fund administration conditions on the basis of State aid rules. However, no State aid remedies have been applied in this case.	The case clarifies that State aid provided within the scope of Commission Regulation No. 800/2003 entails compatible State aid and the obligation to notify State aid is not applicable here.	
Lietuvos vyriausiasis administracinis teismas	Supreme Administrative Court of Lithuania	Last instance court (administrative)	A-261-1743/2010	03/01/2011	Private enforcement	None - Claim rejected	The plaintiffs asked for a re-assessment of the decision to reject their application to receive support from EU funds. In this case, the plaintiffs interpreted EU funding conditions on the basis of State aid rules. However, no State aid remedies were granted in this case.	The case clarifies that Commission Regulation No. 800/2008 provides general rules on State aid and other types of State support, but does not oblige Member States to provide State aid to specific recipients.	
Lietuvos apeliacinis teismas	Court of Appeal of Lithuania	Second to last instance court (civil/commercial)	2-717/2011	24/03/2011	Private enforcement	Recovery order in relation to unlawful aid	The case concerned the recovery of EU funds from a company undergoing bankruptcy. The plaintiff claimed that, based on State aid rules, the interest on the recovered EU funds should be calculated until the final recovery of those funds. This claim was rejected. The Court concluded that interest can only be calculated until the Court's decision to initiate bankruptcy procedures. The decision was based on the Notice from the Commission No. 2007/C 272/05, which suggested that in case of bankruptcy, State aid is recovered under national law.	The case clarifies that in case of bankruptcy of an undertaking which is under an obligation to return EU funds, State aid should be recovered in accordance with national procedural rules. The Court applied the Notice from the Commission No. 2007/C 272/05.	
Lietuvos apeliacinis teismas	Court of Appeal of Lithuania	Second to last instance court (civil/commercial)	2-909/2011	14/04/2011	Private enforcement	None - Claim rejected	The plaintiff requested the Court to apply State aid rules and decide on the possible existence of State aid. The Court stated that such rules are not applicable in this case since no State aid was provided. No grounds for remedies were found to exist.	The case establishes that provision of a rebate of tax arrears provided by the State Tax Inspectorate in restructuring cases cannot be considered State aid. As a result, the Commission Regulation No. 1998/2006 is not applicable.	
Klaipėdos apygardos administracinis	Klaipeda Regional Administrative	Second to last instance court (administrative)	I-211-342/2012	23/03/2012	Private enforcement	Other remedy imposed	The case concerned a refusal by the municipality to grant a reduction on land tax. The Court annulled the municipality's decision and obliged it to reconsider the	Although State aid was not the main aspect of the proceedings, the case is included here as the Court elaborated in	

teismas (darbartinis pavadinimas Regionų apygardos administracinio teismo Klaipėdos rūmai)	Court (current title Regional Administrative Court of Regions, Chamber of Klaipeda)						plaintiff's request. State aid rules were not mentioned in the decision, nor were they specifically applied by the Court.	the judgment on the notion of State aid. In its decision, the Court made a note that tax reduction / relief could amount to State aid and should be taken into account whilst considering whether *de minimis* ceilings are adhered to.	
Lietuvos vyriausiasis administracinis teismas	Supreme Administrative Court of Lithuania	Last instance court (administrative)	A520-2327/2011	24/05/2012	Private enforcement	None - Claim rejected	The plaintiff's request to apply a recovery order in relation to unlawful State aid was rejected.	The case clarifies that Member States have an obligation to recover unlawful State aid. This rule is laid down in Article 107 TFEU and Council Regulation No. 659/1999.	
Lietuvos vyriausiasis administracinis teismas	Supreme Administrative Court of Lithuania	Last instance court (administrative)	A492-118/2013	14/03/2013	Private enforcement	Case sent back to the lower court for re-assessment	Case was sent back to the lower court for re-assessment.	The case clarifies that the State aid shall not double the financial support that is provided by EU, for example, the support for the development of Lithuanian regions. When deciding upon this case, the Court relied upon the Commission Regulation No. 65/2011.	The subsequent ruling from the lower court is not available.
Vilniaus apygardos administracinis teismas	Vilnius Regional Administrative Court	Second to last instance court (administrative)	I-3501-764/2013	01/10/2013	Private enforcement	Other remedy imposed	No State-aid related remedies were requested. However, the Court rules on State aid in the form of compensation of insurance contributions.	The case clarifies that according to Commission Regulation No. 1976/2006, in cases where State aid is granted in the form of compensation of insurance contributions, the compensation could be paid directly to the insurance company (i.e. not to the recipient of aid).	
Vilniaus apygardos administracinis teismas	Vilnius Regional Administrative Court	Second to last instance court (administrative)	I-3595-244/2013	30/10/2013	Private enforcement	None - Claim rejected	An administrator of EU funds adopted a decision to reduce EU financing claiming *inter alia* that the administrator is bound to return unlawful State aid, which was provided to an undertaking. The claim submitted by the plaintiff was rejected. Yet such rejection was based on legislation governing distribution of EU funds.		
Panevėžio apygardos administracinis teismas (darbartinis pavadinimas Regionų apygardos administracinio teismo Panevėžio rūmai)	Panevezys Regional Administrative Court (current title Regional Administrative Court of Regions, Chamber of Panevezys)	Second to last instance court (administrative)	I-635-283/2014	22/04/2014	Private enforcement	None - Claim rejected	The Court stated that a legal act established by local government in the context of support for SMEs is in accordance with other legal acts that provide for regulation of SMEs, local government, etc. No grounds for remedies were found to exist.	The case provides clarifications on the differences between EU support for agriculture, and State aid for agriculture. The EU's support is granted from the EU Funds. All measures that meet the criteria of Article 107 TFEU and are relevant to the sphere of agriculture entail State aid.	
Lietuvos vyriausiasis administracinis teismas	Supreme Administrative Court of Lithuania	Last instance court (administrative)	A822-306/2014	17/06/2014	Private enforcement	None - Claim rejected	The Court stated that the plaintiff did not prove that certain measures could be considered State aid. No grounds for remedies were found.	The case clarifies that State aid shall be provided in a way that the same costs would not be compensated repeatedly. This will ensure the objectives of State aid are met, as well as reasonable usage of public resources.	Relevant Commission Decision C(2007)5076 of 19 October 2007 regarding the program on development of Lithuanian regions for 2007-2013.
Lietuvos apeliacinis teismas	Court of Appeal of Lithuania	Second to last instance court (civil/commercial)	Nr. 2A-1141/2014	08/10/2014	Private enforcement	None - Claim rejected	The Court stated that guarantees that are considered as State aid could be provided only in cases where all necessary conditions are met. Such conditions were not met in this case, so there were no grounds to grant State aid.	The case confirms that State owned enterprises which provide guarantees for small and medium size enterprises intending to get loans are considered as providing State guarantees, and based on this are considered as providing State aid according to Commission Regulation No. 1407/2013.	
Lietuvos Aukščiausiasis Teismas	Supreme Court of Lithuania	Last instance court (civil/commercial)	3K-3-534/2014	09/12/2014	Private enforcement	None - Claim rejected	The plaintiff requested the Court to declare a public service contract related to the provision of public transportation services null and void. The Court rejected such claim. In its reasoning the Court referred to Regulation 1191/91 on the establishment of PSOs in the transport sector. *Inter alia*, the Court referred to the Altmark judgment and conditions which should be met in order to consider the financing provided to a public transportation company as a genuine and correctly defined PSO. No remedies were applied.		
Lietuvos apeliacinis teismas	Court of Appeal of Lithuania	Second to last instance court (civil/commercial)	2-2205/2014	23/12/2014	Private enforcement	None - Claim rejected	The case concerned national legislation which regulates the order of priority of creditors in bankruptcy procedures. The plaintiff considered that a State owned company, which insured bank deposits for the benefit of bank clients, cannot have priority over creditors. The plaintiff considered that priority given by national laws entails unlawful State aid. The Court rejected such argument on the basis of the fact that deposit insurance company was not an undertaking in the sense of State aid rules.		
Vilniaus apygardos administracinis teismas	Vilnius Regional Administrative Court	Second to last instance court (administrative)	I-3447-281/2015	02/02/2015	Private enforcement	None - Claim rejected	The case concerned a dispute between the administrator of EU funds and an undertaking, which implements EU funded projects in the central heating sector. The administrator of the EU funds considered that the heating company did not follow obligations to comply with public procurement procedures and thus decided to reduce the amount of aid provided to the heating company.	The decision mentions that according to the Council Regulation No. 659/1999, a Member State has the obligation to recover unlawful State aid together with the recovery interest calculated by the Commission on the basis of Union law.	The recipient of EU funds appealed against this decision. The appeal has been rejected.

								Even though State aid was not the main aspect of the proceedings or the primary focus of the Court, the case is included here as the Court elaborated on the notion of State aid.	
Vilniaus apygardos administracinis teismas	Vilnius Regional Administrative Court	Second to last instance court (administrative)	I-5040-596/2015	26/06/2015	Private enforcement	None - Claim rejected	The plaintiff requested a re-assessment of the decision to reject their application to receive support. During the evaluation, State aid rules were applied. No grounds for remedies were found.	The case clarifies that Commission Regulation No. 1535/2007 provides the general amount of State aid that could be granted to a single economic entity during a three year time period. In cases where such an amount is exceeded, the Commission Regulation cannot be applied.	
Lietuvos apeliacinis teismas	Court of Appeal of Lithuania	Second to last instance court (civil/commercial)	2A-40-407/2015	02/07/2015	Private enforcement	None - Claim rejected	The plaintiff was bound to pay a special levy, which was used to finance operations of LNG terminal operating in Lithuania. The obligation to pay such a levy was imposed on the plaintiff for the period 1 January 2013 to 31 August 2013. The plaintiff claimed, *inter alia*, that such an LNG levy cannot be collected from the plaintiff since it amounts to unlawful State aid. The claim submitted by the plaintiff was rejected. The Court stated that by its decision of 20 November 2013, the Commission undertook to clear unlawful State aid provided to LNG terminal operator from the beginning of the year. Thus remedies requested by the plaintiff (undertaking bound to pay special levy) were rejected.	The case clarifies the relationship between the Commission decision to clear unlawful State aid and the national court proceedings, whereby State aid measures are challenged on the basis of State aid rules.	Relevant Commission Decision SA.36740 (2013/NN) of 20 November 2014.
Lietuvos vyriausiasis administracinis teismas	Supreme Administrative Court of Lithuania	Last instance court (administrative)	A-1642-492/2015	30/11/2015	Private enforcement	Case sent back to the lower court for re-assessment	The main question in the case concerned damages due to a granting institution failing to notify State aid to Commission. The Court rejected arguments regarding such damages, and sent the case back to the lower court for re-assessment.	The case clarifies that State aid is lawful in cases where State aid is provided within 1) the scheme of State aid; or 2) an individual aid granted *ad hoc*. The granting institution has the right to choose one of these options.	The lower court decision of 20 January 2016 in the case I-4979-561/2016: http://eteismai.lt/byla/263296652549792/I-4979-561/2016. The case was later terminated as the plaintiff withdrew his complaint.
Lietuvos Aukščiausiasis Teismas	Supreme Court of Lithuania	Last instance court (civil/commercial)	3K-3-24-313/2016	05/02/2016	Private enforcement	None - Claim rejected	The case concerned a payment of a special levy in the natural gas sector. The company under the obligation to pay the levy claimed that it constituted unlawful State aid. By the time the final court decision was adopted, the Commission had issued a decision to clear such unlawful State aid. Based on the Commission decision, the national court rejected the claims regarding the infringement of State aid rules and explained the obligations of the national court in such cases, when unlawful State aid is declared compatible by the Commission.	The case provides clarifications that a national court does not have the right to recover State aid in cases in which, during the national litigation procedure, the Commission decides that respective State aid is compatible. The case also clarifies that the obligation to notify State aid applies to the State, not to the recipient of aid.	Relevant Commission Decision SA.36740 (2013/NN) of 20 November 2013.
Vilniaus apygardos administracinis teismas	Vilnius Regional Administrative Court	Second to last instance court (administrative)	eI-3083-171/2016	15/02/2016	Private enforcement	None - Claim rejected	The national competition law contains provisions restricting the distortion of competition, which are very similar to State aid rules. The plaintiff complained against the decision of the competition authority to terminate the investigation of the alleged infringement of such national provisions *inter alia* claiming that the competition authority failed to investigate the allegedly unlawful State aid. The Court rejected such complaint *inter alia* clarifying that national competition authority cannot investigate cases concerning unlawful State aid - this should be done by the Commission.	Although the Court rightly suggested that national competition authority does not have the authority to investigate the infringements of State aid since such competence is provided to the Commission, the Court specified that a decision whether a State aid measure (in this case - special electricity levy) can amount to State aid depends on the assessment made by the Commission. In other words, a decision adopted by the Court seems to reject the possibility that national courts also have authority to decide, whether a particular measure entails State aid.	
Lietuvos Aukščiausiasis Teismas	Supreme Court of Lithuania	Last instance court (civil/commercial)	3K-3-320-469/2016	17/06/2016	Private enforcement	None - Claim rejected	The Court stated that guarantees that entail State aid could be granted only in cases where all necessary conditions are met. Such conditions were not met in this case, meaning there was no ground to provide State aid.	The case provides that State owned enterprises which provide guarantees for SMEs intending to get a loan are considered as providing State guarantees. Therefore, this constitutes State aid according to the Commission Regulation No. 1407/2013.	
Lietuvos apeliacinis teismas	Court of Appeal of Lithuania	Second to last instance court (civil/commercial)	2A-377-236/2017	28/06/2017	Private enforcement	None - Claim rejected	The case concerned the lawfulness of the obligation imposed by the State to pay a special levy on top of electricity price. The levy was used to finance various electric energy projects. The plaintiff claimed that such a levy amounts to unlawful State aid and hence cannot be collected from the plaintiff. The Court rejected this claim. The Court decided that 1) the plaintiff did not prove that levy entails unlawful State aid (despite having the burden of proof); and that 2) the levy should be considered as payment for the services provided to the plaintiff.	The Court decided that only measures that create certain advantages can be considered State aid, as opposed to regular payments on market conditions.	

18. Luxembourg

18.1 Country report

Name national legal expert

Prof Philippe-Emmanuel Partsch

Date

02/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

For the purpose of this Study, public enforcement is defined as recovery proceedings involving national courts after the Commission adopts a recovery decision, ordering Luxembourg to recover unlawful and incompatible State aid granted in breach of the standstill obligation under Article 108(3) TFEU.

Assuming that a State aid measure is generally granted through an administrative act, the competent courts in cases concerning the public enforcement of State aid rules would be the Luxembourg administrative courts: the administrative court (*Tribunal administratif*) as first instance and the Higher Administrative Court (*Cour administrative*) as last instance. These courts would almost certainly hear most of the cases involving the public enforcement of State aid rules. However, should the State aid be granted in a manner other than under the form of what would classify as an administrative act under Luxembourg law, the civil and commercial courts would be competent.

However, no relevant rulings concerning the public enforcement of State aid rules for Luxembourg — and thus from these courts — were identified.

A description of the procedural framework applicable in public enforcement of State aid rules

State aid is granted by a public measure (granted by the State) and, therefore, generally stems from an administrative decision. An administrative decision is an act unilaterally adopted by competent administrative authorities that adversely affects the interests of a natural or legal person (Luxembourg Administrative Court, 8.3.2006 – 20636).

When ordering the recovery of the aid, the Luxembourg authority that adopted the decision to grant the aid must either withdraw its decision or adopt another administrative decision.

Pursuant to Article 8 of the Grand-Ducal Decree dated 8 June 1979 on the procedure followed by the local or state administration, the withdrawal of an administrative decision is only possible:

- During the period in which an appeal may be introduced against the decision (when the appeal can only lead to the annulment of the decision, the appeal must be lodged within three months of the date of publication or notification of the decision appealed against[237] and when it is possible to seek the reversal of the decision, the appeal must, in principle, be lodged within 40 days of the date of publication or notification of the decision being appealed against);[238] or
- During the appeal proceedings, except if another law expressly provides that this withdrawal is not possible.

In this case, pursuant to Article 9 of the aforementioned Grand-Ducal Decree dated 8 June 1979, the administrative authority shall inform the addressee (*i.e.* the State aid beneficiary) of its intent to withdraw the decision to grant the aid and communicate the legal and factual grounds that justify such a withdrawal. The addressee must be granted at least eight days within which to submit its comments; the addressee also has the right to be heard if it so requests.

It is highly unlikely, however, that when the Commission adopts a recovery decision, the public authority that adopted the decision to grant the State aid would still be in the position to withdraw the decision considering the period of limitation (see above).

It is therefore more likely that the public authority will adopt another decision to recover the unlawful and incompatible State aid.

It must be possible to appeal this decision as well as the withdrawal decision under national law before the competent courts (see above, answer provided to question 1).

If the aid beneficiary refuses to repay the aid, the public authority can bring an action before the civil courts (*Tribunal d'arrondissement*) in accordance with the general rules of civil law to obtain legal means of execution.

Should a State aid measure be granted in a manner other than through an administrative act (for instance, a contract between the State and the aid beneficiary) any unlawful aid may be recovered through an action brought before the civil or commercial courts.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

For the purpose of this Study, private enforcement has been defined as any action brought before a national court by a competitor of the aid beneficiary for breach of the standstill obligation under Article 108(3) TFEU.

If the breach of the standstill obligation emanates from what would qualify under Luxembourg law as an administrative act, the competitor of the aid beneficiary may bring an action before the administrative courts. If the State aid was granted in a manner other than through an administrative act, an action should be brought before the civil or commercial courts.

[237] Article 16 of the Law of 21 June 1999 on proceedings before the administrative courts.

[238] Usually, the decision mentions the period in which an appeal may be introduced.

However, no relevant rulings concerning the private enforcement of State aid rules for Luxembourg — and thus from these courts — were identified.

A description of the procedural framework applicable in private enforcement of State aid rules

In the case where the administrative courts are competent (when the State aid measure was granted through an administrative act), the competitor is authorised to apply for interim relief before the President of the Administrative Court to suspend the measure through which the State aid was granted. However, pursuant to Articles 11 and 12 of the Law of 21 June 1999 on proceedings before the administrative courts and the relevant case law, the suspension is subject to the introduction of an action for annulment of the administrative act (see, for instance, decision of the President of the Administrative Court, 20.2.2001 – 11940 and decision of the President of the Administrative Court, 10.7.2002 – 15086). The competitor should therefore introduce two actions: an action for annulment before an administrative court and an action applying for interim relief before the President of the Administrative Court.

When State aid has been granted through other measures, the competitor's action should be brought before civil or commercial courts. In order to obtain interim relief to suspend the measure through which the State aid was granted, the competitor may apply for interim relief to the President of the District Court pursuant to Articles 932 and 933 of the new Civil Procedure Code.

If the competitor wishes to claim damages due to the infringement of Article 108(3) TFEU, it must establish fault by the aid beneficiary, indicate the loss that it has incurred and show a causal link between the alleged fault and the alleged loss. These conditions are required under Article 1382 of the Civil Code. If the competitor wishes to claim damages from the public authority concerned, its action must be based on the Law of 1 September 1998 related to civil responsibility of the State and other public entities and must establish 'improper performance' of the public authority concerned. Alternatively, the competitor may base its action on Article 1382 of the Civil Code.

There is no case law on this topic in the context of private enforcement of State aid rules in Luxembourg. In actions against a State aid beneficiary, the competitor could face difficulties in establishing that the beneficiary committed a fault by accepting the State aid. Accordingly, the competitor would not be able to establish one of the three cumulative conditions to claim damages pursuant to Article 1382 of the Civil Code.

Main findings based on the case summaries

No relevant rulings from 1 January 2007 to 31 December 2017 have been found. This is because none of the cases issued during this period in Luxembourg correspond to the definition of public or private enforcement of State aid rules.

Qualitative assessment of the average time of court proceedings

Although no assessment can be made of the average duration of court proceedings on the enforcement of State aid rules, generally the proceedings before administrative courts are subject to strict time limits:

- At first instance, the examination of the case lasts seven months, after which the court of first instance delivers its judgment;
- At last instance, the higher court delivers its judgment five months after the judgment of the court of first instance.[239]

The average duration of civil court proceedings vary depending on the nature of the court (*Justice de paix*, *Tribunal d'arrondissement*, *Cour d'appel*, *Cour de cassation*).

Qualitative assessment of the remedies awarded by national courts

Not applicable

Qualitative assessment of the application of the State aid *acquis*; preliminary references

Not applicable

Qualitative assessment of any other relevant trends in State aid enforcement

Not applicable

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

Not applicable

Any other relevant comments or findings

The only decisions adopted by the Commission ordering Luxembourg to recover unlawful and incompatible State aid during the reference period (*i.e.* State aid implemented or granted by Luxembourg in favour of Fiat, Amazon and Engie) are currently under appeal before the Union Courts (as regards *Fiat*;[240] Amazon;[241] and Engie).[242] According to the Commission, Luxembourg recovered the alleged State aid from these three undertakings. There is however no public enforcement procedure related to these cases from 1 January 2007 to 31 December 2017.

Furthermore, Luxembourg generally grants State aid to undertakings on the basis of the exemption regulations adopted by the Commission or grants State aid on the basis of national legislation that implements these EU exemption regulations. For instance, on 17 May 2017, Luxembourg adopted a new piece of legislation concerning financial support for research, development and innovation that broadly executes the chapter of the GBER on research, development and innovation.

[239] https://guichet.public.lu/fr/citoyens/citoyennete/voies-recours-reglement-litiges/contestation-decision-administrative/recours-decision-administrative.html (last accessed on 2 January 2019).
[240] Cases T-759/15 *Fiat Chrysler Finance Europe v Commission*;T-555/15 *Hungary v Commission.*
[241] Cases T-816/17 *Luxembourg v Commission*; T-318/18 *Amazon EU and Amazon.com v Commission*.
[242] Cases T-525/18 *Engie Global LNG Holding and others v Commission*; T-516/18 *Luxembourg v Commission*.

Since these EU exemption regulations authorise Member States to grant State aid without prior notification to the Commission, Luxembourg is generally not subject to any standstill obligation. This tendency to implement the possibilities offered by the EU exemption regulations, without going beyond what a Member State is allowed to do, is likely the reason why there are no relevant private enforcement cases in Luxembourg during the reference period.

19. Malta

19.1 Country report

Name national legal expert

Clement Mifsud-Bonnici

Date

11/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

The competent court in cases concerning the public enforcement of State aid rules is the First Hall Civil Court. This Court has competence to hear any and all claims of a civil and commercial nature, including money claims (in excess of EUR 15,000) and, thus, it would hear any public enforcement actions for the recovery of State aid. Following a judgment from the First Hall Civil Court, either party (including the Member State) may lodge an appeal within 20 days from the date of delivery of the judgment before the Court of Appeal (Superior Jurisdiction). The First Hall Civil Court is presided over by one judge, while the Court of Appeal is presided over by three judges (including the Chief of Justice). There is no specialised court to hear cases concerning the public enforcement of State aid rules.

A description of the procedural framework applicable in public enforcement of State aid rules

It must be said that there is no record of any recovery of State aid through the national courts. In theory, the relevant State entity would be responsible for recovery of the State aid, although it is likely that it will be assisted in the process by the State Aid Monitoring Board. The State Aid Monitoring Board consists of five members appointed by the Ministry of Finance under the Business Promotion Act (Chapter 325 of the Laws of Malta). The law (State Aid Monitoring Regulations, Subsidiary Legislation 325.07 of the Laws of Malta) does not specifically provide that the Board will be in any way responsible for recovery procedures; however, the law does state that the Board shall 'act as the pertinent body concerning State aid in Malta' (Article 58(1)(g) of the Business Promotion Act).

It must also be noted that there are no special procedural rules (which are available to the public) on the recovery of State aid. Therefore, general procedural rules on the recovery of debts owed to the Government apply. The process is initiated by the relevant State entity (government department and/or corporate body established by law) filing a declaration (confirmed on oath) before the First Hall Civil Court, stating the nature of the debt and the name of the debtor and confirming that the debt is due. This declaration is served to the debtor (the beneficiary of State aid) and unless the debtor opposes the claim within 20 days, the debt is deemed to be enforceable (by way of executive title). The opposition needs to be made by way of an application before the First Hall Civil Court, which effectively initiates judicial proceedings. The relevant State entity is entitled to file a reply within 20 days. Both parties are then entitled to bring evidence and to make legal submissions.

Once there is a final and definitive judgment confirming that the debt is owed, the competent State entity may take a number of measures to enforce the debt, including, seizure and judicial sale of land and movable assets, and the freezing of bank accounts.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The competent courts for cases concerning the private enforcement of State aid rules are the same as the competent courts for cases concerning the public enforcement of State aid rules (as described above).

There are other courts which may consider State aid issues as part of their assessment, including, the Public Contracts Review Board, which reviews public contracts (whether awarded by a competitive tender process or otherwise) and which is empowered to declare public contracts that were not awarded in line with Maltese public procurement legislation ineffective.

A description of the procedural framework applicable in private enforcement of State aid rules

For the private enforcement of State aid rules, the general procedural framework (as described above) is applicable and the plaintiff should initiate judicial proceedings before the First Hall Civil Court.

Main findings based on the case summaries

There is no record of public enforcement in Malta, and there are very few examples of judicial proceedings initiated by private entities relying on the State aid legal framework for a remedy.

This is not surprising as there is generally little or no understanding of State aid rules in Malta. State entities are frequently aware of it (mostly due to the active role of the State Aid Monitoring Board), but private parties engaging with State entities rarely are and so are competitors of those private parties. This want of understanding is also present among legal professionals and advisors and, therefore, private parties are not necessarily made aware of their rights and obligations.

We have observed that in the past few years there is an increasing awareness of State aid rules. However, this does not necessarily prompt the exercise of judicial remedies.

Qualitative assessment of the average time of court proceedings

We did not find a sufficient number of relevant rulings that could help us to make a material assessment on this point. However, the duration of judicial proceedings for the recovery

of debts, generally, may vary between 1.5 and 3 years (at first instance) with another 2 to 3 years (at appeal).[243]

Qualitative assessment of the remedies awarded by national courts

We did not find a sufficient number of relevant rulings that could help us to make a material assessment on this point.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

We did not find a sufficient number of relevant rulings that could help us to make a material assessment on this point. However, if a reference for a request for a preliminary ruling is made, then the Court of Appeal (which is a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under national law') would typically refer questions of Union law to the CJEU.

Qualitative assessment of any other relevant trends in State aid enforcement

We did not find a sufficient number of relevant rulings that could help us to make a material assessment on this point.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

We did not find a sufficient number of relevant rulings that could help us to make a material assessment on this point.

Any other relevant comments or findings

Not applicable

[243] The statement is based on the author's professional knowledge and expertise.

19.2 Case summaries

Case summary MT1

Date

06/01/2019

Case identifiers

Member State

Malta

Court which adopted the ruling (national language)

Prim'Awla tal-Qorti Ċivili

Court which adopted the ruling (English)

First Hall Civil Court

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

Maltese

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

387/2011/MC

Procedural context of the case

An application filed by the plaintiff to restrain (during the pendency of proceedings) the defendant from adopting certain regulatory conduct with regard to the plaintiff's competitor was upheld on 28 March 2011 by the First Hall Civil Court (ruling 271/2011/1 JZM). This ruling may be considered the illustrate the Maltese courts' willingness to preserve the status quo in cases where the rights of one party might be impaired. The plaintiff then filed the case with the First Hall Civil Court (ruling summarised here).

This ruling is subject to appeal proceedings before the Court of Appeal with reference 387/2011/1. These proceedings are yet to be scheduled for a first sitting.

Type of action

Private enforcement

Delivery date of the ruling

01/03/2016

Language

Maltese

Headnote

In this ruling, the Court held in the context of a State aid argument, that allegations of 'anti-competitive conduct' should have been made within the context of a lawsuit against the competitor rather than against the regulatory authority.

Parties

Names of the parties to the action

Green Dot Malta Ltd

Versus

L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

E - Water supply; sewerage; waste managment and remediation activities

Recycling of packaging

The type of State aid measure challenged in the court proceedings

Other

Lack of enforcement of rules and laws by the regulator with regard to another competitor

Substance of the case

Facts and parties' main arguments in the case

The plaintiff administered a scheme of collection and recycling of packaging waste in its own name and on behalf of members forming part of that scheme. This scheme exonerated any members forming part of it of their obligation to collect and recycle packaging waste. The plaintiff was authorised to administer this scheme since 2004 by the defendant.

GreenMT, a competitor of the plaintiff, started a competing scheme in 2007 as authorised by the defendant (L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar: Malta Planning and Resources Authority).

The plaintiff alleged that GreenMT's licence was not properly renewed for the year 2010 (due to an omission on their part) and rather a new licence was re-issued on 25 June 2010 following a fresh application by GreenMT. Therefore, the plaintiff's key contention was that GreenMT was administering the scheme without being properly authorised between 1 January 2010 and 24 June 2010. 6,000 tonnes of waste were allegedly collected by GreenMT during this period and without a licence.

The plaintiff alleged that the new licence re-issued on 25 June 2010 covered, retroactively, the period 1 January up to 24 June 2010.

The plaintiff's contention was that the re-issue of the licence as described above and generally the lack of regulatory enforcement by the defendant constituted State aid. The plaintiff also contended that the State aid should have been notified to the Commission.

The plaintiff asked for a declaration that the defendant was in breach of the law (including State aid rules) and that consequently the First Hall Civil Court liquidate damages suffered by the plaintiff as a result of this breach of the law.

Remedy(ies) sought

Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

The First Hall Civil Court did not address the arguments made on the basis of State aid rules, but rather, it made an assessment of whether the defendant was in fact in breach of its obligations at law. The First Hall Civil Court reached the conclusion that this was not the case purely on a matter of appreciation of the facts of the case as resulting from the evidence submitted.

However, the First Hall Civil Court did comment in passing that the plaintiff should have made any allegations of 'anti-competitive conduct' within the context of a lawsuit against the competitor rather than against the regulatory authority. This might be indicative of an improper understanding of State aid rules.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

19.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Prim Awla, Qorti Civil	First Hall, Civil Court	Second to last instance court (civil/commercial)	387/2011/MC	01/03/2016	Private enforcement	None - Claim rejected	In this case, the plaintiff argued that the public authority failed to enforce the law vis-a-vis a competitor and this afforded an unlawful advantage to that competitor. The Court found that the public authority was not liable for any damages arising from this oversight on the basis of national tort law provisions.	This is the first case of its kind in Malta where a private operator sued a public authority for damages on the basis of a breach of State aid rules.	Prim Awla, Qorti Civil

20. Netherlands

20.1 Country report

Name national legal expert

Johan C van Haersolte
Esther Tenge

Date

10/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Competent courts

Within the Dutch legal system, cases concerning the enforcement of recovery decisions can be brought before both the civil and administrative courts.[244]

The district courts serve as courts of first instance for both civil and administrative matters. For administrative cases, appeals against judgments rendered by the district courts can be lodged at a competent specialised administrative law tribunal — either the Administrative Jurisdiction Division of the Council of State or the Administrative Court for Trade and Industry. For civil cases, an appeal against a district court ruling can be brought before the four courts of appeal, and finally before the Supreme Court of the Netherlands.

The measure by which the alleged aid was granted will be most decisive in where a case will be brought.[245] Should the contested State aid measure constitute a decision of an administrative authority (*e.g.* grant decisions), it should first be brought before the administrative courts. However, it might be brought before a civil court should, for example, the plaintiff fail to appeal against the decision to an administrative court in time. Should the measure concern aid granted through a non-administrative act, for example, a commercial contract regarding the sale of land, civil courts will hear the case.

There is thus neither a specialised court nor a specific court that hears a clear majority of cases involving the public enforcement of State aid rules.

Standing

A party will have standing before an administrative court only when it is considered an 'interested party'.[246] This means that the interest of the party must be directly involved in the act that is being challenged. In the context of State aid enforcement, for example, both the addressee of the contested act as well as competitors of the addressee (under certain conditions), may be assumed to have such an interest.

Moreover, even a party that may not be considered to have standing before the administrative courts may have standing before the civil courts. Claims related to State aid rules are admissible in civil courts if they are brought by a party with 'sufficient interest'.[247] The civil judge may thus provide legal protection in cases where the option of challenging a measure before the administrative court is not available.

The fact that all interested parties (or those with 'sufficient interest') can invoke a State aid argument means there are several routes for the enforcement of State aid rules before the national courts in the Netherlands.

A description of the procedural framework applicable in public enforcement of State aid rules

On 1 July 2018, the State Aid Recovery Act (*Wet terugvordering staatssteun*) [248] entered into force.[249] This Act provides a national basis for administrative bodies to recover unlawful State aid. It was partly created in order to address certain issues that existed with regard to the recovery of State aid. These problems were mainly caused by the fact that there was no separate and comprehensive legal basis for recovery, meaning that State aid had to be recovered on the basis of different legal provisions (*i.e.* through administrative, private or tax law) depending on the characteristics of the measure (*e.g.* the area of law they resulted from and had their legal basis in). Moreover, interest could not be recovered as the Administrative Jurisdiction Division of the Council of State had ruled in 2006 that there was no legal basis in Dutch administrative law to recover interest.[250]

Another reason for the State Aid Recovery Act was the agreement between the Dutch State and the Commission in the context of a case that was pending before the CJEU. In that case a national judge had ruled that although the General Administrative Law Act did not provide a legal basis for the recovery of State aid pursuant to a Commission decision, based on an unwritten principle of administrative law and EU principles, recovery was allowed nonetheless (although not with regard to interest). The Commission agreed to avert the infraction procedure in return for a commitment from the Dutch State to rectify the legal deficiencies.[251]

The State Aid Recovery Act now provides a general system of enforcement and ensures effective recovery after a Commission decision. In addition to addressing the problem of the legal basis, the Act also covers the recovery of interest and limitation periods.

[244] The Dutch tax courts that sometimes also deal with State aid, have not been included in this Study.
[245] Metselaar, A.J. *Drie rechters en één norm. Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de nationale procedurele autonomie*, Wolters Klower, Leiden, 2016, 139.
[246] Wet van 4 juni 1992, houdende algemene regels van bestuursrecht (Algemene wet bestuursrecht) (General Administrative Law Act), Artikel 8:1.
[247] Burgerlijk Wetboek (Dutch Civil Code), Article 3:303.
[248] Wet van 21 februari 2018, houdende regels voor de terugvordering van staatssteun (Wet terugvordering staatssteun) (State Aid Recovery Act).
[249] Please note that the search to identify relevant rulings for this Study was carried out before this Act entered into force, and the relevant rulings identified are thus not based on this Act.
[250] See ruling ECLI:NL:RVS:2006:AU9416, para. 2.8.1. (http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2006:AU9416) (last accessed on 3 January 2019).
[251] van Haersolte, J.C.. "Terugvordering van staatssteun vindt zijn plek in de Nederlandse wetgeving. *Nederlands tijdschrift voor Europees recht"*, NtER, 2018, no 5, 178.

Under the Act, the administrative body that granted the aid has to issue a payment decision for the amount of the aid to be repaid by the aid beneficiary (including interest). The Act stipulates that the "administrative body concerned" — the one that granted the State aid or is responsible for it (or its enforcement) — will recover the State aid and/or the interest following a decision by the Commission.[252] If necessary, the administrative body can collect the aid amount to be repaid by the aid beneficiary by means of a writ of execution.[253]

It should be noted that pursuant to the State Aid Recovery Act, even if there is no related Commission decision, the administrative body shall be required to amend a decision (resulting in the requirement of payment of a sum of money) if the decision was adopted in violation of Article 108(3) TFEU, and to recover the aid. Additionally, interest may be due.[254] Lastly, the Act prescribes that aid based on tax law should be recovered through existing instruments; these will be recovered as tax payable.[255]

The State Aid Recovery Act is complemented by the Act on Compliance with European Legislation by Public Entities (*Wet Naleving Europese regelgeving publieke entiteiten*). Under this Act, the competent minister may instruct a public body to comply with EU legislation, including State aid rules.[256] For example, the concerned minister may instruct a public entity to notify an aid measure to the Commission. Additionally, the minister may impose penalties if the public body does not follow such instructions.[257] It should be noted that the Dutch Government has not yet made use of the powers granted under this Act. The powers pertaining to the Act on Compliance with European Legislation by Public Entities are supplementary to those based on the Provinces and Municipalities Act,[258] which provide the Ministry of the Interior and Kingdom Relations with certain enforcement instruments (*e.g.* letter of warning, suspension) should a province or municipality not comply with State aid rules.[259]

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The competent courts in cases concerning the private enforcement of State aid rules are the same as those concerning the public enforcement of these rules (as above).

There is thus neither a specialised court nor a specific court that hears a clear majority of cases involving the private enforcement of State aid rules.

A description of the procedural framework applicable in private enforcement of State aid rules

Procedural framework administrative courts

Administrative judges are confined to reviewing a contested decision and decide on a limited number of consequences. Pursuant to the General Administrative Law Act, the administrative court wholly or partially annuls the contested decision if it finds the appeal to be well-founded.[260] Additionally, the national court can determine that the legal consequences of the annulled (part of the) decision remain valid.[261] Moreover, a judgment can replace the annulled decision or the annulled part thereof.[262] The General Administrative Law Act provides that, if these two options are not possible, the administrative court may order the administrative body to take a new decision or to carry out another action with due observance of the national court's instructions.[263]

However, it should be noted that due to procedural reasons, in many cases such a 'contested decision' will not constitute the initial decision (*e.g.* the measure granting aid), but the decision on the objection to the initial decision (*e.g.* the national court finding the objection against the measure granting aid to be unfounded).[264] Therefore, should the national court declare an appeal to be well-founded, in most cases this will simply mean the administrative body must reconsider the contested decision, taking into account the findings of the national court. The administrative body must, in so far as reconsideration gives cause to do so, revoke the (initial) contested decision and, if necessary, issue a new decision in its place.[265]

Under certain conditions (*e.g.* if an appeal has been lodged with an administrative court), the preliminary relief judge of the administrative court may take a provisional measure if urgency, in view of the interests involved, so requires.[266]

Procedural framework civil courts

Compared to administrative courts, which have to focus their rulings on the annulment or confirmation of a contested decision, the civil courts have more options at their disposal. Illustrative of their broad competence, the national court can, for example, rule against a party for "giving, doing or failing to do anything against another person" when obliged to do so.[267] However, civil courts are limited by the parties' claims in the case; they cannot award any remedies that were not requested by one of the parties in the proceedings.[268] Examples of legal actions before civil courts are requests for a prohibition or an

[252] Wet van 21 februari 2018, houdende regels voor de terugvordering van staatssteun (Wet terugvordering staatssteun) (State Aid Recovery Act), Article 1; 3.
[253] *Id.*, Article 5(2).
[254] *Id.*, Article 7.
[255] Wet terugvordering staatssteun (State Aid Recovery Act), Explanatory Memorandum, https://zoek.officielebekendmakingen.nl/kst-34753-3.html (last accessed on 3 January 2019).
[256] Wet van 24 mei 2012, houdende regels met betrekking tot de naleving van Europese regelgeving door publieke entiteiten (Wet Naleving Europese regelgeving publieke entiteiten) (European Legislation by Public Entities), Article 2.
[257] *Id.*, Article 7.
[258] Wet van 10 september 1992, houdende nieuwe bepalingen met betrekking tot provincies (Provinces Act), Wet van 14 februari 1992, houdende nieuwe bepalingen met betrekking tot gemeenten (Municipalities Act).
[259] van Haersolte, J.C., "Terugvordering van staatssteun vindt zijn plek in de Nederlandse wetgeving", *op.cit.*, 176.
[260] Wet van 4 juni 1992, houdende algemene regels van bestuursrecht (Algemene wet bestuursrecht) (General Administrative Law Act), Article 8:72(1).
[261] *Id.*, Article 8:72(3)(a).
[262] *Id.*, Article 8:72(3)(b).
[263] *Id.*, Article 8:72(4).
[264] *Id.*, Section 7: 1.
[265] *Id.*, Article 7:11(2).
[266] *Id.*, Article 8:81.
[267] Burgerlijk Wetboek (Dutch Civil Code), Article 3:296.
[268] Metselaar, A.J., *Drie rechters en één norm. Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de nationale procedurele autonomie*, *op.cit.*, 414.

injunction,[269] a declaratory judgment,[270] or compensatory payments.[271] Parties can — in the context of State aid disputes — for example, request a declaratory judgment to have the (partial) nullity of a particular legal act established in court. The decision of the civil court only concerns the relationship between the parties to the proceedings. Thus, should a third party claim that an agreement between the Government and an alleged beneficiary is null and void, if the alleged beneficiary is not involved in the proceedings, then the ruling in itself does not affect its legal position (although the nullity in principle works *erga omnes*).[272]

Lastly, parties to civil court proceedings can apply for interim relief or a preliminary injunction.[273]

Main findings based on the case summaries

Type of action

State aid rules are regularly and increasingly referred to in national court proceedings in the Netherlands. What can be seen from the case summaries (and the list of relevant rulings), is that a majority of the cases are private enforcement cases in which a party relies on the standstill obligation under Article 108(3) TFEU in order to protect its own competitive interest and to claim the aid is unlawful. This view is confirmed in the literature on the subject.[274]

However, there are fewer rulings relating to the public enforcement of State aid rules (than there are private enforcement rulings). This is related to the fact that only a few Commission decisions have been addressed to the Netherlands, and a limited number of formal procedures were initiated by the Commission.[275]

With regard to the remedies requested in the private enforcement cases that were summarised, the most commonly requested remedies were for a recovery order in relation to unlawful aid and interim measures to suspend the implementation of an unlawful aid measure (private enforcement). In one of the public enforcement rulings summarised, the plaintiffs sought a reinstatement of the decision of the defendant to withdraw a granted subsidy and cut the subsidy to an amount that falls within the requirements of *de minimis* conditions.

Sectors

The sectors relating to the selected rulings on State aid enforcement are very diverse and range from the processing of organic waste to social work activities, the preservation of sheep herds and cross-border electricity. There are two rulings that relate to local authorities and real estate activities.

Main actors

The cases summarised show that many different parties rely on State aid rules with different objectives. In one of the rulings, for example, a competitor, the competent public authority as well as the State aid beneficiary were involved.[276] Other rulings involved a consumer association[277] and competitors[278] (*versus* a public authority). This idea of diversity is also confirmed by the literature.[279] However, the summaries also illustrate that — logically — State aid beneficiaries are involved in cases relatively often.

Qualitative assessment of the average time of court proceedings

In 2014, at the district courts' civil departments, commercial cases without defence took an average of seven weeks (with 79% of the cases being closed within six weeks), and with defence 63 weeks (with 60% of cases being closed within one year). In that same year, administrative cases at the district courts on average lasted 37 weeks, with 70% of the cases being closed within nine months.[280]

In 2014, at the courts of appeal, 80% of commercial cases were closed within two years. At the Administrative Court for Trade and Industry, the duration of proceedings lasted an average of 93 weeks in that year.[281]

As such, there is no suggestion from the case summaries or any other sources that State aid enforcement proceedings last longer than other types of proceedings, although it should be noted that in case of cooperation with the Commission or a preliminary ruling from the CJEU, proceedings may take longer than is normally the case.

Qualitative assessment of the remedies awarded by national courts

It is clear from the case summaries as well as from the list of relevant rulings for the Netherlands that the number of cases in which the national court awards a remedy is very low. It is likely that this is, to a great extent, caused by the fact that in many of the cases no State aid was (found to be) granted. It might be attractive for parties to bring forward a State aid argument in any case, also because not much cost is involved in case of an unsuccessful challenge.

To a lesser extent, it might also be caused by the fact that it may be difficult for parties to prove that a measure constitutes an advantage and does not meet the MEOP test or that unlawful State aid was granted, because the party making these claims lacks information

[269] Burgerlijk Wetboek (Dutch Civil Code), Article 3: 296.
[270] Wet van 4 juni 1992, houdende algemene regels van bestuursrecht (Algemene wet bestuursrecht) (General Administrative Law Act), Article 3:302.
[271] *Id.*, Article 6:95.
[272] Metselaar, A.J., *Drie rechters en één norm. Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de nationale procedurele autonomie*, *op.cit.*, 415.
[273] Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure), Articles 254; 223.
[274] Metselaar, A.J., *Drie rechters en één norm. Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de nationale procedurele autonomie*, *op.cit.*, 138.
[275] http://ec.europa.eu/competition/state_aid/register/ (last accessed on 3 January 2019).
[276] Ruling ECLI:NL:GHSHE:2014:281 (NL4).
[277] Ruling ECLI:NL:CBB:2011:BP7546 (NL1).
[278] Ruling ECLI:NL:CBB:2012:BX6991 (NL2).
[279] Metselaar, A.J., *Drie rechters en één norm. Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de nationale procedurele autonomie*, *op.cit.*, 215.
[280] https://www.rechtspraak.nl/SiteCollectionDocuments/Hoe-lang-duurde-de-afhandeling-van-zaken-in-de-afgelopen-jaren.pdf (last accessed on 3 January 2019).
[281] *Ibid.*

or because of the complexity of the concept of State aid. Although the court may play a role in the collection of evidence, in practice, the plaintiff bears the burden of proof.

More specifically, national courts in the rulings identified under this Study, very rarely ordered the recovery of aid. It has been suggested that this could be because it was unclear for a long time to what extent, under civil law, it was required for the underlying agreement to be considered void or declared invalid in case of recovery.[282] This was clarified in the *Residex* ruling;[283] recovery *must* be ordered, whereas a measure *may* be annulled.[284] Moreover, although it is very rare for an administrative authority to decide autonomously to recover aid without a Commission decision, such a recovery occurred once, in the *Zorg en Zekerheid* case.[285] In this case, the Court established that the calculation of the equalisation contribution was based on incorrect data, and this had led to State aid being granted. In both cases, the recovery by the public authority was disputed before the courts (administrative and civil respectively) by the aid beneficiary, meaning it was the judge who eventually definitively ordered the recovery.[286]

Qualitative assessment of the application of the State aid *acquis*; preliminary references

Despite the fact that the Dutch courts in the cases summarised rely on CJEU case law, there were not that many referrals for preliminary rulings to the CJEU. Only one of the summarised rulings (ECLI:NL:HR:2013:BY0539 (NL5)) represents a follow-up of a preliminary ruling request, and in none of the selected cases does the national court refer a question to the CJEU for a preliminary hearing.

This is interesting, especially taking into account that Dutch courts are usually not hesitant to refer questions to the CJEU.[287] One possible explanation for this might be that judges prefer the possibility of relying on the Commission's 'helpline',[288] as well as on the EU soft law instruments such as Commission notices.[289] This seems to be confirmed by the fact that in most cases the national court (correctly) makes use of at least one aspect of the State aid *acquis*.

In most of the summarised rulings, the court makes references to an aspect of the State aid *acquis*. Most often, the court refers to the Commission Notice on the enforcement of State aid law[290] and the Commission Notice on State aid in the form of guarantees.[291] In one ruling, reference is made to the *de minimis* Regulation.[292]

Qualitative assessment of any other relevant trends in State aid enforcement

With regard to private enforcement, a general tendency can be seen of private parties and governmental entities invoking State aid rules — in particular the standstill rules under Article 108(3) TFEU — against their contractual parties in cases relating to sales contracts, lease agreements, other type of contracts under civil law between a private party and, for example, a municipality.

Furthermore, the expertise of the national judges has increased, meaning there is less room for parties to rely on unsubstantiated State aid arguments.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

From the case summaries, it is clear that the national courts are very aware of their own role and competences, and those of the Commission in the enforcement of State aid rules (see, *e.g.* ruling ECLI:NL:CBB:2012:BX6991 (NL2)), in which the court extensively considered the role of the national courts when ruling on allegations by a private party of unlawful State aid granted to a competitor). Once a violation of the standstill obligation has been established, the judge usually acts strongly. This can be seen, for example, in the *Residex* case (NL5). In fact, national courts have held in certain rulings (not selected for the purposes of this Study) that not asking the Commission for informal advice leads to conflict with the due diligence clause laid down in national law.[293] Even in cases where the Commission has only provided an opinion on the existence of State aid, the national courts seem to place great emphasis on this, and do not seem to consider a scenario in which it would come to a different opinion than the Commission, as can be seen, for example, from ruling ECLI:NL:GHSHE:2014:281 (NL4).[294] Moreover, the national courts do not seem to hesitate to make use of cooperation tools should it be appropriate to do so (as seen in ruling ECLI:NL:CBB:2016:210 (NL8)).

In some instances the national courts do not carry out a substantive 'State aid test' but instead apply State aid rules in an indirect way. For example, in spatial planning cases where an appeal based on State aid rules against a zoning plan was assessed in the context of the financial and economic feasibility of that plan (*i.e.* the plaintiff had to prove the plausibility of its argument that the zoning plan or decision would not have been feasible if no support had been given).[295] This is, to some extent, reflected in ruling ECLI:NL:RVS:2017:2904 (NL6).

Any other relevant comments or findings

[282] van Haersolte, J.C., "Terugvordering van staatssteun vindt zijn plek in de Nederlandse wetgeving", *op.cit.*, 177.
[283] Supreme Court, 26.4.2013 - ECLI:NL:HR:2013:BY0539 (NL5).
[284] *Ibid*.
[285] Council of State, 15.4.2015 - ECLI:NL:RVS:2015:1152 (NL7).
[286] van Haersolte, J.C., "Terugvordering van staatssteun vindt zijn plek in de Nederlandse wetgeving", *op.cit.*, 178.
[287] Ministry of Foreign Affairs. *Procesvertegenwoordiging Hof van Justitie van de EU - Jaarbericht 2017* (http://www.minbuza.nl/binaries/content/assets/ecer/ecer/import/hof_van_justitie/jaarberichten/jaarbericht_2017.pdf), 7-8 (last accessed on 3 January 2019).
[288] National courts can make use of the cooperation tools provided for in Article 29 of the State aid Procedural Regulation (Council Regulation 659/1999, as amended Council Regulation 734/2013).
[289] Langer, J., Hovius, T.E., Groot T., "Toezicht Nederlandse bestuursrechters op de naleving en handhaving van de Europese staatssteunregels 2011-2016", *Tijdschrift voor Bouwrecht*, 2016, no. 2, 19-20.
[290] Rulings ECLI:NL:GHSHE:2014:281 (NL4); ECLI:NL:CBB:2016:210 (NL8).
[291] Rulings ECLI:NL:HR:2013:BY0539 (NL5); ECLI:NL:CBB:2011:BP7546 (NL1).
[292] Ruling ECLI:NL:GHARL:2018:9636 (NL3).
[293] Langer, J., Hovius, T.E., Groot T.,"Toezicht Nederlandse bestuursrechters op de naleving en handhaving van de Europese staatssteunregels 2011-2016", *op.cit*. 1-2.
[294] Metselaar, A.J., *Drie rechters en één norm. Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de nationale procedurele autonomie*, *op.cit.*, 40.
[295] Langer, J., Hovius, T.E., Groot T., ("Toezicht Nederlandse bestuursrechters op de naleving en handhaving van de Europese staatssteunregels 2011-2016" , *op.cit.*, 1-2.

In terms of the scope of protection under the standstill clause, it remains unclear how exactly to determine whether a party has been affected by distortions of competition as a result of the aid measure and to what extent other parties can rely on the duty to suspend.[296]

[296] Metselaar, A.J., *Drie rechters en één norm. Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de nationale procedurele autonomie, op.cit.*, 216.

20.2 Case summaries

Case summary NL1

Date

06/01/2019

Case identifiers

Member State

Netherlands

Court which adopted the ruling (national language)

College van Beroep voor het bedrijfsleven

Court which adopted the ruling (English)

Administrative Court for Trade and Industry

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Dutch

Hyperlink to ruling

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CBB:2011:BP7546

Case reference

ECLI:NL:CBB:2011:BP7546

Procedural context of the case

The plaintiff objected to a decision of the plaintiff in 2004. The defendant declared the objection inadmissible because plaintiff was not an interested party. The plaintiff's appeal against that decision led to the ruling of the Administrative Court for Trade and Industry of 19 March 2008 (ruling ECLI:NL:CBB:2008:BC8379) in which the Court did designate the plaintiff as an interested party and instructed the defendant to take a new decision. However, the defendant maintained its decision, leading to the case at hand to be brought to the Administrative Court for Trade and Industry.

Type of action

Private enforcement

Delivery date of the ruling

04/03/2011

Language

Dutch

Headnote

In this ruling, the Court applied State aid rules in the energy sector and ruled that no State aid is involved because objective criteria were applied to calculate the loss that would be suffered from the purchase of an electricity exchange while the loss would be compensated by the auction revenues of cross-border electricity.

Parties

Names of the parties to the action

Vereniging voor Energie, Milieu en Water (VEMW)

Versus

De raad van bestuur van de Nederlandse Mededingingsautoriteit (NMa)

Also party to the proceedings was TenneT TSO B.V.

The relationship of the plaintiff to the measure

Consumers' association

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Cross-border electricity

The type of State aid measure challenged in the court proceedings

Guarantee at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The dispute concerns the use of proceeds from the auction of electricity transported across national borders. TenneT used its part of the proceeds of the auction to eliminate restrictions in the transmission capacity of the cross-border connections. Amsterdam Power Exchange Spotmarket B.V. (APX) acted as an electricity exchange. TenneT acquired this exchange in 2001. The Director of the Energy Implementation and Supervision Service (Dte) considered APX and its acquisition by TenneT as a fundamental stimulus for the (further) liberalisation of the electricity market and cross-border trade. The purchase by TenneT was hampered by the fact that a large start-up loss was expected. In November 2000, Dte indicated that it supported the purchase of APX by TenneT with 'a guarantee' from the auction proceeds to cover any negative cash flow. Dte confirmed to TenneT that APX would be designated as a further target for the spending of auction proceeds. As of 1 July 2005, Dte's powers were transferred to NMa.

TenneT asked the Commission whether the 'guarantee' should be notified as State aid, and informed Dte that the Commission indicated that no notification had to be made.

The plaintiff (an advocate for business electricity, gas and water customers in the Netherlands) claimed that there was a prohibited State aid measure, since TenneT was dependent on NMa's permission for the use of the auction revenues for a different purpose (than the removal of the restrictions in the transmission capacity). The defendant stated that this did not constitute State aid, since the auction proceeds already accrued to TenneT. In addition, the auction participants, and not the State, paid the auction proceeds.

Remedy(ies) sought

Recovery order in relation to unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court confirmed that under Union law, an intervention of the Government as a shareholder, creditor or contractor fell under the concept of State aid if the intervention would not have been made by a private individual under similar circumstances. It also expanded upon the notion of a government guarantee in this regard.

With regard to the decision of Dte to grant permission to pay the losses incurred by TenneT on the purchase of APX from auction proceeds, the Court noted that TenneT had already been granted this part of the auction proceeds. However, with regard to the use of other spending targets than the expansion of the cross-border transmission capacity, TenneT required permission from Dte and

later NMa. The Court assumed that TenneT would incur a loss on the purchase of APX. Dte had encouraged the purchase of APX by TenneT because it saw that the exchange as being of fundamental value for the (further) liberalisation of the electricity market and the development of the European cross-border energy market(s). The Court noted that TenneT had, at the insistence of Dte, reduced the exchange fees charged to trades after the takeover. The Court considered that the loss to be taken into account had been calculated by an accountant on the basis of objective criteria, comparable to those taken into account in determining the purchase value. Under these circumstances, the Court was of the opinion that the contested decision did not constitute a State aid measure.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- 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

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary NL2

Date

06/01/2019

Case identifiers

Member State

Netherlands

Court which adopted the ruling (national language)

College van Beroep voor het bedrijfsleven

Court which adopted the ruling (English)

Administrative Court for Trade and Industry

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Dutch

Hyperlink to ruling

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CBB:2012:BX6991

Case reference

ECLI:NL:CBB:2012:BX6991

Procedural context of the case

Thuiszorgservice lodged a case at the Administrative Court for Trade and Industry regarding the aid provided by the defendant (Dutch Healthcare Authority).

The Court, by letter of 22 June 2010, submitted a procedural question to the Commission about the handling of complaints, including those submitted by Thuiszorgservice regarding the violation of State aid rules. The Commission, by letter of 13 September 2010, informed the Court that it had received the relevant complaints, but had not taken a decision on them.

Type of action

Private enforcement

Delivery date of the ruling

13/09/2012

Language

Dutch

Headnote

In this ruling, the Court considered the role of national courts when ruling on allegations by a private party of unlawful State aid granted to a competitor.

Parties

Names of the parties to the action

Thuiszorg Service Nederland B.V. and Stichting Thuiszorgservice Groningen

Versus

De Nederlandse Zorgautoriteit

Also party to the proceedings were Stichting Continuering Uitvoering AWBZ;Wmo Groningen e.o. (TZG);Stichting Continuering Uitvoering AWBZ West (HWW)

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

Q - Human health and social work activities

Domestic help, youth health care and general social work

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

Foundations TZG and HWW were established in 2009 to provide health and domestic care, and to guarantee the continuation of the Meavita Netherlands Foundation (which had been in financial difficulties) and its affiliated companies. The foundations had been established for an indefinite period of time and were intended to only carry out activities on a temporary basis. They aimed to transfer the assets and activities intended for this purpose to third parties. The Dutch Healthcare Authority (the plaintiff) provided aid to TGZ and HWW in the form of funds.

The State Secretary for Health, Welfare and Sport claimed that the defendant had established that without the granting of aid to HWW and TZG, the continuity of care in the relevant regions would have been jeopardised. Moreover, the State Secretary claimed that the granting of the aid meant that potential takeover candidates – under the same conditions – would be able to take over the temporary foundations without a heavy burden from the past. According to the defendant (i) there was no advantage or favouring of certain undertakings; (i) the aid did not distort or threaten to distort competition; and (iii) it did not affect trade between Member States. Thus, the aid was not notified to the Commission on the basis of Article 108(3) TFEU.

However, the plaintiff took the view that the measure constituted State aid within the meaning of Article 107 TFEU but had nonetheless been implemented without prior approval of the Commission. It requested the Court either to order the defendant to notify the aid to the Commission and, as soon as possible after the Commission decision, take a new decision; or to take any action required to recover the aid, and take a new decision.

Remedy(ies) sought

Recovery order in relation to unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court considered the notification obligation under Article 108 TFEU and CJEU jurisprudence on: (i) the intent of Article 108(3) TFEU to prevent that an incompatible aid measure will never be implemented; (ii) the task of the national court in the application of the State aid monitoring scheme to ensure the safeguarding of the rights of individuals in the event of a breach of the obligation to notify the aid to the Commission; and (iii) the aim of recovery orders to eliminate the distortion of competition.

From above-mentioned case law, the Court deduced that if it were to decide that the defendant had granted State aid, it was in principle obliged to recover it as the aid had not been notified to the Commission, or at least take a decision ensuring that the distortion of competition caused by the granting of the aid was removed.

However, the Court ruled that the request from the plaintiff was intended to avoid this usual consequence of the finding that there was non-notified State aid. The plaintiff requested that if the Court found that the measure constituted State aid, that it would affirm and state this (i.e. that non-notified State aid was granted to the defendant), and that it should then be left to the defendant to decide what consequence should be attached to this determination whether that be the subsequent notification of the measure to the Commission or the implementation of measures to recover the aid granted. In the opinion of the Court, such a ruling would be contrary to its task pursuant to case law cited above. According to the Court, its task consisted of taking effective measures to eliminate the distortion of competition caused by non-notified aid pending the final decision by the Commission. Therefore, the Court ruled that the plaintiff's request could not be met.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:

- C-199/06, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE) (2008), ECLI:EU:C:2008:79
- C-261/01, Belgische Staat v Eugène van Calster and Felix Cleeren and Openbaar Slachthuis NV (2003), ECLI:EU:C:2003:571
- C-354/90, Fédération nationale du commerce extérieur des produits alimentaires and Others v France (1991), ECLI:EU:C:1991:440
- C-275/10 , Residex Capital IV CV v Gemeente Rotterdam (1991), ECLI:EU:C:2011:814

√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999

Cooperation with the EU institutions

The national court sent a request for information to the Commission (no hyperlink available)

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary NL3

Date

06/01/2019

Case identifiers

Member State

Netherlands

Court which adopted the ruling (national language)

Gerechtshof Arnhem-Leeuwarden

Court which adopted the ruling (English)

Court of Appeal Arnhem-Leeuwarden

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

Dutch

Hyperlink to ruling

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARL:2018:9636

Case reference

ECLI:NL:GHARL:2018:9636

Procedural context of the case

The first instance court delivered its provisional and subsequently its final judgment in this case on 1 July 2015 (ruling ECLI:NL:RBNNE:2015:3300) and 16 December 2018 (ruling ECLI:NL:RBNNE:2015:5815) respectively, ruling that that the purchase agreement between the Municipality and the company constituted unlawful aid within the meaning of Article 107 TFEU, but that the granting of unlawful aid resulted in the related purchase agreement only being partially invalid, where such nullity only concerned the part of the purchase price that included State aid.

Type of action

Private enforcement

Delivery date of the ruling

06/11/2016

Language

Dutch

Headnote

In this ruling, the Court confirmed the ruling of the First Instance Court, that the purchase agreement between the plaintiff and the defendant with regard to the sale of municipal property constituted unlawful State aid. However, contrary to the First Instance Court, it ruled that as a result of the unlawfulness of the aid, the entire purchase agreement was void.

Parties

Names of the parties to the action

Spaansen Holding B.V.

Versus

Gemeente Harlingen

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

L - Real estate activities

Sale of municipal property

The type of State aid measure challenged in the court proceedings

Other

Purchase agreement

Substance of the case

Facts and parties' main arguments in the case

The Municipality of Harlingen (hereinafter also referred to as: 'Municipality' or 'defendant') had concluded a purchase agreement with company Spaansen (hereinafter also referred to as: 'plaintiff'). Under this agreement, the Municipality would buy land from Spaansen for an amount of EUR 8,500,000. It was agreed that the Municipality would pay EUR 6,500,000 at the time of purchase and an additional amount of EUR 2,000,000 after the relocation of Spaansen, at the latest within 5 years after the conclusion of the agreement. When Spaansen asked the Municipality in 2011 to pay the remaining amount, the Municipality refused to pay, contending that the agreed purchase price constituted State aid.

The plaintiff contended that no unlawful aid was granted within the meaning of Article 107(1) TFEU. In addition, it argued that *de minimis* aid was applicable. Further, the plaintiff disputed the ruling of the First Instance Court, that partial invalidity of the purchase agreement would be the most effective measure to remove the distortion of competition caused by the purchase agreement. In this regard, the plaintiff in particular contested that there would be no inseparable link between the purchase price and the remainder of the agreement.

The defendant argued that, on the basis of the fact that the purchase agreement constituted unlawful aid within the meaning of Articles 107 and 108 TFEU, the distortion of competition caused by the aid measure should be removed by repaying the unlawfully granted State aid of EUR 2,250,000.

Remedy(ies) sought

Recovery order in relation to unlawful aid; Other remedy sought (below)

Primarily: payment of the additional amount agreed in the purchase agreement; Secondarily: notification of the purchase agreement to the Commission; Alternatively: that the contract of sale is declared void and the property is returned to the plaintiff.

Outcome of the case

Conclusions adopted by the national court

The Court ruled that the purchase agreement did not include an aid measure that was excluded from a notification obligation pursuant to Article 108(3) TFEU. It further contended that the most logical measure that the national court should take in such situation, was the full recovery of the unlawful aid. Contrary to what the First Instance Court had ruled, it followed from CJEU case law that the distortion of competition caused by the unlawful aid must be removed in the "most effective way", rather than in "the least onerous way".

The Court further ruled, that while failure to notify meant that the validity of the act to implement the measure (in this case the purchase agreement) was affected, pursuant to CJEU case law (Case Residex Capital IV CV v Gemeente Rotterdam C-275/10) it did

not follow from Article 108(3) TFEU that the entire agreement should always be null and void when unlawful aid has been granted. Whether or not the nullity extended to the entire purchase agreement, depended on the question whether the rest of the agreement was inseparable from the part that is null and void. The assessment of such inseparability and the potential justification of a partial nullity should take into account the objective of the infringed legal provision. The Court subsequently concluded that it was in line with the objective of Article 108(3) TFEU that the purchase agreement should be declared void in its entirety under the given circumstances. Partial nullity, as applied by the First Instance Court, meant that the Municipality would be rewarded for violating its duty of notification. This would be detrimental to the useful effect of Article 108(3) TFEU in that it would give the Municipality a reduced incentive to notify the measure to the Commission. For this reason alone, the Court found the partial annulment of the purchase agreement by the First Instance Court unfounded. The Court further considered that the purchase price was inseparably linked to the rest of the agreement and that partial invalidity was therefore not possible.

The Court declared the purchase agreement void due to a breach of Article 108(3) TFEU and ordered the Municipality to ensure that the ownership situation of the property was displayed in the public registers, under forfeiture of a penalty.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order in relation to unlawful aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-17/91, Georges Lornoy en Zonen NV and others v Belgian State (1992) ECLI:EU:C:1992:514
- C-505/14, Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen(2015) ECLI:EU:C:2015:742
- C-275/10, Residex Capital IV CV v Gemeente Rotterdam (2011) ECLI:EU:C:2011:814
- C-39/94, Syndicat Français de l'Express International (SFEI) Others v La Poste and Others (1996) ECLI:EU:C:1999:116
- C-300/16, European Commission v Frucona Košice a.s (2007) ECLI:EU:C:2017:706
- 173/73, Italian Republic v Commission of the European Communities (1974) ECLI:EU:C:1974:71
- C-197/11, and C-203/11 Eric Libert e.a. contre Gouvernement flamand (C-197/11) et All Projects & Developments NV e.a. contre Vlaamse Regering (C-203/11) (2013) ECLI:EU:C:2013:288
- C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht(2003) ECLI:EU:C:2003:415
- C-518/13, Eventech Ltd v The Parking Adjudicator (2015) ECLI:EU:C:2015:9

National case law:
- Hoge Raad 14 April 2000, ECLI:NL:HR:2000:AA5517
- Hoge Raad 29 juni 2007, ECLI:NL:HR:2007:BA3516
- Hoge Raad, 20 december 2013, ECLI:NL:HR:2013:2123

√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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 (*de minimis* Regulation)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary NL4

Date

06/01/2019

Case identifiers

Member State

Netherlands

Court which adopted the ruling (national language)

Gerechtshof 's-Hertogenbosch

Court which adopted the ruling (English)

's-Hertogenbosch Court of Appeal

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

Dutch

Hyperlink to ruling

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2014:281

Case reference

ECLI:NL:GHSHE:2014:281

Procedural context of the case

The case was lodged with the 's-Gravenhage District Court, which ruled on it by judgment of 24 October 2012 (ruling ECLI: NL: RBSHE: 2012: BY1110).

The case summarised here constituted the first interim ruling of the 's-Hertogenbosch Court of Appeal in the appeal of the ruling of the First Instance Court. In its second interim judgment (ruling ECLI:NL:GHSHE:2015:540), the Court of Appeal asked questions to the Commission about the progress in the handling of the complaint submitted in the context of the case.

In the final ruling on the case (ruling ECLI:NL:GHSHE:2017:2127), the Court of Appeal confirmed the ruling of the District Court of 24 October 2012.

Type of action

Private enforcement

Delivery date of the ruling

11/02/2014

Language

Dutch

Headnote

In this ruling, the Court considered requesting information from the Commission.

Parties

Names of the parties to the action

Shanks Nederland B.V.; Orgaworld Nederland B.V.

Versus

Samenwerkingsverband Regio Eindhoven; Regionaal Milieubedrijf Brabant Noord-Oost; Stadsgewest 's-Hertogenbosch; Regio West-Brabant; Gemeente Reusel-De Mierden; Gemeente Bladel; Gemeente Oirschot; Gemeente Best; Gemeente Eersel; Gemeente Veldhoven; Gemeente Bergeijk; Gemeente Son en Breugel; Gemeente Waalre; Gemeente Valkenswaard; Gemeente Nuenen Gerwen en Nederwetten; Gemeente Geldrop-Mierlo; Gemeente Heeze-Leende; Gemeente Cranendonck; Gemeente Laarbeek; Gemeente Helmond; Gemeente Someren; Gemeente Gemert-Bakel; Gemeente Deurne; Gemeente Asten; Gemeente Maasdonk, Gemeente Landerd, Gemeente Boekel, Gemeente Grave, Gemeente Mill en Sint Hubert, Gemeente Cuijk; Gemeente Sint Anthonis; Gemeente Boxmeer; Gemeente Dongen; Gemeente Gilze en Rijen; Gemeente Goirle; Gemeente Hilvarenbeek; Gemeente Loon op Zand; Gemeente Oisterwijk; Gemeente Tilburg; Gemeente Waalwijk; Gemeente 's-Hertogenbosch; Gemeente Schijndel; Gemeente Heusden; Gemeente Haaren; Gemeente Vught; Gemeente Sint-Michielsgestel; Gemeente Boxtel; Gemeente Aalburg; Gemeente Alphen-Chaam; Gemeente Baarle-Nassau; Gemeente Bergen op Zoom; Gemeente Breda; Gemeente Drimmelen; Gemeente Etten-Leur; Gemeente Geertruidenberg; Gemeente Halderberge; Gemeente Moerdijk; Gemeente Oosterhout; Gemeente Roosendaal; Gemeente Rucphen; Gemeente Steenbergen; Gemeente Werkendam; Gemeente Woensdrecht; Gemeente Woudrichem; Gemeente Zundert; Attero-Zuid B.V.

The relationship of the plaintiff to the measure

Competitor; Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

E - Water supply; sewerage; waste managment and remediation activities

The processing of organic waste

The type of State aid measure challenged in the court proceedings

Other

Service agreement

Substance of the case

Facts and parties' main arguments in the case

A number of Municipalities signed an agreement with waste processor Attero, with regard to the processing of organic waste. According to competing waste collector Shanks, the agreement constituted unlawful State aid granted to Attero.

Shanks therefore filed a complaint with the Commission regarding unlawful State aid granted to Attero and summoned the Municipalities and Attero before the civil court. The Municipalities and Attero, on the other hand, disputed Shanks' claims. Moreover, the First Instance Court rejected the claim by Shanks that the Municipalities acted in violation of State aid rules.

While the proceedings were ongoing, the Commission reported to Shanks by letter of 9 November 2011 that the agreement did not appear to constitute State aid within the meaning of Article 107(1) TFEU, and that the Commission would consider the complaint withdrawn unless Shanks contested the Commission's conclusions or was notified within one month of new details which would indicate a breach of State aid rules. At the time of the District Court's ruling, the preliminary position of the Commission was known. The District Court concluded that, in view of the fact that this opinion was provided by the Commission, which must be regarded as uniquely well-equipped in an EU legal context and (exclusively) competent to form an opinion on the question of whether a measure constitutes (unlawful) State aid, Shanks had not sufficiently motivated that the measure constituted a selective economic advantage for Attero within the meaning of Article 107 TFEU.

Shanks requested the Court of Appeal to annul the service agreement, or at least to exclude the defendants from further implementing it, until it had been established that the Commission had been informed of the State aid granted to Attero and had been able to investigate and assess whether the aid measures were in accordance with Articles 107 and 108 TFEU. Shanks also claimed it had reacted to the Commission's letter but had not yet received a response from the Commission at the time of writing its statement of appeal.

According to the Municipalities, on the other hand, the Commission had reacted in the meantime and had maintained its earlier preliminary conclusion, namely that there did not appear to be State aid. They noted that the State Aid Coordination Point was informed that the Commission had sent a second preliminary opinion to Shanks by letter of 6 February 2013, in which the Commission maintained its earlier provisional conclusion, namely that there appeared to be no State aid within the meaning of Article 107 TFEU, and provided that Shanks would be given a period of one month to respond to this second opinion, failing which the Commission would consider the complaint as withdrawn. The Municipalities noted that they understood that Shanks had made use of this possibility but were not aware of the content of that reaction. They also pointed to the possibility for the Court to request assistance from the Commission on the basis of the Commission notice on the enforcement of State aid rules by national courts. Attero requested the Court of Appeal to order Shanks to provide information regarding a possible response from the Commission.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid; Other remedy sought (Annulment of the measure)

Outcome of the case

Conclusions adopted by the national court

The Court considered that Shanks had demanded the prohibition on the execution of the service agreement until it had been established that the Commission had been informed of the aid granted to Attero and had been able to investigate and assess whether the aid measures were in accordance with Articles 107 and 108 TFEU.

According to the Court, such a prohibition had far-reaching consequences and could not be assigned lightly, since it concerned daily waste processing. In addition, according to settled CJEU caselaw, national courts did not have power to declare aid compatible with the Treaty, but rather to protect the rights of individuals which were damaged by an unlawful execution of an aid measure.

The Court considered that if the position of the Municipalities that the Commission by a letter of 6 February 2013 had sent a second preliminary view to Shanks was correct, Shanks had not been able to deal with this in its statement of grievances which had been submitted on 15 January 2013.

According to the Court, the Commission is uniquely equipped to assess the compatibility of State aid, making it advisable that Shanks informed the Court on the state of affairs regarding the submitted complaint. The Court requested that Shanks examined whether it had received a response from the Commission and, if so, to provide this response. Furthermore, the Court requested that Shanks stated whether it had reacted to that response, in which case Shanks would also have to submit this response, as well as any response received from the Commission.

Additionally, if the reaction of Shanks would give rise to this, the Court of Appeal considered asking the Commission for information as referred to in the Commission Notice on the enforcement of State aid rules by national courts. Pursuant to the notice, the national court may ask the Commission for information on whether a procedure is pending before the Commission with regard to a particular aid measure, whether the Commission has initiated a formal investigation procedure and whether the Commission has already taken a decision. Moreover, if no decision has been taken, the national court may request the Commission to indicate when a decision is likely to be provided.

The Court provided the parties with the opportunity to comment on this intention.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The Court requested the plaintiff to provide additional information, and allowed the parties to comment its intention to ask the Commission for information.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission notice on the enforcement of State aid rules by national courts, OJ C 85, 9.4.2009 (Commission Enforcement Notice)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary NL5

Date

06/01/2019

Case identifiers

Member State

Netherlands

Court which adopted the ruling (national language)

Hoge Raad der Nederlanden

Court which adopted the ruling (English)

Supreme Court of the Netherlands

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Dutch

Hyperlink to ruling

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2013:BY0539&showbutton=true

Case reference

ECLI:NL:HR:2013:BY0539

Procedural context of the case

By judgment of 24 January 2007 (ruling ECLI:NL:RBROT:2007:AZ6904), the Rotterdam District Court dismissed the claim for a payment under the guarantee by the plaintiff, since it found that the guarantee qualified as a State aid measure as referred to in Article 87(1) of the EC Treaty (current Article 107(1) TFEU) in connection with the beneficiary. As a result, the guarantee should have been notified to the Commission in line with Article 88(3) EC Treaty (current Article 108(3) TFEU). Since such a notification did not occur, the guarantee was found to be null and void pursuant to Article 3:40 of the Dutch Civil Code.

The appeal brought by the plaintiff against that judgment was dismissed by the 's-Gravenhage Court of Appeal (ruling ECLI:NL:GHSGR:2008:BD6981), which confirmed the previous judgment.

The plaintiff thereupon lodged an appeal in cassation against that judgment before the Supreme Court of the Netherlands. In its interim ruling (ruling ECLI:NL:HR:2010:BL4082), the Supreme Court held that there was no dispute as to the finding of the 's-Gravenhage Court of Appeal that, as the guarantee constituted State aid within the meaning of Article 107 TFEU, it should have been notified to the Commission pursuant to Article 108(3) TFEU. Moreover, it found that the Court of Appeal was authorised to annul, on the basis of Article 3:40 of the Dutch Civil Code, the implementation of that State aid measure if it was contrary to these provisions of the EC Treaty. However, as the Court was uncertain whether annulment of the guarantee was an effective measure by which to remove the distortion of competition caused by the granting of the loan, it referred the following question to the CJEU for a preliminary ruling: 'Does the provision in the last sentence of Article 88(3) EC Treaty, now Article 108(3) TFEU, mean that, in a case such as the present, where the unlawful aid measure was implemented by granting the lender a guarantee which enabled the borrower to obtain a loan from the lender which would not have been available to it under normal market conditions, the national courts, within the framework of their obligation to remedy the consequences of the unlawful aid measure, are obliged, or at any rate authorised, to annul the guarantee, even if that does not result in the annulment of the loan granted under the guarantee?'

The case summarised here is the final ruling of the Supreme Court.

The subsequent ruling from the Amsterdam Court of Appeal is not available.

Type of action

Private enforcement

Delivery date of the ruling

26/04/2013

Language

Dutch

Headnote

In this ruling, the Court held that national courts can annul a guarantee that constituted unlawful State aid if that annulment can remove the distortion of competition caused by the guarantee which was granted and if there are no less onerous procedural measures to do so.

Parties

Names of the parties to the action

Residex Capital IV C.V.

Versus

De Gemeente Rotterdam

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

K - Financial and insurance activities

Credit granting

The type of State aid measure challenged in the court proceedings

Guarantee at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The plaintiff, Residex, had acquired shares in 2001 in MD Helicopters Holding NV (MDH), a subsidiary of RDM Aerospace NV (Aerospace). In the context of that acquisition, Residex also obtained an option on the basis of which it could resell the shares in MDH to Aerospace. In the course of February 2003, Residex exercised this option. Instead of paying the purchase price, the claim was converted into a loan guaranteed by the Rotterdam Municipal Port Authority (GHR).

Aerospace repaid part of the loan. However, when Aerospace failed to repay the remainder of the loan to Residex, Residex invoked the guarantee by letter dated 22 December 2004. The Municipality of Rotterdam (the defendant) refused to pay, on the grounds that the guarantee was null and void because of a violation of State aid rules. More concretely, according to the Municipality, the guarantee involved a subsidy for Aerospace, meaning that State aid, which should have been notified to the Commission in accordance with Article 108(3) TFEU, would be granted. As it had not been notified, however, the guarantee was invalid on the grounds of Article 3:40 of the Dutch Civil Code, according to the Municipality. Thus, Residex brought an action before the Dutch courts.

Remedy(ies) sought

Other remedy sought

Payment of the State guarantee

Outcome of the case

Conclusions adopted by the national court

The Supreme Court followed the CJEU preliminary ruling that the finding that a State aid measure was unlawful had to lead to its undoing by means of recovery "in order to restore the previous situation" and that "the main objective" of the recovery of unlawfully granted State aid lied in the elimination of distortions of competition resulting from the competitive advantage afforded by the unlawful state aid. Therefore, the Court considered it was "strictly necessary" to determine who the beneficiary or beneficiaries of the State aid were; when it came to State aid in the form of a guarantee either the creditor, the borrower, or both could be the beneficiaries.

With regard to annulment of the guarantee, Union law did not impose any specific conclusion that the national courts must necessarily draw with regard to the validity of the acts relating to implementation of the aid. However, the measures taken by the national court in the event of an infringement of Article 108(3) TFEU, should remove the distortion of competition caused by the State aid measure, so that the Court must ensure that objective can be achieved by the measures it adopts with regard to the validity of those measures.

It was therefore for the national court to ascertain whether the annulment of the guarantee may, in light of the circumstances of the case, be more effective in relation to that restoration than other measures. The Court may, "in the absence of less onerous procedural measures", proceed to annul the guarantee provided by the Municipality to Residex, if it is considered that such an annulment may result in or may facilitate the removal of a distortion of competition caused by the provision of the guarantee.

The Court of Appeal had ruled that the guarantee constituted an unlawful State aid measure and that the recovery of the loan granted to Aerospace was therefore not an alternative to invalidating the guarantee. It also stated that in the present case invalidation of the guarantee was an appropriate sanction, and that Article 108(3) TFEU had the purpose of affecting the validity of conflicting legal acts. These statements, taking into account the CJEU preliminary ruling, were found to be incorrect, since the Court of Appeal had taken as its starting point that Aerospace must be regarded as the beneficiary of the guarantee and had not assessed whether Residex could also be considered as such. The Court of Appeal had thus disregarded that Article 108 TFEU was not intended simply to affect the validity of a conflicting guarantee (as referred to in Article 3:40 of the Dutch Civil Code) only if annulment could lead to or contribute to the competitive situation prior to the guarantee.

The measure ordered on the basis of Article 108(3) TFEU must have the primary purpose of eliminating the distortion of competition resulting from the competitive advantage awarded by the unlawful guarantee. In order to be able to assess which measure was the most effective for this purpose, the Court must determine who the beneficiary or beneficiaries of the guarantee was (or were). Thus, it must be ensured that the measure to be taken (where applicable, the annulment of the guarantee) could lead to or help to minimise the advantage that the beneficiary enjoyed as a result of the guarantee vis-à-vis its competitors.

The Court sent the case back to the Amsterdam Court of Appeal, stating that it would have to assess whether, in the absence of less onerous procedural measures, the annulment of the guarantee provided by the Municipality may lead to or may facilitate the restoring of the competitive situation as far as possible to what it was prior to the provision of the guarantee. It also ordered the Court to consider whether Residex could also be regarded as a beneficiary of the guarantee. Furthermore, it noted that the question of whether the guarantee involved the granting of State aid must be assessed according to when the guarantee was provided (at the time the aid was granted) and not to the time when the guarantee was invoked.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The subsequent ruling from the Amsterdam Court of Appeal is not available.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-275/10, Residex Capital IV CV v Gemeente Rotterdam (2011) ECLI:EU:C:2011:814

√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/02), OJ C 155, 20.6.2008

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-275/10, Residex Capital IV CV v Gemeente Rotterdam (2011) ECLI:EU:C:2011:814 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-275/10)

Any other comments (optional)

No other comments

Case summary NL6

Date

06/01/2019

Case identifiers

Member State

Netherlands

Court which adopted the ruling (national language)

Raad van State

Court which adopted the ruling (English)

Council of State

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Dutch

Hyperlink to ruling

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2017:2904

Case reference

ECLI:NL:RVS:2017:2904

Procedural context of the case

In 2015, the plaintiff (college van burgemeester en wethouders van Rotterdam) granted 2d Vastgoed B.V. a so called first-phase environmental permit, to deviate from the zoning plan for the conversion of a canal in Rotterdam into an inner-city water sports area. In that same year, the plaintiff attached an additional condition to the first environmental permit granted, as well as granted a second-phase environmental permit for the building activity to 2d Vastgoed B.V. Moreover, the Municipality of Rotterdam made a subsidy of EUR 3,000,000 available for the realisation of the project.

In 2016, the Rotterdam District Court upheld the appeals against the decisions set out above and annulled those decisions in ruling ECLI:NL:RBROT:2016:4329. Moreover, in this ruling, the Court concluded that the subsidy did not constitute State aid, since it would not affect trade between Member States.

The plaintiff appealed against this ruling, and the defendants (a monastic community as well as a party living in the vicinity of the project) submitted a cross-claim, claiming that the subsidy provided by the Municipality for the project was contrary to Article 108(3) TFEU.

Type of action

Private enforcement

Delivery date of the ruling

25/10/2017

Language

Dutch

Headnote

In this ruling, the Court considered which parties have legal standing to invoke Article 108(3) TFEU.

Parties

Names of the parties to the action

Het college van burgemeester en wethouders van Rotterdam

Versus

[Plaintiff sub 2A], [plaintiff sub 2B], [plaintiff sub 2C], [plaintiff sub 2D], [plaintiff sub 2E], [plaintiff sub 2F] (anonymised), de Nederlandse Provincie van de Dominicanen, het bestuur van de parochie H. Johannes (together: De Dominicanen), and [plaintiff sub 3] (anonymised)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Third party

Sector relating to the State aid argument

F - Construction

Development of a water sport area

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

With regard to the project (i.e. the conversion of the canal into an inner-city water sports area), the defendants feared unacceptable noise nuisance. They claimed that the grant provided by the Municipality for the project was contrary to Article 108(3) TFEU, according to which the Commission must be informed of an intention to introduce a State aid measure, and this measure may not be implemented before the Commission has approved it.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court considered that, in line with its previous ruling ECLI:NL:RVS:2016:2892, it follows from CJEU case law that Article 108(3) TFEU seeks to protect the interests of competitors and individuals who are subject to a levy forming an integral part of an aid measure, and the General Administrative Law Act therefore precludes others from invoking Article 108(3) TFEU to argue that a project is not feasible. The Court considered there was no reason to overturn this previous ruling or make a request to the CJEU for a preliminary ruling. It noted that in view of CJEU case law, there was no need to make a request for a preliminary ruling since the question raised could be answered on the basis of CJEU case law.

The Court ruled that the defendants could not be regarded as competitors or as persons subject to a charge forming an integral part of the State aid measure at hand. In this regard, the General Administrative Law Act prevented them from invoking Article 108(3) TFEU. For that reason, the Court ruled that there was no ground to annul the contested decision.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

National case law:
- Raad van State 2 November 2016, ECLI: NL: RVS: 2016: 2892

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary NL7

Date

06/01/2019

Case identifiers

Member State

Netherlands

Court which adopted the ruling (national language)

Raad van State

Court which adopted the ruling (English)

Council of State

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Dutch

Hyperlink to ruling

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2015:1152

Case reference

ECLI:NL:RVS:2015:1152

Procedural context of the case

By decision of 25 March 2011, the College voor zorgverzekeringen, thans Zorginstituut Nederland (National Health Care Institute, hereinafter also referred to as: 'Zorginstituut' or 'defendant') had set the so-called Health Insurance Law 2007 reconciliation contribution for health insurer Zorg en Zekerheid U.A. (Care and Assurance) hereinafter also referred to as: 'Zorg en Zekerheid' or 'plaintiff') at EUR 386,765,012. By decision of 23 November 2012 it revised this contribution, decreased it to EUR 382,755,039 and reclaimed EUR 4,009,973 from Zorg en Zekerheid.

Zorg en Zekerheid lodged an administrative appeal, which the Zorginstituut dismissed by decision of 4 September 2013. Zorg en Zekerheid appealed against this decision at the Council of State (hereinafter also referred to as: 'the Council' or 'the Court'). The Court held a hearing on 2 June 2014, after which it re-opened the inquiry and issued a request (by letter of 27 June 2014) to the Commission on the basis of Article 23bis, first paragraph of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union. The Commission (hereinafter also referred to as: 'the Commission') issued its advice on 27 October 2014, after which the inquiry was closed.

The Commission Decision of 3 May 2005 (C(2005)1329fin) predated this case, deeming the risk reconciliation system in question compatible with State aid rules.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

15/04/2015

Language

Dutch

Headnote

In this ruling, the Court held that one could not successfully rely on the legitimate expectation of the lawfulness of State aid insofar it had not been granted with due regard for Article 108 TFEU; the obligation to recover unlawful aid laid down in Article 108(3) TFEU applies directly to the Member State of the Netherlands and to its administrative bodies, thus the legal basis for the Netherlands for the recovery of the unlawful aid is a given. The question of which public authority is competent to recover the aid is determined on the basis of national law.

Parties

Names of the parties to the action

Zorginstituut Nederland

Versus

Zorg en Zekerheid U.A.

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

Q - Human health and social work activities

Health insurance

The type of State aid measure challenged in the court proceedings

Other

Decision of the public authority to decrease a reconciliation contribution reclaiming the difference

Substance of the case

Facts and parties' main arguments in the case

This case concerns the so-called reconciliation contribution that Dutch health insurers receive annually from the State. This contribution was intended to prevent risk selection by health care insurers and to ensure fair competition between them. By decision of 3 May 2005 (C(2005)1329fin), the Commission stated that the above described Dutch risk reconciliation system was compatible with Article 86 (2) EC Treaty (current Article 106(2) TFEU), since the system was only applied to the extent necessary in order to compensate for additional costs incurred in the performance of a public service obligation and the measure was set up in such a manner that competition was not affected in a way that is contrary to the common interest.

The Zorginstituut had founded its decision to revise the reconciliation contribution for health insurer Zorg en Zekerheid on the fact that the first reconciliation contribution was calculated on the basis of erroneous reconciliation percentages for the so-called high cost compensation. The Zorginstituut argued, inter alia, that not revising an incorrect calculation, resulting in the receipt of a higher contribution than Zorg en Zekerheid was legally entitled to, should be considered unlawful State aid.

Upon request of the Court, the Commission, in its advice of 27 October 2014, clarified that its earlier decision to approve the above described risk reconciliation system was only applicable to the correct application of the system. An incorrect application of the system, causing insurers to receive a contribution that was too high, would have constituted unlawful State aid within the meaning of Article 107(1) TFEU, and Article 108(3) TFEU, because it would not have qualified as a service of general economic interest. The fact that the too high compensations were caused by a miscalculation of the aid provider, did not affect the unlawfulness of the aid. Zorg en Zekerheid could not rely on the principle of protection of legitimate expectations.

Zorg en Zekerheid relied on the principle of protection of legitimate expectations. In that regard, it stated that the procedure concerning the reconciliation contribution had been approved by the Commission and that such contribution had been granted following the approved procedure. Moreover, and given that the reconciliation contribution had been set three times (whether or not temporally) before the fault was discovered, the fault had not been easy to find. Zorg en Zekerheid therefore could not have known that there was a fault and therefore had the right to expect that the earlier decision of the reconciliation contribution had been correct.

Remedy(ies) sought

Other remedy sought

A preliminary ruling from the CJEU, and to quash the decision of the public authority to revise the reconciliation contribution

Outcome of the case

Conclusions adopted by the national court

The Court contended that the approval by the Commission of the risk reconciliation system (by decision of 3 May 2005) could only be regarded as relating to the correct application of the system. An incorrect application thereof as a result of a calculation error attributable to the provider was not covered. This meant that, insofar as Zorg en Zekerheid had been granted a reconciliation contribution that was too high, this did not comply with Article 108 TFEU, meaning that it could not successfully rely on a legitimate expectation of the legality of the aid. This could only be different if there were exceptional circumstances, for which there was no evidence in this case.

The Court considered that the Commission's contention that, insofar as Zorg en Zekerheid had been awarded a reconciliation contribution that was too high, this had not been done in accordance with Article 108 TFEU. Article 108(3) TFEU stipulates that a Member State may not implement aid measures that are incompatible with Article 107 TFEU. In line with this, the Member State was obliged, on the basis of that provision, to recover aid already granted but incompatible with Article 107 TFEU. Article 108(3) TFEU had direct effect, meaning that the obligation laid down in Article 108(3) TFEU also applied to administrative authorities. The Court ruled that thus, the legal basis for the Netherlands to recover the unlawful aid was a given. When the competence of the Netherlands for the recovery was a given pursuant to Union law, the execution of such power should take place in accordance with national law and by the public authority to which such competence was attributed by national law.

The Court declared the appeal unfounded.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-630/11 P to C-633/11 P, HGA Srl and Others (C-630/11 P), Regione autonoma della Sardegna (C-631/11 P), Timsas srl (C-632/11 P) and Grand Hotel Abi d'Oru SpA (C-633/11 P) v European Commission (2013) ECLI:EU:C:2013:387
- C-599/13, Somalische Vereniging Amsterdam en Omgeving (Somvao) v Staatssecretaris van Veiligheid en Justitie (2014) ECLI:EU:C:2014:2462
- 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (1982) ECLI:EU:C:1982:335
- C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic (1991) ECLI:EU:C:1991:440
- C-174/02, Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën (2005) ECLI:EU:C:2005:10
- C-103/88, Fratelli Costanzo SpA v Comune di Milano (1989) ECLI:EU:C:1989:256
- C-198/01, Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato (2003) ECLI:EU:C:2003:430

National case law:
- ABRvS 24 December 2008 ECLI:NL:RVS:2008:BG8290
- ABRvS 11 January 2006 ECLI:NL:RVS:2006:AU9415

√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission decision of 3 May 2005 (C(2005)1329fin)

Cooperation with the EU institutions

The national court sent a request for information to the Commission (http://ec.europa.eu/competition/court/raad_van_state_nl.pdf)

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary NL8

Date

06/01/2019

Case identifiers

Member State

Netherlands

Court which adopted the ruling (national language)

College van Beroep voor het bedrijfsleven

Court which adopted the ruling (English)

Administrative Court for Trade and Industry

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Dutch

Hyperlink to ruling

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CBB:2016:210

Case reference

ECLI:NL:CBB:2016:210

Procedural context of the case

By decisions of 20 February 2013, the State Secretary for Economic Affairs, Agriculture and Innovation (hereinafter: 'State Secretary') awarded a subsidy at a maximum of EUR 11,397.56 to each of the plaintiffs. By decisions of 16 October 2013 (the so-called primary decisions), the State Secretary changed the decisions of 20 February 2013 into a subsidy complying with the *de minimis* conditions and granted a maximum of EUR 7,500 over three years to each of the plaintiffs. The plaintiffs appealed to the State Secretary against the primary decisions. By decisions of 1 May 2014 (the contested decisions), the State Secretary declared the objections of the plaintiffs unfounded. On 5 February 2015, the State Secretary provided these decisions with a further, modified motivation. The plaintiffs appealed against the contested decisions to the Court.

In the case at hand, the Court re-opened the investigation in the case to submit questions to the Commission.

After receipt of the Commission's answers, the Court found that according to the answers, the State Secretary had not notified the Commission, in accordance with Article 108(3) TFEU, contrary to what he had stated in the contested decisions. The Court therefore declared the claims of the plaintiffs partly founded and annulled the contested decisions because of conflict with principles of general administrative law (the so-called principles of motivation, due diligence and fair play, ruling ECLI:NL:CBB:2017:412).

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

04/08/2016

Language

Dutch

Headnote

In this ruling, the Court considered the granting of a subsidy subject to the prior approval by the Commission, which was later changed into a subsidy complying with the *de minimis* conditions. The Court re-opened the investigation and submitted questions to the Commission.

Parties

Names of the parties to the action

A (V.o.f.); B; C (anonymised)

Versus

De staatssecretaris van Economische Zaken

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

A - Agriculture, forestry and fishing

Preservation of sheep herds consisting of rare breeds

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

By Regulation of the State Secretary of 18 July 2012, No. 282709, amending the Regulation on LNV subsidies (subsidy for certain sheep herds with rare breeds) (hereinafter: 'Regulation'), a new subsidy scheme for the exploitation of certain sheep herds had been included in the Regulation on LNV subsidies. By decisions of 20 February 2013, the State Secretary approved the subsidy applications of the plaintiffs and granted a maximum of EUR 11,997.56 to each of them. The decisions provided that the subsidy constituted State aid, meaning that the Commission must approve the Regulation, that such approval was not yet given and that plaintiffs would receive the subsidy as soon as the Commission had approved the Regulation. The State Secretary subsequently informed the plaintiffs that the Commission had not approved the Regulation and that it could not pay the subsidy as that would constitute unlawful State aid. In addition, the State Secretary changed the decisions of 20 February 2013 into a subsidy complying with the de-minimis rules, granting each plaintiff a subsidy of a maximum of EUR 7,500 over three years.

On 19 February 2016, the Court closed the investigation in these cases at the hearing. The Court subsequently reopened the investigation and decided to ask questions to the Commission. The questions were attached to the ruling.

Remedy(ies) sought

Other remedy sought

The plaintiffs seek repair of the decision of the defendant to withdraw a granted subsidy and cut the subsidy to an amount that falls within the requirements of *de minimis* conditions.

Outcome of the case

Conclusions adopted by the national court

The Court was of the opinion that the investigation is not complete and reopens the investigation on the basis of the Dutch General Administrative Law Act. More specifically, the Court found that a number of points concerning the notification of the Regulation to the Commission remained unclear. With reference to the Commission notice on the enforcement of State aid rules by national courts (2009/C 85/01), the Court submitted questions to the Commission. Upon receipt of the Commission's answers the Court will decide on the continuation of the case.

The questions to the Commission are attached to the case, and are as follows:

Question 1:
Is the Regulation, and more specifically the subsidy granted to plaintiffs on the basis of the Regulation, to contribute to the conservation of certain rare sheep breeds and the preservation of scaled sheep herds as part of Dutch cultural heritage, in the opinion of the Commission an aid measure that falls under Articles 107 and 108 TFEU?

Question 2:
When did the Commission receive the notification of the Regulation of the Dutch Government under Article 108(3) TFEU?

Question 3:
What is the Commission decision on the Regulation notified by the Netherlands? When did the Commission take and publish its decision? How was this decision published? The Court would like to receive a copy of the decision.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The Court re-opened the investigation in this case, asked questions to the Commission and adjourned any further judgment.

Difficulties referred to by the national court in deciding the case (optional)

The Court was of the opinion that the investigation was not complete and reopened the investigation. With reference to the Commission notice on the enforcement of State aid rules by the national courts (2009/C 85/01), the Court submitted questions to the Commission, to clarify if the subsidy scheme and the subsidy granted under the scheme constituted State aid within the meaning of Articles 107 and 108 TFEU, the timing of the notification of the subsidy scheme and information on the Commission decision in this regard. In this regard, the Court noted the following issues. The State Secretary had opted for the State aid scheme (the Regulation) to enter into force in anticipation of approval by the Commission. Furthermore, the State Secretary already granted subsidy under the Regulation to the plaintiffs, albeit under the condition of explicit approval of the Commission. Nevertheless, it followed from the Explanatory Memorandum to the General Administrative Law Act, specifically regarding subsidies, that subsidies may not be provisional or informal and that the administrative authority already enters into a financial obligation the moment it grants a subsidy and not by the subsequent formal confirmation. The Court therefore had to answer, inter alia, the question whether the State Secretary had already implemented the Regulation before the notification procedure at the Commission had led to a final decision and what the possible consequences were for the plaintiffs under the Regulation.

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission Notice on the enforcement of State aid rules by the national courts, 2009/C 85/01, OJ C 85, 9.4.2009

Cooperation with the EU institutions

The national court sent a request for information / opinion to the Commission (no hyperlink available)

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

20.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Rechtbank Rotterdam	Rotterdam District Court	Lower court (civil/commercial)	ECLI:NL:RBROT:2007:AZ6904	24/01/2007	Private enforcement	Other remedy imposed	The Court rules that the guarantee in this case qualifies as a State aid measure as referred to in Article 87(1) of the EC Treaty (current Article 107(1) TFEU). As a result, the guarantee should have been notified to the Commission as referred to in Article 88(3) of the EC Treaty (current Article 108(3) TFEU). Now that this has not been done, the guarantee is null and void pursuant to Section 3:40 of the Dutch Civil Code.		
Rechtbank Rotterdam	Rotterdam District Court	Second to last instance court (administrative)	ECLI:NL:RBROT:2007:BA5115	12/03/2007	Private enforcement	None - Claim rejected	The case concerns the granting of licenses for broadcasting in their area on frequencies reserved for the public broadcaster. The plaintiff (an association of commercial radio providers) argued that the defendant did not explain adequately why the awarding of frequencies to a (local) public broadcaster should not be regarded as unlawful State aid. The Court rules that unlike a commercial radio broadcaster, a local public radio broadcaster has a public task assigned by law. The fact that a local public radio broadcaster is targeting the same audience as the commercial one, and its operating costs are partly financed by advertising revenue, does not diminish this fact. The Court therefore concludes that there was no obligation for the allocation of frequencies to be notified to the Commission.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2007:BA9838	18/07/2007	Private enforcement	None - Claim rejected	The plaintiffs argue that since it is not clear whether the loans secured and the subsidy granted constitute State aid, the exemption and planning permission granted for the renovation should not have been provided. The Court considers that while the loans and subsidy have facilitated the feasibility of the building plan, the building plan does not depend on them. Therefore, regardless of whether the aforementioned loans and subsidy constitute State aid, the Court does not see a reason to annul the exemption and planning permission.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2007:BB4338	26/09/2007	Private enforcement	Other remedy imposed	The Court observes that the municipal council did not provide insight into the purposes for which the contributions for urban and village renewal will be used. Additionally, the sale of municipal land did not take place *via* an unconditional bidding procedure. In view of this, as well as taking into account the fact that a valuation of these lands did not take place before, but after the sales negotiations, the Court considers that the Commission Notice (on State aid elements in the sale of land and buildings by public authorities) was not complied with. The Court rules that a presumption of State aid cannot therefore be excluded and that the financial feasibility of the plan has not been made sufficiently transparent. The Court therefore annuls the approval of the contributions.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2007:BB6760	19/10/2007	Private enforcement	None - Claim rejected	The case concerned permission for the use of frequency space for commercial radio broadcasting and the fixing of implementation and supervision fees. It was claimed that charging a higher fee to plaintiffs was related to the amount of supervision being required, meaning there was an objective justification for the difference in pricing. The Court concluded there was no State aid within the meaning of Article 87(1) of the EC Treaty (current Article 107(1) TFEU). After all, the measure was traceable to an objective difference in work performed and not the result of financial support granted by the Minister to the public service broadcaster.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2007:BB7794	14/11/2007	Private enforcement	None - Claim rejected	The plan at issue provides for the development of a business park. According to the Court, the documents and the proceedings have shown that the sale of the plots has not started yet. According to the Court, although it cannot be ruled out that the municipal council may perform or omit acts in the future, which could lead to unlawful State aid, the Court does not see grounds for the opinion that the municipal reservations and expenditures at present give rise to a presumption of State aid contrary to Article 87 of the EC Treaty (current Article 107 TFEU). The case brought forward therefore does not lead to the conclusion that the financial feasibility of the plan should have been doubted.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2007:BC0537	19/12/2007	Private enforcement	Other remedy imposed	The case concerns the refusal to authorise a foundation for a cross-border housing project. The Court refers a question to the ECJ (current CJEU) on whether the fact that a Member State makes financial resources available to certain undertakings as referred to in Article 86(2) of the EC Treaty (current Article 106(2)) entails the need to delimit their activities on a territorial scale, in order to prevent such financial resources from becoming unlawful State aid and to prevent the undertakings from competing under non-competitive market conditions in another Member State.	Court refers a request for a preliminary ruling to the ECJ (current CJEU).	
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2008:BC1932	15/01/2008	Private enforcement	None - Claim rejected	The Dutch Competition Authority held that the Dutch Competition Act cannot be applied to the issuing of land referred to in the complaint, due to the legal provisions that allow the Commission to act against Member States concerning the granting of State aid. The Court rejects this notion that, due to the role of the Commission in relation to State aid, the activities of governmental bodies that are regarded as providing financial advantages or granting State aid, are not subject to supervision under the Dutch Competition Act.		
Gerechtshof 's-Gravenhage	s-Gravenhage Court of Appeal	Second to last instance court (civil/commercial)	ECLI:NL:GHSGR:2008:BD6256	05/06/2008	Private enforcement	None - Claim rejected	The Court finds that the omission of an initially proposed levy does not constitute State aid. According to the Court, the State is legally obliged to take measures, if necessary, to promote or safeguard effective competition between the operators that compete with each other on the relevant market. It does not follow from this		

							that there is a specific obligation on the State to impose an additional levy. The omission of an initially planned additional levy, therefore, cannot be regarded as State aid prohibited by Article 87(1) of the EC Treaty (current Article 107(1) TFEU), also taking into account that it is not immediately apparent in this case that an additional levy is the only measure to maintain or achieve competition.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2008:BD3598	11/06/2008	Private enforcement	Other remedy imposed	The Court concludes that the contribution at issue must be regarded as State aid within the meaning of Article 87 of the EC Treaty (current Article 107 TFEU), and that at the time of the adoption of the contested decision, the defendants were not entitled to derive legitimate expectations from the 1994 Communication that the Commission would not consider a government contribution to the extension of the runway as aid that required notification. In the Court's view, the defendants should therefore have notified the planned granting of State aid, or have approached the Commission in order to obtain assurance that notification was not necessary. By failing to do so, it has acted in conflict with the obligation under Article 88(3) of the EC Treaty (current Article 108(3) TFEU). The Court therefore annuls the decision of the defendant.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2008:BD8217	08/07/2008	Private enforcement	None - Claim rejected	The Commission established in its decision of 28 November 2001, that the regulatory energy tax, as applied from 1 January 2000, did not constitute State aid within the meaning of the EC Treaty. In a later decision of 11 December 2002, following the notification of a change in the regulatory energy taxation as of 1 January 2003, the Commission decided that the amendment submitted was a system change, which led the tax to constitute State aid. According to the Court, the conclusion from these decisions cannot be anything other than that the regulatory energy tax did not constitute State aid within the meaning of the EC Treaty in the period from 1 January 2000 to 31 December 2002.		
Gerechtshof 's-Gravenhage	s-Gravenhage Court of Appeal	Second to last instance court (civil/commercial)	ECLI:NL:GHSGR:2008:BD6981	10/07/2008	Private enforcement	Other remedy imposed	The case concerned a guarantee provided by the municipality. The Court considered the MEIP, the restoring of the situation prior to unlawful State aid and the legitimate expectation of the lawfulness of State aid, and confirmed the ruling of the lower court that the guarantee provided is null and void.		
Gerechtshof 's-Gravenhage	s-Gravenhage Court of Appeal	Second to last instance court (civil/commercial)	ECLI:NL:GHSGR:2008:BD7068	17/07/2008	Private enforcement	None - Claim rejected	The plaintiffs allege that an air passenger tax constitutes unlawful State aid within the meaning of Articles 87 and 88 of the EC Treaty (current Articles 107 and 108 TFEU) because transfer passengers are exempt from this tax. The Court rules that the measure is of general application, which does not specifically concern the operator of Schiphol airport or the airlines flying to it, and that the prevention of double taxation is an objective reason that can justify exempting transfer passengers from the tax. Furthermore, the Court is of the opinion that the airlines flying from Schiphol are not favoured compared to Ryanair, since Ryanair does not transport transfer passengers. The conclusion is that it cannot be assumed that exempting transfer passengers from the tax constitutes unlawful State aid.		
Rechtbank Rotterdam	Rotterdam District Court	Second to last instance court (administrative)	ECLI:NL:RBROT:2008:BM8038	07/10/2008	Private enforcement	None - Claim rejected	The plaintiff argued that, with regard to frequency space, the expanded license for long-term right of use which represents a significant market value without having to pay market-based remuneration is contrary to Article 87 of the EC Treaty (current Article 107 TFEU). Moreover, it notes that this aid has not been notified to the Commission in accordance with Article 88(3) of the EC Treaty (current Article 108(3) TFEU). The Court concludes that the expanded license provides for national coverage and the object of the license has not been amended. In view of that, there is no question of the granting of any unlawful State aid.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2008:BG7753	12/12/2008	Private enforcement	None - Claim rejected	The plaintiff argued that the concession in question constituted a breach of the rules on the granting of State aid, while the defendant stated that the concession decision did not constitute aid because the operating contribution was no more than a compensation for the performance of services of general economic interest. The Court ruled that the Altmark conditions as set by the ECJ (current CJEU) have been fulfilled and the measure can thus not be considered as constituting State aid.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2009:BH2632	14/01/2009	Private enforcement	None - Claim rejected	The plaintiff argued that the reimbursement of costs incurred by the State in the transition of government personnel to a private-law organisation must be regarded as State aid pursuant to Article 87(1) of the EC Treaty (current Article 107(1) TFEU). Moreover, the plaintiff claimed that the levies involved constituted a form of unlawful - 'negative' - State aid, because imposing them leads to a distortion of competition. The Court ruled against these arguments, seeing as benefits for the State that are financed by undertakings do not constitute State aid, and the imposition of the levies does not confer an advantage on undertakings. Lastly, the levy is exclusively intended for the reimbursement of the transition costs, and there is no 'compelling link' between the levy and the aid.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2009:BH0994	14/01/2009	Private enforcement	None - Claim rejected	The case concerned a levy for the fund for food safety in the livestock and meat sector. The Court states that it must be assumed that only advantages granted directly or indirectly through State resources can be regarded as State aid within the meaning of Article 87(1) of the EC Treaty (current Article 107(1) TFEU). In this case, the Court ruled that the advantage cannot be considered to be financed through State resources. The costs that are (partly) financed through State resources are the costs of special provisions that have to be made in connection with the legal and staff-related transition of inspection staff from the Ministry to a private-law body. In the opinion of the Court, the benefits granted to the entrepreneurs concerned are not to such an extent connected to these special provisions that it can be said that these benefits are paid directly or indirectly through State resources.		
Rechtbank Rotterdam	Rotterdam District Court	Second to last instance court (administrative)	ECLI:NL:RBROT:2009:BH1202	26/01/2009	Private enforcement	None - Claim rejected	The case concerned the renewal of permits for GSMs. The plaintiff argued that, since licence- holders have to pay a much lower amount for the extension than their market value, there is a violation of Article 87 of the EC Treaty (current Article 107 TFEU). However, the Court rules that as the measure reflects the market		

							value, there can be no conflict with Article 87 of the EC Treaty (current Article 107 TFEU).		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2009:BI7245	10/06/2009	Private enforcement	Other remedy imposed	The plaintiffs claim that the financial feasibility of the plan is insufficiently guaranteed. To that end, they argue that a presumption of unlawful State aid is justified, since the sale of the land does not amount to the value of those grounds. The Court rules that the appeal ground that not sufficient insight into the financial feasibility of the plan is provided succeeds, and annuls the decision of the defendant.		
Rechtbank Arnhem	Arnhem District Court	Second to last instance court (administrative)	ECLI:NL:RBARN:2009:BJ1171	22/06/2009	Private enforcement	None - Claim rejected	The Court considered that the aid measures laid down in the relevant Decree were notified to the Commission. By decision of 25 July 2001, the Commission authorised the aid measure (N 597 / 1998- Netherlands). It does not accept the plaintiff's claim that the deductions would be in violation of the Commission decision, from which it follows that the remuneration for non-market-based costs must be paid out of general funds. Therefore, according to the Court, it follows that the aid intended to compensate for stranded costs cannot be financed by taxes on electricity transported from one Member State to another, nor from charges connected with the distance between the producer and the buyer. However, it cannot be concluded that this principle also applies to subsidies that have been granted under another scheme and that are deducted from the stranded costs.		
Hoge Raad	Supreme Court	Last instance court (civil/commercial)	ECLI:NL:HR:2009:BI3451	04/09/2009	Private enforcement	None - Claim rejected	The Court addresses the question of whether exempting transfer passengers from the tax constitutes a State aid measure as referred to in Article 87(1) of the EC Treaty (current Article 107(1) TFEU). For the time being, the Court considers it has not been argued sufficiently plausibly that the consequences of the exemption constitute unmistakable and unauthorised preferential treatment.		
Rechtbank Arnhem	Arnhem District Court	Second to last instance court (administrative)	ECLI:NL:RBARN:2009:BK6483	08/12/2009	Private enforcement	Other remedy imposed	The case concerned contributions for the operation and establishment of a sports building. In the Court's view, the fact that the contract was awarded to the lowest bidder through a restricted EU tender procedure does not mean that by definition there is no unlawful State aid as referred to in Article 87(1) of the EC Treaty (current Article 107(1) TFEU). In order to obtain a definitive answer as to whether there is unauthorised State aid, the measure should have been notified to the Commission. Therefore, the defendant will have to - with due regard to the considerations in this judgment - take a new decision on the contract.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2010:BK9744	11/01/2010	Private enforcement	None - Claim rejected	The Court notes that the levy is relevant only if there is an overriding destination with the aid that is financed with it, meaning it is not plausible that the Commission would have taken into account the (increase of) the levy but not the support measures to be financed. Moreover, the questions posed by the Commission do not support the presumption that the Commission did not fully approve the Regulation. The foregoing cannot lead to any conclusion other than that, the aid measures of which the Regulation forms an integral part, did not have to be suspended, since that obligation was terminated by the approval from the Commission.		
Gerechtshof 's-Gravenhage	s-Gravenhage Court of Appeal	Second to last instance court (civil/commercial)	ECLI:NL:GHSGR:2010:BL7630	18/02/2010	Private enforcement	None - Claim rejected	The plaintiff submitted a complaint to the Commission on 6 July 2009 stating that the municipality granted unlawful State aid by concluding a purchase agreement. The Dutch authorities sent a response to this complaint on 13 November 2009, by which they claimed that there was no question of State aid. The Commission at the time of the ruling had not yet taken a position. The Court is of the opinion that it was not plausible that the transaction involved State aid, in particular because there were insufficient indications that a party has been favoured in any way.		
Hoge Raad	Supreme Court	Last instance court (civil/commercial)	ECLI:NL:HR:2010:BL4082	28/05/2010	Private enforcement	Other remedy imposed	The Court finds there to be State aid contrary to Article 108(3) TFEU consisting of the provision of a guarantee to a lender with the result that the borrower was able to obtain from that lender a credit which would not have been made available to him under normal market conditions and rules that national judicial authorities should in principle grant a request for a refund of unlawfully granted aid. The Court refers a question to the CJEU on whether the national court in the context of its obligation to reverse the effects of that unlawful aid measure, is empowered to reverse the guarantee, even if the latter does not also lead to the annulment of the credit granted under the guarantee.	Court refers a request for a preliminary ruling to the CJEU.	
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2010:BN1097	14/07/2010	Private enforcement	None - Claim rejected	The plaintiffs claim that a former library site was sold by the municipality at a price below its market value. According to the plaintiffs, the sale price was not based on an independent valuation and there was no public bidding procedure, which gives rise to a presumption of State aid. Moreover, the transaction was not notified to the Commission. In addition, the subsidies granted - which might also constitute State aid according to the plaintiffs - were not notified to the Commission either. According to the Court, the question of whether there may be unlawful State aid must be assessed in the context of the feasibility of a zoning plan. Whether the plan is financially feasible within the planning period, depends on whether the beneficiary has sufficient financial means to bear costs itself in the event of the possible recovery of the aid. This Court rules that in this case the financial feasibility of the plan does not depend on the difference in price and the subsidy that was granted, meaning that it can reasonably be assumed the financial feasibility of the plan is guaranteed.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2010:BN5472	20/07/2010	Private enforcement	None - Claim rejected	The case concerned fees for veterinary and hygienic matters. The plaintiff argued State aid was involved, as companies with a small production were favoured through lower tariffs. The Court points out that the lower rates referred to are not part of the dispute. Moreover, the Court considers it was insufficiently substantiated that the fact that these companies are subject to lower rates under certain circumstances has led to higher tariffs for the plaintiffs.		

Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2010:BN4923	25/08/2010	Private enforcement	None - Claim rejected	The Court observes that the measure was notified to the Commission, which concluded that there is a State aid measure. However, it considered the aid to be compatible with the internal market (because the conditions laid down in the EU guidelines on State aid for environmental protection were met), and the measure was approved for ten years. According to the Court, it has not been shown that the beneficiary of the aid would no longer meet the requirements set for the granting of the subsidy and would no longer be covered by the approval granted by the Commission.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2010:BO0270	13/10/2010	Private enforcement	Other remedy imposed	The case concerns the granting of additional tasks to the Dutch Public Broadcasting Foundation. The Court references the Commission's conclusion that public funding of the public service broadcasting system in the Netherlands is considered to be existing aid, since this funding is based on the principle of the Television Decree that preceded the entry into force of the EEC Treaty, and the legal framework introduced by that Decree has not been substantially amended. In doing so, the Commission also found that the addition of incidental tasks are only considered as another way for public service broadcasters to comply with their original task. In view of this, the Court rules that approval of an incidental task cannot be regarded as new aid.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2010:BO2687	03/11/2010	Private enforcement	None - Claim rejected	The Court rules that the proceedings do not give rise to the opinion that there is a chance that the funds made available by the municipality to the pool operator will affect trade between Member States, and that this opinion is supported by the Commission decision of 12 January 2001, SG (2001) D / 285046, N 258/00, Germany (Recreation Pool Dorsten). The planned swimming pool is mainly aimed at a local target group, and it has not been shown that the planned pool is intended to attract visitors from other Member States. In view of the above, the Court rules there was no reason to notify the aid measure to the Commission.		
Rechtbank Utrecht	Utrecht District Court	Second to last instance court (administrative)	ECLI:NL:RBUTR:2010:BO5098	26/11/2010	Private enforcement	Other remedy imposed	The Court rules that it is not competent to decide independently on whether support provided for the years 2008 and 2009 - which deviates from the support assessed by the Commission - meets the SGEI criteria. The assessment of whether an aid measure complies with the SGEI criteria is reserved to the Commission (and the CJEU). The Court understands from the Commission's assessment that the support is compatible with the SGEI criteria and therefore with the internal market only with additional commitments and measures. It follows that the Court has to assume that the support, as implemented in 2008 and 2009, constitutes State aid within the meaning of Article 107 TFEU and should therefore have been notified.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2010:BO7312	15/12/2010	Private enforcement	None - Claim rejected	The plaintiffs argue that the financial feasibility of the plan (which aims, *inter alia*, to enable the construction of a gas compressor station) at issue is not sufficiently guaranteed, and that land was acquired at rates that were not in conformity with the market, which is in conflict with the prohibition on State aid laid down in the EC Treaty. The plaintiffs also argued that municipal and provincial authorities cooperated on a change in the plan, as a result of which an advantage was gained by one party over other companies. Lastly, it was claimed that the municipality had not exercised its land policy instruments. A complaint was filed regarding this with the Commission. The Court takes into account that the Commission, in response to the complaint about State aid, stated that there was insufficient reason to investigate a possible infringement of State aid rules. In view of this, the Court finds that there is no doubt as to the financial feasibility of the plan.		
Rechtbank Amsterdam	Amsterdam District Court	Second to last instance court (administrative)	ECLI:NL:RBAMS:2010:BO8591	24/12/2010	Private enforcement	Other remedy imposed	The Court concludes that the decisions of the defendant (Dutch Public Broadcasting Foundation) granting approval for certain television channels constitute existing aid. However, the Court rules that the defendant must investigate the negative effects of its decisions on the market and market parties. In the Court's opinion, it follows from the Commission decision that the defendant will have to carry out a substantive market test that is not limited to merely an assessment of the views of market parties submitted in the context of this procedure, and orders the defendant to come to a new decision.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2011:BP2816	02/02/2011	Private enforcement	None - Claim rejected	The plaintiff claims that if there is no recalculation of the compulsory deduction, they are being cut off from the normative contribution more than the income from the compulsory deduction justifies. Moreover, the plaintiff asserts that other insurers are cut less on the normative contribution than would be justified on the basis of the income from the compulsory deduction, leading to State aid. Therefore, it is claimed that the amendment of the risk equalisation scheme, which includes the compulsory deduction, should have been notified to the Commission (as the scheme was). The Court notes that recalculation can be regarded as a temporary ex post correction mechanism - which the Commission, when assessing the aid measure, considered as temporary. The abolition of this cost calculation was therefore part of the aid measure as approved by the Commission and can be regarded as existing aid. The Court rules that the expiry of the cost calculation did not have to be notified to the Commission.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2011:BP6917	16/02/2011	Private enforcement	Other remedy imposed	In this case, a notified subsidy was stacked on another scheme which was supposed to have expired (and this was how it was presented when notified to the Commission), meaning the total benefits would have exceeded the support ceiling. The Court rules that in such cases, the benefits from the scheme must be deducted from the notified subsidy to prevent it from constituting State aid prohibited within the meaning of Article 107(1) TFEU.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2011:BP6893	23/02/2011	Private enforcement	None - Claim rejected	The plaintiffs objected to a Regulation which imposed levies on them in connection with the trade in vegetables and / or fruit. The plaintiffs argue that the levies are to be regarded as aid financed by parafiscal charges, which are also imposed on products imported from other Member States without any compensation in return and that this aid was wrongly not notified to the Commission. In the opinion of the		

							Court, there are no starting points for the opinion that the Regulation contains an aid measure. With the proceeds from levy under the Regulation, only the general organisation costs of the Product Board are financed and there is no financing of activities of companies as a result of which the competition is distorted or threatens to be distorted. The levy is therefore not spent on aid within the meaning of Article 107 TFEU.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2011:BP5454	23/02/2011	Private enforcement	None - Claim rejected	The case concerned the recalculation and determination of the equalisation contribution for the Health Insurance Act by the defendant. The Court rules that it cannot be inferred from the Commission decision that the Commission intended to grant approval to the scheme only insofar as the actual loss of the insurers is fully compensated. There is therefore no ground for the conclusion that this measure (which may not compensate the actual losses for a certain year) is in conflict with State aid rules.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2011:BP7546	04/03/2011	Private enforcement	None - Claim rejected	The case concerned the use of proceeds from the auction of electricity transported across national borders. The Court applied State aid rules in the energy sector and ruled that no State aid was involved because objective criteria were applied to calculate the loss that would be suffered from the purchase of an electricity exchange while the loss would be compensated by the auction revenues of cross-border electricity.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2011:BP7722	11/03/2011	Private enforcement	None - Claim rejected	The case concerned levies for the fund for food safety in the livestock and meat sector. With regard to the levies imposed, the plaintiff argues that the approval of the Commission was necessary, since there is State aid, because the Government (or legal entities to be equated with the Government) distort the market by imposing the levies. According to the plaintiffs, Dutch butchers are saddled with extra costs and are thus in a worse position than butchers elsewhere in the EU. This is 'negative state support'. In addition, the plaintiff claims that a surcharge provides enrichment for the inspecting authorities and must therefore be regarded as State aid. The Court states that in the event that State costs are paid by companies - as in the present case - there is no question of State aid, since this does not involve an advantage stemming from the State or through State resources. The Court also dismisses the claim that the measure constitutes a form of unlawful - 'negative' - State aid, because imposing it leads to a distortion of competition. With regard to the second argument of the plaintiff, the Court considers that there is only an unlawful aid measure if there is an 'overriding link' between the levy and the surcharge. As the levy in this case is exclusively intended for reimbursement of the transition costs, this cannot be considered to be the case.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2011:BQ1077	13/04/2011	Private enforcement	None - Claim rejected	With regard to the argument by the plaintiffs that State aid may be involved in the sale of municipal land to a housing foundation laid down in the contested agreement, the Court considers that the administrative judge under Dutch law is not the competent judge to assess the lawfulness of a cooperation agreement. The cooperation agreement can therefore only be dealt with indirectly, in the context of the question as to whether State aid may be an impediment to the financial-economic feasibility of the plan. The Court concludes that the evidence does not give rise to the opinion that it should reasonably have been realised in advance that the plan was not financially feasible.		
Rechtbank 's-Hertogenbosch	s-Hertogenbosch District Court	Second to last instance court (administrative)	ECLI:NL:RBSHE:2011:BQ2331	22/04/2011	Private enforcement	Other remedy imposed	The Court states that the question of whether the defendant has granted financial support in violation of the provisions of Article 107(1) TFEU can only be considered in the context of whether it is sufficiently guaranteed that the building plan is financially feasible. The Court finds that the defendant in the contested decision has not satisfactorily shown that the plan would still be financially feasible if the State aid were to be annulled. The appeal succeeds and the Court stipulates that the defendant must take a new decision with due observance of what has been considered in this ruling.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2011:BQ2679	27/04/2011	Private enforcement	None - Claim rejected	The plaintiffs argue that unlawful State aid was granted, as the zoning plan will result in a financial advantage to another undertaking. Furthermore, the plaintiffs do not exclude the possibility of unlawful State aid due to the fact that the developer of the plan paid too low a price for land in the area. The Court considers that the measure is not financed by State resources, so there is no question of State aid that should have been notified to the Commission. Additionally, the Court rules that it is not plausible, even if the measure were found to have involved State aid, that it would constitute an amount which would have to be notified.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2011:BQ9692	29/06/2011	Private enforcement	None - Claim rejected	The plaintiffs claim that the province's guarantee must be regarded as unlawful State aid, without which the zoning plan cannot be realised. The Court notes that an argument that pertains to the feasibility of a zoning plan can only lead to the annulment of the contested decision if, and insofar as, the assertion leads to the conclusion that it should have been reasonably assumed in advance that the plan cannot be implemented within a period of ten years. In this case, the Court holds that there is no ground for the opinion that it should have been assumed that the financial feasibility of the plan would be insufficiently guaranteed in connection with possible aspects of State aid.		
Gerechtshof Leeuwarden	Leeuwarden Court of Appeal	Second to last instance court (civil/commercial)	ECLI:NL:GHLEE:2011:BR0389	05/07/2011	Private enforcement	Other remedy imposed; Interim measures to suspend the implementation of an unlawful aid	The case concerned the question of whether an agreement with the municipality with regard to the processing of household waste constituted State aid. The Court ruled that the measure must be notified to the Commission as unlawfully granted State aid in accordance with Commission Regulation (EC) No 794/2004 and further implementation must be suspended until the moment that the Commission has established that execution of the agreement is not impermissible in light of the provisions of Article 107 TFEU.		

Rechtbank 's-Gravenhage	s-Gravenhage District Court	Second to last instance court (administrative)	ECLI:NL:RBSGR:2011:BR4069	07/07/2011	Private enforcement	None - Claim rejected	The plaintiff claims that by levying a commuter tax on non-residents, a form of State aid is granted to the residents of the municipality. According to the Court, State aid as referred to in Article 107(1) TFEU concerns advantages that are provided to an enterprise and that are financed through State resources. The Court rules there is no question of this with regard to the commuter tax.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2011:BS8847	14/09/2011	Private enforcement	None - Claim rejected	The Court is of the opinion that the State Secretary has adequately implemented the Commission decision. According to the Court, the State had promised that the outcomes of the open consultation, namely the submitted views and the harmful effects of the proposed services on the market that they have put forward, will be weighed against the value of these services for society. This procedure was assessed and was found to be adequate to ensure that the new audio-visual services planned by the public broadcasters comply with the conditions set. Moreover, it did not follow from the Commission decision that the State Secretary was obliged to carry out his own market test.		
Rechtbank Roermond	Roermond District Court	Second to last instance court (administrative)	ECLI:NL:RBROE:2011:BT2450	16/09/2011	Private enforcement	None - Claim rejected	The Court is of the opinion that the construction of infrastructure cannot be regarded as State aid (even though a gas station benefits from it), since it fulfils a public task in optimising and securing the use of the motorway. The publicly funded infrastructure is in principle accessible to all potential users in a non-discriminatory manner. The fact that only the gas station is in a position to set up a service point does not mean that the public funding must be regarded as (unlawful) State aid.		
Rechtbank 's-Gravenhage	s-Gravenhage District Court	Second to last instance court (administrative)	ECLI:NL:RBSGR:2011:BT7119	28/09/2011	Private enforcement	None - Claim rejected	The case concerned the refusal to grant a subsidy due to conflict with the rules on State aid. The Court concludes that the defendant rightly took the view that awarding the full amount of the requested subsidy would constitute aid. Moreover, the defendant did not have to notify the Commission of the intention to grant the requested subsidy, as the scope of the subsidy adhered to the *de minimis* threshold.		
Gerechtshof Amsterdam	Amsterdam Court of Appeal	Second to last instance court (civil/commercial)	ECLI:NL:GHAMS:2011:BT8434	04/10/2011	Private enforcement	None - Claim rejected	The case concerned the claim that the municipality had granted State aid by making money available from public funds to build a (commercial) health centre and to rent it out. As a result, the municipality performs an economic activity and in this way enters into direct competition with the pharmacy (the plaintiff). Additionally, the plaintiff considers that the prohibition on State aid was violated because the rent that will be paid to the municipality does not reflect market value. The Court rules that it has not been satisfactorily argued that the measure does not reflect market value and therefore constitutes an aid measure that fulfils all of Article 107(1) TFEU's provisions and should have been notified to the Commission on the basis of Article 108(3) TFEU.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2011:BT7368	12/10/2011	Private enforcement	None - Claim rejected	The Court found that the financial feasibility of the project was sufficiently guaranteed. In this respect, it was taken into account that the plaintiff (the beneficiary of the building permit) had not stated during the entire procedure that the project would not go ahead if the financial support was not granted, or if unlawful State aid would be recovered. Upon request, the plaintiff confirmed at the hearing that the project will be carried out, even in the event that the financial support were recovered. Furthermore, it did not appear that the plaintiff would have insufficient resources for the implementation of the project.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2012:BV3215	08/02/2012	Private enforcement	None - Claim rejected	The plaintiffs doubt whether the plan is financially feasible. In this respect, they argue that the subsidies made available by the national government must be regarded as unlawful State aid. The defendants note that with regard to the operating subsidy, the Decree on the basis of which the subsidy was granted was found to constitute State aid compatible with the internal market by the Commission in 2007. Although the separate subsidy decision has been notified to the Commission and the Commission has not yet given a definite answer, the defendants therefore claim they assume that the Commission will not have any objections to the granted operating subsidy. The second subsidy concerns a one-off investment subsidy. The Court notes that this subsidy has been notified to the Commission. Even if this subsidy should have to be recovered, that would not mean that it would not be possible to implement the plan. In light of this, the Court rules that in this case it should not have reasonably been considered in advance that the plan is not financially feasible.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2012:BV5092	15/02/2012	Private enforcement	None - Claim rejected	The Court rules it is very doubtful that the plaintiff could directly appeal against the Commission decision that State aid is compatible with the internal market. The Court sees no reason to doubt the validity of the Commission decision, so that in this case there is no reason to refer a request for a preliminary ruling to the CJEU. The Court also concludes that the Dutch State is not obliged to suspend the existing measure until the procedure under Article 18 of the Procedural Regulation has been terminated.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2012:BV8841	15/02/2012	Private enforcement	None - Claim rejected	The case concerned the objections of the plaintiff against levies imposed on them. The Court states that even if a situation cannot be regarded as a "Pearle" exemption situation, all conditions under Article 107(1) TFEU must still be met for there to be State aid. In this case, these conditions have not been met. For example, it has not been shown that there is or may be a (threatened) distortion of competition or an unfavourable interfering with trade between Member States. Therefore, according to the Court, it has not yet emerged that there is an aid measure as referred to in Article 107 TFEU.		
Gerechtshof Leeuwarden	Leeuwarden Court of Appeal	Second to last instance court (civil/commercial)	ECLI:NL:GHLEE:2012:BW6167	15/05/2012	Private enforcement	None - Claim rejected	The case concerned a construction agreement between an undertaking and the municipality. The Court concludes it was not substantiated that two conditions - trade between Member States is adversely affected, and a distortion or threat of distortion of competition - for a successful invocation of unlawfulness because of conflict with Article 107(1) TFEU, were met. Thus, Court cannot establish that there is an obligation to notify to the Commission on the basis of Article 108(3) TFEU.		

College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2012:BW7946	06/06/2012	Private enforcement	None - Claim rejected	The Court rules that it has not been found that the grant of the exemption (on opening hour rules) constitutes State aid prohibited by Article 107 TFEU, since the plaintiff has not further substantiated its argument that an advantage was granted directly or indirectly with State resources.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2012:BW7642	06/06/2012	Private enforcement	Other remedy imposed	The plaintiffs argue that the plan is not feasible, since according to them the amount allocated for the relocation constitutes unlawful State aid. According to the plaintiffs, the relocation is not necessary and the amount allocated to it is too high. Furthermore, according to the plaintiffs, it is not substantiated on which basis the promised amount is based. The Court rules that an argument that pertains to the feasibility of a zoning plan can only lead to the annulment of the contested decision if and insofar as the assertion leads to the conclusion that it should have been reasonably assumed in advance that the zoning plan is not feasible. This condition cannot be considered to be met if it is shown that the State aid that has been or will be granted can be recovered. However, in this case it is plausible that the plan could not be implemented if the unlawful State aid would have to be recovered. The Court recommends that the measure be re-considered.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2012:BW9581	27/06/2012	Private enforcement	None - Claim rejected	The plaintiffs argue that if the land development costs are not recovered through the determination of an exploitation plan, there may be unlawful State aid. The Court did not find any evidence for the assessment that the measure would conflict with Article 107 TFEU. The Court thereby took into account that the measure was intended for the development of a nature and recreation area and that there is no evidence that there is or will be a favouring of companies.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2012:BX6991	13/09/2012	Private enforcement	None - Claim rejected	The plaintiff in this case requested the Court to order the defendant to either notify the aid to the Commission and, as soon as possible after the Commission decision, to take a new decision; or to take any action required to recover the aid, and take a new decision. In the opinion of the Court, to grant this request would be contrary to the task of the national court in accordance with CJEU case law. According to the Court, its task consisted of taking effective measures to eliminate the distortion of competition caused by non-notified aid pending the final decision by the Commission. Therefore, the Court ruled that the plaintiff's request could not be met.		
Hoge Raad	Supreme Court	Last instance court (civil/commercial)	ECLI:NL:HR:2013:BY0543	18/01/2013	Private enforcement	None - Claim rejected	The Court notes, in response to the arguments in the case regarding State aid, that the role of national courts is to ensure that measures are taken which lead to or contribute to restoring the competitive situation prior to the payment of the State aid in question. According to the Court, this means that, in the absence of less restrictive procedural measures, the court may proceed to annul the legal act whereby the State aid was granted. It therefore concludes that it cannot see why Article 108 TFEU would in principle oppose the pronouncement of partial nullity of a legal act, and that a single declaration that the (further) execution of the agreement in connection with State aid is unlawful cannot be considered as an appropriate measure leading to a restoration of the competitive situation prior to the payment of the relevant State aid. The Court therefore rejects the appeal.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2013:BY9933	30/01/2013	Private enforcement	None - Claim rejected	The case concerned the permission to provide training by a university. Based on the reply of the Commission to the Court's question, the Court concludes that the offering of education in this case cannot be regarded as an economic activity and that the university does not qualify as an undertaking within the meaning of Articles 101 and 107 TFEU. Thus, the Court rules that State aid rules do not apply and the measure does not need to be notified.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2013:BZ0794	06/02/2013	Private enforcement	None - Claim rejected	The case concerns a fund providing special project support to housing corporations. The Court considers that contrary to what the plaintiffs argue, it does not follow from the case law of the CJEU that, because there is a link between the tax decisions and the aid decisions, the interests of the plaintiffs (corporations) directly involved in the tax decisions are also directly involved in the aid decisions. It follows from the CJEU case law that only corporations which pay must be able to submit their State aid objections to the tax decisions to the Court.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2013:BZ1245	13/02/2013	Private enforcement	Other remedy imposed	The case concerned a subsidy for the recreation and tourism sector. The question in this case is whether granting a subsidy above the *de minimis* ceiling would result in State aid being granted. The Court rules that in view of the role of the Commission in enforcing State aid rules and the specific expertise at its disposal when assessing whether a State measure qualifies as State aid, the Commission should be asked for its opinion.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2013:BZ2265	25/02/2013	Private enforcement	None - Claim rejected	The case concerned the decision to expropriate securities and assets of limited liability companies. A number of plaintiffs argued that the expropriation order is in conflict with Article 108(3) TFEU and that the decision constitutes State aid within the meaning of Article 107 TFEU. According to the Court, the interests of the plaintiffs derive from their position as holders of securities issued by (or with the cooperation of) the banks, as representatives of the holders of such securities or as providers of loans to the banks. The Court rules that Article 108(3) TFEU clearly does not seek to protect the interests of holders of securities issued by or with the cooperation of an undertaking which was granted State aid, or of providers of loans to such an undertaking. Additionally, the Court sees no reason to refer questions to the CJEU on the applicability of State aid rules, as requested by the plaintiffs.		
Rechtbank Rotterdam	Rotterdam District Court	Second to last instance court (administrative)	ECLI:NL:RBROT:2013:BZ5824	28/03/2013	Private enforcement	Other remedy imposed	The Court submitted questions to the Commission because there was uncertainty about the applicability of, among other things, an exemption and SGEI rules with regard to a measure on inland waterway transport. Following the answers from the Commission, the Court concluded that neither is applicable in this case. Subsequently, the Court applied the Altmark criteria and came to the conclusion that not all criteria were met. The Court, for example, was of the opinion that it was sufficiently plausible that there was an effect on trade between Member States.		

							The Court therefore ruled that the measure should have been notified to the Commission and should not have already been implemented. The appeal was therefore declared well-founded and the contested decision by the lower court was annulled.		
Hoge Raad	Supreme Court	Last instance court (civil/commercial)	ECLI:NL:HR:2013:BY0539	26/04/2013	Private enforcement	Case sent back to the lower court for re-assessment	The measure at stake was a guarantee issued by the Rotterdam Port Authority to Residex which also benefitted Aerospace as that company had lent a sum of EUR 23 million to Residex. Rotterdam refused to uphold the guarantee claiming it was issued without being notified to the EC and therefore was null and void under Dutch civil law because of a breach of State aid rules. Following a CJEU preliminary ruling, the Supreme Court considers that it has to be examined whether the annulment of the guarantee is the most effective measure, and it should be considered whether there exist less far-reaching procedural measures to re-establish the competitive situation existing prior to the payment of the aid in question. The Supreme Court refers the case to the Court of Appeal which will have to decide who the actual beneficiary of the State aid is: Residex or Aerospace.	This judgment by the Supreme Court is a follow up to the CJEU ruling of 8 December 2011 (Residex, C-275/10). It is very rare that the Supreme Court refers requests for a preliminary ruling to the CJEU regarding State aid to the CJEU. The civil law consequences of a breach of State aid rules because of non-notification to the Commission are still being discussed before Dutch courts in 2018.	The subsequent ruling from the lower court is not available.
Gerechtshof Arnhem-Leeuwarden	Arnhem-Leeuwarden Court of Appeal	Second to last instance court (civil/commercial)	ECLI:NL:GHARL:2013:6675	03/09/2013	Private enforcement	None - Claim rejected	The plaintiffs claim that the compensation paid by a municipality for the collection of waste does not reflect market value, in the sense that this compensation is too high, and that it should therefore be regarded as unlawful State aid. The plaintiffs filed a complaint with the Commission in the course of 2006. The Court notes that the fact that the Commission investigated the measure, but did not deal with State aid implications, is an indication that there is no question of a violation of Article 107 TFEU. Furthermore, the Court is of the opinion that even if the municipality pays the undertaking a higher price than that for which the plaintiffs would be able to carry out exactly the same activities, that does not imply that an advantage is provided. After all, if the municipality had its own garbage collection service - with relatively expensive civil servants - that would mean the Government would carry out the task of collecting garbage for higher costs than a private company would ask for exclusively using employees paid the minimum wage.		
Gerechtshof 's-Hertogenbosch	s-Hertogenbosch Court of Appeal	Second to last instance court (civil/commercial)	ECLI:NL:GHSHE:2014:281	11/02/2014	Private enforcement	Other remedy imposed	The Court notes that the preliminary position of the Commission is known - that there appeared to be no State aid within the meaning of Article 107(1) TFEU. However, the Court demands more information from the plaintiff on its interaction (regarding a complaint) with the Commission. In case this is not provided, the Court indicates it will request information from the Commission.		
Rechtbank Den Haag	Den Haag District Court	Second to last instance court (administrative)	ECLI:NL:RBDHA:2014:6726	28/05/2014	Private enforcement	Other remedy imposed	The case concerns the plaintiff's request for a project subsidy. The Commission ruled that the successor of the subsidy scheme constituted State aid, but also considered that this scheme was compatible with the internal market. In view of this, the Court ruled that it cannot automatically be assumed that granting the project subsidy would constitute State aid, even though this concerns the previous subsidy scheme. In such circumstances, an administrative body needs to ask the Commission for informal advice (prior to a possible notification). The Court therefore instructs the defendant to take a new decision on its objection taking into account this ruling.		
Rechtbank Noord-Nederland	North-Netherlands District Court	Lower court (civil/commercial)	ECLI:NL:RBNNE:2014:2790	04/06/2014	Private enforcement	None - Claim rejected	According to the plaintiff, the low purchase price charged by the municipality for the sale of building sites and the other financial benefits constitute unlawful State aid. The Court is of the opinion that, even if there had been unlawful State aid in this case (which is not the case), the entire land transaction is not necessarily null and void, but that this nullity can (in some cases) be limited to the purchase price. In that case, there is at most a partial nullity of the purchase agreement (with regard to the agreed purchase price) and an obligation to pay the municipality, in order to reverse the consequences of unlawful State aid.		
Rechtbank Rotterdam	Rotterdam District Court	Second to last instance court (administrative)	ECLI:NL:RBROT:2014:7917	02/10/2014	Private enforcement	None - Claim rejected	The case concerned the distribution of licenses for frequency ranges through the procedure of auctioning. The plaintiff claimed that the reservation for newcomers in this regard constituted State aid. The Court rules that there is no unlawful State aid and finds in favour of the defendant, who had argued the reservation for new entrants is in the interests of promoting competition in the mobile communications market and explained why they distinguish between new entrants and existing players.		
Gerechtshof 's-Hertogenbosch	s-Hertogenbosch Court of Appeal	Second to last instance court (civil/commercial)	ECLI:NL:GHSHE:2015:540	17/02/2015	Private enforcement	Other remedy imposed	The dispute concerns whether State aid has been granted by government authorities, and it is known to the Court that a complaint was submitted to the Commission in the context of this case. The Court therefore requests information about the current state of affairs regarding the complaint.		
Rechtbank Noord-Nederland	North-Netherlands District Court	Lower court (civil/commercial)	ECLI:NL:RBNNE:2015:3300	01/07/2015	Private enforcement	Other remedy imposed	The Court ruled that the land transaction between these parties constitutes State aid. The agreed purchase price was assessed as not reflecting market value, and the argument that there was no aid because the price corresponded to full compensation for the avoidance of expropriation, was rejected. This judgment shows that paying full compensation for the prevention of expropriation does not constitute aid unless expropriation is actually in the offing if no amicable agreement is concluded. Regarding the further consequence of the finding of unlawful State aid, the Court gives the parties the opportunity to provide further explanations. It will have to be examined whether the purchase agreement is completely or partially invalid.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2016:201	03/02/2016	Private enforcement	None - Claim rejected	With regard to the zoning plan, the Court considers that the question of unlawful State aid is only indirectly relevant, in the context of the question of whether State aid may be an impediment to the financial-economic feasibility of the plan. This condition can be considered not to be met if it is plausibly argued that the State aid that has been or will be granted can be recovered. Additionally, the defendant should reasonably have realised in advance that the plan cannot be implemented		

							within the planning period in a way that no unlawful State aid is granted. The Court rules that is has not been plausibly argued that such circumstances arise in this case. The Court notes that in this context it is important that the mere circumstance that the developer should withdraw all or part of it in connection in case of a possible recovery of State aid would not mean that it will be impossible to realise the planned but not yet realised developments without unlawful State aid.		
Rechtbank Oost-Brabant	Oost-Brabant District Court	Second to last instance court (administrative)	ECLI:NL:RBOBR:2016:586	19/02/2016	Private enforcement	None - Claim rejected	The contested decision was the granting of a permit for the redevelopment of commercial spaces, residential units and the construction of public areas. The Court finds that, with regard to this decision, it is not plausible that funds were made available to a licensee or that they led to the making available of land to a holder of a license for a price other than a market price, which would also have paid by other potential buyers. The Court states that insofar as the plaintiffs nonetheless consider that there is unlawful State aid which should have been notified to the Commission in advance on the grounds of Articles 107 and 108 TFEU, the plaintiffs are of course free to plead this in the context of a procedure before the civil courts. However, this cannot lead to the annulment of the contested decision.		
Hoge Raad	Supreme Court	Last instance court (civil/commercial)	ECLI:NL:HR:2016:994	27/05/2016	Private enforcement	Case sent back to lower court for re-assessment	The Court rules (based on the answers to questions referred to the CJEU for a preliminary ruling) that to answer the question of whether a guarantee by a public company can be attributed to the Government, it is decisive whether it can be inferred from the entire set of indications that the Government was involved in granting the guarantees. For that involvement, it is in any case not sufficient that a public company controlled by the Government has provided guarantees. The Court refers the proceedings to the Amsterdam Court of Appeal for further consideration.		The subsequent ruling from the lower court is not available.
Rechtbank Rotterdam	Rotterdam District Court	Second to last instance court (administrative)	ECLI:NL:RBROT:2016:4329	10/06/2016	Private enforcement	None - Claim rejected	The case concerns an environmental permit for an inner-city water sports area. The Court rules that the proceedings do not give rise to the opinion that there is a chance that the subsidy to be granted will affect trade between Member States. It considered this confirmed by the Commission, which recently confirmed in a number of decisions that financial support for local projects does not constitute State aid.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2016:282	08/09/2016	Private enforcement	None - Claim rejected	The defendant reduced the subsidy for the projects of the plaintiff due to the cumulation of subsidies and tax benefits. The plaintiff argues that a correction to the subsidy may only be made if it follows from the rules on the aid ceilings as set out in theCommunication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020 The plaintiff is of the opinion that the support framework is limited to measures that qualify as State aid, whereas the subsidy at issue is a generic measure that is accessible to all companies in the Member State. Since the scheme does not therefore confer a selective advantage, according to the plaintiff, it should remain outside the cumulation test based on the EU guidelines. The Court concludes against these arguments as it believes there are no special circumstances that have consequences for the plaintiff that are disproportionate to the goals to be served by the policy rules. It therefore rejects the appeal.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2016:2568	28/09/2016	Private enforcement	None - Claim rejected	By decision of 15 December 2009, the Commission issued a decision on the Dutch system of financing housing corporations. In response to this, the Dutch State issued a 'Temporary Regulation'. According to the Court, the most important elements of the conditions of the Commission decision are laid down in this Temporary Regulation. In view of the foregoing, the Court concludes that aid, which meets the requirements set in the Temporary Regulation, has been lawfully granted. In addition, it is considered that the compensation that can be granted to housing associations under the Temporary Regulation was considered by the Commission - in its decision - as existing aid. The Court concludes that the aid at issue in the case was not granted in violation of the Temporary Regulation and therefore does not constitute new aid but existing aid. This means that the Commission should not have been informed of the intention to pay the aid under Article 108(3) TFEU. In view of this, there is therefore no ground for the opinion that aid should not have been implemented and is unlawful.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2016:3386	21/12/2016	Private enforcement	None - Claim rejected	The Court considers that the question of unlawful State aid is only indirectly relevant, in the context of the question of whether State aid may be an impediment to the financial-economic feasibility of a zoning plan. Only when the defendant should reasonably have realised in advance that the plan cannot be implemented within ten years in a way that no unauthorised State aid is granted, can the contested decision be annulled. The Court rules that in this case there is no ground for the conclusion that the development of the plan cannot be carried out within the planning period in a way that no unlawful State aid is granted. The plaintiff also stated they had lodged a complaint with the Commission. According to them, the Board acted in breach of the standstill principle in Article 108(3) TFEU) because the Board adopted the plan without the decision of the Commission to wait for the complaint. According to them, the defendant acted in breach of the standstill obligation in Article 108(3) TFEU by adopting the plan without waiting for the decision of the Commission on the complaint. The Court also notes that the defendant was not obliged to wait for complaints to the Commission, as there is no reason for the opinion that the defendant has acted contrary to Article 108(3) TFEU.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2017:354	08/02/2017	Private enforcement	None - Claim rejected	The Court considered that, in the context of a procedure against an environmental permit, an argument relating to the feasibility of the project, which also includes the financial-economic feasibility, can only result in the annulment of the contested decision if and insofar as the alleged conduct leads to the conclusion that the plaintiff should reasonably have realised in advance that the project could not be executed. This condition can be considered not to be met if it is plausibly shown		

							that the State aid that has been or will be granted can be recovered. It should also be plausibly shown that the plaintiff should reasonably have realised in advance that the project cannot be implemented without unlawful State aid being granted – which the Court rules has not been done in this case.		
Rechtbank Den Haag	Den Haag District Court	Lower court (civil/commercial)	ECLI:NL:RBDHA:2017:4278	26/04/2017	Private enforcement	None - Claim rejected	The case concerns a subsidy scheme under which Dutch academic hospitals that purchase NIPTs (prenatal tests) can apply for a subsidy from the State. The plaintiff claims this constitutes unlawful State aid which should have been notified to the Commission. The State does not dispute that this subsidy scheme is an aid measure. However, it states that it is exempt from notification to the Commission as the SGEI decision has been complied with. The Court observes that the State has designated the NIPT as a service of general economic interest and follows the position of the State. In this regard, the Court considers that the State has a wide discretion to determine whether a particular service is a service of general economic interest.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2017:2065	02/08/2017	Private enforcement	None - Claim rejected	The contested decisions provide for the replacement of an existing multifunctional sports and recreation centre by a more compact sports complex and the realisation of dwellings. The Court observes that the interest of the plaintiffs in their capacity as residents is to maintain a good living and social climate. In these circumstances, the Court is of the opinion that Article 108(3) TFEU clearly does not seek to protect the interests of the plaintiffs.		
Rechtbank Amsterdam	Amsterdam District Court	Lower court (civil/commercial)	ECLI:NL:RBAMS:2017:10553	18/10/2017	Private enforcement	None - Claim rejected	The case concerns the claim that the lease concluded by a central government body with the municipality constituted the granting of State aid to the municipality, which should not have been provided without prior notification and approval from the Commission. The Court notes that in this case, a (central) government body has entered into a lease agreement with another (local) government body, both of which are considered to be (part of) the Member State in the context of Article 107(1) TFEU. In other words, the funds remain within the Member State. For this reason, the Court finds Article 107(1) TFEU cannot be said to apply. The Court establishes that at least one of the conditions for concluding that there is State aid within the meaning of Article 107(1) TFEU, is not met.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2017:2904	25/10/2017	Private enforcement	None - Claim rejected	The Court considered that it follows from CJEU case law that Article 108(3) TFEU seeks to protect the interests of competitors and individuals who are subject to a levy forming an integral part of an aid measure, and the General Administrative Law Act therefore precludes others from invoking Article 108(3) TFEU to argue that a project is not feasible. The Court ruled that the defendants could not be regarded as competitors or as persons subject to a charge forming an integral part of the State aid measure at hand. In this regard, the General Administrative Law Act prevented them from invoking Article 108(3) TFEU. For that reason, the Court ruled that there was no ground to annul the contested decision.		
Rechtbank Gelderland	Gelderland District Court	Second to last instance court (administrative)	ECLI:NL:RBGEL:2017:5660	01/11/2017	Private enforcement	None - Claim rejected	The case concerns the granting of an environmental permit for the internal conversion of a building. The Court observes that the plaintiff does not operate a business and has only brought an appeal against the contested decision in their capacity as an individual resident. In the Court's view, Article 108(3) TFEU clearly does not seek to protect the interests regarding which the plaintiff wishes to be protected (limiting nuisance). The Court concludes from this that conflict with Article 108(3) TFEU in this case cannot lead to the annulment of the contested decision.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2017:3126	15/11/2017	Private enforcement	None - Claim rejected	The contested decision concerns the transformation of Twente Airport into an airport of regional significance. The province and the municipality of Enschede offer financial support for the exploitation of the airport, which according to the plaintiff constitutes State aid which has wrongly not been notified to the Commission. The Court notes that the interest of the plaintiffs is to preserve a good living and social climate for local residents and the preservation of local flora and fauna. According to the Court, the parties have not made a plausible argument that they will be subject to a levy that forms an integral part of the aid measure (they claim to fear the rise of local taxes). In these circumstances, the Court is of the opinion that Article 108(3) TFEU does not aim to protect the interests of these parties.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2017:412	29/12/2017	Private enforcement	Other remedy imposed	The case concerned an approval for a subsidy to the plaintiffs by the defendant (the Secretary of State for Economic Affairs). The decision by which this subsidy was approved stated that the subsidy constituted a form of State aid, which means that it could only be granted after it had been approved by the Commission. The defendant later informed the plaintiffs that the Commission did not approve the subsidy and that it could therefore not be paid as it was seen as unlawful State aid. However, according to the Commission's answers to questions put to it by the Court, the Secretary of State for Economic Affairs - contrary to what he stated - did not notify the subsidy to the Commission in accordance with Article 108(3) TFEU. Thus, the Secretary must notify this measure within a period of four weeks after this ruling.		
Rechtbank Overijssel	Overijssel District Court	Lower court (civil/commercial)	ECLI:NL:RBOVE:2018:788	14/03/2018	Private enforcement	Other remedy imposed	The case concerned an agreement pursuant to which a party obtained the exclusive right to exploit advertising objects in the form of street furniture in the public space of the municipality for a period of 20 years. Although the Court rules it is not yet possible to determine whether there is (unlawful) State aid, it does consider misuse of powers, abuse of the law and justified trust, as well as the statute of limitations in the context of State aid. The Court stipulates that the case will continue after parties are provided with an opportunity to respond.		
Gerechtshof Arnhem-Leeuwarden	Arnhem-Leeuwarden	Second to last instance court (civil/commercial)	ECLI:NL:GHARL:2018:9636	06/11/2018	Private enforcement	Recovery order in relation to unlawful aid	The Court ruled that the purchase agreement did not include an aid measure that was excluded from a notification obligation pursuant to Article 108(3) TFEU. It further contended that the most logical measure that the national court should take		

	Court of Appeal						in such a situation, was the full recovery of the unlawful aid. The Court declared the purchase agreement void due to a breach of Article 108(3) TFEU and ordered the municipality to ensure that the ownership situation of the property was displayed in the public registers, under forfeiture of a penalty.		
Rechtbank Rotterdam	Rotterdam District Court	Lower court (civil/commercial)	ECLI:NL:RBROT:2007:BB0270	04/07/2007	Public enforcement	None - Claim rejected	The Court notes that the argument of the plaintiff (the State) that if the rules of national law would prevent a full recovery of the subsidy unlawfully paid and the interest claimed by the State, these rules should be disregarded. According to the Court, it is clear from the case law of the ECJ (current CJEU) that only national provisions which are contrary to directly applicable Union law should be disregarded. The State has not referred to any direct Union law provisions on the basis of which, in the present case, the national provisions must be disregarded. It therefore rejects the appeal.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2011:BU3143	02/11/2011	Public enforcement	None - Claim rejected	The Commission found the special project to constitute State aid, by decision of 15 December 2009. According to the plaintiffs, this means that not only the payment of the aid should have been suspended until after that date, but also the imposition of the levies to finance that support. Now that this has not happened for the years 2008 and 2009, the Court should have already annulled the levy decisions for those years, according to the plaintiffs. The fact that the payment of the aid has been suspended does not make a difference, according to them, as the levies are part of the aid. The Court rejects this argument and rules that the special project support for the years 2008 and 2009 meets the SGEI criteria. Any aid which fulfils the conditions set out in the Commission decision must be considered compatible with the internal market and shall be exempt from the notification requirement of Article 108(3) TFEU. This means that the imposition of the levy did not have to be suspended until the Commission decision was taken. According to the Court, this does not alter in any way the fact that, according to the Commission, the special project aid does not fulfil one of the criteria of the Altmark judgment.		
Raad van State	Council of State	Last instance court (administrative)	ECLI:NL:RVS:2015:1152	15/04/2015	Public enforcement	None - Claim rejected	The Court held that one could not successfully rely on the legitimate expectation of the lawfulness of State aid insofar it had not been granted with due regard for Article 108 TFEU; the obligation to recover unlawful aid laid down in Article 108(3) TFEU applies directly to the Netherlands as a Member State and to its administrative bodies, thus the legal basis for the Netherlands for the recovery of the unlawful aid is a given; the question of which public authority is competent to recover the aid is determined on the basis of national law. Thus, the Court rules that the legal basis for the Netherlands for the recovery is a fact, and declares the appeal unfounded.		
College van Beroep voor het bedrijfsleven	Administrative Court for Trade and Industry	Last instance court (administrative)	ECLI:NL:CBB:2016:210	04/08/2016	Public enforcement	Other remedy imposed	The Court considered that the granting of a subsidy was subject to prior approval by the Commission, which was later changed into a subsidy complying with the *de minimis* conditions. The Court re-opened the investigation and submitted questions to the Commission.		

21. Poland

21.1 Country report

Name national legal expert

Dr hab. Jakub Kociubiński

Date

06/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

In Poland, no court is specifically dedicated to deal with State aid cases. However, given that in most cases concerning State aid, public authorities are involved (aid is typically granted through the legally binding act of a public authority), the vast majority of State aid cases falls within the jurisdiction of administrative courts (*sądy administracyjne*). This category comprises the following courts:

- Provincial administrative courts (*Wojewódzki Sąd Administracyjny*) – 16 courts, one in each province (*Voivodship*), and one regional branch of the Warsaw court located in Radom.
- Supreme Administrative Court (*Naczelny Sąd Administracyjny*).

Ratione materiae of these courts is regulated in Act – Law on Proceedings before Administrative Courts.[297] It can be said that although there is no *de jure* exclusive jurisdiction of administrative courts, their scope of cognition — as set out by the abovementioned legislation — encompasses the majority of State aid cases. Statistically speaking, a search in the LEX database (database containing all case law from 2004, conducted on 14 December 2018)[298] produced 8097 hits — judgments of national courts — under the keywords 'State Aid' (*pomoc publiczna*). Out of the total number, 6054 judgments were rendered by the provincial administrative courts and 1393 by the Supreme Administrative Court. No existing database allows searches by public/private enforcement, as defined in this Study. However, these figures give a general indication of the dominant role played by administrative courts, which are effectively competent in both public and private enforcement cases.

Also, it should be noted that a State aid issue may be part of a factual and/or legal background in every other type of case. These issues may even form an essential part of the case, for example, in competition cases, settlements or insolvencies. Consequently, there are no formal obstacles to decide upon State aid related issues by non-administrative courts. Case Supreme Court of Justice, 8.5.2013 – III SK 34/12 (PL7) can be used as a reference here.

Additionally, if a case involves the compliance of legislation and international agreements with the Polish Constitution, or disputes over the powers of central constitutional bodies, it will fall within the jurisdiction of the Constitutional Tribunal (*Trybunał Konstytucyjny*). This court is located outside the regular court structure. The keyword search in the LEX database (details as above) produced 81 hits — cases of the Constitutional Tribunal concerning State aid.

A description of the procedural framework applicable in public enforcement of State aid rules

In principle, the obligation to recover unlawful State aid is imposed on the aid grantor (exceptionally, however, such an obligation may be imposed on different entities as happened with recovery of aid granted to Polish shipyards — cases C 17/05, C 18/05, and C 19/05). No entity is specifically designated to enforce recovery decisions. The Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów*), State Treasury General Representation (*Prokuratoria Generalna Skarbu Państwa*), the Ministry of Agriculture (only for CAP-related cases) are vested with prosecutorial powers. Also, the public prosecutor (*prokurator*) may, in some circumstances, intervene in proceedings instituted before national courts (a highly unlikely possibility in State aid cases). All of these entities are governed by separate regulations depending on the specific type of proceedings. A side note: There are also doubts (so far only theoretical) about recovery when aid has been issued on the basis of a normative act — as to whether the Parliament should amend the act or whether the act should be declared void by the Constitutional Tribunal.

The Act on State aid procedure[299] provides a general procedural framework for enforcing the recovery decision. The act was primarily designed to provide a legal framework for administrative authorities responsible for managing State aid schemes or individual aid measures. It governs notifications and procedures before the Commission and the court, by clarifying procedural and institutional issues. It is not specifically linked to accession issues; rather, it aims to ensure post-accession cross-sector compatibility with State aid rules on an on-going basis. These general rules are supplemented by the corresponding procedural provisions — administrative or civil — depending on instruments initially employed to grant State aid.

If the aid was granted through an administrative decision (as is usually the case), then the recovery decision will constitute a legally effective basis for a national authority to adopt a new decision revoking its prior decision on State aid. This is the case unless, as a result of the appeal lodged, the enforcement of the Commission decision is suspended.[300] The recovery shall be conducted according to normal administrative procedure as set out in the

[297] *Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi, Dz.U. 2002 nr 153 poz. 1270*
[298] More information about the lext database can be accessed here: https://www.lex.pl/ (last accessed on 6 January 2019).
[299] *Ustawa z dnia 30 kwietnia 2004 r. o postępowaniu w sprawach dotyczących pomocy publicznej, Dz.U. 2004 nr 123 poz. 1291 ze zm*
[300] Article 25 of the Act on State aid procedure.

Code of Administrative Procedure[301] (and during a judicial proceeding, as set out in the Act – Law on Proceedings before Administrative Courts).[302]

If the aid was granted by a civil law contract, there is some controversy in the literature as to whether an action should be brought to declare such a contract void or whether the contract automatically becomes void. In either case, however, the Code of Civil Procedure[303] will be applicable.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

There is no formal distinction between public and private enforcement, as defined for the purposes of this Study, in Polish law (see comments in the last section); administrative and civil courts are competent in public and private enforcement cases. Therefore, the response to the first question is equally applicable here.

A description of the procedural framework applicable in private enforcement of State aid rules

The answer to this question is related to the answers above and the fact that Polish law does not distinguish between public and private enforcement. Assuming (for the sake of argument) that these categories are distinguishable at all, the only procedural difference between public and private enforcement is that the former is initiated *ex officio* while the latter upon complaint. However, this kind of distinction is mere semantics: once initiated, all other aspects of the procedure are similar to the process described above (in the question on procedural framework in public enforcement), both in judicial and non-judicial proceedings.

Main findings based on the case summaries

Type of action

The majority of cases analysed within this Study concern the enforcement of the standstill obligation, the application of the *de minimis* Regulation and the interpretation of whether a given grant or subsidy constituted (or would constitute) State aid (five cases in total: Supreme Administrative Court, 12.2.2014 – II FSK 507/12 (PL1); Supreme Administrative Court, 3.7.2012 – II FSK 2636/10 (PL3); Regional Administrative Court in Cracow, 31.10.2014 – I SA/Kr 1121/14 (PL5); Court of Appeal in Warsaw, 19.6.2013 – VI Aca 74/13 (PL6); Supreme Administrative Court, 6.4.2017 – II FSK 678/15 (PL2); Supreme Court of Justice, 28.11.2017 – III SK 30/14 (PL4)). Only in one of the selected rulings (Supreme Court of Justice, 8.5.2013 – III SK 34/12 (PL7)) there was a Commission decision.

As for the remedies requested, many cases concerned a claim for interpretation of the national law at issue, especially tax law, in such a way that would allow for State aid to be granted (*e.g.* case II FSK 2636/10 (PL3), where the plaintiff argued an erroneous interpretation of national law — the Act on State Aid Proceedings in conjunction with the provisions of the Act of 12/01/1991 on taxes and local fees: the day from which State aid was calculated was the day of submitting the application; whereas, according to the plaintiff, national legal provisions clearly showed that State aid should be calculated from the day when the right to the tax exemption was acquired).

There were also numerous claims for granting *de minimis* aid (*e.g*. case VI Aca 74/13 (PL6)). Both types of claims were initiated by the companies aiming to receive State aid (potential aid beneficiaries). One of the selected rulings concerned a claim in which the plaintiff asked for the annulment of the obligation to buy cogeneration energy from State sources, arguing such an obligation constituted State aid (case III SK 30/14 (PL4)).

Sectors

- A significant number of tax cases: Those are mostly cases relating to the GBER because regional aid can often be granted by means of a tax reduction, especially for undertakings in special economic zones. Such cases typically involved disputes over cost/expenses eligibility for aid and the date of eligibility. Example: case II FSK 507/12 (PL1).
- A notable number of cases involved healthcare services: Cases related to the commercialisation of healthcare services, wherein healthcare centres (*Zakład Opieki Zdrowotnej*) could be eligible to receive *de minimis* aid (for certain commercial activities).
- Moreover: A large number of *de minimis* cases: A search of the LEX database (conducted on 14 December 2018) under the keyword '*de minimis*' produced 3485 hits, including 2791 rulings of the provincial administrative courts and 564 of the Supreme Administrative Court (case II FSK 2636/10 (PL3)).

Main actors

- Regional Accounting Chamber (*Regionalna Izba Obrachunkowa*): Since accounting chambers are tasked with overseeing the expenditure of regional governments, most State aid cases fall within their auditing competences.
- Tax Office (*Izba Skarbowa*): as a consequence of a high number of tax cases (see above). These cases mostly involved annulment actions against tax decisions, typically concerning tax breakdowns constituting State aid.
- The State Fund for Rehabilitation of Persons with Disabilities (*Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych*): Entities employing persons with disabilities are granted various tax reductions which are considered as *de minimis* aid.

In the light of the above, it should be clearly stated that according to statistical data published by the Office of Competition and Consumer Protection (responsible for overseeing State aid measures) these findings reflect the overall percentage of all national State aid measures).[304] In other words, it does not indicate any problems related to a

[301] *Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, Dz.U. 1960 nr 30 poz. 168 ze zm*
[302] *Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi, Dz.U. 2002 nr 153 poz. 1270 ze zm.*
[303] *Ustawa z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego., Dz.U. 1964 nr 43 poz. 296 ze zm.*

[304] Annual statistics available at: https://www.uokik.gov.pl/raporty_i_analizy2.php (last accessed on 6 January 2019).

specific type of aid or specific public body; it merely reflects the relative abundance of these cases in Poland.[305]

Qualitative assessment of the average time of court proceedings

Detailed statistics assessing the courts' effectiveness are published by the Ministry of Justice,[306] by the Supreme Administrative Court[307], and by the Supreme Court.[308] However, it must be emphasised that these statistics give only a limited quantitative picture of a much more complex pattern of second/last instance proceedings wherein a case can be sent back for reassessment, suspended pending a preliminary ruling from the CJEU, or a question to the Constitutional Court. Therefore, while the duration of the proceeding in the first instance can be calculated relatively easily and translated into information that is useful for case analysis, higher instances involve more variables that make generalisation more difficult. Moreover, most importantly, existing statistics do not specifically distinguish State aid cases.

According to 'The 2018 EU Justice Scoreboard', prepared according to the methodology used by the Council of Europe Commission for the Evaluation of the Efficiency of Justice, in the category of 'Time needed to resolve administrative cases at all court instances in 2016' (page 12), the average duration of a Polish court proceeding is over of 500 days. Against this backdrop, the length of selected cases compares as follows:

- Case II FSK 507/12 (PL1): Supreme Administrative Court's judgment of 12 February 2014. The previous ruling of the provincial administrative court (I SA/Op 335/11) was delivered on 7 December 2011. The original complaint related to the administrative decision of 6 May 2011.
- Case II FSK 2636/10 (PL3): Supreme Administrative Court's judgment of 3 July 2012. The previous ruling of the provincial administrative court (I SA/Gd 352/10) was delivered on 7 September 2010. The original complaint related to the administrative decision of 14 December 2009.
- Case I SA/Kr 1121/14 (PL5): The provincial administrative court's judgment was issued on 31 October 2014. The previous decision of the regional accounting chamber (XLV/611/2014) was delivered (*ex officio*) on 30 January 2014.
- Case II FSK 678/15 (PL2): Supreme Administrative Court's judgment of 6 April 2017. The previous ruling of the provincial administrative court (I SA/Wr 1604/14) was delivered on 16 October 2014. Information about the original administrative case has not been disclosed.

As far as the non-administrative cases are concerned, according to the report mentioned earlier, in the category 'Time needed to resolve litigious civil and commercial cases at all court instances in 2016' (page 12) shows the average duration of a Polish court proceeding in civil and commercial cases is less than 200 days. The duration of selected cases compares as follows:

- Case III SK 34/12 (PL7): Supreme Court's judgment of 8 May 2013. The previous ruling of the court of appeal was delivered on 7 March 2012, the district court (first instance) ruling was delivered on 26 May 2010.
- Case III SK 30/14 (PL4): Supreme Court's judgment of 28 November 2017. The previous ruling of the court of appeal was delivered on 14 October 2013. The case was remanded twice to the lower court for reassessment. The original complaint related to the administrative decision of the Energy Regulatory Office of 27 November 2008.
- Case VI Aca 74/13 (PL6): Judgment of the court of appeal of 18 June 2013. The previous district court's ruling was delivered on 9 December 2009.

A comparison between the statistics mentioned above and the three selected non-administrative cases listed above would *prima facie* suggest that State aid cases take considerably longer. It must be recalled, however, that the statistical average is calculated on the basis of all cases; these cases were resolved in the first, second, and third instances. Here, the sampling involves only a group of relatively the longest cases — judgments at the third instance — constituting a fraction of the whole test group. Hence, the existing statistical data does not provide a full picture in relation to the State aid cases. In this context, the selected group is too small to justify any definite conclusion.

Overall, it can reasonably be assumed that the duration of State aid cases, in their entirety, does not deviate appreciably from the statistical average.[309]

Qualitative assessment of the remedies awarded by national courts

In the majority of cases selected for this Study, claims were rejected, so no remedies were granted (see cases II FSK 2636/10 (PL3); I SA/Kr 1121/14 (PL5); III SK 30/14 (PL4); II FSK 678/15 (PL2)). Also, it must be recalled that most of these cases involved attempts to challenge recovery decisions (so lack of jurisdiction could not be invoked at this stage since jurisdiction was not questioned at the first or second instance). Therefore, the catalogue of legal remedies available was rather limited. Moreover, typically, a final remedy does not take effect until the challenging party has exhausted its appeal rights. Assuming the claim is approved, the court can either declare that the contested decision is void or send it back for reassessment (see cases II FSK 507/12 (PL1); III SK 34/12 (PL7)).

Due to the constraints of a small study sample no generalisation can be justified. However, the literature does not point to any single problem specifically related to remedies in State aid cases (detailed analysis of selected cases seems to confirm this). This stems largely from the fact that the procedure for State aid cases does not differ from the procedures for other types of judicial proceedings so there are no remedy-related issues unique to these types of cases.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

[305] Please note that the statements below were based on, and provide an overview of the summarised cases, supplemented by the case selection process (*i.e.* the list of relevant rulings) and professional experience. The sample selected is meant to be representative of the status of the enforcement of State aid rules in Poland. However, due to the very high total number of cases on the topic, the representativeness of the statements cannot be absolutely guaranteed.

[306] Available at: https://isws.ms.gov.pl/pl/baza-statystyczna/publikacje/download,2779,0.html *(last accessed on 6 January 2019.*

[307] Available at: http://www.nsa.gov.pl/statystyki-wsa.php *(last accessed on 6 January 2019).*

[308] Available at: http://www.sn.pl/sprawy/SitePages/Statystyki_ruchu_spraw.aspx (*last accessed on 6 January 2019).*

[309] This statement is based on the author's professional knowledge and expertise, and the fact that the literature does not point to any contentious issues relating to the duration of the proceedings.

Firstly, a thorough analysis of the case law[310] reveals that courts rarely invoke soft law instruments (communications, guidelines, etc.) in support of their reasoning. The Polish courts also quite seldom rely upon case law of the CJEU (although national courts seem sufficiently aware of the landmark cases). However, it remains unclear (and methodologically impossible to determine) as to whether it is an effect of insufficient knowledge displayed by national courts or merely an absence of explicit citations. The national courts' view on State aid cases is generally in line with the corresponding EU *acquis,* which may indicate the latter. According to the author's tentative hypothesis, since analogous soft law instruments do not exist in the national legal order, the courts are understandably reticent to invoke these formally non-binding acts. Consequently, given that in continental legal systems, sources of law are organised in a strict hierarchy that is constructed on the principle of the supremacy of normative acts, by an express reference to soft law instruments, the court is (perhaps unjustifiably) risking its ruling to be overturned on appeal for lack of grounds (especially considering that these EU-related cases are relatively rare in comparison to purely national cases so it may well be that there is not enough experience about these acts (see in this regard the last question).

Secondly, there seems to be no immediately apparent problem when it comes to the application of formally binding Union law — both the TEU/TFEU and EU secondary legislation. Cases I SA/Kr 1121/14 (PL5) and II FSK 678/15 (PL2) provide an example of the correct application of relevant Union law. However, in case VI Aca 74/13 (PL6), the national court implicitly hinted that it could rule on the compatibility of State aid. However, although the doctrine has not highlighted any occurrences of systemic problems in national courts' jurisprudence on State aid, all this must be considered anecdotal evidence since no comprehensive study has been conducted thus far (specifically dedicated to State aid). There exists only quantitative, but no qualitative research.

Thirdly, statistically speaking, the number of questions referred to the CJEU for a preliminary ruling has been steadily increasing, although the numbers are still relatively modest: 3.6% of the total number of such references in 2017 for all cases (not just State aid). However, the author is of the opinion that any comparisons of the number of references from different Member States using the population or total number of national court cases as a base are of dubious analytical value. What can be said is that there is no reliable data to indicate a statistical increase or decrease in State aid cases referred to the CJEU in comparison with other requests for preliminary rulings submitted by national courts (an example of such a case – III SK 30/14 (PL4) lodged in case *ENEA S.A. v Prezes Urzędu Regulacji Energetyki*.[311]

Qualitative assessment of any other relevant trends in State aid enforcement

As mentioned above, courts rarely invoke soft law instruments (communications, guidelines, etc.) in support of their reasoning.

Aside from that, there appears to be no observable trends in case law. The quality of national rulings can be roughly assessed on the basis of the number of cases successfully challenged. From this standpoint, the quality of rulings appears to be high. However, as already mentioned, the list provides only a sample of rulings, and the existing statistics (referred to earlier) do not necessarily allow for drawing far reaching conclusions about all Polish State aid cases.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

Out of the total number of State aid cases dealt with by the national courts there have been relatively few where courts had to decide on either the substantive compatibility of State aid with the internal market or on the concept of State aid (see case VI ACa 74/13 (PL6)). In a statistic that fairly reflects the observable majority of cases concerns aid measures exempted from the notification procedure — by virtue of *de minimis* Regulation, and GBER (3,485 *de minimis* cases in the LEX system; there is no reliable keyword search for regional aid measures). The existence of State aid is never the issue in such cases, so inquiries are typically limited to costs eligibilities and procedural issues. This seems to be closely related to the general approach towards State aid adopted by public bodies, (most notably local authorities). There are a few notable exceptions, but where there is doubt as to whether the measure amounts to State aid, the regional authorities typically assume the existence of aid. This is convenient, since it usually involves relatively straightforward *de minimis* or GBER cases).[312] It also poses no risk from an oversight standpoint, because it allows diffusion of possible allegations of *contra legem* behaviour.

When referring to challenges, although no available data point to any underlying systemic problem with case management by national courts, it merits mentioning that, according to statistical data published by the Ministry of Justice, the total number of cases lodged with Polish courts, in civil and administrative cases only, are roughly around 5.7 million per year.[313] Since, as has been mentioned above, the total number of State aid cases in Poland is very high (according to the database used for conducting research for this Study — the LEX database, the main database used by the legal practitioners in Poland — there have been thousands of cases including the term 'State aid'), a tentative conclusion may be formulated that individual judges have little practice in dealing with such cases. This could also indicate the local governments' good grasp of State aid related issues, resulting in a relatively small number of litigious cases.

Any other relevant comments or findings

It should be re-emphasised that in Polish law, private and public enforcement does not constitute separate legal categories. In the opinion of the national legal expert for Poland, no such distinction exists, either *de jure* as a separate legal category or *de facto.*

Furthermore, the statements in this country report, especially in relation to the conclusions and findings to be drawn from the case law, were predominantly based on the selected and summarised cases. While, in the interest of completeness, the information is supplemented by findings from the list of relevant rulings and professional experience of the expert, the representativeness of the statements and findings to all the cases in Poland

[310] Carried out during the selection query, and based on the author's knowledge and expertise.
[311] Case C-329/15 *ENEA S.A. v Prezes Urzędu Regulacji Energetyki (*2017) ECLI:EU:C:2017:671.
[312] Statistics available at: https://www.uokik.gov.pl/raporty_i_analizy2.php (last accessed on 6 January 2019).
[313] Detailed statistics available at: https://isws.ms.gov.pl/pl/bazastatystyczna/publikacje/download,2779,16.htm (last accessed on 6 January 2019).

cannot be guaranteed, also due to a very high overall number of cases concerning State aid in Poland (as set out above).

21.2 Case summaries

Case summary PL1

Date

04/01/2019

Case identifiers

Member State

Poland

Court which adopted the ruling (national language)

Naczelny Sąd Administracyjny

Court which adopted the ruling (English)

Supreme Administrative Court

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Polish

Hyperlink to ruling

https://www.orzeczenia-nsa.pl/wyrok/ii-fsk-507-12/ulgi_platnicze_umorzenie_odroczenie_rozlozenie_na_raty_itp_podatkowe_postepowanie/259e39f.html?q=II+FSK+507%2F12&x=0&y=0&pth=%2Fszukaj

Case reference

II FSK 507/12

Procedural context of the case

The first instance judgment in this case was delivered by the Regional Administrative Court in Opole (Wojewódzki Sąd Administracyjny w Opolu). The judgment was issued on 7 December 2011 (ruling I SA/Op 335/11), and it preceded the second instance judgment analysed here.

Afterwards, the Supreme Administrative Court sent the case back to the Regional Administrative Court for reassessment, the Regional Administrative Court in Opole, judgment of 14 May 2014, (ruling I SA/Op 285/14, http://www.lexlege.pl/orzeczenie/41837/i-sa-op-285-14-wyrok-wojewodzki-sad-administracyjny-w-opolu/), rejected the claim.

Type of action

Private enforcement

Delivery date of the ruling

12/02/2014

Language

Polish

Headnote

In this ruling, the Court discussed the way in which the concepts of 'the taxpayer's relevant interest' and 'public interest', are defined in the context of State aid cases. The Court also concluded that a mistake in applying domestic tax law should be disregarded (as a ground for annulment) if at the same time the court correctly applies the Union law and the judgment is in line with the Union law.

Parties

Names of the parties to the action

Samorządowe Kolegium Odwoławcze

Versus

F. [...] S.A. z siedzibą w W. (anonymised)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

L - Real estate activities

Real estate activities

The type of State aid measure challenged in the court proceedings

Other

Public authority decision refusing to grant State aid

Substance of the case

Facts and parties' main arguments in the case

By decision of 29 April 2010 (based on the domestic law – Tax Ordinance), the mayor (public authority – the plaintiff in this case at this instance) refused to redeem 50% of property tax due for December 2004 which a company (the defendant in this case) was due to pay, redeem 100% interest on the arrears due and divide in 16 instalments the remaining 50% of arrears. Hence, the mayor rejected the company's claim in its entirety.

The company (the defendant) appealed against this decision to the Local Government Appeal Body and claimed that the State aid included in the restructuring plan (and effectively denied by the Mayor) met the conditions of an important taxpayer's interest and public interest as referred to in Article 67a in conjunction with Article 67b of the Tax Ordinance. Furthermore, the defendant argued that the mere existence of a social interest was examined by the Commission when assessing the restructuring plan submitted to it. The defendant indicated that it recognised the issuance by the Mayor of a decision suspending the proceedings until such time that the Commission issues its decision, as a promise of granting State aid to the company, especially given previous verbal assurances regarding how to settle the matter. The company further claimed it did not have an overpayment of 482,023.80 PLN, and only 274,484 PLN, resulting from overpaid tax payments in previous years.

On the other hand, the Mayor (on behalf of the plaintiff) explained that the company did not receive a written acceptance of the proposed assistance (in the form of State aid), so it should not undertake restructuring measures according to the plan that had not obtained a positive opinion of the local government. The Mayor stressed that he did not give opinion on the restructuring plan and was not bound by its provisions.

The Local Government Appeal Body upheld the contested decision of the first instance body, sharing its standpoint in its entirety, both in terms of factual findings and the legal assessment.

In its complaint to the Regional Administrative Court, the defendant applied for the annulment of the contested decision and the Mayor's decision preceding it as they argued it violated domestic law (the Tax Ordinance) and misinterpreted the decision of the Commission of 20 December 2006 and the Polish Constitution. The defendant underlined that its restructuring plan was approved in December 2003 by the general shareholders' meeting and then approved by the Office for the Protection of Competition and Consumers and submitted to the Commission in a notification procedure. The Commission, by a decision of 20 December 2006, declared the notified State aid compatible with the internal market provided the conditions set out therein were met. The company indicated that its request for State aid, the exchange of correspondence in this case from July 2004 to the end of 2009, and the suspension of the

proceedings in connection with the pending decision of the Commission gave a full basis to recognise that the Mayor will issue a positive decision.

The plaintiff requested a dismissal of the claim and upheld its position expressed in the contested decision. The plaintiff added that the company-defendant included in the restructuring plan payment reliefs that the Mayor would grant but did so without taking into account the procedure for granting State aid, that talks between the defendant and the plaintiff did not result in an agreement on the scope of assistance. For this reason, the plaintiff argued that the Commission decision, albeit favourable to the company, cannot be used as a legal basis to issue an order to the tax authority to issue a decision on granting relief in payment of tax arrears.

The First Instance Court (The Regional Administrative Court) indeed repealed the local authorities' decision. As a result, the Local Authority appealed as a plaintiff to the National Administrative Court.

Remedy(ies) sought

Other remedy sought

Granting of State by annulment of a public authority decision effectively prohibiting it

Outcome of the case

Conclusions adopted by the national court

The Supreme Administrative Court confirmed it was correct of the First Instance Court to decide that the company's request of 16 December 2004 for tax relief (to the extent specified in it) should be considered on the basis of the provisions in force prior to the entry into force of the amendments to the Tax Ordinance, i.e. before 1 September 2005. However, this condition was not met, and the provisions of the amended law which constituted the legal basis for the decision were not sufficient to render the decisions void.

The Supreme Administrative Court however did not agree with the Regional Administrative Court as far as the application of *de minimis* aid rules was concerned. The Court indicated that State aid allowed by the Commission decision of 20 December 2006 should not be considered as *de minimis* aid inter alia due to the fact that its full amount exceeded the limit for *de minimis* aid.

The Court also confirmed that a decision of the Commission, beneficial for the defendant, made it possible to restructure the Company's tax liabilities towards the Municipality in the manner indicated in the plan approved by the Commission, which recognised that the notified aid is compatible with the internal market (if certain conditions are met). Hence the aid was lawful in the light of the provisions of the Act of 30 April 2004 on proceedings in matters concerning State aid and the currently binding Article 67b of the Tax Ordinance. The Regional Administrative Court decided it could not conduct a deeper analysis of the Commission decision. Therefore, the Court could not decide whether the amount in question was subject to the decision issued by the Commission. This was due to the fact that the Commission decision was not included in the case file. The National Administrative Court indicated that the Commission decision was available in the public domain and published in the Official Journal and therefore it asked the first instance court to reconsider the case.

The National Administrative Court stated also that the First Instance Court failed to show, in the grounds of its judgment, that the violation of material and procedural law indicated by this Court would indeed occur as a result of the contested decisions of regional authorities. Hence, the reasons the First Instance Court provided to justify the repeal of the decisions were not sufficient. At the same time, the National Administrative Court asked the Regional Administrative Court for the reassessment of the case in light of the Commission decision and stated that the above shall not prejudge the direction of the final ruling of the Regional Administrative Court.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

After the Supreme Administrative Court sent the case back to the Regional Administrative Court for reassessment, The Regional Administrative Court in Opole, in the judgment of 14 May 2014, I SA/Op 285/14 (http://www.lexlege.pl/orzeczenie/41837/i-sa-op-285-14-wyrok-wojewodzki-sad-administracyjny-w-opolu/), rejected the claim.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission Regulation 1407/2013 of 18/12/2013 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 (*de minimis* Regulation)
- The EU decision on lawfulness of the notified State aid, 20/12/ 2006, OJ 2007.187.30

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary PL2

Date

04/01/2019

Case identifiers

Member State

Poland

Court which adopted the ruling (national language)

Naczelny Sąd Administracyjny

Court which adopted the ruling (English)

Supreme Administrative Court

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Polish

Hyperlink to ruling

https://www.orzeczenia-nsa.pl/wyrok/ii-fsk-678-15/podatki_od_nieruchomosci_ulgi_podatkowe_podatek/1eae7f0.html?q=II+FSK+678%2F15&x=0&y=0&pth=%2Fszukaj

Case reference

II FSK 678/15

Procedural context of the case

Earlier instance:
- Regional Administrative Court in Wrocław (Wojewódzki Sąd Administracyjny we Wrocławiu), judgment of 16/10/2014, reference number I SA/Wr 1604/14.

Type of action

Private enforcement

Delivery date of the ruling

06/04/2017

Language

Polish

Headnote

In this ruling, the Court discussed State aid aspects in relation to 'special economic zones' (types of market) and tax measures. This is a controversial issue in Poland and many court judgments have been issued on that matter.

Parties

Names of the parties to the action

Samorządowe Kolegium Odwoławcze

Versus

R. sp. z o.o. z siedzibą w W (anonymised)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

L - Real estate activities

Real estate activities

The type of State aid measure challenged in the court proceedings

Other

Refusal to grant the plaintiff aid in the form of real estate tax exemption

Substance of the case

Facts and parties' main arguments in the case

The object of the dispute was the refusal to grant the company (the defendant in the cassation claim) State aid in the form of a real estate tax exemption. When refusing the application, the regional authorities considered whether or not there were reasons for granting State aid in the form of *de minimis* aid and in the form of regional investment aid. The authorities decided that the conditions were not met for granting of any of these type of State aid measures. However, their decision was then overturned by the First Instance Court (Regional Administrative Court). The regional authority filed an appeal (cassation) from the First Instance Court judgment.

The regional authority (plaintiff in this case) alleged a violation of substantive law through misinterpretation and misapplication of the provisions of Articles 107 and 108 TFEU and the Polish Constitution. In particular, the plaintiff lodged the appeal from the First Instance Court judgment claiming that the Court wrongly decided:
- That only the Commission has the power to issue a decision denying granting State aid, and that the powers of the national authorities are limited only to the implementation of this decision and the recovery of unlawful aid;
- That the city council authorities (regional public authorities) cannot invoke the unlawfulness of the aid granted as only the individual is entitled to such powers in a dispute with the State;
- That the plaintiff acquired rights due to the fact that the 2002 resolution remained in force.

In response to a cassation complaint, the defendant requested a dismissal.

Remedy(ies) sought

Other remedy sought

The public authority applied to declare the first instance court judgment void and to decide that the company was not eligible for being granted State aid.

Outcome of the case

Conclusions adopted by the national court

According to the Regional Administrative Court (i.e. the first instance court), neither the Mayor N. nor the Local Government Appeal Board (i.e. none of the public authorities deciding upon this case in the pre-court administrative proceedings) were entitled to take steps to prevent the defendant from being granted unlawful State aid. This was due to the fact that the only body competent in this regard was, according to the First Instance Court, the Commission.

The Supreme Administrative Court did not agree with this view. This Court underlined that while the Commission has exclusive competence to assess the compatibility of the proposed State aid measures with the internal market on the basis of the criteria set out in Articles 107 TFEU (i.e. the approval of State aid) it does not have the exclusive right to adjudicate on unlawfully granted aid (aid that the Commission has not approved under the procedure set out in Article 108 TFEU and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999)). The Commission's

competences in relation to unlawful aid is limited. The Commission may not, for instance, take a final recovery decision if the only infringement was the lack of notification of the aid in accordance with Article 108(3) TFEU. The Commission must carry out a full compatibility assessment, regardless of whether the standstill obligation was respected or not.

Furthermore, it is the role of national courts, inter alia, to prevent the disbursement of unlawful aid and supervise reimbursement of unlawful aid (irrespective of its compatibility with the internal market). In the case of unlawful aid, national courts are required to draw all appropriate legal consequences, in accordance with national law, in case of violation of Article 108(3) TFEU. The obligations of national courts are not limited to unlawful aid that has already been paid. The national courts also deal with cases where unlawful State aid is yet to be paid out.

The domestic court may, in particular, order the recovery of unlawful aid, irrespective of the later Commission decision on compliance with the internal market. The Supreme Administrative Court distinguished here between the compatibility of the aid with the internal market (the assessment of which may only be made by the Commission (Article 107(2) and 107(3) TFEU), and unlawful and incompatible aid (Article 108(3) TFEU; Article 1f, Article 3 of Regulation 659/1999) in which case the actions may be undertaken by the authorities of the State.

The Supreme Administrative Court underlined that the court of first instance clearly distinguished unlawful aid from the assessment of compatibility of State aid with the internal market. However, the First Instance Court made an incorrect assessment of the effects of the State aid in relation to the competences of the authorities.
The Supreme Administrative Court then discussed the concept of 'national court'. The Commission in its Regulation No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 EC Treaty to *de minimis* aid pointed out that national courts are required to draw all appropriate legal consequences, in accordance with national law, in the event of violation of Article 108(3) TFEU. The Supreme Administrative Court, unlike the First Instance Court, decided that the regional authorities that issued the decisions should not be considered a 'domestic court' within the meaning of the CJEU case law. Neither the tax authorities nor the Local Government Appeal Court are therefore 'national courts'.

In Poland, the competent authority to determine whether State aid poses no problems in this respect is the Office of Competition and Consumer Protection (UOKiK). The Court also emphasised that only the lawfully acquired rights are subject to the protection provided for in Article 2 of the Constitution. Rights that are illegal or moral, or rights that have been acquired on the basis of unjustly established norms do not enjoy the protection under Article 2 of the Constitution. In the present case, State aid in the form of a real estate tax exemption that the plaintiff intended to obtain was, as the Supreme Administrative Court stated, undoubtedly unlawful.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The Court declared the first instance court judgment void and rejected the original claim. Hence, the decision of the regional public authorities rejecting to grant State aid remains in force.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-54/96, Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH (1997) ECLI:EU:C:1997:413
- C-96/04, Standesamt Stadt Niebüll, (2006) ECLU:EU:C:2006:254
- C-6/64, Flaminio Costa v E.N.E.L, (1964) ECLI:EU:C:1964:66
- C-183/02 P and C-187/02 P, Daewoo Electronics Manufacturing Espana SA (Demesa) and Territorio Histórico de Álava - Diputacíon Foral de Álava v EC, (2004) ECLI:EU:C:2004:701
- T-126/99, Graphischer Maschinenbau GmbH v EC, (2002) ECLI:EU:T:2002:116
- C-324/90 and C-342/90, German Federal Republic and Pleuger Worthington GmbH v EC (1994) ECLI:EU:C:1994:129

National case law:
- Supreme Administrative Court, 28/02/2014, II FSK 3399/13

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Commission notice on the enforcement of State aid rules by national courts OJ C 85, 9.4.2009, p. 1–22

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary PL3

Date

04/01/2019

Case identifiers

Member State

Poland

Court which adopted the ruling (national language)

Naczelny Sąd Administracyjny

Court which adopted the ruling (English)

Supreme Administrative Court

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Polish

Hyperlink to ruling

https://www.orzeczenia-nsa.pl/wyrok/ii-fsk-2636-10/podatki_od_nieruchomosci/14049a3.html?q=II+FSK+2636%2F10&x=0&y=0&pth=%2Fszukaj

Case reference

II FSK 2636/10

Procedural context of the case

The lower instance court judgment was issued by the Regional Administrative Court in Gdansk (Wojewódzki Sąd Administracyjny w Gdańsku), 07/09/2010, (ruling I SA/Gd 352/10).

Type of action

Private enforcement

Delivery date of the ruling

03/07/2012

Language

Polish

Headnote

In this ruling, the Court discussed the legal provisions concerning *de minimis* aid. The Court reiterated that while the granting of *de minimis* aid must be compliant with Union law, the decision as to whether to grant State aid and at what level is entirely up to the national authorities.

Parties

Names of the parties to the action

D. S.A. z siedzibą w B. (anonymised)

Versus

Samorządowe Kolegium Odwoławcze

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

L - Real estate activities

Real estate activities

The type of State aid measure challenged in the court proceedings

Other

Decision of the national authorities on exemption from the obligation to pay real estate tax (which to an extent annuls the plaintiff's tax debts but not to the extent required by the plaintiff)

Substance of the case

Facts and parties' main arguments in the case

The court proceedings concentrated on determining the point in time when the right to grant the real estate tax exemption (in the form of *de minimis* aid) is acquired by the plaintiff company. The Court considered the following EU legislation when deciding upon this question: Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 EC Treaty to *de minimis* aid and *de minimis* Regulation on the application of Articles 87 and 88 EC Treaty to *de minimis* aid.

Based on a resolution of the City Council in B. No. XXIX / 243/2005 of 14/09/2005 regarding real estate tax exemptions for entrepreneurs implementing new investments, the plaintiff applied on 7 December 2006 for an exemption from real estate tax on buildings and structures intended for running a business. On 22 January 2007, the company was informed that some of the properties indicated in the application meet the conditions for an exemption from the real estate tax as of 1 January 2007. However, the decision issued on 12 May 2009 calculated the amount of the tax exemption in question in a different manner than indicated by the plaintiff in the 2009 tax return. In the decision, the public authorities underlined that the plaintiff used the maximum amount of the allowed *de minimis* aid as set in the Resolution of the City Council, which referred to Commission Regulation No. (EC) 69/2001 of January 12, 2001 on application of Article 87 and 88 EC Treaty with regard to aid under the *de minimis* rule.

The Regional Administrative Court (First Instance Court) ruled that the *de minimis* aid should be granted from the moment the plaintiff applied for it rather than from the moment when it acquired such a right, i.e. from 1 January 2007. The First Instance Court considered the amount of State aid was correctly determined by the tax authorities, based on Commission Regulation EC No. 69/2001. Moreover, the Court stated that *de minimis* State aid is granted on the basis of domestic law, not Commission regulations. The act of local law only has to meet the conditions set out in the Commission Regulation, and the issuance of a new Regulation by the Commission, setting a higher level of *de minimis* aid allowed, did not mean the need to automatically increase the State aid granted.

The company appealed against the above judgment and requested its revocation and referral of the case for re-assessment to the lower instance court. The plaintiff argued the judgment of the First Instance Court was in breach of procedural provisions having a significant impact on the content of the decision, and further alleged a violation of substantive law, i.e.:
(a) the provisions of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid with regard to *de minimis* aid, consisting in their application, despite the fact that they were not binding at the time the aid was granted;
(b) the provisions of *de minimis* Regulation due to not applying them despite their validity at the time the aid is granted;
(c) the provisions of the domestic Act on State Aid Proceedings in conjunction with the provisions of the Act of 12 January 1991 on taxes and local fees, by their erroneous interpretation: the day from which State aid was calculated was the day of submitting the application, while according to the plaintiff, domestic legal provisions clearly show that it should be calculated from the day when the right to the tax exemption was acquired.

The defendant maintained its position as expressed in the local authority decisions, granting *de minimis* aid only as a limited real estate tax exemption.

Remedy(ies) sought

Other remedy sought

Revocation of the local public authorities' decision granting only a limited amount of *de minimis* aid and granting the plaintiff the full amount of *de minimis* State aid applied for

Outcome of the case

Conclusions adopted by the national court

The Court rejected the claim.

The Court did not agree with the plaintiff's position regarding the determination of the day from which the *de minimis* aid should be granted. The Court indicated that the way of determining that day suggested by the plaintiff (from the day the right was acquired rather than the day when the application was submitted) would be in breach of the domestic law provisions, namely the Act on Proceedings in Matters Concerning State aid. The Court underlined that the national legislation allowed the day to be defined differently than in the Act, by introducing separate provisions. Moreover, the Court noted that following the plaintiff's way of determining the day from which to calculate the aid would have led to a paradoxical conclusion: on the day selected by the plaintiff (15 January 2007), the resolution of the City Council in B of 14 September 14 2005, was not in force anymore hence there would be no grounds for providing State aid to the plaintiff.

Furthermore, the Court considered the alleged violation of the provisions of both Regulations of the Commission (EC No. 69/2001 of 12 January 2001 and *de minimis* Regulation). The Court indicated that *de minimis* State aid is granted on the basis of local law acts, and not on the basis of the Commission Regulation hence the alleged violation was unjustified. The Court stated that the Regulation sets only the general framework of State aid that cannot be exceeded by the national legislation, yet the fact that the Commission issued the new Regulation, which set a higher limit for *de minimis* aid did not mean an automatic obligation for *de minimis* State aid to be increased at national level. The State had the freedom to set the allowed level of *de minimis* aid, provided that it did not exceed the amount specified in the relevant Regulation. As a result, a State may abstain from issuing regulations on *de minimis* aid or set its level in an amount lower than indicated in the Commission's regulation. A possible increase in the amount of aid to the amount of EUR 20,000, as well as extending the scope of the exemption would have required – as indicated in the response to the cassation claim by the defendant – changes to the existing resolution or a new resolution in this matter by the City Council in B.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- 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 (*de minimis* Regulation)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary PL4

Date

19/11/2018

Case identifiers

Member State

Poland

Court which adopted the ruling (national language)

Sąd Najwyższy

Court which adopted the ruling (English)

Supreme Court of Justice

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Polish

Hyperlink to ruling

http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20SK%2030-14-2.pdf

Case reference

III SK 30/14

Procedural context of the case

The District Court (the Court for the Protection of Consumers and Competition) issued a judgment regarding the regional authorities' decision on 15 December 2009. The case was then heard by the Court of Appeal on 24 November 2010, which sent the case back to the District Court for re-assessment. The District Court rejected the claim on 27 September 2011, upon which an appeal was lodged with the Court of Appeal which rendered its judgment on 29 May 2012, returning the case to the District Court. The District Court ruled on the issue for the third time on 12 December 2012, and the Court of Appeal rendered a new appeal judgment on 14 October 2013. The plaintiff filed a cassation claim following the Court of Appeal judgment, and the Supreme Court judgment was first issued on 16 April 2015, in which the Court referred a request for a preliminary ruling to the CJEU. The judgment at hand is the Supreme Court's judgment following the CJEU ruling.

Type of action

Private enforcement

Delivery date of the ruling

28/11/2017

Language

Polish

Headnote

In this ruling, the Court discussed whether the obligation to purchase cogeneration electricity from specified state sources constituted State aid.

Parties

Names of the parties to the action

E. S.A. w P (anonymised)

Versus

Prezes Urzędu Regulacji Energetyki

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Energy sector

The type of State aid measure challenged in the court proceedings

Other

Obligation to purchase energy from a specific source

Substance of the case

Facts and parties' main arguments in the case

The plaintiff (an energy provider) filed a cassation claim in which they asked the Supreme Court to overrule the judgment of the Court of Appeal keeping in force the decision of the Office of Energy Regulation of 27 November 2008. According to that decision, the plaintiff was liable to pay 3,600,000 PLN to the defendant (the President of the Office for Energy Regulation). The plaintiff argued a breach of Article 108(3) TFEU in conjunction with Article 107(1) TFEU and Article 91(2) of the Polish Constitution due to the fact that these articles were not relied upon. According to the plaintiff, the obligation stemming from the Polish law to purchase electricity produced by cogeneration with the production of heat ("electricity produced by cogeneration") from energy sources connected to the network and situated in the Republic of Poland constitutes unlawful State aid within the meaning of Articles 107(1) and 108(3) TFEU. Hence, the plaintiff argued that if these Articles were correctly applied, such an obligation would not exist and as a result a financial sanction would not be imposed upon the plaintiff for breach of the said obligation. The plaintiff further argued that the obligation to purchase the cogeneration energy and the financial sanctions related to breach of this obligation are in violation of the EU ban on providing State aid prior to the Commission decision on compatibility of the State aid (Article 108(3) TFEU).

The defendant dismissed all these claims and asked the Court to dismiss the action brought by the plaintiff.

Remedy(ies) sought

Other remedy sought

The plaintiff asked to annul the obligation to purchase the cogeneration energy and to annul sanctions for breach of this obligation. According to the plaintiff, such obligation constituted unlawful State aid.

Outcome of the case

Conclusions adopted by the national court

The Court decided that "the most important arguments of the cassation claim", namely the breach of Article 108(3) TFEU in conjunction with Article 107(1) TFEU in relation to the obligation to purchase cogeneration energy proved unjustified. This ruling was rendered based on the preliminary ruling of the CJEU – judgment of 13 September 2017, Case ENEA S.A. v Prezes Urzędu Regulacji Energetyki C-329/15. The CJEU decided that the obligation placed on both private and public undertakings to purchase electricity produced by cogeneration was not imputable to the State nor did it constitute a grant through State resources and therefore should not be classified as State aid. The CJEU further explained that the mere fact that the State held the majority of the capital in some of the undertakings to which the purchase obligation applies, did not lead to the conclusion that the State exercised a dominant influence that enabled it to direct the use of the resources of those undertakings. Furthermore, the purchase obligation applied equally to all electricity suppliers, regardless of whether their capital was predominantly held by the State or by private operators.

The CJEU also questioned whether the conduct of the plaintiff in this case was indeed dictated by the state. The CJEU was of the opinion that the decision to decline offers for the sale of electricity produced by cogeneration was the result of autonomous business decisions. Hence, the CJEU concluded that in this case no unlawful State aid existed (paragraphs 16-36 of the CJEU judgment). The Polish Supreme Court did not further elaborate on this reasoning yet accepted the outcome of the CJEU ruling and dismissed the claim in relation to its arguments based on State aid rules.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-329/15, ENEA S.A. v Prezes Urzedu Regulacji Energetyki, (2017) ECLI:EU:C:2017:671

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

C-329/15, ENEA S.A. v Prezes Urzedu Regulacji Energetyki (2017) ECLI:EU:C:2017:671 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-329/15)

Any other comments (optional)

No other comments

Case summary PL5

Date

04/01/2019

Case identifiers

Member State

Poland

Court which adopted the ruling (national language)

Wojewódzki Sąd Administracyjny w Krakowie

Court which adopted the ruling (English)

Regional Administrative Court in Cracow

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

Polish

Hyperlink to ruling

http://www.orzeczenia-nsa.pl/wyrok/i-sa-kr-1121-14/podatki_od_nieruchomosci_skargi_organow_nadzorczych_na_uchwaly_rady_gminy_w_przedmiocie_art_ust/1e1d7.html

Case reference

I SA/Kr 1121/14

Procedural context of the case

In this case, the Regional Administrative Court in Kraków (Wojewodzki Sad Administracyjny w Krakowie) was acting as the First Instance Court. No information is available whether this was afterwards considered by the Supreme Administrative Court.

Type of action

Private enforcement

Delivery date of the ruling

31/10/2014

Language

Polish

Headnote

In this ruling, the Court rejected the claim concerning the lawfulness of regional law on reductions concerning the tax on real estate. The Court explicitly interpreted Articles 107 and 108 TFEU and implicitly distinguished between deciding on the compatibility of aid and on the need for notification.

Parties

Names of the parties to the action

Kolegium Regionalnej Izby Obrachunkowej w Krakowie

Versus

Rada Miejska w Tarnowie

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

L - Real estate activities

Real estate activities

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The subject of the case was the resolution of the Town Council of Tarnów of 30 January 2014 (local law) on the exemption from property tax, constituting regional investment aid.

The plaintiff in this case, the College of the Regional Audit Chamber in Kraków, filed for an annulment of this resolution in its entirety. According to the plaintiff, the exemption from tax, and therefore the regional investment aid (State aid) would be granted under the resolution after 30 June 2014. At that time, both the domestic governmental Ordinance of 5 August 2008 on the conditions for granting property tax exemptions and tax exemptions on means of transport constituting regional investment aid (Journal of Laws No. 146, item 927, as amended) and the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (OJ L 214, 9.8.2008) would no longer be in force. Hence, there would be no legal basis for granting State aid.

According to the plaintiff, the State aid in question here applied to buildings from the first day of the year following the year in which the investment was completed and lasts for three tax years. The admissibility of granting State aid (in the form of regional investment aid) after 30 June 2014 under domestic law required an opinion on of the President of the Office for the Protection of Consumers and needed to be based on a new Commission regulation or a new regulation of the Council of Ministers. Since these conditions were not met here, the plaintiff argued that the resolution in question was, consequently, unlawful.

In response to the complaint, the defendant filed for a dismissal of the complaint indicating that the Commission Regulation (EC) 800/2008 did not expire on 31 December 2013. This is due to the fact that based on Article 45 (amended by Article 1 of Regulation No. 1224/2013 dated 29 November 2013), Regulation (EC) No. 800/2008 should apply until 30 June 2014, and the exclusion of regional aid programs expires on the date approved in regional aid maps (Article 44 paragraph 3 sentence 2). In the case of Poland, this date is also 30 June 2014 (according to paragraph 9 of the Council of Ministers' Regulation of 13 October 2006 on the establishment of a regional aid map (Journal of Laws No. 190, item 1402, as amended). As a result, the defendant argued regional State aid may be granted up until that day (paragraph 13 of the Regulation of the (Polish) Council of Ministers of 9 January 2015 on the conditions of granting real estate tax exemption and tax on transport means).

The defendant also indicated that the Regulation 800/2008 limits only the possibility of granting regional aid to 30 June 2014, yet it does not provide for any time limits as regards the use of aid, provided that its maximum intensity and value is maintained. The three-year duration of the tax exemption in the Municipality of Tarnów refers precisely to the use of this exemption, and not to its granting, which can only take place during the period of validity of the resolution, i.e. until 30 June 2014. In the opinion of the defendant, the plaintiff misinterpreted the definition of the date of granting aid. The day of granting the aid in the form of the challenged exemption was not the day on which the deadline for submitting the relevant tax return expires, but in accordance with the general rule, the day when the entity acquires the right to receive State aid in this form. The defendant argued that pursuant to paragraph 5(1) of the challenged resolution, an entrepreneur who meets the conditions set out in it, acquires the right to State aid on the day of filing and submitting information. Of course, these activities may be undertaken only during the period of validity of the resolution, i.e. until 30 June 2014.

Remedy(ies) sought

Other remedy sought

Annulment of the resolution of the Commune Council of Tarnów of 30 January 2014

Outcome of the case

Conclusions adopted by the national court

The Court dismissed the complaint and shared the view of the defendant. The Court relied on the Act of 12 January 1991 on taxes and local fees (Journal of Laws of 2014, item 849) regulating the establishment of tax and the rules for the settlement of property tax, and stated that it is necessary to distinguish the moment of acquiring the right to be released from tax obligations and the actual beginning of exercising the right to a tax exemption (its consumption). Thus, the Court did not share the plaintiff's position according to which these terms were identical.

The Court further held that this had led the plaintiff to erroneously conclude that, on the basis of the challenged resolution, the emergence of tax liability in respect of real estate would arise after the expiration of validity of Commission Regulation (EC) No. 800/2008, and the Regulation of the Council of Ministers of 5 August 2008. In the opinion of the Court, the right to tax exemption was acquired during the period of validity of both acts. The Court distinguished the concept of 'tax exemption' and 'tax relief'. Consequently, the Court considered that when a tax exemption is introduced by a resolution of the Town council as was the case here (pursuant to Article 17 (3) of the Act on Taxes and Local Charges), if the property tax obligation arises at the moment when the resolution does not apply anymore and the law is then implemented, it does not change the fact that the right to tax exemption was acquired before 30 June 2014.

As a consequence, the Court also declared that the plaintiff's argument regarding the requirement to give opinion on the draft challenged resolution by the President of the Office for Competition and Consumer Protection was also unfounded.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (Text with EEA relevance), OJ L 214, 9.8.2008

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary PL6

Date

04/01/2019

Case identifiers

Member State

Poland

Court which adopted the ruling (national language)

Sąd Apelacyjny w Warszawie

Court which adopted the ruling (English)

Court of Appeal in Warsaw

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

Polish

Hyperlink to ruling

http://orzeczenia.waw.sa.gov.pl/content/$N/154500000003003_VI_ACa_000074_2013_Uz_2013-06-18_002

Case reference

VI ACa 74/13

Procedural context of the case

- First instance court judgment: 9 December 2009, District Court of Warsaw; (ruling XX GC 206/08);
- Second instance court judgment: 10 December 2010; Warsaw Court of Appeal (no reference available);
- Last instance court (in a cassation claim): Supreme Court in Warsaw, judgment of 20 January 2012 (ruling I CSK 214/11);
- Second instance court (as the Supreme Court sent the case back for reassessment: Warsaw Court of Appeal, judgment of 29 June 2012 (no reference available);
- Last instance Court - Supreme Court (issuing a ruling regarding a complaint against the Court of Appeal judgment): ruling of 23 November 2012, (ruling I CZ 152/12);
- Court of Appeal – final judgment – the ruling at hand.

Type of action

Private enforcement

Delivery date of the ruling

18/06/2013

Language

Polish

Headnote

In this ruling, the Court examined in detail the notion of State aid and the four requirements which need to be met in order to classify a measure as State aid: state resources, economic advantage, selectivity and distortion of competition. The judgment also defines the scope of competence of national courts in cases concerning State aid.

Parties

Names of the parties to the action

S.A. w W. (anonymised)

Versus

S.A. w W. (anonymised)

The relationship of the plaintiff to the measure

Other

A company established from a limited liability company (from the defendant's daughter-company). This is also why the parties have the same name. The defendant alleged that if they executed the agreement in place, the plaintiff would have become a beneficiary.

The relationship of the defendant to the measure

Competitor

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Gas transmission

The type of State aid measure challenged in the court proceedings

Other

Agreement regulating the liabilities of the plaintiff and the defendant in relation to paying the employees' social security contributions

Substance of the case

Facts and parties' main arguments in the case

The plaintiff's company was created from a limited liability company that was formed as the 'daughter-company' of the defendant. The shares in the plaintiff's company were transferred by way of a donation agreement of 28 April 2005 to the State Treasury, which contributed in the form of segments transmission system.

On 7 July 2005, following the conclusion of the transfer contract by the plaintiff (then acting as a limited liability company) and the State Treasury, the defendant transferred to the plaintiff the ownership and perpetual usufruct right to the assets owed by him to the State Treasury. On 6 July 2005, the parties concluded an operating lease agreement regarding the use of elements of the gas transmission system located throughout Poland.

As a result of these events, the plaintiff became an employer of 2017 employees formerly employed by the defendant. The parties were liable for obligations arising from the employment relationship that arose before the takeover of the enterprise by the plaintiff company.

On 7 July 2005, the parties concluded an agreement regarding the takeover of the plaintiff's company by the defendant and implementation of obligations towards the complainant's employees in respect of retirement benefits and jubilee bonuses. As a result, the defendant was obliged to partially refund to the plaintiff the value of benefits paid to employees in respect of retirement benefits and jubilee bonuses, corresponding to the length of service in each of the companies. By 30 April 2006, the plaintiff created balance sheet provisions for the payment of retirement severance pays and jubilee bonuses. Similar reserves, in the amount determined by the actuary, were also to be created by the defendant. Pursuant to paragraph 5(1) of the agreement, the plaintiff accrued and paid to each employee the benefits to which they are entitled by virtue of retirement benefits and jubilee bonuses, setting the amount that the defendant was obliged to return.

For the period from July to November 2005, the plaintiff paid the employees individual benefits in the amount of PLN 703,574.16. On 14 December 2005, the plaintiff issued a note to the defendant for the amount of PLN 679,117.01, which the plaintiff then adjusted, charging the defendant with a portion of the defendant's due to the eligible employees.

The defendant alleged, inter alia, that the implementation of the agreement could expose them to a charge of granting unlawful State aid as referred to in Article 87(1) EC Treaty (current Article 107(1) TFEU).

The First Instance Court rejected the defendant's position that the implementation of the agreement would mean granting the plaintiff State aid, which is not allowed according to Article 87(1) of the EC Treaty (current Article 107(1) TFEU). The Court explained that the agreement entered into by the parties was not subject to a decision or even to an evaluation by the Commission. In addition, any recognition by the Commission that a Member State has granted State aid which is not allowed can only result in the obligation to return it by the beneficiary. However, it does not affect the validity of the contract being the source of such State aid.

Remedy(ies) sought

Other remedy sought

The plaintiff sought that the court orders the defendant to make the payments according to the agreement regulating the liabilities of the plaintiff and the defendant in relation to paying the employees' social security contributions.

Outcome of the case

Conclusions adopted by the national court

The Court of Appeal therefore decided to examine whether this was a case of State aid, as alleged by the defendant.

The Court restated that State aid can be defined as disbursement of State resources to support undertakings or the production of certain goods, constituting an economic benefit for the beneficiary (undertakings), and at the same time distorting or threatening to distort competition. It is therefore incompatible with the internal market in so far as it affects trade. An entrepreneur receiving this State aid from the Government gains an advantage over its competitors. Therefore, the EC Treaty (current TFEU), in general, prohibits State aid, unless it may be considered compatible with the internal market for reasons of general economic development.

The Court of Appeal shared the view expressed by the plaintiff that the defendant did not provide sufficient evidence, which would prove that the implementation of the agreement of 7 July 2005 would entail State aid. The defendant failed to show that the obligation under the agreement at issue constituted aid granted by the State or through State resources, which only favours certain undertakings or products, distorts competition or threatens to distort competition and at the same time affects trade between Member States. Only support that causes imbalance between the beneficiary of aid and its competitors can be classified as State aid, according to the so-called selectivity requirement. The defendant did not manage to show how this requirement was met in the case at stake. Meanwhile, the file shows that the plaintiff is the entity managing the national transmission system. It is a company that exists since 16 April 2004 and when it was established, it assumed responsibility for the transmission of natural gas and management of the transmission network in Poland. In June 2004, the President of the Energy Regulatory Office granted the company a gas transmission and distribution license for 2004 – 2014. In 2010, the plaintiff was designated as the operator of the gas transmission system until 31 December 2030.

The defendant also failed to show that, if the plaintiff had competitors, the plaintiff would receive an advantage under the agreement of 7 July 2005 in relation to its competitors operating on the gas transmission market, i.e. such a benefit that they would not be able to count on in the same circumstances.

Furthermore, the Court underlined that State aid distorts or threatens to distort competition. Almost any selective support will have the potential to distort competition, however the scale of the distortion or threat of distortion of competition will depend on the size of the beneficiary and its market share. This requirement is not satisfied in principle when the beneficiary's activity is a local monopoly. An examination is required as to whether the aid measure strengthens the beneficiary's market position in relation to the position of its competitors.

Moreover, the Court stated that State aid usually affects trade between Member States. The majority of goods or services are traded between Member States and therefore support for almost any business activity may cause disruption of trade between Member States, even if the supported company does not directly export. According to the Commission (supported by the ECJ (current CJEU) judgment in Case Commission v. Italy C-305/89), it suffices that at least two products compete on the market of a given Member State, and one of them originates from another Member State. However, helping enterprises competing on local markets for goods and services that do not compete with goods from other Member States does not constitute a threat to trade. In the case in question, the defendant did not elaborate on the situation regarding the gas transmission market. The Court also mentioned and analysed a category of State aid measures whose size indicates that they are not able to have an adverse effect on competition (*de minimis* aid). The Court concluded the defendant did not show that the support resulting from agreement at hand could distort competition.

The Court also underlined that Article 108(3) TFEU, unambiguously grants the Commission the exclusive supervisory function over granting State aid. Before 1 May 2004 (Polish accession to the EU), the President of the Office of Competition and Consumer Protection was the organ supervising the granting of State aid to undertakings in the Poland. Since Poland's accession to the EU, the President of UOKiK (Office for the Protection of Competition and Consumers) pursuant to Article 31(2) of the Act of 30 April 2004 on proceedings in matters concerning State aid, is responsible for monitoring State aid. For these reasons, in the Court's assessment, the District Court correctly observed that the agreement entered into by the parties had not been the subject of a decision or even an assessment by the Commission, and the Court is not competent to deal alone in this case with regard to the compliance of the contract with the provisions of Articles 107 - 109 TFEU.

The claim was rejected meaning that the first instance judgment remained in force according to which the defendant needed to pay the plaintiff the amount as calculated according to the agreement of 7 July 2005.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-305/89, Italian Republic v Commission of the European Communities (1991) ECLI:EU:C:1991:142

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- 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 (*de minimis* Regulation)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary PL7

In this ruling, the Court discussed the implementation of the public assistance program considered compatible with Union law on State aid.

Date

04/01/2019

Case identifiers

Member State

Poland

Court which adopted the ruling (national language)

Sąd Najwyższy

Court which adopted the ruling (English)

Supreme Court of Justice

Instance court which adopted the ruling

Last instance court (civil/commercial)

Official language of the court

Polish

Hyperlink to ruling

http://www.sn.pl/sites/orzecznictwo/orzeczenia2/iii%20sk%2034-12-1.pdf

Case reference

III SK 34/12

Procedural context of the case

Earlier instances:
- Sąd Okręgowy w W; District Court, judgment of 26 May 2010;
- Sąd Apelacyjny, Court of Appeal, judgment of 7 March 2012.

The Supreme Court decided to send the case back to the Court of Appeal for reassessment. However, a subsequent ruling from the lower court is not available.

The Commission issued a decision on 25 September 2007, approving State aid granted based on the law on the rules of covering costs incurred by generators in connection with early termination long-term contracts for the sale of power and electricity (Law of 29 June 2007).

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

08/05/2013

Language

Polish

Headnote

Parties

Names of the parties to the action

PGE Górnictwa i Energetyki Konwencjonalnej Spółki Akcyjnej w B.

Versus

Prezes Urzędu Regulacji Energetyki

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Generated energy

The type of State aid measure challenged in the court proceedings

Other

Annual adjustment of stranded costs

Substance of the case

Facts and parties' main arguments in the case

The case concerned the issue of stranded costs. Stranded costs are the producer's expenses not covered by revenues obtained from the sale of generated energy on the competitive market after an early termination of a long-term contract.

The defendant was of the opinion that the financial result generated by the producer on the competitive market is taken into account for the calculation of payment of stranded costs under the provisions of the LTC Act (the law on the rules of covering costs incurred by generators in connection with early termination long-term contracts for the sale of power and electricity, 29 June 2007). The producer's income depends on the volume sold and the electricity price at which it was sold.

In a situation where the price of energy sold has not been shaped by activities in a competitive market, determining the value of the producer's income should take into account the prices that the company would receive, if it operated on a competitive market.

Only such an interpretation, according to the defendant, allows for a correct implementation of the Commission decision of 25 September 2007 approving State aid provided for in the LTC Act (hereinafter referred to as the Commission decision).

The plaintiff, on the other hand, was of the opinion that if the producer did not act on the competitive market, its financial balance for the purposes of the annual adjustment of stranded costs should be calculated by substituting income and costs in the amount of PLN 0 and the depreciation amount in the actual amount (providing that depreciation is not subject to compensation based on support mechanism for stranded costs and does not affect the amount of compensation received under the Act).

Furthermore, the plaintiff claimed an erroneous interpretation of the domestic law by assuming that the domestic law shall serve to control State aid granted to the manufacturer under the LTC Act.

The defendant in the reply to this cassation claim considered in detail the concept of the competitive market. The defendant argued that it was necessary to specify the 'component Dj' for the purpose of calculating the actual value of the manufacturer's financial balance, and hence the revenues from sales on the competitive market. Only revenues from sales in such a market are relevant to the calculation of the stranded costs adjustment, according to the domestic law (LCT Act).

The President of the Energy Regulation Office challenged the plaintiff's claim that the competitive market within the meaning of domestic law is the entire market on which the producers sell their electricity after the termination of long-term contracts, regardless of whether the sale of such energy is made within a capital group, or outside of this group.

The defendant further argued that the domestic law did not contain a definition of the concept of a competitive market, hence the general meaning as used in the legal language should be adopted. Competitive markets are therefore markets with a free game of demand and supply. The basic condition classifying a market as competitive is the existence of a competitor. A competitive market is a market where competition is effective. It is therefore a market where energy sellers can reap real benefits from competition between buyers.

Long-term contracts and their operating mechanism were only one of the elements disrupting the functioning of the competitive market. The market created after the termination of long-term contracts is however, according to the defendant, not a competitive market. In the opinion of the defendant, the exemption of generators from the tariff obligation does not prove the sale of electricity by each producer on the competitive energy market. Conducting vertical consolidation in the power sector in 2007 radically changed the possibilities of their operation in a competitive market. Generators belonging to vertically consolidated energy groups basically sell the whole energy volume to their parent companies dealing in energy trading, and only these companies offer electricity in a competitive market.

Remedy(ies) sought

Other remedy sought

In the cassation claim, the plaintiff requested to repeal the judgment under appeal in its entirety and amend it by dismissing the appeal of the President of the Office, possibly repealing the judgment in its entirety and referring the case to the Court of Appeal for reconsideration. The defendant, in response to the plaintiff's cassation complaint, filed for dismissal and adjudication of the costs of legal representation.

Outcome of the case

Conclusions adopted by the national court

According to the Supreme Court, the concept of 'competitive market' used in the domestic law is not defined in the LTC Act. The justification for the draft LTC Act also does not explain why the concept was introduced into the Act in such a vague manner. The justification of the project shows that long-term contracts "create a semi monopolistic structure", while "the development of a competitive electricity market will be hindered without the liquidation of such structures". This suggests that only the implementation of the solutions provided for in the LTC Act could lead to the creation of a competitive energy market in the future. On the other hand, the justification of the Act itself states that the LTC Act introduces solutions of significance for the "further development of a competitive electricity market", which would mean that the market was competitive before the entry into force of the law, and the termination of the long term contracts only increased the level of competition in this market.

The Supreme Court also noted that referring to systemic interpretation, it can be assumed that the notion of a competitive market for the purposes of the LTC Act should be understood in the same way as in the Energy Law, which is the main act applicable to the activity on the energy market. The Energy Law Act also does not define the concept of a competitive market, but the term is used in one of the provisions envisaging certain consequences from the fact of operating on a competitive market. In the present case, the reference to the Energy Law Act would lead to the conclusion that the plaintiff operates in a competitive market, since he is exempt from the obligation to submit tariffs for approval, regardless of how the energy market in Poland and the rules of its operation developed after being released from the obligation. However, it would undermine the advisability of adopting the LTC Act, since the energy market in Poland was competitive despite the existence of the long-term contracts. Consequently, it is necessary to reject the possibility of forming the content of the notion of a competitive market solely on the grounds that the plaintiff has been released from the obligation to submit tariffs for approval. The mere termination of long-term contracts also does not mean that the energy market in Poland has become a competitive market, although it has undoubtedly positively influenced its competitiveness. The Supreme Court also stated that the decision of the Commission did not make the implementation of the approved State aid program conditional on the obligation to sell energy on the power exchange, or on the bilateral agreements concluded with entities from outside the capital group. The Commission found the prices obtained for energy under long-term contracts as non-market prices. On the other hand, market prices are prices that energy producers were not entitled to without long-term contracts (point 200 of the Commission decision).

Long-term contracts guaranteed the producers energy price level detached from the actual market situation. The Commission therefore recognised the energy sales market as a competitive market based on a qualitative criterion (selling price close to the marginal costs level) and not based on a structural-subject criterion (a multiplicity of entities acting on the supply and demand side). The decision of the Commission did not, therefore, preclude the possibility of qualifying sales of energy to a trading company from the same capital group as a transaction on a competitive market.

In Article 4(2) of the decision, the Commission found State aid provided for in the LTC Act to be compatible with the internal market in accordance with the Stranded Costs Methodology, while the LTC Act itself was assessed "in the light of the content of the Methodology" (paragraph 346 of the decision). In paragraph 366 of the decision, the Commission found that the aid provided for in the LTC Act fulfilled the conditions provided for in points 4.1 and 4.2 of the Methodology. At the same time, the Court underlined that the decision showed that the Commission always reserves the right to control that the actual implementation of the State aid program is compliant with State aid rules (point 4.6). The rulings of the courts issued in the case at hand would not therefore in any case preclude a possible future recovery order of State aid.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

Subsequent ruling from the lower court is not available.

Difficulties referred to by the national court in deciding the case (optional)

The Court faced difficulties regarding the enforcement of State aid rules due to the strategic national importance of the plaintiff, a major energy producer.

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission Decision K (2007) 4319 of 25 September 2007 on compatibility of the State aid granted based on national legislation

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

21.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 391/08	17/10/2008	Private enforcement	Other remedy imposed	The case concerned a rejection of a request for issue of a confirmation of receipt of *de minimis* aid to a services company by the city in which it is located. The Court of Appeal regarded the rejection of the request as unlawful. The city appealed to the Supreme Administrative Court but the appeal was unsuccessful. The subject of the proceedings before the public administration authorities was the refusal to issue a certificate to the party filing a cassation complaint stating that the aid granted is *de minimis* aid. The refusal to issue a certificate was justified on the basis of the analysis of individual items of assistance granted to the party filing a cassation complaint which showed that in the period of three subsequent years preceding the day of submitting the application, the value of assistance provided by the authority, together with the assistance provided by the party, exceeded the equivalent of EUR 100,000 and the conditions for granting *de minimis* aid referred to in Article 63 of the Act of 30 April 2004 on proceedings in matters concerning State aid were not met. However, the public authorities did not analyse all the evidence correctly and did not apply the relevant legal provisions which is why their refusal shall be rendered void.		The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 686/08	09/02/2009	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The Supreme Administrative Court annulled the judgment of the Administrative Court of Appeal and ruled the case should be re-considered by the Administrative Court of Appeal.	The Court confirmed that if the assistance provided under the contract has been misused, the authority granting the aid, ex officio or at the request of the supervisory body, will apply to the court for reimbursement of the equivalent amount. As of the date of the decision of the court ordering the return of the amount constituting the equivalent of the aid, there is an obligation to return this amount.	The Regional Administrative Court rejected the claim in the following judgment: V SA/Wa 422/09 on 28 May 2009, available at http://orzeczenia.nsa.gov.pl/doc/1206B3A903.
Wojewódzki Sąd Administracyjny w Krakowie	Regional Administrative Court in Kraków	Second to last instance court (administrative)	SA/Kr 1121/08	04/03/2009	Private enforcement	None - Claim rejected	The plaintiff appealed against the regional authority's decision on the refusal to grant funds for the restructuring of its company. The regional authorities refused to grant such funds as, due to the accession of Poland to the EU (the facts of the case took place at the beginning of Polish membership to the EU), in circumstances like the ones at hand, the provisions on the granting of State aid according to Union law apply and therefore have primacy over the Polish law on restructuring. Therefore, any aid shall be notified to the Commission, which the plaintiff declined to do.	Although the general prohibition pursuant to Article 88(3) of the EC Treaty (current Article 108(3) TFEU) is addressed to the Member States, it can also directly affect the right and obligations of the individuals. See Bernat, M. (2012). Środki tymczasowe w prawie pomocy publicznej (Cz. I). *Europejski Przegląd Sądowy* 7, page 12–21.	The court acted as a last instance court in this case.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 817/08	20/05/2009	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected cassation in this case. This means the judgment of the Regional Administrative Court remains in force. According to that judgment, the decision of regional authorities refusing to waive the execution costs remains in force. The enforcement bodies also correctly assessed the existence of a redemption condition due to the 'important public interest'. In the opinion of the Regional Administrative Court, this concept should be evaluated, taking into account values common to society as a whole, such as justice, security, trust in State bodies, as well as eliminating situations where the result of non-payment will be a burden on the State Treasury for enforcement costs. Certainly, however, the public interest cannot be equated with the subjective conviction of the plaintiff that the costs should be remitted. When assessing this circumstance, account should be taken of the legitimacy of the burden State aid creates for the State and for society as a whole. The inability to clearly define this concept means that in each individual case its meaning may take into account various aspects.	This case was not a classic State aid case and State aid was predominantly a part of the factual background in this case. It is nevertheless included as the Court did elaborate on the notion of State aid.	The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 574/09	27/04/2010	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The Supreme Administrative Court annulled the judgment of the Regional Administrative Court and ruled that the case should be considered again by the Regional Administrative Court. In relation to State aid, the Supreme Administrative Court stated that financing a lawful purchase, from an account to which State aid funds are only subsequently transferred, does not mean that the purchase cannot be classified as funded by State aid.		The case was referred back to the Regional Administrative Court, which rejected the claim on 5 October 2010 in the judgment V SA/Wa 1614/10 (not publicly available).
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 624/10	22/06/2010	Private enforcement	None - Claim rejected	The Supreme Court rejected the cassation appeal in this case. Hence, the judgment of Regional Administrative Court - which kept in force the regional authority's decision on not granting the State aid to the company as it did not fulfil the administrative requirements - remains in force. Due to its close links to a significantly bigger company, the plaintiff company could not be considered as an SME and as such receive State aid in the case in question. The plaintiff failed to meet the status of a micro, small or medium enterprise as referred to in Article 3 Annex 1 to the established Commission Regulation (EC) No.		The case was referred from the Regional Administrative Court.

							800/2008, which is an obstacle to applying for financial support for the implementation of the discussed project. The connection of E.S.A. enterprises was taken into account. As the Supreme Administrative Court put it, the company, which is part of a larger economic body, shares its fate, in any case when applying for public assistance.		
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 610/09	20/08/2010	Private enforcement	Case sent back to the lower court for re-assessment	The Supreme Administrative Court annulled the judgment of the Regional Administrative Court and ruled the case should be re-considered by the Regional Administrative Court. Please note that as tax relief was never granted in the case at stake, the lawfulness of State aid was not examined. The Court rules that if the tax authority finds, in the proceedings, that there are no grounds for granting relief because doing so does not support the 'important interest of the taxpayer' or the 'public interest', it makes no sense to determine whether the relief is admissible State aid.	Although the lawfulness of State aid was not examined, the case is nevertheless included as the Court elaborated on the notion of State aid.	The case was referred from the Regional Administrative Court. The subsequent ruling from the lower court is not available.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 17/10	12/02/2011	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The Supreme Administrative Court annulled the Regional Administrative Court judgment and ruled that the case should be considered again at the Regional Administrative Court level. As the regional authorities underlined, when first deciding on the case, the plaintiff's request for aid may fail as his circumstances do not comply with requirements for granting *de minimis* aid. In line with recital 7 of Commission Regulation (EC) No. 1998/2006 on the application of Article 87 and 88 of the EC Treaty to *de minimis* aid, this Regulation should not apply to disadvantaged economic operators within the meaning of the Commission guidelines on State aid for rescuing and restructuring firms in difficulty.		The Regional Administrative Court rejected the claim in its judgment of 30 May 2011 (V SA/Wa 406/11; http://orzeczenia.nsa.gov.pl/doc/18D1A23312).
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 512/10	11/05/2011	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected the cassation appeal in this case and, as a result, the judgment of the Regional Administrative Court remains in force. Accordingly, the decision of regional authorities refusing to recognise the aid as *de minimis* aid (and hence classifying it as unlawful State aid), is rendered void.	Temporary covering expenses of the rehabilitation fund from the entrepreneur's own account and then its supplementation from the State aid account cannot result in the refusal to recognise the aid as *de minimis* aid.	The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 362/10	22/06/2011	Private enforcement	None - Claim rejected	The Supreme Court rejected the appeal from the Court of Appeal judgment. Prior to this, the Court of Appeal rejected the appeal from the regional court. The regional court issued the recovery order which, therefore, remains in force. The case related to existing State aid measures. The allegations raised by the plaintiff refer to issues related to the admissibility of the pre-existing aid after 1 May 2004. The court of first instance, referring to the regulations relating to the admissibility of applying State aid to entrepreneurs in the form of a tax exemption after that date, stated that, in the case at hand, public aid is unacceptable.		The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 299/10	29/06/2011	Private enforcement	Interim measures to suspend the implementation of an unlawful aid	Interim measures to suspend the implementation of (what would otherwise be) unlawful aid. The company applied for a higher waiver of an annual fee than allowed according to the *de minimis* Regulation. The Supreme Court did not allow the waiver.	The *de minimis* aid (as is apparent from the wording of the provision) has a discretionary character and requires the tax authority to determine that the aid is justified due to an important interest of the taxpayer or the public interest. The increase of the maximum amount of this aid by Commission Regulation (EC) of 15 December 2006 is without prejudice to any aid granted during the period of application of Regulation 69/2001. Since the decision to grant *de minimis* aid remains within the competence of a Member State, an increase in the ceiling for that aid would require the establishment of other grounds under national law.	The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 1396/10	27/01/2012	Private enforcement	Case sent back to the lower court for re-assessment; Other remedy imposed	The Supreme Administrative Court annulled the judgment of the Regional Administrative Court and ruled that the case should be re-considered by the Regional Administrative Court. The case points to additional conditions in the scope of public aid resulting from the provisions of the EC Treaty (current TFEU) and national provisions taking into account Union law provisions, in a situation where legal decisions continue to operate regarding the restructuring conditions in which the body fails to respect the principle of the rule of law expressed in Article 2 of the Constitution. According to the Supreme Administrative Court, the decision of 23 March 2005 on the restructuring conditions issued after Poland's accession to the EU has a law-making character. In this situation, the restructuring body's decision on the conditions of restructuring and the fulfilment of these conditions by the entrepreneur, the principle of trust in the State and its law, would require the restructuring authority to issue a decision on the confirmation of redemption of receivables (arrears) covered by the decision on restructuring conditions.		The Regional Administrative Court, in its judgment of 12 April 2012 (I SA/Ol 134/12) overturned the decision of the tax authorities which refused to restructure the tax debts (http://orzeczenia.nsa.gov.pl/doc/AF15EFE873).
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 335/11	27/03/2012	Private enforcement	Case sent back to the lower court for re-assessment; Other remedy imposed	The Supreme Administrative Court annulled the judgment of the Regional Administrative Court and ruled that the case should be re-considered by the Regional Administrative Court. The Court states that using the proceeds from rehabilitation funds for other costs incurred as part of the rehabilitation program does not constitute a misappropriation of State aid. A refusal to recognise expenditure as *de minimis* aid		The Regional Administrative Court in its judgment of 5 October 2012 (V SA/Wa 1566/12; http://www.lexlege.pl/orzeczenie/229851/v-sa-wa-1566-12-wyrok-wojewodzki-sad-administracyjny-w-warszawie/) annulled the decision of the regional authorities which

							could only apply to expenditure that would not be covered by the program or would not aim at reducing the occupational limitations under which the costs are financed. Under the circumstances that the purchase of a particular piece of equipment provides an increase in work comfort, promotes the improvement of working conditions regardless of whether the work is performed by a fully functional or disabled employee - they do not constitute a negative indication for the expenditure of the individual rehabilitation program. It is only of importance whether the covered IPR items are suitable to serve the purpose of reducing the occupational limitations of people with disabilities.		refused granting *de minimis* aid to the plaintiff.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 2636/10	03/07/2012	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected the cassation claim, hence the judgment of the Administrative Court of Appeal remains in force. This judgment rejected the claim of the defendant company to render void the decision of regional authorities regarding the property tax. The Mayor of the City determined the amount of the tax in question differently than indicated in the 2009 tax return of the company. The authority relied in its decision on the *de minimis* aid ceiling set by law. The issuing of a new regulation by the Commission, which sets a higher ceiling for *de minimis* aid, does not constitute an automatic obligation for the aid amount to be increased at national level. It may at any rate abstain from issuing regulations governing the issue of providing assistance or determining an amount lower than the level indicated in the Commission's regulation. A possible increase in the amount of aid, as well as extending the scope of the exemption, requires the changing of an existing one or making a new decision.		
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 86/12	19/12/2012	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected the cassation appeal in this case, meaning the Regional Administrative Court judgment remained in force. According to this case, the taxpayer needs to return the State aid by paying the tax - as well as possibly settling the loss on general principles - which is consistent with the intention of the legislature and systematic and purposive interpretation of provisions on the use of State aid based on authorisation to conduct business in a given zone (area); contrary interpretation leads to circumvention of the rules and violations of the rules for granting and using State aid.	The State aid issue was a part of the factual background, but irrelevant to the substantive issue. The case is nevertheless included as the Court did elaborate on the notion of State aid.	The case was referred from the Regional Administrative Court.
Sąd Apelacyjny w Warszawie	Court of Appeal in Warsaw	Second to last instance court (civil/commercial)	VI ACa 74/13	18/06/2013	Private enforcement	None - Claim rejected	The Court restated that State aid can be defined as the disbursement of public resources or their depletion in any form, to support enterprises or the production of certain goods, constituting an economic benefit for the beneficiary (entrepreneurs), and at the same time distorting or threatening to distort competition. It is therefore incompatible with the internal market in so far as it affects trade between Member States. An undertaking receiving this State aid from the Government gains an advantage over its competitors. Therefore, the EC Treaty, in general, prohibits State aid, unless it may be considered compatible with the internal market in light of services of general economic interest. The claim was rejected meaning that the first instance judgment remained in force according to which the defendant needed to pay the plaintiff the amount as calculated according to the agreement of 07/07/2005.		The Court acted as a last instance court in this case.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 552/12	30/07/2013	Private enforcement	Case sent back to the lower court for re-assessment	The Supreme Administrative Court annulled the judgment of the Administrative Court of Appeal and ruled the case should be re-considered by the Administrative Court of Appeal. Aid in the form of a real estate tax exemption granted to the company on the basis of the 2002 Resolution was unlawful.		The subsequent ruling from the lower court is not available. The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 532/12	23/01/2014	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected the cassation claim. Hence, the judgment of the Regional Administrative Court remains in force, according to which *de minimis* aid cannot be granted. This is due to the fact that the Court did not recognise any 'important interests of the taxpayer' - hence the aid, even though below the *de minimis* threshold, would constitute unlawful State aid.		The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 507/12	12/02/2014	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The case concerned the manner in which 'the taxpayer's relevant interest' and 'public interest', required for defining the lawfulness of State aid, are defined. The Supreme Administrative Court annulled the judgment of the Administrative Court of Appeal and ruled that the case should be re-considered by the Administrative Court of Appeal.		The Regional Administrative Court, in the judgment of 14 May 2014 (I SA/Op 285/14; http://www.lexlege.pl/orzeczenie/41837/i-sa-op-285-14-wyrok-wojewodzki-sad-administracyjny-w-opolu/) rejected the claim.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 633/13	18/06/2014	Private enforcement	Other remedy imposed	In this case, the plaintiff appealed against the decision of the regional authorities which denied a grant of *de minimis* aid. This decision was upheld by the Regional Administrative Court, but was amended in this judgment by the Supreme Court. The regional authorities and the first instance court both argued that no *de minimis* aid was to be granted as the plaintiff did not meet the 30 day deadline for the submission of documents (after the expense was made, which the party wanted to be reimbursed for). The Supreme Court ruled that the existence of such a deadline is unlawful in itself and therefore cannot constitute a reason for denying *de minimis* aid.		The case was referred from the Civil Court of Appeal.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 2068/12	27/08/2014	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected the claim in this case, meaning that the judgment of the Administrative Court of Appeal remained in force. According to that judgment, the decisions of the regional authorities are rendered void. This was since, when making a decision concerning the plaintiff's application to divide the paying off of tax debts into 20 instalments, the tax authorities did not give the plaintiff the choice to declare whether she was applying for *de minimis* aid or an aid available to entrepreneurs, which does not constitute State aid. The tax authorities assumed the plaintiff intended to obtain State aid. Hence, the procedure was not conducted in a lawful manner.		The case was referred from the Regional Administrative Court.

Wojewódzki Sąd Administracyjny w Krakowie	Regional Administrative Court in Kraków	Second to last instance court (administrative)	I SA/Kr 1121/14	31/10/2014	Private enforcement	None - Claim rejected	The Regional Administrative Court in Kraków rejected the claim in the case between two regional authorities, concerning the lawfulness of the regional law on reductions concerning the tax on real estate. The plaintiff pursued that the normative act in question allowed for the granting of unlawful State aid and is therefore in breach of Article 107(1); 107(3) and 108 TFEU. However, no such breach was established by the Court.		
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 464/14	25/02/2015	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected the cassation appeal in this case, hence the decision of the local authority remains in force.	State aid cannot be granted or paid to an employer who is in a difficult economic situation, according to the criteria set out in State aid rules. Hence, the claim of the employer (a company) for monthly support for the salaries of handicapped employees was rejected.	The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 506/13	02/04/2015	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The Supreme Administrative Court annulled the judgment of the Regional Administrative Court and ruled the case should be re-considered by the Regional Administrative Court. The case concerned defining the starting moment of the investment, which was relevant for the assessment whether the investments in question fulfilled the criteria for being granted State aid.		The case was referred back to the Regional Administrative Court which ruled in the judgment of 21 October 2015 (I SA/Bd 641/15; http://orzeczenia.nsa.gov.pl/doc/D78666B114) and rejected the claim.
Sąd Najwyższy	Supreme Court of Justice	Last instance court (civil/commercial)	III SK 30/14	16/04/2015	Private enforcement	Other remedy imposed	The Court decided to refer the case to the CJEU (case C-574/1). The Court asked whether Article 107 TFEU in conjunction with Article 4(3) TEU and Article 4(2) of EC decision of 25 September 2007 meant that once the Commission approves the lawfulness of the granted State aid, the national courts are not eligible to verify whether the domestic provisions based on which the State aid was granted are compatible with the rules outlined in the Commission's Communication on the methodology of the analysis of State aid of the stranded costs. Following up on this question, the Court inquired further into the relationship between the TFEU provisions and the methodology of the stranded costs.		The case was referred from the Civil Court of Appeal.
Wojewódzki Sąd Administracyjny w Warszawie	Regional Administrative Court in Warsaw	Second to last instance court (administrative)	VIII SA/Wa 109/15	25/06/2015	Private enforcement	None - Claim rejected	The Regional Administrative Court in Warsaw rejected the complaint of the plaintiff against the decision of the regional authorities on the matter of granting aid. The regional authorities refused to grant the aid as the plaintiff did not provide full documentation - documents regarding the received *de minimis* aid were missing. The plaintiff argued that as it was fully funded from the public budget, *de minimis* aid provisions did not apply to it. The Court did not agree with this reasoning and rejected the claim. It stated that in this case, the aid was granted for funding the training of new employees and in that sense constituted State aid, and therefore should have been notified.		The case was referred from the decision of the regional authorities.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 2049/14	28/10/2015	Private enforcement	None - Claim rejected	The Supreme Administrative Court in this case rejected the cassation claim. Hence, the judgment of the Regional Administrative Court remains in force, according to which State aid shall not be granted. The Court ruled that Article 109(1)(4) of the Public Finance Act of 30 June 2005, allowing for subsidies for various entities performing agricultural tasks, and Section 14 of the Regulation of the Minister of Agriculture and Rural Development of 13 April 2007 - providing for subsidies for farmers who suffered losses due to the necessary change in the intended use of sowing potatoes for less profitable purposes, would be applied taking into account EU regulations. It follows from these regulations that State aid is permissible only by way of exception and within the limits set by EU institutions. Aid to compensate farmers for costs and losses related to animal and plant diseases and pests may only be granted to agricultural producers falling within the definition of 'small or medium-sized enterprise'. National regulations, even if they do not explicitly contain such a reservation, must, of course, be applied with regard to it, since both the State and its administration are bound by Union law and the Constitution.		
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 2624/13	19/11/2015	Private enforcement	None - Claim rejected	The Supreme Court in this case rejected the cassation claim, meaning that the judgment of the Civil Court of Appeal remained in force. The Civil Court of Appeal also rejected the claim in question - in which the plaintiff asked for a tax reduction (to be allowed to pay the tax debts in instalments). The claim was rejected as it was decided that the requirements for granting *de minimis* aid were not met - *inter alia*, the *de minimis* aid may not be granted to entrepreneurs in a difficult economic situations, as was clearly the case in this instance.		The case was referred from the Civil Court of Appeal.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 90/14	31/03/2016	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected the cassation claim in this case, hence the judgment of the Regional Administrative Court remains in force. Any aid granted under the Law on Special Economic Zones of 1994, will be considered as new aid pursuant to existing State aid rules. Hence, the aid (in the form of a tax relief) could not be granted in this case, as it would constitute unlawful State aid.		The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 692/14	24/05/2016	Private enforcement	None - Claim rejected	The Supreme Administrative Court annulled the cassation claim and as a result the judgment of the Regional Administrative Court remains in force. According to this judgment, the decision of the regional authorities not granting *de minimis* aid to the plaintiff is rendered void. The omission by the tax authority of a reference to the previous interpretation issued to the same entity, on the basis of the same facts, violates the procedural provisions.	Please note that even though State aid did not constitute the substance of the case, the Court elaborated on the notion of State aid, hence it is included.	The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 815/16	07/07/2016	Private enforcement	None - Claim rejected	The Supreme Court rejected the cassation in this case, meaning the judgment of the Regional Administrative Court remains in force, which rejected the plaintiff's claim. Hence, the decision of regional authorities remains valid. In the Court's opinion, the first-instance authority correctly indicated that since the company did not incur costs (related to the notified investment) to be eligible until		The case was referred from the Regional Administrative Court.

							the end of 2006, the investment was not commenced in the given year. Hence, there was no eligibility for State aid.		
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 1975/14	09/08/2016	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected the cassation claim in this case, hence the judgment of the Regional Administrative Court remains in force. According to that judgment, no *de minimis* aid is granted as the conditions for it are not met.		The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 2741/14	28/10/2016	Private enforcement	None - Claim rejected	The Supreme Administrative Court annulled the judgment of the Regional Administrative Court and ruled that the case should be re-considered by the Regional Administrative Court. In the opinion of the Supreme Administrative Court, the reservations contained in Article 7 preamble and Article 1(1)(h) Regulations 1998/2006 should be read in such a way that the conditions for granting *de minimis* aid (no notification requirement - Article 2(1) of the Regulation), do not apply to enterprises in a difficult situation. In the case of a request the granting of public aid made an entrepreneur in a difficult situation, the granting of *de minimis* aid would hence be unlawful. The requested assistance cannot be treated as *de minimis* aid referred to in Article 67(b) Section 1(2) of the Tax Ordinance, even if the other conditions for *de minimis* aid set out in the Regulation 1998/2006 are met.		The case was referred from the Regional Administrative Court.
Sąd Najwyższy	Supreme Court of Justice	Last instance court (civil/commercial)	III SK 53/13	10/11/2016	Private enforcement	Other remedy imposed	The Supreme Administrative Court annulled the judgment of the Administrative Court of Appeal and ruled the case should be re-considered by the Administrative Court of Appeal. The plaintiffs applied for a waiver of social security contributions financed for the period from October 2000 to February 2004 and from August 2004 to October 2004 as State aid. This was rejected by the regional authorities.		The case was referred from the Civil Court of Appeal.
Sąd Najwyższy	Supreme Court of Justice	Last instance court (civil/commercial)	I CSK 252/15	26/01/2017	Private enforcement	Case sent back to the lower court for re-assessment	The Supreme Court decided to send the case back to the Court of Appeal so that it could rule on it again, from a different viewpoint. The Supreme Court ruled that the Court of Appeal, on the basis of Union law and the Act on Competition and Consumer Protection, should consider whether the fact that the defendant town only allowed different bus transport companies in some areas of the town, and granted them lower compensation than the main bus company constituted an abuse of a dominant position. In the light of CJEU case law (judgment of 24 July 2003, C-280/00 in the Altmark case) on the recognition of aid as unlawful State aid within the meaning of Article 107(1) TFEU, compensation (vehicle-ocometers) obtained by the dependent of the defendant main bus company may be considered as unlawful State aid. However, this fact alone is not decisive for the statement that the defendant is liable to the plaintiff in this respect. The Court of Appeal emphasised that it is for the Commission to decide on the compatibility of the granted State aid with the internal market. In this case, the Commission did not issue any decision regarding this matter.	Please note that this is a competition law case (abuse of dominant position). Part of the factual background was that a company was receiving public service compensation. Even though this part was never questioned, nor was the validity of said compensation, it is included here as the Court elaborated on the notion of State aid in its judgment.	The case was referred from the Civil Court of Appeal. The subsequent ruling from the lower court is not yet available (the case is ongoing).
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 3286/16	09/02/2017	Private enforcement	None - Claim rejected	The plaintiff applied for a waiver of an annual fee paid for agricultural fields. The regional authorities refused by arguing it would constitute unlawful State aid. The plaintiff appealed to the Court of Appeal and the Supreme Administrative Court - the Court of Appeal did not grant the plaintiff the right to the waiver and the Supreme Administrative Court rejected the cassation appeal. Only when it concerns the fulfilment of the criterion of important taxpayer's interest / public interest does the obligation to consider the reasons for granting the aid specified in Article 107 TFEU and its implementing EU regulations, i.e. the admissibility of granting public aid to the entrepreneur due to the principle of competition, apply. No such interests identified in this case.		The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 676/15	06/04/2017	Private enforcement	Case sent back to the lower court for re-assessment	The Supreme Administrative Court annulled the judgment of the Administrative Court of Appeal and ruled the case should be re-considered by the Administrative Court of Appeal. State aid in the form of a real estate tax exemption granted to the company on the basis of the 2002 Resolution was unlawful.		The subsequent ruling from the lower court is not available. The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny w Warszawie	Supreme Administrative Court	Last instance court (administrative)	II FSK 675/15	06/04/2017	Private enforcement	None - Claim rejected	The plaintiff applied for a tax reduction which was not granted by the regional authorities, and this decision was upheld by the Supreme Administrative Court (which overturned the judgment of the Regional Administrative Court). The regional authorities underlined that according to State aid guidelines, State aid schemes have to include the condition that an application for aid should be submitted before work on the project begins. In the case at hand, this condition was not met because the company had at least started the investment project on 18 July 2005 and the correction of the declaration, which could be treated as an application for the State aid in the form of a real estate tax exemption, was submitted only on 23 July 2012. Furthermore, the case at hand concerns a company in difficulty, which also excludes the possibility of granting State aid. The company refused to submit financial statements, which did not allow for the assessment of whether there are actually circumstances allowing the granting of State aid.	This case was not a classic State aid case, and State aid was predominantly part of the factual background in this case. It is nevertheless included as the Court did elaborate on the notion of State aid.	
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 678/15	06/04/2017	Private enforcement	Other remedy imposed	The Supreme Administrative Court rejected the cassation appeal in this case, hence the decision of the local authorities remains in force. The Court underlined that the view expressed by the court of first instance was not correct - the actions that can be taken by the national court are not limited to complying with the Commission decision or cooperating in the recovery of unlawful aid. The Court considered the assessment of the compatibility of State aid with the internal market (which is the exclusive competence of the Commission, according to Article 108 TFEU). The Commission issues decisions on the compatibility of State aid with the internal market based on the criteria laid down in Article 107(2) and (3) TFEU. The Court distinguished between the assessment of compatibility with the internal market (Articles 107(2) and 107(3) TFEU), which is the exclusive competence of the		The case was referred from the Regional Administrative Court.

							Commission and unlawful State aid (Article 108(3) TFEU, Article 1(f), Article 3 of Regulation 659/1999). The Court underlined that in the latter case, the authorities of the Member States can undertake the relevant measures especially prior to the EC decision. Furthermore, the Court in the judgment at hand disagreed with the lower instance judgment that the consequences of unlawful State aid may only be changed by the appropriate Commission procedure or amendments of the national law.		
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 1592/17	12/10/2017	Private enforcement	Case sent back to the lower court for re-assessment; Other remedy imposed	The Supreme Administrative Court annulled the judgment of the Administrative Court of Appeal and ruled the case should be re-considered by the Administrative Court of Appeal. The Court states that in the case of submitting a relief application that meets the formal requirements, the authority first determines whether the interests of the taxpayer or the public interest speak in favour of granting this form of assistance. These are the basic criteria, the fulfilment of which will allow the tax authorities to grant relief. In a situation where none of these premises is present, it is immaterial to determine whether the relief constitutes lawful State aid. If the authority cannot grant relief, there are no grounds to apply the provisions governing State aid. If the authority finds that there is an important interest of the taxpayer or the public interest, in the next stage it will determine whether the plaintiff is a business entity. Establishing that the application originates from such an entity will result in the fact that the further procedure for granting relief should be conducted taking into account the provisions governing State aid.	This case concerns aid below *de minimis* ceiling.	The case was referred back to the Regional Administrative Court which, in the judgment of 6 February 2018 (I SA/Bd 1018/17; http://www.orzeczenia-nsa.pl/wyrok/i-sa-bd-1018-17/ulgi_platnicze_umorzenie_odroczenie_rozlozenie_na_raty_itp/2043c00.html) annulled the decision of the regional authorities which refused the annulment of tax debts.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II GSK 764/16	24/11/2017	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected cassation appeal in this case, meaning the judgment of the Regional Administrative Court remains in force. According to that judgment, the plaintiff's claim is rejected and the decision of regional authorities, requiring the return of some of the aid granted, remains valid. The regional authorities made calculations based on the maximum amount of permitted State aid, and then calculated the difference between the value of public aid granted (as demonstrated by the plaintiff) and this maximum amount. The calculated difference was thus considered to be unlawful State aid and its return was demanded.		The case was referred from the Regional Administrative Court.
Sąd Najwyższy	Supreme Court of Justice	Last instance court (civil/commercial)	III SK 30/14	28/11/2017	Private enforcement	None - Claim rejected	The Supreme Court rejected the cassation appeal in this case. Hence, the judgment of the Regional Administrative Court remains in force, which in turn kept in force the regional authorities' decision on halting the flow of State aid.	The Court in this case elaborated on the notion of State aid. The case concerned the obligation imposed on energy suppliers and producers to buy 15% of energy from cogeneration. The plaintiff argued such an obligation was unlawful as it constituted State aid. The Court interpreted State aid rules and referred a request for a preliminary ruling to the CJEU, which did not find State aid in this case as not all the prerequisites of Article 107(1) were met. Hence, the plaintiff's claim was rejected.	The case was considered by the Supreme Court again, in the light of the judgment of the CJEU in reply to the preliminary questions (ruling III SK 30/14 of 16 April 2015).
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 3134/15	12/12/2017	Private enforcement	None - Claim rejected	The Supreme Court rejected the cassation appeal in this case. Hence, the judgment of the Regional Administrative Court remains in force, which in turn kept in force the regional authorities' decision on halting the flow of State aid.	The taxpayer acquires the right to State aid in the form of a tax exemption once s/he actually incurs expenses for the purchase of fixed assets and intangible assets under investment expenditure qualifying for public aid. Both by defining a new investment and using the term 'cost of a new investment' or 'incurring investment expenditure', the legislature does not refer to the concept of tax deductible costs.	The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 3178/15	20/12/2017	Private enforcement	None - Claim rejected	The Supreme Administrative Court rejected the cassation appeal in this case, hence the decision of the local authority remains in force. According to this decision, the manner of defining the moment of crediting investment expenses as costs eligible for State aid does not in this particular case permit State aid to be granted.	Included due to its relevance in the field of State aid in special economic zones.	The case was referred from the Regional Administrative Court.
Naczelny Sąd Administracyjny	Supreme Administrative Court	Last instance court (administrative)	II FSK 133/16	02/02/2018	Private enforcement	None - Claim rejected	The Court ruled that no further State aid in the form of tax reductions should be granted to the company, as it used up the maximum allowance in the given region. Adding up allowances for State aid from different regions would constitute a breach of the Union law. The tax exemption resulting from the established provision is an exemption constituting State aid. Therefore, the entrepreneur should assess the admissible aid limit separately for each zone, since the maximum allowable State aid limit is calculated separately for each region in which the zone is located. The special economic zone is an uninhabited part of the territory of Poland, in accordance with the provisions of the law, on which the economic activity may be conducted. Interpreting provisions providing for State aid in the form of a tax exemption without considering the purpose of this aid - by combining the limits of State aid resulting from permits granted for action in different zones - would also constitute a violation of EU rules on State aid.		

Sąd Najwyższy	Supreme Court of Justice	Last instance court (civil/commercial)	III SK 34/12	08/05/2013	Public enforcement	Case sent back to the lower court for re-assessment	The Court ruled that the case should be decided upon again in the second instance court (in the Court of Appeal). The Commission found the State aid provided for in the LTC Act to be compatible with the internal market in accordance with the Stranded Costs Methodology. The LTC Act itself has been assessed "in the light of the content of the Methodology". The Commission stated that the aid provided for in the LTC Act meets the conditions provided for in points 4.1.-4.2. of the Methodology. However, the Commission always reserves the right to control the actual implementation of the public assistance programme considered compatible with Union State aid rules. The rulings of the Courts issued in the present case do not preclude a possible recovery of the aid if the Commission found that the actual conditions for its granting were inconsistent with the Methodology.		The case was referred from the Civil Court of Appeal. The subsequent ruling from the lower court is not available.
Sąd Najwyższy	Supreme Court of Justice	Last instance court (civil/commercial)	I UK 395/13	07/10/2014	Public enforcement	None - Claim rejected	The Supreme Court rejected the appeal from the Court of Appeal judgment as it agreed with the judgment of the Court of Appeal. Prior to this, the Court of Appeal rejected the appeal from the Regional Court. The Regional Court issued the recovery order which, therefore, remains in force.	The State aid beneficiary needs to return the unlawful State aid. Hence ZUS (social security service) is permitted to enforce overdue contributions for social and health insurance.	The case was referred from the Civil Court of Appeal. In this case, the plaintiff also asked for the case to be referred to the CJEU for a preliminary ruling, yet the Supreme Court rejected this motion as well.

22. Portugal

22.1 Country report

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A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Competent courts

Within the Portuguese legal system, cases concerning the enforcement of recovery decisions can be brought before both the administrative and tax first instance courts (*tribunais administrativos e fiscais*).

In Portugal, the contentious-administrative jurisdiction is based on the coexistence of specialisation of the courts in function of the substantive law they are called to apply.

The administrative law — Code of Procedure in Administrative Courts (*Código do Processo nos Tribunais Administrativos*)[314] — is applied in the litigation against unlawful acts of the public administration. The administrative courts are competent when the case concerns a decision of a public authority.

The measure by which the alleged aid was granted will be most decisive in where a case can be brought. Should the contested State aid measure constitute a decision of an administrative authority (*e.g.* grant decisions), the case should be brought before the administrative first instance courts. Should the measure concern aid granted through a non-administrative act, for example, a land transaction or government guarantee, civil courts of first instance will hear the case.

The majority of cases concerning State aid are brought before administrative courts. As such, the leading cases come from the Supreme Administrative Court. However, State aid may also be dealt with by the Supreme Court of Justice, if the appeal comes from decisions from the lower civil courts.

Although there is a specialised court in competition law that deals with decisions of the Portuguese Competition Authority (PCA), as State aid does not fall under the competences of the PCA, this court does not deal with State aid issues.

Additionally, there is a specialised arbitration court for tax cases that are submitted on a voluntary basis. In one ruling, however, this court declared it was not competent to analyse State aid issues concerning tax.[315]

Standing

A party will have standing before an administrative court only when it has a "personal and direct interest".[316] This means that the interest of the party must be directly affected by the act that is being challenged. In the context of the enforcement of State aid rules, both the addressee of the contested act as well as the competitor (under certain conditions), for example, may be assumed to have such an interest.

Moreover, even a party that may not be considered to have standing before the administrative courts may have standing before the civil courts. Claims related to State aid rules are admissible in civil courts, as long as they are brought by a party that has *direct interest* in the action (according to Article 26 of the Portuguese Civil Procedure Code (*Código do Processo Civil)*, approved by Law number 41/2013 of 26 June 2013. The civil judge may thus provide legal protection in cases where the option of challenging a measure before the administrative court is not available.

A description of the procedural framework applicable in public enforcement of State aid rules

In general terms, the decision to enforce a recovery decision must be taken according to an administrative act. As such, the first step is to have an administrative act from the public authority that provided the unlawful State aid, demanding the recovery. Applicable in this regard is Article 179 of the Portuguese Administrative Code, which states the following:

"*Execution of pecuniary obligations*
1. Where, by virtue of an administrative act or order, pecuniary benefits are to be paid to a public legal person, it follows, in the absence of voluntary payment within the period established, the tax enforcement process, as regulated in the legislation of the tax procedure, applies.
2. For this purpose, the competent body issues, under the legal terms, a certificate with the value of an enforceable title, which refers to the competent tax administration department, and the administrative process.
3. In cases where, under the law, the administration carries out, directly or through a third party, coercive execution of fungible deeds, the procedure provided for in this article may always be used to obtain reimbursement of expenses incurred."

It should be noted that this procedure does not just concern tax recovery, but also any kind of State aid recovery. As such, the execution of a recovery order (administrative act)

[314] Law no 15/2002, de 22/02 according to the last version approved by the Decree-Law n.º 214-G/2015, de 02/10.

[315] See https://caad.org.pt/tributario/decisoes/decisao.php?listPageSize=100&listOrder=Sorter_data&listDir=DESC&id=3338 (last accessed on 31 December 2018).

[316] See article 9; 55.º,n .º 1, a) and 68.º of the Portuguese *Código do Processo nos Tribunais Administrativos* (Code of Procedure in Administrative Courts).

must follow the tax enforcement process, as regulated in the legislation of the tax procedure.[317]

If there is no decision from the public authority and State aid is not recovered, legal proceedings according to the Code of Procedure in Administrative Courts can be started.[318]

Please find below more information on the procedural framework for administrative courts.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The competent courts in cases concerning the private enforcement of State aid rules are the same ones as those concerning the public enforcement of these rules (as above). Both civil and administrative courts are competent.

There is thus neither a specialised court nor a specific court that hears a clear majority of cases involving the private enforcement of State aid rules.

A description of the procedural framework applicable in private enforcement of State aid rules

Procedural framework administrative courts

A contentious appeal consists of a challenge before the competent administrative court of an administrative act or an unlawful regulation, in order to have it annulled. It aims to resolve a dispute over which the public administration has already taken a position through an act of authority (administrative act or regulation).

According to the Code of Procedure in Administrative Courts[319] the administrative court can wholly or partially annul the contested decision. Additionally, the court can determine that the legal consequences of the annulled (part of the) decision remain valid. Under certain conditions, the preliminary relief judge of the administrative court may issue a provisional measure if urgency is required in view of the interests involved.[320]

Procedural framework civil courts

Private enforcement of State aid rules by civil courts is regulated by the Portuguese Code of Civil Procedure. Civil judges are limited by the parties' claims in the case; they cannot award any remedies that were not requested by one of the parties in the proceedings. Parties can — in the context of State aid disputes – for example, request a declaratory judgment to have the (partial) nullity of a particular legal act established in court. Also parties can ask for provisional measures if urgency is required.

Main findings based on the case summaries

Type of action

There are not many rulings in Portugal in which the court addressed State aid matters. A possible explanation is the lack of awareness of State aid issues for many undertakings, the fact that State aid granted was *de minimis* and that some courts considered that cases were not under the scope of State aid issues or did not deal with State aid. Moreover, in some cases, national courts considered that the State aid issues were already addressed by the CJEU. Consequently, in accordance with the *acte claire* doctrine, national courts in some cases have merely referred to CJEU case law without elaborating further on State aid issues.

In many of Portuguese national relevant rulings, State aid issues appeared in the context of public enforcement, considering issues connected to State aid (*e.g.* the interaction between public procurement and State aid, taxes). As such, public and private enforcement cases have been dealt with from different perspectives. Moreover, different remedies were requested such as *de minimis* State aid (see ruling Supreme Administrative Court, 14.1.2015 - 01216/13 (PT3)) or the appreciation of taxes according to State aid rules (see ruling Supreme Administrative Court, 25.5.2011 - 069/11 (PT4)).[321]

Sectors

The sectors involved are mainly agriculture (wine sector — several relevant rulings referred to this area, *e.g.* ruling Supreme Administrative Court, 5.7.2017 - 0529/15 (PT1)); banking (*e.g*. ruling Lisbon Court of Appeal, 16.2.2016 - 519/10.5TYLSB-CE.L1-7) and the financial sector/tax issues (*e.g.* ruling 069/11 (PT4)); transportation (*e.g.* ruling Supreme Administrative Court, 26.2.2015 - 01050/03 (PT5)) and public procurement.

Main actors

The main actors are public authorities (such as public institutes and local governments) and different undertakings. In many cases, State aid beneficiaries were involved. Third parties are usually not involved in State aid cases. However, in ruling 01050/03 (PT5), a third party lodged an appeal for the annulment of part of the Resolution of the Council of Ministers, which laid down compensatory allowances to other transport companies.

Qualitative assessment of the average time of court proceedings

Cases in which State aid issues were raised are published only after the decision rendered by higher courts (usually by the Supreme Court) is delivered. It is therefore more difficult to assess the quality and duration of decisions from the lower courts, which are not public.

However, it is known that Portuguese courts usually take around three to four years to decide a case, which is more than the average of the courts of other Member States.[322]

[317] Código do Processo e Procedimento Tributário (Code of Process and Tax Procedure) – Decree-law n.º 433/99, 26th October.
[318] See António Carlos dos Santos; Eduardo Maia Cadete; Cátia Sousa and Sofia Ricardo Borges, Jurisprudência sobre auxílios de Estado, available at https://www.cideeff.pt/xms/files/04_PUBLICATIONS/Working_Papers/Grupo_III/Jurisprudencia_sobre_auxilios_de_Estado.pdf (last accessed on 31 December 2018).
[319] Law n.º 15/2002, de 22/02 according to the last version approved by the Decree-Law n.º 214-G/2015, de 02/10.
[320] See article 36 of the Code of Process at the Administrative Courts.
[321] See Cunha Rodrigues, N., "Auxílios de Estado com finalidade regional", in *Estudos em Homenagem ao Prof. Pitta e Cunha*, vol. I, Almedina, Coimbra, 2010, p. 885-915.
[322] For more information, check https://portal.oa.pt/comunicacao/imprensa/2017/04/11/tribunais-demoram-em-media-710-dias-a-resolver-litigios/(last accessed on 31 December 2018).

Although there is no precise data concerning the average duration of court proceedings concerning State aid, in general terms, the average duration of these proceedings is similar to other proceedings in Portugal. If a case concerns possible preliminary rulings and/or cooperation between national courts and the Commission, national rulings on State aid can be expected to last longer than 'regular' cases.

While there are no official statistics on the duration of the State aid cases, it can be noted that some of the analysed cases concerning State aid took around four to five years to be decided (including time spent on appeal to the superior courts — *e.g.* case 0529/15 (PT1), case 01216/13 (PT3) and case 069/11 9 (PT4)).

Qualitative assessment of the remedies awarded by national courts

Overall, the number of rulings in which the Portuguese courts granted remedies is relatively low. In fact, possible remedies against violations of the standstill obligation such as damages, interim measures or interest payments were not used by Portuguese courts.

However, in some cases, Portuguese courts did order a recovery of unlawful aid (*e.g*. case 01050/03 (PT5)).

Different reasons can be mentioned for that, such as lack of training and awareness of national judges in relation to State aid rules.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

In the Portuguese case 01050/03 (PT5), there was a request to the CJEU for a preliminary ruling (Case C-504/07).[323] Preliminary rulings are well used as an instrument of dialogue between national courts and the CJEU.

With regard to the State aid *acquis*, Portuguese national courts primarily quote the TFEU and the *de minimis Regulation*, rather than Commission guidelines. Furthermore, there have been very few situations in Portuguese courts, in which State aid rules were applicable (see, for instance, ruling 0529/15 (PT1) where the court rejected the plaintiff's claim by concluding that the concerned levy was not subject to the standstill obligation, insofar as it did not, in principle, constitute State aid. More concretely, the court was of the opinion that — as the Commission later confirmed — it was not likely that the small part of the levy in question, financing State aid, would not respect the EU *de minimis* rules.

On average, Portuguese courts are second to last with regard to the number of references for preliminary rulings (2.9) per year, only marginally higher than the Irish (1.9) and Luxembourgish courts (2.0) and a considerable distance from the EU average (15.9). Observed in absolute terms, the Portuguese references for preliminary rulings correspond approximately to 1/8 of the Dutch, 1/7 of the Belgians, 1/3 of the Spanish and 1/2 of the Greeks, representing only 1.39% of the total registered in the EU.[324]

There are several aspects that reveal some singularities of the Portuguese case: (i) the absolute and relative number of references for a preliminary ruling is low; (ii) the evolution of the references for a preliminary ruling has been irregular; (iii) the 'dialogue' with the CJEU has been confined almost exclusively to the tax courts; (iv) requests for preliminary rulings from the higher courts and the administrative courts have been residual; (v) the Constitutional Court has never referred a request for a preliminary ruling to the CJEU; and (vi) the CJEU considered several requests for preliminary rulings as inadmissible.

Still, Portuguese courts correctly refer questions for a preliminary rulings[325] such as in Portuguese national case 01050/03 (PT5) from the Supreme Administrative Court.

Qualitative assessment of any other relevant trends in State aid enforcement

Over the years, the quality of national rulings on State aid has clearly been improving. The relevance of State aid issues in the context of the financial crisis that Portugal faced after 2008, as well as several specialised courses for judges on State aid and competition law helped to improve that quality and the awareness of State aid issues.[326]

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

The notion of State aid was well conducted by the national courts. According to the cases selected and summarised, the courts correctly applied State aid rules, including those on the standstill obligation, and applied Commission decisions on State aid correctly. For instance, in case 0529/15 (PT1), the court's opinion on the *de minimis* State aid was later confirmed by the Commission (see above).

However, the legal regime applicable to the public enforcement of State aid rules (namely the recovery of State aid), is a general one, also applicable to the recovery of taxes and fees, under the scope of general rules. The approval of a national law or EU regulations or directives specifically concerning the recovery of State aid could help to clarify and reinforce the legal regime within Portugal.

For private enforcement of State aid there is still a long way to go. Similar to private enforcement of competition law, private enforcement of State aid is not always clearly understood by judges and legal practitioners. More training and information in this area would be welcomed.

Any other relevant comments or findings

Not applicable

[323] Case C-504/07 Associação Nacional de Transportadores Rodoviários de Pesados de Passageiros (Antrop) and Others v Conselho de Ministros, Companhia Carris de Ferro de Lisboa SA (Carris) and Sociedade de Transportes Colectivos do Porto SA (STCP) (2009) ECLI :EU :C :2009 :290.

[324] See Pereira Coutinho, F., *Os Juízes Portugueses E O Reenvio Prejudicial (Portuguese Judges and Preliminary References)* (2011). Duarte, M-L., Fernandes L. e Pereira Coutinho, F.(coord.), *20 Anos de Jurisprudência da União sobre Casos Portugueses: o que fica do diálogo entre os juízes portugueses e o Tribunal de Justiça da União Europeia*, Instituto Diplomático, Lisboa, 2011, p. 13-52. Available at SSRN: https://ssrn.com/abstract=2957854, (last accessed on 31 December 2018), p. 22.

[325] *Ibid*.

[326] For some examples of national training courses for judges check https://institutoeuropeu.eu/pt/noticias/noticias-do-instituto-europeu/355-4o-curso-de-formacao-para-juizes-em-direito-europeu-da-concorrencia (last accessed on 31 December 2018).

22.2 Case summaries

Case summary PT1

Date

05/01/2019

Case identifiers

Member State

Portugal

Court which adopted the ruling (national language)

Supremo Tribunal Administrativo (2ª Secção)

Court which adopted the ruling (English)

Supreme Administrative Court (Tax Disputes Section)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Portuguese

Hyperlink to ruling

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/7738fde8c008ccf48025815b00562a00?OpenDocument&ExpandSection=1#_Section1

Case reference

0529/15

Procedural context of the case

The lower court (Tribunal Administrativo e Fiscal de Viseu) dismissed as unfounded the judicial challenge, lodged by the plaintiff, regarding the self-assessment of the wine promotion fee (levy) due to the Instituto da Vinha e do Vinho, I.P. (Wine and Vineyard Institute) (case reference not available). The judicial challenge was rejected on the ground that the charge in question could not be classified as State aid under the terms and for the purposes of Articles 107 and 108 TFEU.

As the plaintiff did not agree with this ruling, it lodged an appeal before the Supreme Administrative Court, whose ruling is analysed in this summary.

The Commission issued a decision on 25 September 2007, approving State aid granted based on the law on the rules of covering costs incurred by generators in connection with early termination long-term contracts for the sale of power and electricity.

Type of action

Private enforcement

Delivery date of the ruling

05/07/2017

Language

Portuguese

Headnote

In this ruling, the Court considered that the concerned levy was not subject to the standstill obligation provided in Article 108(3) TFEU, insofar as it did not, in principle, constitute State aid.

Parties

Names of the parties to the action

A……, Lda. (anonymised)

Versus

Instituto da Vinha e do Vinho, I.P.

The relationship of the plaintiff to the measure

Other

Contributors to the fee / levy

The relationship of the defendant to the measure

Other

Public institute

Sector relating to the State aid argument

I - Accommodation and food service activities

Wine sector

The type of State aid measure challenged in the court proceedings

Other

Wine promotion fee

Substance of the case

Facts and parties' main arguments in the case

The plaintiff argues that there had been a violation of the standstill obligation, as foreseen in Article 108(3) TFEU, in relation to the promotion rate (levy) on wine and wine products being charged by the Instituto da Vinha e do Vinho, I.P. (IVV) – which, in another decision of the Commission (dated the 20 July 2010), had previously been considered as State aid. According to the plaintiff, the violation took place regardless of the compatibility of the levy (for the particular time period at the centre of the case; November 2002) with State aid rules and despite the existence of a Commission decision of 20 July 2010.

For its part, the IVV pled that the Commission decision clearly mentioned that the financing of the activities carried out by the IVV as a public authority, responsible for the overall coordination of the wine sector in Portugal, did not constitute State aid within the meaning of Article 107 TFEU. Indeed, according to the IVV, the Commission decision showed that revenue of the levy in question corresponded to more than 62% of the budget associated with the operation of the IVV and, as such, it respected the *de minimis* limits and could not be classified as 'State aid'. In a nutshell, according to the IVV, there was no obligation to notify the measure in question to the Commission.

Remedy(ies) sought

Reimbursement of the taxes paid for financing an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court rejected the plaintiff's claim by concluding that the concerned levy was not subject to the standstill obligation, insofar as it did not, in principle, constitute State aid (or came from State resources) and the sought annulment of the totality of the levy was, therefore, disproportionate. More concretely, the Court was of the opinion that, as the Commission later confirmed, it was not likely

that the small part of the levy in question financing State aid would not respect the EU *de minimis* rules. Furthermore, the Court stated that there was no need for a preliminary ruling procedure and relied on CJEU case law to confirm that a national jurisdictional body may interpret and apply the notion of State aid under Article 107 TFEU, in view of assessing the lawfulness of a given State measure.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-47/69, Government of the French Republic v Commission of the European Communities (1970) ECLI:EU:C:1970:60
- C-261/01 Belgische Staat v Eugène van Calster and Felix Cleeren and Case C-262/01 and Openbaar Slachthuis NV (2003) ECLI:EU:C:2003:571
- T-75/03, Banco Comercial dos Açores, SA v Commission of the European Communities (2009) ECLI:EU:T:2009:322
- C-174/02, Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën (2005) ECLI:EU:C:2005:10

National case law:
- Case 0656/14 of 07/01/2016
- Case 0330/14 of 18/06/2014
- Case 055/13 of 26/06/2013
- Case 29/03 of 23/04/2013 which was followed by many other cases:
- Case 292/13 of 30/4/2003
- Cases 9/13, 44/13, 48/13, 53/13, 200/13 and 1311/12 of 22/05/2013
- Cases 84/13, 198/13, 30/13, and 1398/12 of 29/05/2013
- Cases1329/12 and 55/13, of 26/06/2013
- Cases 44/13, 9/13, 53/13 and 200/13 of 10/7/2013
- Cases 1221/12, 46/13 and 177/13 of 2/10/2013
- Cases 1464/12, 31/13, 176/13 and 207/13 of 23/10/2013
- Cases 193/13, 408/13, 1081/13, 1138/13 and 1147/13 of 30/10/2013
- Cases 0901/13 and 01304/12, of 13/11/2013
- Cases 01286/12 and 01232/12 of 27/11/2013
- Cases 01287/12, 01441/12, 01143/13 and 0202/13 of 04/12/2013
- Case 01389/13 of 11/12/2013
- Cases 01394/13, 028/13 and 09/14 of 19/02/2014

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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 (*de minimis* Regulation

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary PT2

Date

05/01/2019

Case identifiers

Member State

Portugal

Court which adopted the ruling (national language)

Supremo Tribunal Administrativo (2ª Secção)

Court which adopted the ruling (English)

Supreme Administrative Court (Tax Disputes Section)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Portuguese

Hyperlink to ruling

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/7738fde8c008ccf48025815b00562a00?OpenDocument&ExpandSection=1#_Section1

Case reference

0529/15

Procedural context of the case

The lower court (Tribunal Administrativo e Fiscal de Viseu) dismissed as unfounded the judicial challenge, lodged by the plaintiff, regarding the self-assessment of the wine promotion fee (levy) due to the Instituto da Vinha e do Vinho, I.P. (Wine and Vineyard Institute) (case reference not available). The judicial challenge was rejected on the ground that the charge in question could not be classified as State aid under the terms and for the purposes of Articles 107 and 108 TFEU.

As the plaintiff did not agree with this ruling, it lodged an appeal before the Supreme Administrative Court, whose ruling is analysed in this summary.

The Commission issued a decision on 25 September 2007, approving State aid granted based on the law on the rules of covering costs incurred by generators in connection with early termination long-term contracts for the sale of power and electricity.

Type of action

Private enforcement

Delivery date of the ruling

05/07/2017

Language

Portuguese

Headnote

In this ruling, the Court considered that the concerned levy was not subject to the standstill obligation provided in Article 108(3) TFEU, insofar as it did not, in principle, constitute State aid.

Parties

Names of the parties to the action

A……, Lda. (anonymised)

Versus

Instituto da Vinha e do Vinho, I.P.

The relationship of the plaintiff to the measure

Other

Contributors to the fee / levy

The relationship of the defendant to the measure

Other

Public institute

Sector relating to the State aid argument

I - Accommodation and food service activities

Wine sector

The type of State aid measure challenged in the court proceedings

Other

Wine promotion fee

Substance of the case

Facts and parties' main arguments in the case

The plaintiff argues that there had been a violation of the standstill obligation, as foreseen in Article 108(3) TFEU, in relation to the promotion rate (levy) on wine and wine products being charged by the Instituto da Vinha e do Vinho, I.P. (IVV) – which, in another decision of the Commission (dated the 20 July 2010), had previously been considered as State aid. According to the plaintiff, the violation took place regardless of the compatibility of the levy (for the particular time period at the centre of the case; November 2002) with State aid rules and despite the existence of a Commission decision of 20 July 2010.

For its part, the IVV pled that the Commission decision clearly mentioned that the financing of the activities carried out by the IVV as a public authority, responsible for the overall coordination of the wine sector in Portugal, did not constitute State aid within the meaning of Article 107 TFEU. Indeed, according to the IVV, the Commission decision showed that revenue of the levy in question corresponded to more than 62% of the budget associated with the operation of the IVV and, as such, it respected the *de minimis* limits and could not be classified as 'State aid'. In a nutshell, according to the IVV, there was no obligation to notify the measure in question to the Commission.

Remedy(ies) sought

Reimbursement of the taxes paid for financing an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court rejected the plaintiff's claim by concluding that the concerned levy was not subject to the standstill obligation, insofar as it did not, in principle, constitute State aid (or came from State resources) and the sought annulment of the totality of the levy was, therefore, disproportionate. More concretely, the Court was of the opinion that, as the Commission later confirmed, it was not likely that the small part of the levy in question financing State aid would not respect the EU *de minimis* rules. Furthermore, the Court stated that there was no need for a preliminary ruling procedure and relied on CJEU case law to confirm that a national jurisdictional

body may interpret and apply the notion of State aid under Article 107 TFEU, in view of assessing the lawfulness of a given State measure.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-47/69, Government of the French Republic v Commission of the European Communities (1970) ECLI:EU:C:1970:60
- C-261/01 Belgische Staat v Eugène van Calster and Felix Cleeren and Case C-262/01 and Openbaar Slachthuis NV (2003) ECLI:EU:C:2003:571
- T-75/03, Banco Comercial dos Açores, SA v Commission of the European Communities (2009) ECLI:EU:T:2009:322
- C-174/02, Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën (2005) ECLI:EU:C:2005:10

National case law:
- Case 0656/14 of 07/01/2016
- Case 0330/14 of 18/06/2014
- Case 055/13 of 26/06/2013
- Case 29/03 of 23/04/2013 which was followed by many other cases:
- Case 292/13 of 30/4/2003
- Cases 9/13, 44/13, 48/13, 53/13, 200/13 and 1311/12 of 22/05/2013
- Cases 84/13, 198/13, 30/13, and 1398/12 of 29/05/2013
- Cases1329/12 and 55/13, of 26/06/2013
- Cases 44/13, 9/13, 53/13 and 200/13 of 10/7/2013
- Cases 1221/12, 46/13 and 177/13 of 2/10/2013
- Cases 1464/12, 31/13, 176/13 and 207/13 of 23/10/2013
- Cases 193/13, 408/13, 1081/13, 1138/13 and 1147/13 of 30/10/2013
- Cases 0901/13 and 01304/12, of 13/11/2013
- Cases 01286/12 and 01232/12 of 27/11/2013
- Cases 01287/12, 01441/12, 01143/13 and 0202/13 of 04/12/2013
- Case 01389/13 of 11/12/2013
- Cases 01394/13, 028/13 and 09/14 of 19/02/2014

√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- 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 (*de minimis* Regulation

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary PT3

Date

05/01/2019

Case identifiers

Member State

Portugal

Court which adopted the ruling (national language)

Supremo Tribunal Administrativo (2ª Secção)

Court which adopted the ruling (English)

Supreme Administrative Court (Tax Disputes Section)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Portuguese

Hyperlink to ruling

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/37140aff79603bf080257dd3003ea6d2?OpenDocument&ExpandSection=1&Highlight=0,Aux%C3%ADlios,de,Estado#_Section

Case reference

01216/13

Procedural context of the case

Under case number 1653/08.7BEVIS, the plaintiff lodged an appeal before the First Instance Court (Tribunal Administrativo e Fiscal de Viseu) against the enforcement of a levy (of promotion fees) imposed by the Instituto da Vinha e do Vinho, I.P. (the Wine and Vineyard Institute, a public body, acting on behalf of the Portuguese State, also referred to ad: 'IVV'). The Court rejected the claim lodged by the plaintiff. The plaintiff appealed to this ruling before the Supreme Administrative Court, whose ruling is analysed in this summary.

Type of action

Private enforcement

Delivery date of the ruling

14/01/2015

Language

Portuguese

Headnote

In this ruling, the Court considered that with regard to a levy that was used to finance State aid, it should be determined if the investigation initiated by the Commission on the basis of Article 108(2) TFEU had been opened at the time of application of the levy in order to assess the compatibility of that aid with State aid rules.

Parties

Names of the parties to the action

A ...., Lda. (anonymised)

Versus

Instituto da Vinha e do Vinho, I.P.

The relationship of the plaintiff to the measure

Other

Contributors to the fee / levy

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

I - Accommodation and food service activities

Wine sector

The type of State aid measure challenged in the court proceedings

Other

Wine promotion fee

Substance of the case

Facts and parties' main arguments in the case

The main question in this case was whether or not the collection of the levy (of promotion fees) by Instituto da Vinha e do Vinho, I.P. to the plaintiff, covering the period of January to March 2008, was suspended by a Commission decision. On 1 December 2004, the Commission notified the Portuguese Government of its decision to initiate an investigation procedure provided for in Article 88(2) of the EC Treaty (current Article 108(2) TFEU) with a view to assess the compatibility of the levy (of promotion fees) with State aid rules. This was due to the fact that this levy, which represented more than 62% of the budget allocated to the operation of the IVV, was imposed not only on wine products produced and marketed in Portugal, but also those produced in Portugal and marketed in other Member States and in third countries, and those originating in other Member States or in third countries marketed in Portugal.

Before the First Instance Court, the plaintiff had argued that the levy enforcement was invalid, given that the requirements set forth under Article 148(2)(a) of the Code of Tax Procedure and Proceedings (CPPT) were not met. In particular, a final decision on the procedure that had been initiated by the Commission with regard to the levy had not yet been taken, meaning that the Portuguese State could not implement the measures it envisaged (including the settlement and collection of the promotion levy in question). The lower instance Court had considered, among other factors, that the assessment and collection of the levy could take place as it was based on an administrative act carried out by a competent authority, as part of its duties.

The plaintiff argued that the levy in question (which finances aid granted to the Instituto da Vinha e do Vinho, I.P.), could not be enforced while a procedure such as that foreseen in Article 108(2) TFEU was initiated and ongoing at the time it was collected, and the Commission had not yet issued a decision regarding the compatibility of the aid in question with the principles of State aid rules.

The Instituto da Vinha e do Vinho, I.P. argued that State aid that was not notified to the Commission should be considered 'unlawful aid' only within the meaning of Article 1(f) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999) but that it did not mean that it was incompatible with State aid rules.

In addition, it stated that the procedure initiated by the Commission only covered the period between 2002- 2006. With regard to this period, the Commission concluded that all actions financed by the promotion rate for 2007-2011 comply with the *de minimis* limits laid down under Union law.

Remedy(ies) sought

Reimbursement of the taxes paid for financing an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court stated that, as the levy being coercively collected was used to finance State aid, it was important to determine if, in relation to the time period of the levy, the formal procedure foreseen in Article 108(2) TFEU was ongoing to assess the compatibility of that aid with State aid rules, as laid down in Article 107 TFEU. This was not done in the contested judgment from the lower instance. Consequently, the Court clarified that, should such a procedure have been ongoing, the coercive collection of the levy in question must be considered suspended and cannot be executed since it would be in contravention of Article 108(3) TFEU.

The Court resent the case to the lower instance, so that the facts of the case could be expanded on. This assessment would include an investigation of whether the procedure in question was initiated and ongoing at the moment of the collection and enforcement of the levy, and, thereby, whether there had been a violation of Article 108(3) TFEU.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The subsequent ruling from the lower court (Tribunal Administrativo e Fiscal de Viseu) is not available.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary PT4

Date

05/01/2019

Case identifiers

Member State

Portugal

Court which adopted the ruling (national language)

Supremo Tribunal Administrativo (2ª secção)

Court which adopted the ruling (English)

Supreme Administrative Court (Tax Disputes Section)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Portuguese

Hyperlink to ruling

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/9e7b2eccc0d9dddc802578a8002c95b4?OpenDocument&ExpandSection=1#_Section1

Case reference

069/11

Procedural context of the case

The First Instance Court (Tribunal Administrativo e Fiscal de Ponta Delgada) dismissed the judicial challenge as unfounded, lodged by the plaintiff, regarding additional corporate income tax (IRC) assessments for the years 1999, 2000, 2001, 2002, 2006 and 2007 (case reference not available). The Court did so on the basis that (i) the decisions taken by the Tax Authority (Fazenda Pública) contain an account of the factual and legal grounds on which they are based; (ii) the reduced rate initially granted to the plaintiff is considered by Union law as State aid and, as such, is subject to the procedure of notification to the Commission, a procedure which in this case was omitted; (iii) the aid cannot be considered until the Commission has taken a decision authorising it; (iv) the aid to be recovered by means of a recovery decision shall include interest at an appropriate rate fixed by the Commission and shall be due from the date on which the unlawful aid was made available to the beneficiary until the time of its recovery.

As the plaintiff did not agree with this ruling, it lodged an appeal before the Supreme Administrative Court, whose ruling is analysed in this summary.

According to the relevant Commission decision (C 35/2002 (EX NN 10/2000)), tax rebates in Azores entail State aid.

Type of action

Public enforcement

Date of the Commission decision

28/01/2011

Delivery date of the ruling

25/05/2011

Language

Portuguese

Headnote

In this ruling, the Court considered that it is for the Union Courts to assess whether the recovery decision by the Commission in question violates any legal principles, through the recovery it entailed.

Parties

Names of the parties to the action

A ..., SA (anonymised)

Versus

Fazenda Pública

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

K - Financial and insurance activities

Banking sector

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The plaintiff argued that the implementation of Commission Decision C 35/2002 (EX NN 10/2000) considering that tax rebates in the Azores constituted State aid) through issuing of a new value for taxes for the respective period by the Portuguese Tax Authorities involves the practice of acts which violate the fundamental principles of a democratic constitutional State, such as the principle of fiscal legality, including the sub-principle of non-retroactivity of tax laws, as well as the principles of legal certainty and the protection of citizens' legitimate expectations. In the opinion of the plaintiff, the additional corporate tax assessments, issued pursuant to the Commission decision, implied the retroactive collection of taxes in relation to tax situations already fulfilled and validated by the Tax Administration, in accordance with the law in force.

Moreover, on the dates on which the plaintiff paid its taxes, the tax computer system did not allow them to be paid at a rate other than the reduced rate imposed by the applicable Portuguese Law (i.e. the State aid measure). Consequently, the plaintiff claimed it should not have to pay compensatory interest.

The defendant, the Tax Authority (Fazenda Pública), relied on the judgment under appeal.

Remedy(ies) sought

Other remedy sought

The remission of compensatory interest

Outcome of the case

Conclusions adopted by the national court

The Court rejected the plaintiff's first argument, clarifying that only the CJEU (i.e. not the national courts) may assess whether the recovery decision by the Commission in question was violated. The Court moreover clarified that the decision taken by the Fazenda

Pública and implementing the recovery decision was not impaired by a violation of the principle of fiscal legality, the sub-principle of non-retroactivity of tax laws and the principles of legal certainty and the protection of citizens' legitimate expectations. Hence, according to the Court the decision taken by Fazenda Pública should not be considered invalid and, therefore, the higher court decided not to order the recovery of the levy at stake.

Moreover, the Court confirmed that on the dates on which the plaintiff settled its taxes, the tax system did not allow them to be settled at a rate other than the reduced rate imposed by the applicable Portuguese Law. Therefore, the Court considered that the plaintiff, when carrying out the self-liquidation of IRC (Portuguese corporate tax), had complied with the legal framework in force at the time, which only later was considered by the Commission to be incompatible. Accordingly, the settlement of compensatory interest did not have a legal basis. Subsequently, the Court ordered the recovery of the compensatory interest paid by the former to the Portuguese Tax Authority.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The recovery of the compensatory interest paid to the public authority

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-148/04, Unicredito Italiano SpA v Agenzia delle Entrate (2005), ECLI:EU:C:2005:774
- C-183/02 P and C-187/02 P, Demesa v Territorio Histórico de Álava (2004) ECLI:EU:C:2004:701
- C-88/03, República Portuguesa v Comissão das Comunidades Europeias (2006) ECLI:EU:C:2006:511

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Commission Decision C 35/2002 (EX NN 10/2000)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary PT5

Date

05/01/2019

Case identifiers

Member State

Portugal

Court which adopted the ruling (national language)

Supremo Tribunal Administrativo (pleno)

Court which adopted the ruling (English)

Supreme Administrative Court (plenary)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Portuguese

Hyperlink to ruling

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/b67515ec119cd9ab80257dff00414b9d?OpenDocument&ExpandSection=1&Highlight=0,Aux%C3%ADlios,de,Estado#_Section1

Case reference

01050/03

Procedural context of the case

The defendants – active in the field of transport – lodged an appeal for annulment of part of the Resolution of the Council of Ministers No. 52/2003, of 27 March 2003, in which it laid down compensatory allowances to other transport companies.

The Section of the Supreme Administrative Court (case reference not available) rejected the appeal on the grounds that (i) the initial claim could not be accepted as it concerned the general allegation of a breach of the Vehicle Transport Regulation; (ii) the ruling was not appealable in respect of one of the parties; and (iii) the defendants lacked locus standi.

This ruling was revoked by the Plenary of the Supreme Administrative Court (case reference not available), on the ground that it was open to challenge and that the defendants had locus standi, meaning the case was sent back to the Section, which decided to (a) request that an audit of the accounts of the companies which benefited from the compensatory allowances, for the year 2003, should take place, in order to determine whether (i) these accounts showed a difference between the costs attributable to the part of their activity in the exclusive concession areas and the corresponding revenue or; (ii) there were certain elements that would allow for the conclusion that the compensatory allowances allocated to them were insufficient to cover the damage which could be attributed to the exploitation of the concession area on an exclusive basis; (b) refer a request for a preliminary ruling to the ECJ (current CJEU) (Case Associação Nacional de Transportadores Rodoviários de Pesados de Passageiros (Antrop) and Others v Conselho de Ministros, Companhia Carris de Ferro de Lisboa SA (Carris) and Sociedade de Transportes Colectivos do Porto SA (STCP) C-504/07).

The audit was carried out and the ECJ (current CJEU) delivered judgment on the questions raised (C-504/07), following which the appeal lodged by the defendants was accepted (case reference not available) and the Resolution partially revoked.

In disagreement, the Prime-Minister decided to lodge the appeal under analysis.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

26/02/2015

Language

Portuguese

Headnote

In this ruling, the Court considered that only the licensed activity (i.e. not competitive activity) could be supported by compensatory allowances.

Parties

Names of the parties to the action

Conselho de Ministros

Versus

ANTROP – Associação Nacional de Transportes Rodoviários de Pesados de Passageiros & Others

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Competitor

Sector relating to the State aid argument

H - Transporting and storage

Public transport

The type of State aid measure challenged in the court proceedings

Other

Compensatory allowances

Substance of the case

Facts and parties' main arguments in the case

The plaintiff argued that the beneficiary companies were subject to public service obligations, resulting from the Vehicle Transport Regulation and from the continuity of the lines started in the concession area, even outside the limits of their concession areas. In a nutshell, all the passenger public transport activities carried out by the beneficiary companies are, according to the plaintiff, subject to public service obligations.

In addition, the plaintiff highlighted that, pursuant to the aforementioned regulation, the validity of the compensatory allowances granted stems from the imposition of public service obligations, not being limited to the concession of an exclusive area.

In light of the above, for the plaintiff, the conclusion taken by the CJEU that the clearance of the amounts due as compensatory allowances required the accounting separation between the two exclusive areas and the rest of the territory covered by the activity arises from the wrong assumption that the beneficiary companies would only fulfil public service obligations in the exclusive zone, as if the defendants themselves were only subject to public service obligation within their exclusive zones.

For their part, the defendants argued that the 'public service obligations' are, within the aforementioned Regulation, those arising from the extra costs incurred in the concession areas and not from the subjection to the common public service regime to which all carriers are subject, without receiving any compensatory allowance. According to the defendants, the plaintiff are confusing 'public

service obligations' which are eligible, under the abovementioned regulation as 'subject to a licensed public service scheme'. This confusion exists only because for decades the two public companies in question have become accustomed to receiving, annually, a financial compensation from the State, improperly called a 'compensatory allowance', which is no more than the financing of the general operating deficit and not compensating for the extra costs arising from the special obligations inherent in the public service concession.

Remedy(ies) sought

Other remedy sought

Continuation of the compensatory allowance

Outcome of the case

Conclusions adopted by the national court

The Court observed that both the judgment under appeal, as well as the CJEU judgment draw up their conclusions on the basis of a common certainty: that it was essential to separate the licensed activity (i.e. the activity in the concession area) from the competitive activity, since only the former could be supported by compensatory allowances.

The Court, moreover, ruled that it is impossible to conclude from the factual basis that the service provided in the concession areas was of the same nature as the service provided outside those areas and that they must, therefore, both be qualified as a public service (which could be financially supported by the State), as argued by the plaintiff.

Finally, as regards the plaintiff's claim that the Court should have considered that the accounts of the beneficiary companies made it possible to determine the cost of passenger transport activities and the size of their deficits vis-à-vis their revenue, the Court noted that the plenary court has only powers to address matters of law and, for that reason, unless there is an offence against an express provision of the law, that required a certain kind of evidence for the existence of the fact or established the force of a particular evidence, the error in the determination of the material facts is excluded from the scope of its Court's powers of cognition.

Thus, the conclusion of the Court was to dismiss the appeal and to uphold the contested decision.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

Continuation of the compensatory allowance (where it was considered to be under the scope of public service)

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-504/07 Antrop and Others v Conselho de Ministros, Carris and STCP (2009), ECLI:EU:C:2009:290 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-504/07)

Any other comments (optional)

No other comments

22.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	0576/08	19/11/2008	Private enforcement	None - Claim rejected	The decision of the Commission to recover the aid granted by the reduction of fees provided for in Article 5 of Regional Legislative Decree No. 2/99/A led to the question of possible retroactive taxation. The Court ruled this should be raised in a Commission decision, since it does not constitute an inherent defect in the act of liquidation, which merely implements it.		
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	029/13	23/04/2013	Private enforcement	None - Claim rejected	No remedies were granted since the Court considered that there was no reason to demand the fulfilment of the previous notification obligation, i.e. to enforce the standstill obligation. This was because the Court considered that there was not a high enough probability that the measure at stake would be considered State aid.	Case also focuses on control of non-notified aid.	This case follows the line of jurisprudence consolidated by case 0529/15 of the Supreme Administrative Court (2nd section) found at http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/7738fde8c008ccf48025815b00562a00?OpenDocument&ExpandSection=1#_Section1.
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	0203/13	26/06/2013	Private enforcement	None - Claim rejected	No remedy was granted for procedural reasons. In particular, the plaintiff would have to allege and prove that aid in question went beyond *de minimis* rules.	Not every aid needs to be notified and Member States must proceed with registering aid granted, in compliance with the Regulations establishing *de minimis* aid.	This case follows the line of jurisprudence consolidated by case 0529/15 of the Supreme Administrative Court (2nd section) found at http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/7738fde8c008ccf48025815b00562a00?OpenDocument&ExpandSection=1#_Section1.
Supremo Tribunal Administrativo (Secção de Contencioso Tributário)	Supreme Administrative Court (Tax Disputes Section)	Last instance court (administrative)	01216/13	14/01/2015	Private enforcement	Case sent back to the lower court for re-assessment	The Court considered that the lower instance court should have awaited the pending Commission decision on the compatibility of the State aid with the internal market before rendering the judgment. The Court therefore sent the case to the lower instance court for re-assessment and re-consideration of the facts of the case. It instructed the lower instance court to carry out an investigation concerning (the timeline of) the implementation of the levy collection procedure. In the Court's opinion, such an investigation would clarify whether there had been a violation of Article 108(3) TFEU.	This case clarifies that, should a formal investigation procedure under Article 108(2) TFEU be ongoing, the collection of levies financing State aid cannot take place at the same time, as this would be in violation of national and Union law.	The subsequent ruling from the lower court (Tribunais Administrativo e Fiscal de Viseu) is not available.
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	0590/15	25/06/2015	Private enforcement	Case sent back to the lower court for re-assessment	No remedies were granted due to procedural reasons. In particular, the Court remitted the case to the lower instance it had come from so that the facts of the case could be expanded in view of including an investigation of whether the procedure of Article 108(2) TFEU was in place and, if so, what its status was. Only afterwards can the case be decided.	There are many cases relating to the Institution in question in this case. This case is one of the more recent ones and consolidates previous jurisprudence. The Supreme Administrative Court has been deciding like this in similar cases.	The subsequent ruling from the lower court (Tribunal Administrativo e Fiscal de Viseu) is not available.
Supremo Tribunal Administrativo (1ª Seccção)	Supreme Administrative Court (1st Section)	Last instance court (administrative)	01021/15	07/01/2016	Private enforcement	Case sent back to the lower court for re-assessment	The Court ordered the lower instance court to re-assess the case and the plaintiff's request. The Court ruled that resorting to the employment support measures foreseen in the Portuguese law in question (Portuguese Decree-Law No. 89/95 (Decreto-Lei No. 89/95) and Portaria No. 106/2013), or the benefit obtained by employers with its attribution, does not constitute State aid within the meaning of Article 107 TFEU.		The subsequent ruling from the lower court (Tribunal Central Administrativo Sul) is not yet available.
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	0529/15	05/07/2017	Private enforcement	None - Claim rejected	No remedies were granted since the Court considered that there were no grounds to demand the fulfilment of the previous notification obligation, i.e. to enforce the standstill obligation. This was because the Court considered that it was not improbable that the measure at stake would be considered State aid. The Court decided that the aid at hand did not constitute State aid. The Court relied on established CJEU case law and confirmed that the lower court was competent to interpret and apply the notion of State aid, according to Article 107 TFEU. The Court also re-stated that the lower courts could have decided that it was not a State aid issue, without waiting for the Commission decision, in accordance with Article 108(3) TFEU. In this case, the Commission decided that this was indeed not a State aid issue.	There are many cases relating to the institution in question in this case. This case is one of the more recent ones and consolidates previous jurisprudence. This case has been considered by academics as particularly illustrative. The wine levy in question was not subject to the standstill obligation insofar as it did not, in principle, constitute State aid. The annulment sought of the totality of the levy was deemed disproportionate. The Court decided that there was no need to refer a request for a preliminary ruling to the CJEU.	
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	0911/10	02/03/2011	Public enforcement	None - Claim rejected; Other remedy imposed	The Court ordered the recovery of the compensatory interest paid by the plaintiff to the national tax authorities. The annulment of the recovery sought in the case pursuant to a Commission decision that the CJEU considered valid (namely in stating the scheme in question did not apply to companies with financial activities) cannot take place since it is merely an execution of that decision. The matter of fiscal retroactivity following the Commission's recovery decision should be raised - as it was - before the CJEU.		This case follows the line of jurisprudence consolidated by case 069/11 of the Supreme Administrative Court (2nd section) found at http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/9e7b2eccc0d9dddc802578a8002c95b4?OpenDocument&ExpandSection=1#_Section1.
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	0791/10	22/03/2011	Public enforcement	None - Claim rejected	The Court ruled that no compensatory interest was due. The annulment of the recovery sought in the case pursuant to a Commission decision that the CJEU considered valid (namely in stating the scheme in question did not apply to companies with financial activities) cannot take place since it is merely an execution of that decision.	The matter of fiscal retroactivity following the Commission's recovery decision should be raised - as it was - before the CJEU.	This case follows the line of jurisprudence consolidated by case 069/11 of the Supreme Administrative Court (2nd section) found at http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/9e7b2eccc0d9dddc80

									2578a8002c95b4?OpenDocument&ExpandSection=1#_Section1.
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	069/11	25/05/2011	Public enforcement	Other remedy imposed	The Court ordered the recovery of the compensatory interest paid by the plaintiff to the national tax authorities. The plaintiff could not be held responsible for the delay of the payment leading up to the compensatory interest because at the time it paid its taxes in accordance with the relevant fiscal regime, and the Commission had not yet considered that regime as unlawful State aid.	The Court stated that it is up to the CJEU (as opposed to the national courts) to assess whether the relevant Commission decision (declaring the fiscal regime in question as unlawful State aid) violates - through the recovery it required, the legal principles raised by the plaintiff, including Portuguese constitutional law.	
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	01050/03	12/01/2012	Public enforcement	Recovery order of the unlawful/incompatible aid	The decision of the Council of Ministers granting the compensation in question (in violation of State aid rules) is to be annulled. Whenever a national court identifies an unlawful State aid measure it must act upon it in accordance with national law in relation to the validity of the execution acts of those measures.		This case is part of a line of cases culminating in case 01050/03 of the Supreme Administrative Court (full court) found at http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/b67515ec119cd9ab80257dff00414b9d?OpenDocument&ExpandSection=1&Highlight=0,Aux%C3%ADlios,de,Estado#_Section1.
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	0770/13	05/02/2015	Public enforcement	None - Claim rejected	The Court ruled that the debt previously considered as unlawful State aid does not have the nature of a tax. No remedies were granted since they fell outside the scope of the decision to be made by the Court.		
Supremo Tribunal Administrativo (full court)	Supreme Administrative Court (full court)	Last instance court (administrative)	01050/03	26/02/2015	Public enforcement	Recovery order of the unlawful/incompatible aid	The Court confirms the decision of the lower court that the decision of the Council of Ministers granting the compensation in question (in violation of State aid rules) should be annulled. Whenever a national court identifies an unlawful State aid measure it must act upon it in accordance with national law in relation to the validity of the execution acts of those measures. The yearly grant ('compensation') is considered State aid and is in violation of national law, in particular because it is not possible to determine the amount of costs associated with the activity of the companies in question in the context of the execution of their public service obligations. The ruling was given pursuant to a preliminary ruling of the CJEU (case C-504/07 of 7 May 2009). The yearly aid granted by the Portuguese State, in order to compensate constant deficits of operation, to bus (passenger transport) companies who, by virtue of public concession, exercise their activity in an exclusive regime within certain urban perimeters but also exercise their activity in competition with private operators outside the urban areas subject to exclusivity falls within the concept of State aid rules.	This case has been considered by academics as particularly illustrative.	
Tribunal da Relação de Lisboa	Lisbon Court of Appeal	Second to last instance court (civil/commercial)	519/10.5TYLSB-CE.L1-7	16/02/2016	Public enforcement	None - Claim rejected	No remedy was granted since the Court ruled that an insolvent bank could not be considered as an undertaking in the sense of Article 107 TFEU. The Court also concluded that it is up to the Portuguese State, in accordance with its own legislation, to adopt the necessary execution measures in order to abide by Commission decisions.		This case is followed up by ruling 519/10.5TYLSB-CE.L1.S1 of the Supreme Court of Justice, found at http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/68c4a035a32e4981802580b9004df66d?OpenDocument&Highlight=0,aux%C3%ADlios,estatais.
Supremo Tribunal Administrativo (2ª Seccção)	Supreme Administrative Court (2nd Section)	Last instance court (administrative)	0482/16	12/10/2016	Public enforcement	Other remedy imposed	The Court ordered the recovery by the plaintiff of the amounts wrongly levied by the Tax Authority pursuant to the fact that it benefited from the fiscal benefit at the centre of this case. The National Tax Authority could not rely on the Commission decision on tax benefits in question to justify its decision about how the plaintiff company was not entitled to that benefit due to its agricultural activity, since the notification made to the Commission did not include agriculture and the latter has therefore not decided on it.		
Supremo Tribunal de Justiça	Supreme Court of Justice	Last instance court (civil/commercial)	519/10.5TYLSB-CE.L1.S1	31/01/2017	Public enforcement	None - Claim rejected	No remedy was granted since the Court ruled that an insolvent bank could not be considered an undertaking in the sense of Article 107 TFEU. The Court also concluded that it is up to the Portuguese State, in accordance with its own legislation, to adopt the necessary execution measures in order to abide by Commission decisions. In other words, if aid granted by a Member State is considered unlawful in light of Article 107 TFEU, it is up to that State to take the necessary measures to guarantee the effective recovery of that aid from its beneficiaries, according to its national laws (national autonomy principle).		This case decides on a previous case by the Lisbon Court of Appeal (519/10.5TYLSB-CE.L1-7), from 16 February 2016, found here: http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/e16a27e21ca0d7428025807600341aa3?OpenDocument.

23.1 Romania

23.1 Country report

Name national legal expert

Dr Valentin Mircea

Date

28/12/2018

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Any court in Romania may handle State aid matters, from the general local courts (*judecatorie*) to the High Court of Cassation and Justice. Therefore, there is no specialised court dealing with State aid rules. In particular, in public enforcement of State aid rules, the local courts are competent to settle issues regarding the direct enforcement of a recovery decision. Their rulings may be appealed before the administrative divisions of the county courts (tribunal).

However, if a recovery decision is enforced by an order issued by a Romanian administrative authority, the competence to hear any challenge to this act belongs to the administrative division of the Court of Appeal. Its decision can be further appealed to the administrative division of the High Court of Cassation and Justice.

A description of the procedural framework applicable in public enforcement of State aid rules

The recovery of unlawful State aid is regulated by specific legal provisions, incorporated in the Emergency Government Ordinance number 77/2014 (EGO 77/2014) regarding the national State aid procedures.[327] EGO 77/2014 includes provisions covering all the aspects of the State aid control, monitoring and recovery.

According to EGO 77/2014, the main public institutions involved in the enforcement of a Commission decision for recovery of the unlawful State aid are the Romanian Competition Council (*i.e.* the national competition authority) and the Ministry of Public Finances. The recovery of State aid is enforced by the Ministry of Public Finances, whilst the Romanian Competition Council is the national contact authority between the Commission, the authorities granting the State aid and the beneficiaries of State aid. The Competition Council issues its opinion and advises the Government in State aid related matters, including compliance with the *de minimis* rules or the conditions for compensation of the services of general economic interest (SGEI). The Romanian Competition Council also represents Romania before the Commission in any matter pertaining to State aid rules. EGO 77/2014 includes specific provisions for the courts, such as the remedies that they may grant: suspension of the payment of unlawful State aid, recovery of unlawful State aid and payment of interest.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

In private enforcement cases, most matters are dealt with at first instance by the county courts (*i.e.* the lower courts). Their rulings are subject to a first appeal at the civil division of the Court of Appeal and to a second appeal at the civil division of the High Court of Cassation and Justice.

A description of the procedural framework applicable in private enforcement of State aid rules

The private enforcement of State aid is regulated by the Civil Procedure Code (Law 134/2010), applicable to a claim for damages, which requires a plaintiff to prove the existence of the *delict* (*i.e.* wrongdoing), the amount of the damage incurred and the causality between the *delict* and the damage.

Any person who is affected by an unlawful State aid measure has the legal standing in court. This means that such cases are brought mainly by competitors of the beneficiaries of unlawful State aid.

Main findings based on the case summaries

So far, the public enforcement cases outnumber the private enforcement cases. Among the selected rulings were two public enforcement judgments (High Court of Cassation and Justice, 7.2.2018 - 417/2018 (RO2) and ruling ECLI: RO:CAORA:2016:034.xxxxxx (RO3)) and one private enforcement ruling (ECLI:RO:CATIM:2016:022.xxxxxx(RO1)).

The main remedies requested included the recovery of the unlawful aid (*e.g*. ruling 417/2018 (RO2), ECLI:RO:CAORA:2016:034.xxxxxx (RO3)) and the payment of damages to third parties (ruling ECLI:RO:CATIM:2016:022.xxxxxx (RO1)).

Public enforcement cases arose with regard to a wide variety of economic sectors, from transportation (*e.g.* ruling ECLI:RO:CATIM:2016:022.xxxxxx (RO1)) to manufacturing (*e.g.* ruling ECLI:RO:CAORA:2016:034.xxxxxx (RO3)) and professional activities (ruling 417/2018 (RO2)).

The parties involved in the court proceedings included State aid beneficiaries and public authorities (*e.g.* ruling ECLI:RO:CAORA:2016:034.xxx (RO3), ruling 417/2018 (RO2)), as well as State aid granting authorities (*e.g.* ruling ECLI:RO:CATIM:2016:022.xxxxxx (RO1)).

[327] Ordonanța de urgență nr. 77/2014 privind procedurile naționale în domeniul ajutorului de stat, precum și pentru modificarea și completarea Legii concurenței nr. 21/1996", (the Energency Ordinance regarding the national procedures in State aid matters, as well as for amending Competition Law no.21/1996) published in the Official Gazette no.893/09.12.2014.

Qualitative assessment of the average time of court proceedings

The average duration of the court proceedings in State aid enforcement cases is lower than the average duration of litigation in Romania, which lasts approximately five months.[328] For instance, ruling ECLI:RO:CATIM:2016:022.xxxxxx (RO1) of the Court of Appeal of Timisoara was issued in the ambit of an appeal registered on 8 September 2016 and settled on 7 December 2016. Therefore, the ruling was issued in less than three months. This might be due to the fact that State aid cases usually deal with procedural questions, which do not require extensive hearings of the parties or opinions from external experts.

Qualitative assessment of the remedies awarded by national courts

Given that cases decided by Romanian courts usually do not include an in-depth analysis of the State aid issues and given that Romanian courts do not usually grant State aid remedies, it is difficult to assess the quality of their decisions. In fact, no State aid remedies were granted in the three selected rulings. One case was rejected (ruling ECLI:RO:CAORA:2016:034.xxxxxx (RO3)), while the other two were sent back for reassessment to the lower instance court. The reasons for not directly awarding remedies in the three selected rulings might be related to the lack of experience of the Romanian judges in State aid matters, since they are not specialised judges and the training provided to them does not sufficiently touch upon the issue of the remedies.

It can be noted that several cases were identified (although not selected) in which the Court addressed a State aid argument in light of Romania's accession to the EU. The Court, in ruling on these cases, adopted different reasoning in different cases. For example, it analysed alleged State aid by referring to the Romanian law on State aid in force before 1 January 2007 (ruling 3162/2014) and declared State aid granted before Romania's accession unlawful (ruling 4994/2009). Moreover, in one case the Court ruled that State aid which was not specifically listed as existing on the accession date had to be approved by the Commission (ruling 77F/09.04.2010) whereas in another case it ruled that any State aid which was in force before Romania joined the EU did not have to be re-approved by the Commission (ruling 3844/12.10.2010).

Qualitative assessment of the application of the State aid *acquis*; preliminary references

The courts in Romania demonstrated a good knowledge and understanding of the body of legislation and the case law of the CJEU with respect to State aid matters. There is, so far, only one CJEU preliminary ruling further to the two requests formulated before Romanian courts (Joined cases *Fondul Proprietatea*).[329] On the other hand, courts use general references to the EU *acquis*, including GBER and the *de minimis* Regulation, without going too much into detail. Romanian courts rely on CJEU case law on State aid matters, rather than refer directly to State aid rules.

At the same time, in cases 417/2018 (RO2) and ECLI:RO:CAORA:2016:034.xxxxxx (RO3), the court referred to Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (the current Regulation is Council Regulation (EU) 2015/1589 of 13 July 2015.[330] In case 417/2018 (RO2), the court also made a reference to Council Regulation (EC) 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) 1260/1999.[331]

Qualitative assessment of any other relevant trends in State aid enforcement

The number of private enforcement cases is likely to rise over the next years, due to an increased awareness of the affected undertakings of State aid rules. Many disputes arose with regard to the transition period from the period before the accession of Romania to the EU, which took place in 2007, and after the accession. Such disputes related to a large extent to State aid measures granted before the EU accession. The focus of the cases in the coming years will likely shift to new State aid matters, not originating in the period before 2007.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

In a vast majority of cases, courts in Romania understood properly and gave the correct interpretation to the State aid concepts, including the definition of State aid under Article 107(1) TFEU.

Any other relevant comments or findings

Romania is one of the most recent Member States of the EU, alongside Bulgaria and Croatia, but it has applied State aid rules since 1999, which helped both judges and practitioners gather the necessary expertise before Romania's accession to the EU. The Romanian Competition Council continues to play an important role in State aid matters as it has the important title of 'contact authority' in State aid matters between Romania and the Commission, it issues its opinions prior to any new State aid measures and it has attributions regarding the monitoring of the State aid schemes and the recovery of unlawful State aid.

In addition, the Romanian Competition Council was, before 2007, a full-fledged enforcer of State aid rules, including issuing recovery decisions, and this helped it to acquire expertise regarding the analysis and the enforcement of State aid rules.

[328] According to the Romanian Ministry of Justice, quoted here - https://www.digi24.ro/stiri/actualitate/justitie/cat-dureaza-un-proces-in-instantele-din-romania-921193 (last accessed on 29 December 2018).
[329] Joined cases C-556/15 and C-22/16 - *Fondul Proprietatea* (2017) ECLI:EU:C:2017:494.
[330] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*
[331] Currently repealed through Regulation (EU)1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, *OJ L 347, 20.12.2013, p. 320–469.*

23.2 Case summaries

Case summary RO1

Date

06/01/2019

Case identifiers

Member State

Romania

Court which adopted the ruling (national language)

Curtea de Apel Timișoara

Court which adopted the ruling (English)

Court of Appeal Timisoara

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

Romanian

Hyperlink to ruling

http://www.rolii.ro/hotarari/589526c5e490098027000537

Case reference

ECLI:RO:CATIM:2016:022.xxxxxx; 885A/15.12.2016

Procedural context of the case

This was an appeal against Decision 462/06.05.2016 of the Timis Tribunal (ruling ECLI:RO:TBTIM:2016:044.xxxxxx), through which the claim to recover an unlawful State aid had been rejected as being prescribed and the last in a succession of cases regarding this State aid, granted by Aeroportul International Timisoara (Timisoara International Airport) to an airline – the Hungarian based company WizzAir – started following a complaint by an affected competitor – Carpatair airline.

The existence of an unlawful State aid granted by Aeroportul Internațional Timișoara to Wizz Air had been ascertained irrevocably through ruling 253l/14.11.2012 of the Court of Appeal of Pitești, which rejected the appeal against the ruling 922/PI/CA/30.08.2011 of Timis Tribunal (http://www.rolii.ro/hotarari/5898192ce49009b4340001ff).

Further to a control at Aeroportul International Timisoara, the Romanian Court of Accounts, through its ruling 142/23.12.2013 obliged this undertaking to recover the amount of the State aid granted to Wizz Air, as ascertained by the aforementioned decision.

The appeal lodged by Aeroportul International Timisoara against the measure imposed by the Romanian Court of Accounts had been rejected through ruling 2977/06.10.2015 of the Court of Appeal of Alba Iulia (http://www.rolii.ro/hotarari/589505ece490092824002672).

Based on these judgments, ruling 885A/07.12.2016 of the Court of Appeal Timisoara (discussed here) established that the obligation to recover the State aid appeared as a result of the ruling 253/14.11.2012 of the Court of Appeal of Pitești and not the obligation imposed by the Court of Accounts and the subsequent judgment of the Court of Appeal of Alba Iulia and sent the case back to the Timis Tribunal for retrial and the case is still pending.

Type of action

Private enforcement

Delivery date of the ruling

07/12/2016

Language

Romanian

Headnote

In this ruling, the Court held that knowing that the damage was caused by a unlawful State aid was essential to entitle the damaged party to reclaim such damages. In this context, the Court held that the statute of limitation for the recovery of the damage started not at the moment the State aid comes to an end, but when a competent court established the existence of the State aid.

Parties

Names of the parties to the action

Societatea Națională Aeroportul Internațional Timișoara S.A. Ghiroda

Versus

Wizz Air LegikozlekedesI Kft Budapest

The relationship of the plaintiff to the measure

Other

Authority granting the aid

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

H - Transporting and storage

Transport

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The main argument put forward by the plaintiff was that the State authorities should recover the aid from the defendant, because they have been obliged to do so by the Romanian Court of Accounts. Such obligation had been confirmed by a binding court ruling. The plaintiff also argued that the statute of limitation started at the moment when the measure is qualified as State aid, not when the measure expired.

In response to the claim, the defendant argued that Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999). Moreover, the statute of limitation started from the moment when the granting of unlawful State aid comes to an end, irrespective of the fact that it had been already qualified as such or not. Therefore, at the moment when the claim of the plaintiff was lodged with the Court, the deadline applicable to actions for recovery of damages already expired (the statute of limitation – three years), so that recovery was no longer possible.

Remedy(ies) sought

Recovery order in relation to unlawful aid; Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

The Court agreed with the plaintiff and annulled the first court ruling on the ground that the right to recover the amount of the unlawful State aid, as damage from its recipient, appeared at the moment when its existence has been certified through a definitive court ruling.

Hence, the Court confirmed that the period for the statute of limitation did not start when the State aid comes to an end, but at a later moment, when a court decides finally and irrevocably that the measures do constitute State aid. The Court decided to send the case back to the lower court for reassessment.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The case has not been settled yet by the lower court.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary RO2

Date

06/01/2019

Case identifiers

Member State

Romania

Court which adopted the ruling (national language)

Înalta Curte de Casație și Justiție

Court which adopted the ruling (English)

High Court of Cassation and Justice

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Romanian

Hyperlink to ruling

http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=143801

Case reference

417/2018

Procedural context of the case

The case originates from the appeal proceedings against the ruling 1.452/22.05.2015 of the Bucharest Court of Appeal. The Bucharest Court of Appeal had previously ruled in favour of the aid beneficiary, sanctioned for misuse of Romanian and EU structural funds. The High Court of Cassation sent the case back to the Bucharest Court of Appeal for re-assessment, where the case is pending at the moment.

Type of action

Public enforcement

Date of the Commission decision

30/03/2015

Delivery date of the ruling

07/02/2018

Language

Romanian

Headnote

In this ruling, the Court considered whether the recovery of unlawful State aid is subject to the national law in force at the moment when the aid was granted or the law applicable when the recovery is initiated.

Parties

Names of the parties to the action

Ministerul Fondurilor Europene

Versus

A (anonymised)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

M - Professional, scientific and technical activities

Professional activities

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The case concerned the temporal application of the Romanian Emergency Ordinance No. 66/2011. The legislation sanctions irregularities in relation to the grant and use of European regional and structural funds and/or national aid co-funded by European funds. The Ordinance No-66/2011 replaced the previous Ordinance No. 79/2003.

The plaintiff in this case was a public institution – i.e. the Romanian Ministry of Public Funds. The plaintiff ordered the recovery of the unlawful aid on the basis of the conditions laid down in the Ordinance No. 66/2011. The defendant was the aid beneficiary. The defendant claimed that Ordinance No. 66/2011 was not applicable, since it was not in force when the contested aid was granted.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

The Court referred to the CJEU preliminary rulings in the joint cases Județul Neamț and Județul Bacău v Ministerul Dezvoltării Regionale și Administrației Publice (C-260/14 and C-261/14) and in A2A SpA v Agenzia delle Entrate (C-89/14). In these judgments, the CJEU ruled that in procedural matters, such as ex-post State aid control, the principle of 'tempus regit actum' applies.

The Court established that a control regarding the validity of public spending under a State aid measure is governed by the national law in force in the moment when the aid was granted. In particular, Ordinance No. 66/2011 could not be applied retroactively, since it was not in force when the aid was granted.

As a result, the Court rejected the claim of the Romanian Ministry of Public Funds and decided in favour of the defendant. The Court thus annulled the previous ruling of the lower instance court and sent the case back to the lower instance court for re-assessment.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The case is still pending in front of the Bucharest Court of Appeal.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-89/14, A2A SpA v Agenzia delle Entrate, (2015) ECLI:EU:C:2015:537
- C-260/14 and C-261/14, Județul Neamț and Județul Bacău v Ministerul Dezvoltării Regionale și Administrației Publice (2016) ECLI:EU:C:2016:360

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ L 210, 31.7.2006

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary RO3

Date

06/01/2019

Case identifiers

Member State

Romania

Court which adopted the ruling (national language)

Curtea de Apel Oradea

Court which adopted the ruling (English)

Court of Appeal Oradea

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

Romanian

Hyperlink to ruling

http://www.rolii.ro/hotarari/589a3a54e49009101f000318

Case reference

ECLI:RO:CAORA:2016:034.xxxxxx

Procedural context of the case

The case occurred in the context of the recovery proceedings initiated by the Romanian State of an unlawful State aid, as settled by the Commission Decision C-2012 F of 30 March 2015. Given that the plaintiff was the central Romanian tax authority (Agenția Națională de Administrare Fiscală), the competence to settle the challenge brought by the plaintiff, in the first instance belonged to the Court of Appeal of Oradea.

Type of action

Public enforcement

Date of the Commission decision

30/03/2015

Delivery date of the ruling

12/12/2016

Language

Romanian

Headnote

In this ruling, the Court confirmed that an unlawful State aid which results from payment of damages to a beneficiary is not recovered based on the procedure applicable to tax liabilities and, furthermore, it cannot have an impact on the fiscal rights of the beneficiary.

Parties

Names of the parties to the action

TGIE SRL

Versus

Ministerul Finanțelor Publice – Agenția Națională de Administrare Fiscală București

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

C - Manufacturing

Wholesale trade/transportation

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The case was the follow-up on a State aid decision of the Commission, regarding the fact that obtaining compensation for alleged damages under a treaty for the protection of investments between Romania and Sweden, could amount to State aid. The Commission issued Commission Decision 2112/30.03.2015 in which it ascertained that the compensations constituted State aid and that the provisions of Article 107 - 108 TFEU prevail over any treaty for protection of investments between countries member of the EU and part of its internal market.

The plaintiff claimed that:

- Decision 2112/30.03.2015 of the Commission could not affect their fiscal rights and obligations and it did not impose any specific measures on the plaintiff, as the State aid beneficiary, but only on Romania, as State aid granting authority, according to this decision.
- The obligations imposed by the Commission are of civil and not fiscal nature, as long as this institution is not a fiscal authority in the same way that national tax authorities are.
- The International Center for Settlement of International Disputes arbitration award which was at the basis of the issuance of Commission Decision 2112/2015 of the Commission also includes damages, of civil nature, and not tax reductions.
- In accordance with article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, the recovery of an unlawful State aid is made pursuant the applicable provisions in the Member State concerned.
- It had not been the beneficiary of the State aid further to the ICSID awards but the Commission established its joint and several liability, together with other companies from the same group.
- The amount of the State aid established through Commission Decision 2112/2015 was uncertain.

The defendant argued that:

- The joint and several liability of the plaintiff for the recovery of unlawful State aid had been established in Commission Decision 2112/2015.
- In accordance with the judgment of the ECJ (current CJEU) in the Case Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA C-119/05: "Community law precludes the application of a provision of national law, [...] in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission of the European Communities which has become final."
- The joint and several liability allowed the Romanian State to enforce the decision to recover State aid from any of the companies mentioned in the decision.
- Based on articles 263 and 278 of the TFEU, the validity of Commission Decision 2112/2015 may be challenged only in front of the CJEU and pending such a challenge the decision was not suspended.
- The decisions issued by the Commission are enforceable by law, with no other formalities.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

In case 276 /CA/2016 -PI, the Court admitted the claim of the plaintiff and ruled that the decision of the tax authorities to annul certain tax incentives on the grounds that it lost the benefit of these incentives as a result of Commission Decision 2112/2015 is not in accordance with the relevant Romanian fiscal regulations.

The Court decided that the fact that the obligation to recover the State aid belonged to the Romanian State did not change the nature of the aid from a civil into a fiscal obligation, as long the origin of the State aid was not a fiscal obligation.

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

The Court was called upon to decide whether unlawful State aid resulting from payment of damages had a fiscal or civil nature.

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-119/05, Ministero dell'Industria, del Commercio e dell'Artigianato V. Lucchini SpA, formerly Lucchini Siderurgica SpA (2007) ECLI:EU:C:2007:434

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

23.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Înalta Curte de Casație și Justiție	High Court of Cassation and Justice	Last instance court (civil/commercial)	3162/2014	14/11/2014	Private enforcement	Recovery order in relation to unlawful aid	The Court admitted the claim of the plaintiff, but rejected the argument that the claim could be considered as State aid.	Although the Court admitted that the EU rules on State aid are directly applicable, it analysed the alleged State aid by reference to the Romanian law on State aid, in force before 1 January 2007. This is a contradictory decision and it demonstrates that the High Court sometimes prefers to settle conflicts arising from State aid which existed at the time Romanian joined the EU, based on previous legislation. In this ruling, the Court declared the EU rules on State aid directly applicable; however, it analysed the alleged State aid by reference to the Romanian law on State aid, in force before 1 January 2007.	
Curtea de Apel Timisoara	Timisoara Court of Appeal	Second to last instance court (civil/commercial)	ECLI:RO:CATIM:2016:022.xxxxxx; 885A/15.12.2016	07/12/2016	Private enforcement	Case sent back to the lower court for re-assessment; Damages awards to third parties / State liability; None - Claim rejected	The Court rejected the argument that the claim for damages was proscribed, and established that the limitation period in this State aid case (unlawful State aid granted by an airport to an airline in the form of reduced tariffs for handling and grounding) starts not at the moment the State aid ceases, but when a court establishes the existence of the State aid.	This is, so far, the most important litigation regarding the private enforcement of State aid rules in Romania.	The litigation ended recently, on 12 July 2018, when the Bucharest Tribunal, to which the case was referred by Înalta Curte de Casatie si Justitie, rejected the claim - see decision 2226/2018 (http://portal.just.ro/3/SitePages/Dosar.aspx?id_dosar=300000000684260&id_inst=3). The decision of the Bucharest Tribunal may be appealed to the Curtea de Apel Bucuresti in the future.
Înalta Curte de Casație și Justiție	High Court of Cassation and Justice	Last instance court (administrative)	1223/2008	25/03/2008	Public enforcement	Recovery order of the unlawful/incompatible aid	The Court admitted the claim of a beneficiary of State aid, considered to be unlawful by the Romanian competition authority before Romania acceded to the EU, and remitted the case for retrial, based on procedural irregularities in the previous litigation phases.	This decision is of relevance as it concerns State aid for facts originating before Romania's accession to the EU. This case concerns the interpretation given by the highest court to the delicate and recurring issue of existing State aid.	
Înalta Curte de Casație și Justiție	High Court of Cassation and Justice	Last instance court (administrative)	4994/2009	11/11/2009	Public enforcement	Recovery order of the unlawful/incompatible aid	This decision is a follow-up of the case sent for retrial by decision 1223/2008, and it resulted in the confirmation by the highest court of the decision of the Romanian competition authority declaring State aid granted before Romania's accession to the EU unlawful.	This decision is of relevance as it concerns State aid for facts originating before Romania's accession to the EU - the case relates to a recurring and important matter - that of the existing State aid at the moment of accession of Romanian to the EU. The reasoning of the Court covers extensively all the aspects of the case and demonstrates that the State aid at stake could be considered neither lawful nor 'existing aid', at the time when Romania joined the EU.	
Curtea de Apel Brașov	Brașov Court of Appeal	Second to last instance court (administrative)	77F/09.04.2010	09/04/2010	Public enforcement	Recovery order of the unlawful/incompatible aid	The Court rejected the claim of the plaintiff for the annulment of a recovery decision issued by the tax administration, considering that after Romania joined EU, any previous tax exemptions in certain areas (industrial parks) had to comply with the EU rules on State aid. The Court considered that an existing State aid, not specifically listed in the Annex of the Treaty of the Accession of Romania to the EU, cannot be invoked after the entry into the Union.	The Court held a restrictive interpretation of State aid rules embedded in the TFEU and in the accession agreement for Romania, and decided that State aid which was not specifically listed as existing on the accession date had to be approved by the Commission. This case relates to a recurring and important matter - that of the existing State aid at the moment of accession of Romania to the EU.	
Curtea de Apel Bucuresti	Bucharest Court of Appeal	Second to last instance court (administrative)	3844/12.10.2010	12/10/2010	Public enforcement	None - Claim rejected	The Court accepted the claim against a recovery order and considered that the State aid in favour of the plaintiff - an exemption from payment of certain taxes and late penalties - was in force before Romania joined the EU and, therefore, it did not have to be approved again by the Commission. The Court relied on the view of the Romanian Competition Council and supported the view that the State aid beneficiary did not have to take action after Romania joined the EU, such as obtaining a new authorisation from the Commission.	This is one of the cases in which the Court considered existing State aid to be valid, even if it was not mentioned in the Annex to the Treaty based on which Romania joined the EU. This case relates to a recurring and important matter - that of the existing State aid at the moment of accession of	

								Romanian into the EU, but a different interpretation was given, in the sense of admitting a State aid measure existed, even if not mentioned in the Annex to the Accession Treaty.	
Înalta Curte de Casație și Justiție	High Court of Cassation and Justice	Last instance court (administrative)	610/2012	07/02/2012	Public enforcement	Recovery order of the unlawful/incompatible aid	The Court rejected a claim which was based on the argument that State aid rules were applied in an incorrect manner to existing State aid. The reasoning of the Court is focused on the primacy of State aid rules over Romanian legislation.	The case emphasises the primacy of Union law on State aid over national regulations. This case signals a consolidation of the practice at the level of the highest court of Romania.	
Judecătoria Oradea	Oradea First Court	Lower court (administrative)	2273/2016	11/03/2016	Public enforcement	Other remedy imposed	In this case, a company claimed to have benefitted from tax incentives in Romania, based on a treaty for the bilateral protection of investments between Romania and Sweden, whilst the Commission found that such treaties among Member States do not preclude the application of State aid rules and ordered for the tax exemptions to be recovered - decision 2112/30.03.2015. The Court ruled in favour of the beneficiary of the unlawful aid and annulled the recovery procedures against it based on the fact that the amount to be recovered is based on a decision of the Commission and henceforth it has a civil and not tax nature, so procedures applicable to recovery of civil damages should have been followed.	This case is of relevance insofar it establishes that 1) the recovery of unlawful aid which originates in an arbitration award is of civil and not tax nature; and 2) the decisions of the Commission establishing the existence of unlawful aid can be enforced in Romania based on the confirmation that they are authentic and a judge orders that they are observed.	
Curtea de Apel Constanta	Constanta Court of Appeal	Second to last instance court (administrative)	RO:CACTA:2016:016.xxxxxx	28/04/2016	Public enforcement	Recovery order of the unlawful/incompatible aid	The Court rejected the claim of the plaintiff for the annulment of a recovery order issued by the tax administration, considering that after Romanian joined the EU, any previous tax exemptions in certain areas (industrial parks) had to comply with State aid rules. The Court analysed the conditions for benefiting from a State aid measure *stricto sensu* and stated that the plaintiff did not comply with these conditions.	It touches upon the issue of existing aid at the moment Romania joined the EU. This case relates to a recurring and important matter - that of the "existing State aid" at the moment of accession of Romania to the EU.	
Curtea de Apel Oradea	Oradea Court of Appeal	Second to last instance court (administrative)	ECLI:RO:CAORA:2016:034.xxxxxx	12/12/2016	Public enforcement	None - Claim rejected	This case is related to the case of the Oradea First Court (decision 2273/2016), in which the Romanian State annulled a rescheduling of tax liabilities of a recipient of State aid which had been declared as unlawful by Commission decision 2112/30.03.2015 - not related to the respective aid, because the recovery procedures have been annulled by the Oradea First Court.	The case concerns company claiming the tax exemptions won against Romania in an ICSID arbitration, which did not stop the Commission from deciding that the respective tax advantages amounted to unlawful State aid. The decision itself does not tackle substantial State aid issues but rather procedural aspects. Apart from the fact that the Court acknowledges that the decision of the Commission establishing the existence of unlawful State aid can only be challenged in front of the CJEU, its reasoning refers solely to Romanian tax procedure aspects. Moreover, the claim by the State aid beneficiary to annul the enforcement of other tax liabilities owed by it, due to the fact that the State aid was not returned by its beneficiary has been admitted because the Court acknowledged that the enforcement procedures have been previously annulled based on procedural irregularities.	
Curtea de Apel Bucuresti	Bucharest Court of Appeal	Second to last instance court (administrative)	RO:CABUC:2017:023.xxxxx	28/11/2017	Public enforcement	Recovery order of the unlawful/incompatible aid	The Court rejected the claim of the plaintiff for the annulment of a decision issued by an entity administering POSDRU funds to recover amounts deemed to exceed the State aid measure and those found ineligible. The reasoning of the Court took into account the following: a) the fact that Regulation 800/2008/EC applies directly and supersedes any internal regulations, which would allow different expenses to be accepted as lawful State aid; b) the fact that the Romanian public authority bears the responsibility for the incorrect formulations in its guidance, does not exonerate the beneficiary of the State aid from returning the unlawful State aid; and c) the binding force of a contract cannot be contrary to a norm of public interest, such as the State aid rules in the TFEU.	The ruling contains elaborate reasoning, including the noteworthy application of the issue of the primacy of State aid rules and the issue of unlawful aid granted by the State. Relevant ruling recognising the pre-eminence of State aid rules.	
Inalta Curte de Casatie si Justitie	High Court of Cassation and Justice	Last instance court (administrative)	417/07	07/02/2018	Public enforcement	Recovery order of the unlawful/incompatible aid	The Court rejected the claim of the plaintiff regarding the order for recovery of amounts which were not eligible. The Court referred to the decision of the CJEU of 26 May 2016 in the connected cases C 260-14 and C-261/14 and rejected the claim due to the infringement of specific legal provisions, which was not in line with the principle of legal security and the protection of legitimate trust.	In this case, Romania's highest Court provides an elaborate assessment of the conditions for lawful State aid and refers to relevant case law of CJEU. This case signals a consolidation of practice at the level of the highest Court of Romania.	

24.1 Slovakia

24.1 Country report

Name national legal expert

JUDr Juraj Gyárfáš LLM
Doc JUDr Kristián Csach LLM PhD

Date

02/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

A recovery decision issued by the Commission is directly enforceable in Slovakia, that is, it will serve as an 'execution title' to initiate standard enforcement proceedings. These enforcement proceedings are identical to enforcement proceedings initiated on the basis of any other 'execution title' (*e.g.* a judgment of a civil court). In other words, the recovery decision will serve as a legal basis to initiate enforcement proceedings and the proceedings will then essentially take the ordinary course of enforcement proceedings initiated on the basis of any other 'execution title'. Consequently, there is no specialised court overseeing exclusively the public enforcement of State aid rules. The enforcement proceedings will be initiated before the District Court of Banská Bystrica (*Okresný súd Banská Bystrica*) that oversees all enforcement proceedings.

Within enforcement proceedings, most decisions, such as authorising the bailiff to conduct the enforcement or granting a stay on the proceedings, are issued by court clerks and can be reviewed by a judge. Some of the more complex decisions identified in the Enforcement Code,[332] as amended, are issued by a judge (*e.g.* excluding certain assets from the scope of enforcement) and can be appealed to the Regional Court in Banská Bystrica (*Krajský súd v Banskej Bystrici*). An appeal to the Supreme Court in enforcement proceedings is specifically excluded by the Enforcement Code and is thus inadmissible. After the exhaustion of all remedies, decisions can be challenged by a complaint to the Constitutional Court on the basis of alleged violations of fundamental rights. Under the Slovak Constitution (similar to the German constitutional complaint (*Verfassungsbeschwerde*)), the final decision of any public authority, including that of ordinary courts, can be reviewed by the Constitutional Court and annulled if it violates fundamental rights.

In the event that the aid beneficiary undergoes insolvency proceedings, the claim for State aid recovery can be lodged with the bankruptcy trustee and would be satisfied in those proceedings. Insolvency proceedings are overseen by the relevant district court (*okresný súd*) depending on the seat of the insolvent debtor.

A description of the procedural framework applicable in public enforcement of State aid rules

A recovery decision issued by the Commission is directly enforceable in Slovakia, that is, it will serve as a title to initiate standard enforcement proceedings under the Enforcement Code.

In cases where the recovery decision does not specify the amount of aid or does not identify the beneficiary, it will be supplemented by a separate decision issued by the competent national authority (usually the central authority that granted the aid) (Section 10 of the State Aid Act).[333] Such decision can then be challenged before administrative courts (Code of Administrative Judicial Review).[334]

In the event that the aid beneficiary undergoes insolvency proceedings, the claim for recovery can be lodged with the bankruptcy trustee and would be satisfied in those proceedings. Insolvency proceedings are overseen by the relevant district court, depending on the seat of the insolvent debtor.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

There is no specialised court to hear cases of private enforcement of State aid rules. Consequently, the competent court would be determined on the basis of general jurisdictional rules and it would depend on the specific type of private enforcement.

Private enforcement in the form of a civil action (*e.g*. a claim for damages or for specific performance in tort or in contract) would be heard by the relevant first instance civil court (district court) determined under the Code of Civil Procedure.[335] Generally, the relevant court would be determined according to the domicile of the defendant. If the dispute relates to the determination of rights in real property (*e.g.* a claim for declaratory relief that the public authority is still the owner of property, because the transfer constituted State aid and was thus null and void), the competent district court would be determined according to the location of the property.

Private enforcement in the form of a third party challenging an administrative measure constituting State aid would be heard by the first instance administrative court. In administrative matters, the regional courts sit as first instance courts (Code of Administrative Judicial Review). The competent court would be determined according to the seat of the public authority that decided to award the aid at first instance.

There are specialised courts for competition and unfair competition claims — specifically the District Court of Bratislava II for all competition law cases and the District Courts of Bratislava I (Banská Bystrica and Košice I), each for their respective region, for cases arising out of unfair competition (Sections 26 and 27 of the Code of Civil Procedure). It

[332] Zákon č. 233/1995 Z. z. o súdnych exekútoroch a exekučnej činnosti (Exekučný poriadok) a o zmene a doplnení ďalších zákonov v znení neskorších predpisov (Enforcement Code).
[333] Zákon č. 358/2015 Z. z. o úprave niektorých vzťahov v oblasti štátnej pomoci a minimálnej pomoci a o zmene a doplnení niektorých zákonov (zákon o štátnej pomoci) v znení neskorších predpisov (State Aid Act).
[334] Zákon č. 162/2015 Z. z. Správny súdny poriadok v znení neskorších predpisov (Code of Administrative Judicial Review).
[335] Zákon č. 160/2015 Z. z. Civilný sporový poriadok v znení neskorších predpisov (Code of Civil Procedure).

could be argued that these courts should also hear State aid cases, because State aid rules are formally a part of competition law or because private enforcement claims could be formulated as claims arising out of unfair competition. However, based on our knowledge, this has not been tested in practice and there is thus no precedent confirming this interpretation of the jurisdictional rules.

A description of the procedural framework applicable in private enforcement of State aid rules

There is no specific procedural framework for private enforcement of State aid rules. Any such claim would thus be governed by the general framework depending on the particular type of action. If it is framed as a civil claim for damages or specific performance, it would fall under the Code of Civil Procedure. If it is framed as an administrative claim for annulment of an administrative decision, it would fall under the Code of Administrative Judicial Review.

Main findings based on the case summaries

The Slovak example shows how one precedent can frame the discourse for an entire decade. In Slovakia, that precedent was the *Frucona* case,[336] where the first recovery decision was issued in 2006. *Frucona* was also the only public enforcement case that generated Slovak court decisions identified in the Study. The State launched several attempts to recover the aid, but these attempts were largely unsuccessful, because courts were reluctant to override the *res judicata* effect of the restructuring proceedings within which the aid in question was granted. The legislator then overhauled the legislative framework for enforcing recovery decisions, thus making it no longer necessary to file an action for recovery of State aid, but making recovery decisions directly enforceable, thus allowing the State to initiate enforcement proceedings on the basis of a recovery decision issued by the Commission (Act number 102/2011 Coll.).[337] This legislation was challenged before the Constitutional Court and the central provisions laying down the direct enforceability of recovery decisions were upheld by the Constitutional Court (ruling Pl. US 115/2011 (SK3)). The Commission decision concerning *Frucona* was ultimately annulled (C-300/16P),[338] but the case generated an extensive amount of interest in Slovakia and effectively shaped the framework for public enforcement of State aid rules.

Most private enforcement cases identified in the Study (although only a representative few were ultimately included) were also indirectly linked to *Frucona*, because they were based on the same legal question. Namely, a number of public authorities that were forced to accept write-offs of their claims in restructuring proceedings of insolvent debtors subsequently challenged such write-offs of public claims as having constituted State aid. The cases usually turned on the question of whether the creditor would have obtained a higher repayment in bankruptcy proceedings and whether accepting restructuring proceedings was thus compliant with the private creditor test.

The Study identified one more relevant private enforcement case, specifically a case concerning the nullity of a transfer of municipal land (ruling ECLI:SK:2117221806 (SK1)). In this case, the City of Trnava had sold municipal land to a private investor for EUR 1; the purchaser also undertook to carry out certain investments. Following the election of a new mayor, the City of Trnava filed a complaint with the Commission, alleging that the sale constituted unlawful State aid. The City also filed an action with the relevant court for declaratory relief that it was still the owner of the land, because the sale constituted unlawful State aid and was thus null and void or ineffective. The Commission has not yet ruled on the complaint, but the first instance court already dismissed the claim, holding that even if the sale had constituted State aid, this would only give rise to an obligation to repay the aid, but not to the nullity of the sale itself.

Overall, it appears that the market is embracing State aid rules, but it seems to be a slow process.

The authors of this report have not identified any particular trends with respect to the sectors in which aid was granted, but rather to the form and the main actors, that is, aid being granted by a write-off of public debts in restructuring proceedings and subsequently challenged by the relevant public authority, usually the Social Insurance Agency.

Qualitative assessment of the average time of court proceedings

On average, the duration of civil and commercial proceedings in Slovakia during the period 2007–2017 ranged between 15 and 21 months from the opening of proceedings until the issuance of a final decision, including appellate proceedings, if applicable.[339] However, based on our practice, the actual duration of proceedings in complex and unusual cases is usually longer.

The sample of cases identified in the Study is too small to draw general conclusions. As for the three private enforcement cases identified in the Study, two lasted, respectively, 30 and 22 months (first instance and appellate proceedings) and one lasted 10 months (only first instance proceedings). In light of the fact that State aid cases are rare and relatively complex, this duration does not appear unusual. Public enforcement cases identified in the Study all relate to *Frucona*, where the specific features of the case (amendment to the Enforcement Code by Act number 102/2011 Coll. during the recovery process, adopted to facilitate the recovery of aid from *Frucona*, annulment of the recovery decision concerning *Frucona* and the issuance of a new decision) make it impossible to draw any conclusions regarding duration.[340]

Qualitative assessment of the remedies awarded by national courts

It appears that relatively few cases regarding State aid rules are making it to the courts in the first place. Putting aside the public enforcement of the *Frucona* recovery decision as well as *Frucona*-inspired challenges by public creditors against write-offs of claims in

[336] Constitutional Court of the Slovak Republic, 12.12.2012 – PL. ÚS 115/2011 (SK3).
[337] Zákon č. 102/2011 Z. z., ktorým sa mení a dopĺňa zákon č. 231/1999 Z.z. o štátnej pomoci v znení neskorších predpisov a ktorým sa mení a dopĺňa zákon Národnej rady Slovenskej republiky č. 233/1995 Z.z. o súdnych exekútoroch a exekučnej činnosti (Exekučný poriadok) a o zmene a doplnení ďalších zákonov v znení neskorších predpisov. National Council of the Slovak Republic, Act 102/2011 Coll. Amending Enforcement Code, Act No 233/1995 Coll.
[338] Case C-300/16 P *European Commission v Frucona Košice a.s.* (2017) ECLI:EU:C:2017:706.
[339] https://www.justice.gov.sk/Stranky/Sudy/Statistika-priemerna-dlzka-konania.aspx (last accessed on 2 January 2019).
[340] National Council of the Slovak Republic, Act 102/2011 Coll, *op.cit.*

restructuring proceedings, there was only one relevant case in the Study (ruling ECLI:SK:2117221806 (SK1)).

The reasons are analysed in connection with the assessment of relevant trends below.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

During the early years of the *Frucona* saga, Slovak courts were struggling on how to reconcile the direct effect of Union law with the *res judicata* principle under national law. In that case, the Commission found that the write-off of tax claims in restructuring proceedings constituted aid. However, the closure of the restructuring proceedings and the write-off were confirmed by a court ruling that carried *res judicata* effects. Consequently, once the State filed a civil action against *Frucona* to recover the aid identified by the Commission, courts dismissed such action on the basis that it would violate the *res judicata* effects of the initial restructuring proceedings.

Other than that, the judges deciding the cases identified in the Study seem to have been acquainted with the relevant Union law and have applied and referred to it accordingly.

So far, there has been no reference for a preliminary ruling in a State aid legal question, but none of the cases identified would have necessarily required one (again, save for the public enforcement of *Frucona*, where the interplay between Union law and national law was very complex). Overall, it does not appear that Slovak courts would be unusually reluctant to make references for a preliminary ruling.

Slovak courts have not referred to the GBER or the *de minimis* Regulation in a significant manner. The GBER was mentioned in ruling ECLI:SK:2117221806 (SK1) concerning the nullity of a transfer of municipal land, but merely as a supportive argument.

Qualitative assessment of any other relevant trends in State aid enforcement

Overall, the authors of this report do believe that national courts have become more familiar with State aid rules over the period 2007–2017. To a large extent, this is due to the interest in various emanations of the *Frucona* case. The *Frucona* case triggered a significant amount of academic debate.[341] Based on our discussions with judges, academics and practitioners, the market seems to be becoming more familiar with State aid rules.

On a more general note, Slovakia joined the EU in 2004 and there was a natural learning curve of Union law, which is also reflected in the increasing knowledge of State aid rules.

As for private enforcement cases, these are very rare. The authors of this report believe that this is mainly because private enforcement of State aid rules requires more precedents to become a known and used remedy. This is supported by the limited number of cases identified in the Study as well as our discussions with academics, judges and practitioners in Slovakia. It is also illustrated by the small number of academic papers covering this subject.[342]

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

The authors of this report have not discovered any major challenges with the notion of State aid; rather, with its legal and procedural consequences. As discussed above, the main challenge in the context of public enforcement was whether the fact that a write-off of tax claims in restructuring proceedings constituted State aid can override the *res judicata* effects of the court's judgment closing such restructuring proceedings and approving such write-off.

In the context of private enforcement, the main challenge was discussed in more detail in relation to case ECLI:SK:2117221806 (SK1): whether the fact that the sale of municipal land to a private investor may have constituted State aid renders such sale null and void and whether the municipality can thus claim that it is still the owner of the land.

Any other relevant comments or findings

Based on our discussions with academics and practitioners, the authors of this report believe that relevant players are more likely to file a complaint with the Commission rather than to rely on national avenues.

As the authors of this report have argued elsewhere,[343] this state of affairs may be a vicious circle. Based on our discussions with practitioners, it appears that the option to pursue private enforcement is largely unknown to potential plaintiffs or the courts. This means that private enforcement actions are not even considered by potential plaintiffs or, to the extent that they are, there is a concern that they will be dismissed by courts unfamiliar with the field. This, in turn, means that actions do not make it to the courts and do not lead to the creation of precedents that would raise the interest of the legal community and reinforce the chances of such actions.

The question is whether more may be done to advance the cause of private enforcement of State aid rules. The comparison with the private enforcement of competition law comes to mind. The Damages Directive (Directive 2014/104/EU)[344] and its transposition (Act number 350/2016 Coll.[345]) facilitated the actual enforcement of private claims for

[341] For a detailed overview of the literature about the *Frucona* case: Gyarfas, J. Hic Sunt Leones, "Private Enforcement of State aid rules in Slovakia", *EStAL*, 3/2017, p. 458.
[342] For an overview of Slovak legal literature on private enforcement: *Id.*, p.459; overall, there are only a few academic papers touching upon the issue).
[343] *Id.*, p. 469.
[344] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, *OJ L 349, 5.12.2014, p. 1–19.*
[345] Zákon č. 350/2016 Z. z. o niektorých pravidlách uplatňovania nárokov na náhradu škody spôsobenej porušením práva hospodárskej súťaže a ktorým sa mení a dopĺňa zákon č. 136/2001 Z.z. o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov v znení neskorších predpisov. Act No 350/2016 Coll. on certain rules regulating actions on recovery of damage caused by competition rules violation.

damages. However, it also had a 'soft' impact in raising awareness of the issue and in triggering a number of articles and seminars.

Based on our legal practice and discussions with practitioners, it appears that market players often analyse whether advantages granted to their competitors could be challenged as aid and consider the options for such challenge. It appears that the option to file a complaint with the Commission is widely known and frequently considered. Conversely, the option to initiate private enforcement proceedings is rarely even considered, let alone actually applied. This general conjecture is partially corroborated by the fact that beside *Frucona*-inspired cases related to restructuring proceedings, the Study has identified only one relevant private enforcement case (ruling ECLI:SK:2117221806 (SK1)). There are no hard numbers to support this claim, but it can be assumed that increasing awareness of the option to file private claims for damages in the legal and business community will ultimately contribute to an increasing number of such claims and thus to the emergence of case law.

24.2 Case summaries

Case summary SK1

Date

02/01/2019

Case identifiers

Member State

Slovakia

Court which adopted the ruling (national language)

Okresný súd Trnava

Court which adopted the ruling (English)

District Court of Trnava

Instance court which adopted the ruling

Lower court (civil/commercial)

Official language of the court

Slovak

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

ECLI:SK:2117221806; 39C/30/2017

Procedural context of the case

This is a first-instance ruling with respect to an action filed by the City of Trnava alleging that the sale of municipal land to a private investor constituted State aid and was thus null and void. On that basis, the City of Trnava requested declaratory relief that it was still the owner of the land.

Type of action

Private enforcement

Delivery date of the ruling

14/09/2018

Language

Slovak

Headnote

In this ruling, the Court held that the transfer of municipal land to a private investor was valid, even though the transfer may have constituted State aid. Even if it did constitute State aid, this would only give rise to the obligation to recover aid, but it would not render the transfer null and void or ineffective.

Parties

Names of the parties to the action

Mesto Trnava

Versus

City-Arena a.s.; City-Arena PLUS a.s.

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

L - Real estate activities

Real estate development

The type of State aid measure challenged in the court proceedings

Concession/privatisation of State-owned land/property at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The City of Trnava (the plaintiff) sold municipal land to a private investor for EUR 1 and the investor undertook to carry out certain investments into a stadium and adjacent areas. Following the election of a new mayor, the plaintiff filed an action for declaratory relief that the transfer of title to the land was null and void or ineffective, because it constituted State aid granted without a notification pursuant to Article 108(3) TFEU. In parallel, it filed a complaint with the Commission (SA.48558), but at the time of the ruling, the Commission had not initiated a formal investigation procedure.

The defendant argued that the sale was tied to further obligations, including most importantly to invest into the development of public property. When taking into account the overall transaction, the plaintiff had therefore acted in accordance with the MEOP. The defendant further argued that the measure did not affect trade between Member States. Moreover, it argued that the plaintiff, having itself granted the measure in question, did not have legal standing to challenge it.

Remedy(ies) sought

Other remedy sought

Declaratory relief that the plaintiff is the owner of the land

Outcome of the case

Conclusions adopted by the national court

The Court rejected the claim of the plaintiff on three grounds. Firstly, the plaintiff had failed to prove that the measure constituted State aid. In particular, the price viewed together with the undertaking to invest into the stadium did not constitute an advantage. Secondly, even if the transfer constituted State aid, it might have been exempted under Article 55 GBER. Thirdly and most importantly, the Court analysed whether, even if the measure had constituted unlawful State aid within the meaning of Article 108(3) TFEU, it would not invalidate the underlying purchase agreement. According to the Court, the appropriate remedy would in that case be the obligation to repay such aid. The sanction of nullity of contract goes beyond what is required by Union law as a consequence of unlawful aid (in this regard, the Court referred to the Austrian cases Bank Burgenland, (ruling OGH, 4 Ob 209/13h) and Landesforstrevier (ruling L, OGH, 4 Ob 164/09i)). Article 108(3) TFEU has direct effect on the State, but not against the beneficiary (see Case Syndicat français de l'Express international (SFEI) and others v La Poste and others C-39/94) and it would be immoral for a party to claim the nullity of contract that it has caused. The violation of Article 108(3) TFEU does not prevail over the general civil law principle of validity of contract (potius valeat actus quam pereat). In this case, the State may have violated its obligation vis-à-vis the EU to notify State aid for which the sanction would be the obligation to recover the aid, but not the nullity or ineffectiveness of the contract entered into with a third party. On that basis, the Court rejected the claim.

Remedy(ies) granted – including assessment public enforcement issues

None – Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-39/94, Syndicat français de l'Express international (SFEI) and others v La Poste and others (1996) ECLI:EU:C:1996:285
- T-452/08, DHL Aviation and DHL Hub Leipzig GmbH v Commission (2010) ECLI:EU:T:2010:427
- C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic (1991) ECLI:EU:C:1991:440
- C-690/13, Trapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE) and Pavlos Sidiropoulos (2015) ECLI:EU:C:2015:235
- C-266/04, Nazairdis SAS, now Distribution Casino France SAS and Others v Caisse national' de l'organisation auto'ome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales (Organic) (2005) ECLI:EU:C:2005:657
- C-24/95, Land Rheinland-Pfalz v Alcan Deutschland GmbH (1997) ECLI:EU:C:1997:163
- C-368/04, Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644

National case law:
- Bank Burgenland, OGH, 4 Ob 209/13h, ECLI:AT:OGH0002:2014:0040OB00209.13H.0325.000
- Landesforstrevier L, OGH, 4 Ob 164/09i, ECLI:AT:OGH0002:2010:0080OB00164.09I.0422.000

√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015 (State aid Procedural Regulation)
- Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009 (Commission Enforcement Notice)
- 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 (General Block Exemption Regulation)
- Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007 (Commission Recovery Notice)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

This was a landmark ruling on the effects of a violation of Article 108(3) TFEU on the validity of private agreements under civil law. Previously, this question was only addressed in legal literature in Slovakia and the prevailing view, based mainly on German doctrine and case law, was that a breach of the standstill obligation renders the underlying agreement null and void or ineffective under Slovak civil law. The Court has adopted a completely different view, relying rather on the general principle to uphold the validity of contracts.

If this ruling is confirmed on appeal, it may also be relevant for the ongoing debate about the civil law consequences of a breach of Article 108(3) TFEU in other Germanic jurisdictions, for example in Austria, Germany or the Czech Republic.

Case summary SK2

Date

02/01/2019

Case identifiers

Member State

Slovakia

Court which adopted the ruling (national language)

Krajský súd v Trnave

Court which adopted the ruling (English)

Regional Court in Trnava

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

Slovak

Hyperlink to ruling ---

https://obcan.justice.sk/content/public/item/4dfc9113-b985-4441-b5fa-507a7adca8b0

Case reference

ECLI:SK:KSTT:2016:2114222717.1

Procedural context of the case

The ruling was rendered in appellate proceedings against the first-instance ruling of the District Court of Trnava (Okresný súd), (ruling 36Cbi/21/2014-90), dated 9 December 2014. At first instance, the Social Insurance Agency sought to have the restructuring plan of an insolvent debtor set aside, because the write-off of public claims may have constituted State aid. The First Instance Court upheld the claim and set aside the restructuring plan. The debtor appealed, and the Appellate Court affirmed the first-instance ruling.

Type of action

Private enforcement

Delivery date of the ruling

09/06/2015

Language

Slovak

Headnote

In this ruling, the Court considered whether the write-off of claims by the national Social Insurance Agency in restructuring proceedings against an insolvent debtor constituted State aid and, if that was the case, whether the restructuring plan should be set aside on that basis.

Parties

Names of the parties to the action

Sociálna poisťovňa

Versus

B. E. N., s. r. o. 'v reštruktural"zácii'

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

Not specified in ruling

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

An insolvent debtor underwent restructuring proceedings. In the present case, the restructuring plan provided for the write-off of certain debts owed by the debtor to the plaintiff, the Social Insurance Agency (such as payroll taxes). The restructuring plan was approved despite the opposition of the Social Insurance Agency. The Social Insurance Agency then requested that the restructuring plan of the debtor be set aside, because it imposed a write-off and such write-off of public claims constituted State aid. The Social Insurance Agency argued that it would have obtained a higher collection in bankruptcy proceedings.

The defendant (the debtor that underwent restructuring proceedings) argued that the Court had to apply the private creditor test and that it should benchmark the level of repayment obtained by the Social Insurance Agency in restructuring proceedings against the hypothetical level obtained in bankruptcy proceedings. According to the defendant, a private creditor would have agreed to a write-off in restructuring proceedings, rather than pushing the debtor into bankruptcy proceedings, where it would not have obtained a higher collection.

Remedy(ies) sought

Other remedy sought

Setting-aside of a restructuring plan in insolvency proceedings of a private company

Outcome of the case

Conclusions adopted by the national court

The Court upheld the request of the plaintiff on the basis that the write-off would have constituted unlawful State aid and that the Social Insurance Agency was justified in opposing the restructuring plan. The Court relied on the fact that the claims of the Social Insurance Agency constituted State resources and that by virtue of their write-off, the debtor was granted an advantage that constituted State aid. The Court also applied the MEOP and observed that the Social Insurance Agency may have obtained a higher collection in bankruptcy proceedings, thus a private creditor would have preferred to push the defendant into bankruptcy proceedings.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

Setting-aside of a restructuring plan in insolvency proceedings of a private company

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission Decision C(2010) 5406 of 4 August 2010

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

This case shows a line of argumentation where a request to set aside restructuring plans in private insolvency proceedings succeeded on the grounds that the write-off of public sector receivables would have constituted State aid.

Case summary SK3

Date

02/01/2019

Case identifiers

Member State

Slovakia

Court which adopted the ruling (national language)

Ústavný súd Slovenskej republiky

Court which adopted the ruling (English)

Constitutional Court of the Slovak Republic

Instance court which adopted the ruling

Constitutional Court

Official language of the court

Slovak

Hyperlink to ruling

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https://www.ustavnysud.sk/ussr-intranet-portlet/docDownload/c1937f9f-629e-4dd7-b803-21253d5e8500/Rozhodnutie%20-%20Rozhodnutie%20PL.%20%C3%9AS%20115_2011.pdf

Case reference

PL. ÚS 115/2011

Procedural context of the case

Commission Decision 2007/254/EC found that the Slovak Republic had granted State aid to Frucona. The aid had been granted in the form of a partial write-off of tax claims against Frucona in restructuring proceedings.

To recover the aid, the Slovak tax authority filed a civil action against Frucona requesting the repayment of aid. This action was unsuccessful, because the initial restructuring proceedings had been closed and approved by a court ruling. Courts hearing the tax authority's claim for recovery dismissed the claim on the grounds that the res judicata effects of the court ruling approving the restructuring proceedings could not be altered, not even on the basis of a Commission decision. The failure to recover the aid resulted in EU infringement proceedings against the Slovak Republic (Case European Commission v Slovak Republic C-507/08).

To facilitate recovery, the National Council of the Slovak Republic adopted Act 102/2011 Coll. amending the Enforcement Code (Act No 233/1995 Coll.). The central provision of the amendment made recovery decisions by the Commission directly enforceable, i.e. awarding them the status of an 'execution title', on the basis of which the State can initiate enforcement proceedings without the need to file a civil action for recovery of the aid.

This legislation was challenged before the Constitutional Court by opposition MPs who alleged that it was unconstitutional. In other words, the ruling was not adopted in the context of a specific case, but rather in order to consider a general question of constitutionality of the said legislation.

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

12/12/2012

Language

Slovak

Headnote

In this ruling, the Court delivered a ruling on the enforcement of State aid, including questions on Union law and a detailed overview of procedural frameworks for State aid recovery in other Member States. Most importantly, the Constitutional Court assessed the constitutionality of the direct enforceability of recovery decision by the Commission (previously, the State had to bring a civil action for recovery of the aid) and affirmed that such framework for the enforcement of recovery decisions is in line with the Slovak Constitution.

Parties

Names of the parties to the action

Skupina 37 poslancov Národnej rady Slovenskej republiky

Versus

Národná rada Slovenskej republiky; Vláda Slovenskej republiky

The relationship of the plaintiff to the measure

Other

Opposition members of Parliament

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

Not applicable

The type of State aid measure challenged in the court proceedings

Other

National legislation amending the Enforcement Code (please note this does not constitute a State aid measure as such)

Substance of the case

Facts and parties' main arguments in the case

Commission Decision 2007/254/EC found that the Slovak Republic had granted State aid to Frucona. The aid had been granted in the form of a partial write-off of tax claims against Frucona in restructuring proceedings.

To recover the aid, the Slovak tax authority filed a civil action against Frucona requesting the repayment of aid. This action was unsuccessful, because the initial restructuring proceedings had been closed and approved by a court ruling. Courts hearing the tax authority's claim for recovery dismissed the claim on the grounds that the res judicata effects of the court ruling approving the restructuring proceedings could not be altered, not even on the basis of a Commission decision. The failure to recover the aid resulted in EU infringement proceedings against the Slovak Republic (Case European Commission v Slovak Republic C-507/08).

To facilitate recovery, the National Council of the Slovak Republic adopted Act 102/2011 Coll. amending the Enforcement Code (Act No 233/1995 Coll.). The central provision of the amendment made recovery decisions by the Commission directly enforceable, i.e. awarding them the status of an 'execution title', on the basis of which the State can initiate enforcement proceedings without the need to file a civil action for recovery of the aid.

This legislation was challenged before the Constitutional Court by opposition MPs of the National Council who alleged that it was unconstitutional. The National Council of the Slovak Republic and the Cabinet of the Slovak Republic were the defendants in this case.

In relation to the direct enforceability of a recovery decision by the Commission, the plaintiff argued that this violated the separation of powers and that it deprived the recipient of procedural rights in proceedings related to recovery, because enforcement would not be preceded by civil proceedings at national level, as was the case before the adoption of Act No 102/2011 Coll. The plaintiff also argued that Act No 102/2011 Coll. was retroactive and thus unconstitutional, because it also covered Commission decisions issued before the adoption of the new legislative framework and it violated the principle of the general application of legislation, because although it is worded in general terms, it only affects Frucona.

The National Council relied on the direct effect and primacy of Union law and on the need to create an effective system for enforcing recovery decisions.

Remedy(ies) sought

Other remedy sought

Annulment of new legislative framework on the enforcement of recovery decisions

Outcome of the case

Conclusions adopted by the national court

The Constitutional Court delivered a ruling on the enforcement of State aid, including questions of Union law and a detailed overview of procedural frameworks for State aid recovery in other Member States. Most importantly, it ruled that national legislation declaring a recovery decision by the Commission directly enforceable did not violate the Constitution, because, in any event, national courts did not have jurisdiction to review Commission decisions.

The Constitutional Court opined that the direct enforceability did not deprive beneficiaries of their procedural rights, because they could challenge the Commission decision before Union Courts.

In the event that the Commission decision would not specify certain elements necessary for recovery, such as identifying the beneficiary or quantifying the amount of aid, the national authorities would issue a separate decision supplementing these details. In those cases, the Commission decision and the national decision would jointly constitute an 'execution title'. On that basis, the Constitutional Court opined that even in those cases, the beneficiary would not be deprived of its procedural rights, because under Act No 102/2011 Coll., the national decision supplementing the Commission decision could be reviewed by national courts.

On that basis, the Constitutional Court upheld the central provision declaring recovery decisions by the Commission immediately enforceable, while it declared certain ancillary procedural provisions invalid.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected; Other remedy imposed (below)

The Constitutional Court annulled certain national legal provisions concerning the public enforcement of State aid recovery decisions, but upheld the central legal provision declaring recovery decisions by the Commission directly enforceable.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-223/85, Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v Commission of the European Communities (1987) ECLI:EU:C:1987:502
- C-94/87, Commission of the European Communities v Federal Republic of Germany (1989) ECLI:EU:C:1989:46
- C-142/87, Kingdom of Belgium v Commission of the European Communities (1990) ECLI:EU:C:1990:125
- C-5/89, Commission of the European Communities v Federal Republic of Germany (1990) ECLI:EU:C:1990:320
- C-24/95, Land Rheinland-Pfalz v Alcan Deutschland GmbH (1997) ECLI:EU:C:1997:163
- C-169/95, Kingdom of Spain v Commission of the European Communities (1997) ECLI:EU:C:1997:10
- C-378/98, Commission of the European Communities v Kingdom of Belgium (2001) ECLI:EU:C:2001:370
- C-499/99, Commission of the European Communities v Kingdom of Spain (2002) ECLI:EU:C:2002:408
- C-50/00 P, Unión de Pequeños Agricultores v Council of the European Union (2002) ECLI:EU:C:2002:462
- C-209/00, Commission of the European Communities v Federal Republic of Germany (2002) ECLI:EU:C:2002:747
- C-404/00, Commission of the European Communities v Kingdom of Spain (2003) ECLI:EU:C:2003:373
- C-415/03, Commission of the European Communities v Hellenic Republic (2005) ECLI:EU:C:2005:287
- C-119/05, Minister' dell'Industria, del Commercio ' dell'Artigianato v Lucchini SpA (2007) ECLI:EU:C:2007:434
- C-232/05, Commission of the European Communities v French Republic (2006) ECLI:EU:C:2006:651
- C-507/08, Commission v Slovak Republic (2010) ECLI:EU:C:2010:802
- C-214/07, Commission of the European Communities v French Republic (2008) ECLI:EU:C:2008:619

National case law:
- Constitutional Court of the Slovak Republic, II. ÚS 501/2010

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on 'equivalence'

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015 (State aid Procedural Regulation)
- Commission Decision 2007/254/EC of 7 April 2006 on State aid C 25/2005 (ex NN 21/2005) implemented by the Slovak Republic for FRUCONA Košice, a.s. (notified under document number C(2006) 2082), OJ L 112, 30.4.2007

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

The case shows that, due to the procedural framework for the enforcement of State aid recovery decisions in place, and despite a Commission decision ordering the recovery from Frucona, the State had to follow the route of civil litigation against Frucona. Faced with infringement proceedings (Case European Commission v Slovak Republic C-507/08), the legislator adopted Act No 102/2011 Coll. declaring recovery decisions immediately enforceable - i.e. constituting 'execution titles' on the basis of which the State can open enforcement proceedings without the need for further civil litigation. Moreover, the law annulled some procedural safeguards that could be used to delay the enforcement proceedings.

24.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Krajský súd v Trnave	Regional Court in Trnava	Second to last instance court (civil/commercial)	31CoKR/2/2015 ECLI:SK:KSTT:2016:2114222717.1	09/06/2015	Private enforcement	Other remedy imposed	The Social Insurance Agency requested that the restructuring plan of an insolvent debtor be set aside, because it imposed a write-off that might have constituted State aid. The Court upheld the application on the basis that the write-off would have constituted operating aid and that the Social Insurance Agency was justified in opposing the restructuring plan. The Court also applied the MEOP and observed that the Social Insurance Agency may have obtained a higher collection in bankruptcy proceedings.	This case shows a line of argumentation where requests to set aside restructuring plans succeeded on the grounds that the write-off of public sector receivables would have constituted aid.	In the aftermath of Frucona, State aid provided in the form of writing off public sector debt in restructuring proceedings became a much debated issue in Slovakia (for reasons not related to State aid rules, but rather general insolvency law; restructuring proceedings used to be very frequent in Slovakia).
Krajský súd v Bratislava	Regional Court in Bratislava	Second to last instance court (civil/commercial)	3CoKR/99/2016 ECLI:SK:KSBA:2017:1114230053.1	19/04/2017	Private enforcement	None - Claim rejected	The Social Insurance Agency requested that the restructuring plan of an insolvent debtor be set aside, because it imposed a write-off that might have constituted State aid. The Court denied the request on the grounds that the repayment of creditor claims would have been even lower in bankruptcy proceedings and no aid was thus provided to the debtor.	The case shows that, when assessing whether the write-off of public sector receivables in restructuring proceedings constitutes aid to the insolvent debtor, the main test is whether the public sector creditor would have achieved a higher level of repayment in the alternative of bankruptcy proceedings.	In the aftermath of Frucona, State aid provided in the form of writing off public sector debt in restructuring proceedings became a much debated issue in Slovakia (for reasons not related to State aid rules, but rather general insolvency law; restructuring proceedings used to be very frequent in Slovakia).
Okresný súd Trnava	District Court Trnava	Lower court (civil/commercial)	39C/30/2017 ECLI:SK:2117221806	14/09/2018	Private enforcement	None - Claim rejected	The City of Trnava sold municipal land to a private investor for EUR 1; the investor undertook to carry out certain investments into a stadium and adjacent areas. Following the election of a new mayor, the City filed an action for declaratory relief that the transfer of title to the land was null and void or ineffective, because it constituted State aid granted without a notification pursuant to Article 108(3) TFEU. In parallel, it also filed a complaint with the Commission (SA.48558), but at the time of the ruling, the Commission had not initiated a formal investigation procedure. The Court dismissed the application on three grounds: 1) The City failed to prove that the measure constituted State aid. In particular, the price viewed together with the undertaking to invest into the stadium does not constitute an advantage. 2) Even if it did constitute State aid, it might have been exempted under Article 55 GBER. 3) Most importantly and most extensively, the Court analysed whether, even if the measure had constituted State aid granted in violation of Article 108(3) TFEU, it would invalidate the underlying purchase agreement. According to the Court, the appropriate remedy would be the obligation to repay such aid, but the sanction of nullity of contract goes beyond what is required by Union law as a consequence of unlawful aid (here the Court referred to the Austrian cases Bank Burgenland, OGH, 4 Ob 209/13h and Landesforstrevier L, OGH, 4 Ob 164/09i). Article 108(3) TFEU has direct effect against the State, but not against the beneficiary (C-39/94) and it would be immoral for a party to claim the nullity of contract that it has caused. There is a general principle in favour of the validity of the contract and a violation of Article 108(3) TFEU does not prevail over this principle. In this case, the State violated its obligation vis-a-vis the EU to notify State aid and the sanction for that is the obligation to recover the aid, but not the nullity of the contract entered into with a third party.	This is a landmark ruling on the effects of a violation of Article 108(3) TFEU on the validity of private agreements under civil law. Previously, this question was only addressed in legal literature in Slovakia and the prevailing view, based mainly on German doctrine and case law, was that a breach of the standstill obligation renders the underlying agreement null and void or ineffective under Slovak civil law. The Court adopted a completely different view, relying rather on the general principle to uphold the validity of contracts.	If this ruling is confirmed on appeal, it may also be relevant for the ongoing debate about the civil law consequences of a breach of Article 108(3) TFEU in other Germanic jurisdictions, for example in Austria, Germany or the Czech Republic. A copy of this ruling was requested from the Court under the Freedom of Information Act.
Najvyšší súd Slovenskej republiky	Supreme Court of the Slovak Republic (Civil Division)	Second to last instance court (civil/commercial)	5MObdo/3/2009	26/11/2009	Public enforcement	None - Claim rejected	The Supreme Court dismissed the appeal on the grounds that the ruling concluding the initial restructuring proceedings is *res iudicata* and *ipso iure* extinguished the debt that was written off. This was not overridden by State aid rules and the State thus had no claim for recovery of the aid. This case relates to the enforcement of State aid granted to Frucona (found by the Commission under C25/2005 (ex NN21/2005)) by a write-off of tax liabilities in restructuring proceedings. In the absence of any other national procedural framework for the enforcement of recovery decisions, the State claimed recovery by means of a civil action against Frucona. The claim was dismissed at first instance and on appeal, and the prosecutor general filed an extraordinary appeal on the side of the State. The Supreme Court refused to grant primacy of Union law over the national *res iudicata* effects of the initial restructuring proceedings. The Supreme Court also opined that the relevant provision of the Slovak State Aid Act that mandated the recovery of State aid did not give rise to a standalone repayment obligation of the beneficiary. Following this case, the legislature adopted a new framework for the enforcement of recovery decisions.		
Ústavný súd Slovenskej republiky	Constitutional Court of the Slovak Republic	Last instance court (general jurisdiction)	II. ÚS 501/2010	06/04/2011	Public enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	The State filed a constitutional complaint against Supreme Court ruling 5MObdo/3/2009. The Constitutional Court opined that a decision of the Commission on State aid cannot be called into question by a national court. It also emphasised that both the State and the beneficiary had standing to challenge the decision before the CJEU (and, indeed, the beneficiary made use of such right). On that basis, the Constitutional Court annulled the ruling of the Supreme Court and remitted the case for re-assessment.		The case went back to the Supreme Court that issued a ruling (4MObdo/7/2011) that was then again annulled by the Constitutional Court (III. ÚS 638/2014). None of these cases is reported, because the argumentation did not relate to State aid rules. Moreover, the case became moot, as the legislator introduced a new procedural framework for enforcing recovery decisions

									(as discussed in connection with PL. ÚS 115/2011).
Ústavný súd Slovenskej republiky	Constitutional Court of the Slovak Republic	Last instance court (general jurisdiction)	PL. ÚS 115/2011	12/12/2012	Public enforcement	None - Claim rejected; Other remedy imposed	The Constitutional Court delivered a ruling on the enforcement of State aid, including questions of Union law and a detailed overview of procedural frameworks for State aid recovery in other Member States. Most importantly, it ruled that legislation declaring a recovery decision immediately enforceable does not violate the Constitution, because, in any event, national courts do not have jurisdiction to review Commission decisions. If the Commission decision does not identify the beneficiary of the amount of aid, this will be supplemented by orders of national authorities which can then be reviewed by national courts. On that basis, it annulled certain provisions concerning the public enforcement of State aid recovery orders, but upheld the central provision declaring recovery decisions immediately enforceable.	The case reflects that due to the procedural framework for the enforcement of recovery decisions in place - despite a Commission decision ordering the recovery from Frucona - the State had to follow the route of civil litigation against Frucona. Faced with infringement proceedings (C-507/08), the legislature adopted Act No 102/2011 Coll declaring recovery decisions immediately enforceable - i.e. constituting 'execution titles' on the basis of which the State can open enforcement proceedings without the need for further civil litigation. Moreover, the law annulled some procedural safeguards that could be used to delay the enforcement proceedings.	
Krajský súd v Košiciach	Regional Court in Košice	Second to last instance court (civil/commercial)	2CoKR/36/2012 ECLI:SK:KSKE:2015:7112201659.2	30/11/2015	Public enforcement	None - Claim rejected	The Court denied declaratory relief sought by the State, that its claim for recovery of aid validly exists in the restructuring proceedings of Frucona, because the Commission decision was annulled by the CJEU (C-73/11) and the new Commission decision issued after the annulment should have been enforced in new proceedings. Frucona entered restructuring proceedings, within which the restructuring trustee rejected the State's claim for the recovery of aid. The State sought declaratory relief that the claim was valid, but in the meantime the CJEU annulled the underlying Commission decision. The Commission issued a new decision, but since the procedural framework for enforcement had been amended in the meantime, the Court referred the State to direct enforcement of the recovery claim.		
Ústavný súd Slovenskej republiky	Constitutional Court of the Slovak Republic	Last instance court (general jurisdiction)	II. ÚS 455/2012	02/12/2015	Public enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	Frucona, a recipient of unlawful and incompatible State aid, entered restructuring proceedings and adopted a restructuring plan, pursuant to which 98% of the State's claim for the repayment of aid would have been written off. The State filed a constitutional complaint against the lower courts' approval of the restructuring plan. The lower courts approved a restructuring plan that provided for a write-off of almost the entire repayment obligation. The Constitutional Court reversed the ruling, emphasising the primacy of Union law and the lack of jurisdiction of the Slovak courts to alter (albeit not formally, but effectively) a recovery decision. The Constitutional Court opined that the lower courts failed to take into account the fact that the legal basis for the repayment obligation is the recovery decision of the Commission which enjoys primacy over national law. Effectively, the restructuring plan would have altered the Commission decision by providing for a 98% write-off of the obligation to repay unlawful and incompatible aid. In cases of State aid, the restructuring plan must not only take into account the interests of the creditors, but also the interest of competitors in restoring the *status quo ante* on the market. On that basis, the Constitutional Court annulled the restructuring plan providing for a write-off of the obligation to repay State aid.		The ultimate question of whether the State could effectuate recovery from Frucona was left open, because the Commission decision was annulled in the end (C-300/16P).
Najvyšší súd Slovenskej republiky	Supreme Court of the Slovak Republic (Civil Division)	Second to last instance court (civil/commercial)	6EMCdo/1/2016 ECLI:SK:NSSR:2017:1613215730.1	24/08/2017	Public enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	Following the amended procedural framework for enforcing recovery decisions, the State initiated enforcement proceedings against Frucona on the basis of the recovery decision. Frucona requested a stay of enforcement proceedings pending annulment proceedings before the CJEU. Such stay was granted by the lower enforcement courts, but the general prosecutor filed an extraordinary appeal to the Supreme Court. The Supreme Court opined that the mere existence of appellate proceedings against the underlying Commission decision does not suffice to stay the enforcement proceedings. It then noted that the lower courts failed to take into account Union law and on that basis their rulings had to be quashed for lack of reasoning. On that basis, the Supreme Court concluded that no stay of enforcement should have been granted.	The ruling is relevant in showing that Union law was also invoked in enforcement proceedings governed by national law.	Shortly after this decision, the Commission decision concerning Frucona was annulled (C-300/16P) and the matter became moot.

25.1 Slovenia

25.1 Country report

Name national legal expert

Aleš Ferčič, Doctor of Juridical Science

Date

04/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

There are no specific rules on the competence of the courts and how they should deal with the public enforcement of State aid rules. Therefore, general rules apply.[346] However, these rules have not yet been applied in practice as there have been no typical public enforcement cases to date.

A recovery decision seems to be enforceable *via* the civil or administrative (enforcement) procedure, depending on the nature of the public measure underlying the granting of the State aid concerned, as explained below in the section discussing the procedural framework.

State aid recovery *via* the civil (enforcement) procedure can be enforced before competent courts of general jurisdiction, that is, local courts (circuit courts), district courts (regional courts), high courts (courts of appeal) and, in some cases, even before the Supreme Court of the Republic of Slovenia, depending on the qualification of an enforcement title and on the invoked legal remedies as explained below in the text where the procedural framework is described. The first instance courts, in particular the departments for enforcement of local courts, deal with the majority of such cases.

State aid recovery *via* the administrative (enforcement) procedure can be enforced by a competent administrative body. The Administrative Court of the Republic of Slovenia and, in some cases, even the Supreme Court of the Republic of Slovenia may also be involved by providing the judicial review of administrative acts in an administrative dispute.

The involvement of the Constitutional Court of the Republic of Slovenia is highly unlikely and would only take place in case of a real risk of breach of human rights and fundamental freedoms.

A description of the procedural framework applicable in public enforcement of State aid rules

After the competent ministry receives the recovery decision it forwards the decision to the granting body, (*i.e.* the body that granted the State aid in question). The granting body requests the recovery of State aid from the State aid beneficiary and, if this is refused, the recovery needs to be carried out *via* an official procedure (*i.e. via* the civil or administrative (enforcement) procedure as explained above). In this regard, general rules apply. However, as mentioned above, due to lack of the relevant case law, several uncertainties exist.

For example, it is not clear whether a recovery decision can provide a valid legal basis (*i.e.* the so-called enforcement title) for a recovery order since such a decision is only addressed to the Member State, not to the beneficiary. A different qualification of the enforcement title can cause a different mode of recovery, both in terms of competent bodies and courts, as well as in terms of the procedures that support the recovery. The possible scenarios are briefly described below, but among them, the last two seem to be most likely.

(1) If the recovery decision is considered as the enforcement title and the State aid has been granted by a contract or another private law measure, direct access to a genuine enforcement procedure[347] is allowed and the procedure shall be carried out by the enforcement department of a competent local court. However, if legal remedies are invoked and litigation[348] is triggered, the litigation department of a competent local court as well as other courts may be involved, namely, a competent district court, a high court and in some cases even the Supreme Court of the Republic of Slovenia.[349]

(2) If the recovery decision is considered as the enforcement title and the State aid has been granted by an administrative act, in principle, direct access to a genuine enforcement procedure[350] is allowed and the procedure shall be carried out by a competent administrative body or by a competent court. According to the general rules on general administrative procedure, the enforcement of an administrative act may be performed either as an administrative or a judicial enforcement. In principle, administrative enforcement is more likely for State aid recovery since it is applicable for enforcement of monetary and non-monetary obligations established by administrative acts; whereas, the judicial enforcement[351] of an administrative act is applicable for enforcement of immovable property and of shares in a company.[352] In principle, both types of procedure enable proper enforcement of a recovery decision if the principle of effectiveness is duly applied. The judicial enforcement, however, seems to be more important in case of the civil enforcement procedure where one can find more procedural mechanisms, which can be an obstacle for immediate and effective execution of the recovery decision. For instance, in the civil enforcement

[346] *E.g.* Zakon o sodiščih, OJ No. 94/07, 45/08, 96/09, 86/10, 33/11, 75/12, 63/13, 17/15, 23/17, 22/18 (henceforth: Courts Act); Zakon o pravdnem postopku, OJ No. 73/07, 45/08, 45/08, 111/08, 57/09, 12/10, 50/10, 107/10, 75/12, 40/13, 92/13, 10/14, 48/15, 6/17,10/17 (henceforth: Contentious Civil Procedure Act); Zakon o izvršbi in zavarovanju, OJ No. 3/07, 93/07, 37/08, 45/08, 28/09, 51/10, 26/11, 17/13, 45/14, 53/14, 58/14, 54/15, 76/15, 11/18 (henceforth: Claim Enforcement and Security Act); Zakon o upravnem sporu, OJ No. 105/06, 107/09, 98/11, 109/12, 10/17 (henceforth: Administrative Dispute Act).
[347] According to the Claim Enforcement and Security Act.
[348] According to the Contentious Civil Procedure Act.
[349] According to the Courts Act.
[350] According to the General Administrative Procedure Act, in particular its provisions on enforcement or execution; and the Tax Procedure Act, in particular its provisions on enforcement or execution.
[351] According to the Claim Enforcement and Security Act.
[352] See Art. 287 and 288 of the General Administrative Procedure Act.

procedure, after a debtor's objection against a decision on execution has been rejected, the debtor can lodge an action that triggers litigation or other procedure in order to obtain a declaration that the execution is inadmissible.[353] Moreover, although the abovementioned objection and action have no suspensive effect, under certain conditions the debtor can nevertheless achieve deferral of the execution.[354] Furthermore, legislation on the civil enforcement procedure minutely defines reasons for objection against the decision on execution, which leaves little room for interpretation.[355]

(3) If the recovery decision is not considered as the enforcement title and the State aid was granted by a contract or another private law measure, direct access to a genuine enforcement procedure is not allowed. First, classical litigation[356] has to be carried out in order to obtain the national enforcement title. In this regard, the contract or other private law measure shall be declared void or null and only then the disputed State aid can be recovered pursuant to the principle of unjust enrichment. At the first instance, litigation can be carried out before a competent local court or district court depending on the amount in dispute or, more precisely, the amount of State aid to be recovered. In principle, legal remedies are admissible, with which the second and the third instance review can be triggered. After the national enforcement title is established, a genuine enforcement procedure[357] is allowed and further procedural steps are, in principle, the same as described above.

(4) If the recovery decision is not considered as an enforcement title and the State aid was granted by an administrative act, direct access to a genuine enforcement procedure is not allowed. First, an administrative procedure[358] is carried out by the administrative body that granted the State aid, in order to establish a national enforcement title. The new administrative decision can in principle be appealed against and, moreover, after the decision is final an administrative dispute[359] before the Administrative Court of the Republic of Slovenia is admissible. The Administrative Court's judgment can in principle be appealed before the Supreme Court of the Republic of Slovenia. After the enforcement title is established, a genuine enforcement procedure[360] is allowed, as described above.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

There are no specific rules on the competence of the courts and how they should deal with the private enforcement of State aid rules. Therefore, general rules apply.[361] However, due to a relatively low number of relevant cases, their application brings uncertainties, as described below in the section discussing the procedural framework.

In case of private enforcement of State aid rules, in principle, all kind of courts of general jurisdiction (*i.e.* local courts, district courts, high courts and the Supreme Court of the Republic of Slovenia) can be competent, depending on the remedies invoked. However, among the listed courts, local and district courts play a crucial role. Moreover, it seems in some cases the Administrative Court of the Republic of Slovenia can also be competent (see, *e.g.* the atypical case ECLI:SI:UPRS:2013:I.U.289.2012 although it is 'merely' a soft (SI3)).

A description of the procedural framework applicable in private enforcement of State aid rules

There are no specific procedural rules concerning the private enforcement of State aid rules. Therefore, general rules apply, but due to the low number of cases, several uncertainties exist. There is no typical private enforcement case initiated by a competitor of a State aid beneficiary or by another affected market participant to date.

For example, it is not clear whether, in parallel or in addition to the grantor of the State aid, the State aid beneficiary can also be sued by the affected market participant.[362] This question is important in typical cases where the affected market participant (operating on the same market as the aid beneficiary), by lodging an action, triggers litigation before the local or district court, depending on the amount of the State aid, in order to achieve the enforcement title (for this reason also high courts and in some cases even the Supreme Court of the Republic of Slovenia may be involved). If, at this stage, only the grantor of the State aid can be the defendant, the enforcement title cannot be used directly against the aid beneficiary. Here, the grantor of the State aid shall take appropriate measures. However, the situation is different (and easier) in terms of immediate and effective enforcement if the beneficiary can also be directly sued by the affected market participant since in this case there is no need for an action of the grantor of the State aid against the beneficiary.

However, there are also cases in which the abovementioned uncertainty regarding the status and rights of a (potential) defendant does not play any role. In fact, that can be said for most of the (few) private enforcement cases where a new administrative procedure was initiated in order to, first, annul the previous grant decision and, second, to reduce a subsidy due to new circumstances. Moreover, there is some uncertainty regarding the demonstration of legal interest, which is a necessary condition for the right to lodge an action before the court, as there is no relevant Slovenian case law to date. Furthermore, there is no Slovenian case law regarding the question of what the legal consequences are for a breach of Article 108(3) TFEU, namely, whether the act in question is relatively or absolutely void.

Main findings based on the case summaries

So far, there have been only few cases in which the Commission was involved and only in one of them did the Commission order a recovery of the State aid that was granted *via* recapitalisation, namely, in the case *Elan*[363]. In this case, the State aid beneficiary 'voluntarily' returned the unlawful aid plus interest almost three years after the Commission issued the

[353] *Id.*, Art. 59 of the Claim Enforcement and Security Act.
[354] *Id.*, Art. 71 of the Claim Enforcement and Security Act.
[355] *Id.*, Art. 55 of the Claim Enforcement and Security Act.
[356] According to the Contentious Civil Procedure Act.
[357] According to the Claim Enforcement and Security Act.
[358] According to the General Administrative Procedure Act.
[359] According to the Administrative Dispute Act.
[360] According to the General Administrative Procedure Act and the Tax Procedure Act, or the Claim Enforcement and Security Act.
[361] For instance, the Courts Act; the Contentious Civil Procedure Act; the Claim Enforcement and Security Act, and the Administrative Dispute Act.
[362] It seems at least in cases where the plaintiff claims nullity of the agreement, by which disputable State aid has been granted, both parties of this agreement, *i.e.* the grantor and beneficiary, shall be sued together.
[363] *Ad hoc* case SA.26379 *Elan* C13/2010 (ex NN 17/2010).

recovery decision. Thus, there was no enforcement procedure and, therefore, there is no case law in this regard.

There are also some cases in which State aid was granted by a private law measure and in which the defendant raised State aid arguments. However, the courts in some cases refused to apply State aid rules due to national procedural rules, without mentioning the principle of effectiveness and primacy of the Union law (see, *e.g.* the following judgments: Pg 909/2012 (no ECLI), ECLI:SI:VSKP:2016:CPG.346.2015 (SI1), and ECLI:SI:VSRS:2016:III.DOR.52.2016.9). However, there are also some good practices, mainly where a new administrative procedure was initiated *ex officio* by the grantor of a subsidy in order to annul its own grant decision and to reduce the subsidy due to new circumstances, and then this new administrative decision was challenged before the Administrative Court of the Republic of Slovenia. This has been most frequent in the energy sector in the context of subsidies for production of electricity from renewable sources (*e.g.* ruling ECLI:SI:UPRS:2013:I.U.289.2012.13 (SI3).

To summarise, in Slovenia, atypical cases relating to the energy sector, in which grantors of the aid claim a suspension or reduction of the aid while the State aid beneficiaries oppose, are predominant. However, it is noteworthy to mention that this finding is based on a small number of cases.

Qualitative assessment of the average time of court proceedings

The average duration of court proceedings to date is around ten months (cases vary from six to fifteen months) per instance. This depends on the complexity of the case and on the arguments put forward, that is, whether only a State aid argument was invoked or whether other arguments were invoked as well. Moreover, the number of cases is too small for a credible assessment and comparison.

Nevertheless, it can be said that the State aid cases last a bit longer than other complex cases. According to the annual report on effectiveness of the Slovenian courts for the year 2017, as published by the Supreme Court of the Republic of Slovenia:

- Proceedings before local courts vary from three to fourteen months;
- Proceedings before district courts vary from nine to fourteen months;
- Proceedings before high courts vary from two to three months;
- Proceedings before the Administrative Court of the Republic of Slovenia last around seven and half months; and
- Proceedings before the Supreme Court of the Republic of Slovenia last around six months.

Qualitative assessment of the remedies awarded by national courts

Due to a relatively low number of cases it is difficult to make a credible qualitative assessment, in particular because of a high number of very similar cases on subsidy reduction which were ruled and processed almost in the same way (see, *e.g.* ruling ECLI:SI:UPRS:2013:I.U.289.2012.13 (SI3)). In addition, there is also one case where a preliminary ruling was requested and then the national court ruled in line with the CJEU's ruling (see ruling ECLI:SI:USRS:2016:U.I.295.13 (SI2)).

However, there are cases in which it seems State aid rules have not been considered sufficiently due to the national procedural rules (see, *e.g.* ruling Pg 909/2012 (no ECLI); ruling ECLI:SI:VSKP:2016:CPG.346.2015 (SI1); and ruling ECLI:SI:VSRS:2016:III.DOR.52.2016.9).

Qualitative assessment of the application of the State aid *acquis*; preliminary references

The State aid *acquis* is in principle not cited in State aid related national decisions and judgments. However, there are some exceptions. In the abovementioned cases dealing with the reduction of a subsidy for the production of electricity from renewable sources, the *de minimis* Regulation was explicitly pointed out (see, ruling ECLI:SI:UPRS:2013:I.U.289.2012.13 (SI3)). Moreover, in the case in which the Constitutional Court of the Republic of Slovenia requested a preliminary ruling, several CJEU judgments were cited (see, ruling ECLI:SI:USRS:2016:U.I.295.13 (SI2)).

Qualitative assessment of any other relevant trends in State aid enforcement

As mentioned above, due to the low number of cases it is difficult to draw credible conclusions on any relevant trends just yet. Nevertheless, it can be said that the overall understanding and knowledge of State aid rules among judges is still relatively limited. However, some differentiation is possible in this regard: the Administrative Court of the Republic of Slovenia (and the Constitutional Court of the Republic of Slovenia) seem to be better prepared to rule on challenges regarding State aid rules as compared to other courts.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

In most of the existing cases the notion of State aid has been conducted well, with some exceptions in which the courts did not consider the State aid aspect at all or at least not sufficiently in its reasoning as described above.

The main challenge seems to be the little experience that courts have in dealing with State aid rules and with the principle of effectiveness. Therefore, a national legislative act (or at least guidelines) dealing with open substantive and procedural questions would be highly welcome in order to streamline the court proceedings. Moreover, a systematic approach would be helpful in relation to the training of national judges, public official and attorneys.

Any other relevant comments or findings

Not applicable

25.2 Case summaries

Case summary SI1

Date

26/12/2018

Case identifiers

Member State

Slovenia

Court which adopted the ruling (national language)

Republika Slovenija, Višje sodišče v Kopru

Court which adopted the ruling (English)

Republic of Slovenia, High Court in Koper

Instance court which adopted the ruling

Second to last instance court (general jurisdiction)

Official language of the court

Slovenian

Hyperlink to ruling

http://www.sodnapraksa.si/?q=id:2015081111393917&database%5bSOVS%5d=SOVS&database%5bIESP%5d=IESP&database%5bVDSS%5d=VDSS&database%5bUPRS%5d=UPRS&_submit=i%C5%A1%C4%8Di&page=0&id=2015081111393917

Case reference

ECLI:SI:VSKP:2016:CPG.346.2015

Procedural context of the case

After a dispute arose between the contractual parties the State aid beneficiary lodged an enforcement proposal in order to gain a monetary sum defined by the contract. The department for enforcement of the Local Court in Ljubljana endorsed the beneficiary's proposal and allowed the enforcement of the monetary sum in its judgment of 12 October 2012, (ruling No. VL 151138/2012). An objection has been lodged against this ruling which was rejected and then the action for the inadmissibility of the execution was lodged, and, as a consequence, a litigation was triggered.

The First Instance Court, (the District Court in Koper, department of commercial judiciary), rejected the objection and confirmed the ruling of the Enforcement Court. The Court refused to consider the State aid argument in its judgment of 18 June 2015, (ruling No. Pg 909/2012). It declared this argument as being invoked too late without offering any other explanation in this regard (paragraph 4 of the judgment). Thus, the Court refused the State aid argument due to the national procedural rule that, all the relevant facts, evidence and statements must be put forward or invoked at the first hearing session within the main proceeding. This had not been done in the case at hand. However, the State aid argument had been invoked before the end of the main proceeding (before the Court decided on merits).

The Second Instance Court, (High Court in Koper, department of commercial judiciary) (henceforth: the Court of Appeal), rejected the appeal of the KOBILARNA LIPICA, Lipica 5, Sežana, and confirmed the judgment of the First Instance Court by its judgment of 11 March 2016, (ruling ECLI:SI:VSKP:2016:CPG.346.2015). This is the judgment discussed in this document.

The Last Instance Court (Supreme Court of the Republic of Slovenia) allowed a revision against the final judgment of the second instance court in its judgment of 20 May 2016 (ruling No. ECLI:SI:VSRS:2016:III.DOR.52.2016.9), however, not because of the State aid argument). The Last Instance Court did not address the State aid argument at all. The State aid argument also was not considered in the judgment of 13 March 2018, (ruling No. ECLI:SI:VSRS:2018:III.IPS.78.2016), in which the Supreme Court decided on merits.

Type of action

Private enforcement

Delivery date of the ruling

11/03/2016

Language

Slovenian

Headnote

In this ruling, the Court did not address the State aid argument and State aid rules in general.

Parties

Names of the parties to the action

KOBILARNA LIPICA, Lipica 5, Sežana

Versus

PETROL, Slovenska energetska družba, d.d., Ljubljana, Dunajska cesta 50, Ljubljana

The relationship of the plaintiff to the measure

Other

A public institute: a legal person over which public authorities may exercise a dominant influence

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

A - Agriculture, forestry and fishing

Horse breeding

The type of State aid measure challenged in the court proceedings

Other

Purchase of the project documentation needed for the public-private partnership

Substance of the case

Facts and parties' main arguments in the case

KOBILARNA LIPICA, Lipica 5, Sežana, tried to prove that the payment of the monetary sum as claimed by the PETROL, Slovenska energetska družba, d.d., Ljubljana, Dunajska cesta 50, Ljubljana, could contravene State aid rules.

The plaintiff decided to carry out the project called Comprehensive Environmental and Energy Solution in the Stud Farm of Lipica *via* public-private partnership. The plaintiff concluded a contract with the PETROL, Slovenska energetska družba, d.d., Dunajska cesta 50, Ljubljana (in this regard the negotiated procedure without prior publication has been applied). According to the contract, the latter shall deliver final and effective project documentation needed for the public-private partnership. This documentation was delivered, however two ministries competent for finances and culture pointed out several shortcomings of the documentation. As a result, since the obligations were not fulfilled, the plaintiff rejected the payment and the other party has lodged the enforcement proposal; please see supra, i.e. Procedural context of the case.

In the case at hand, several legal questions arose relating to different fields of law, also to State aid rules. Only State aid arguments are discussed here.

The plaintiff argued the risk of the fundamental breach of State aid rules. According to the plaintiff, the Court shall deal with additional factual and legal questions to find out whether the payment of the requested monetary sum would entail State aid in the sense of the Article 107(1) TFEU and whether the absence of its notification to the Commission means a breach of the Article 108(3) TFEU. Moreover, the plaintiff claimed a breach of the standstill obligation would cause nullity of the contract and that the latter shall be considered by the Court ex officio according to the national rules. And finally, the plaintiff pointed out, according to the principle of effectiveness which limits the national procedural autonomy, that the Court shall not use the national procedural rules to block the application of supranational substantive rules and more generally, according to the principle of primacy of Union law, supranational rules shall enjoy priority over national rules. For these reasons, the plaintiff discussed all elements of the Article 107(1) TFEU as well as Article 108(3) TFEU.

The defendant did not offer any detailed State aid rule-related considerations. It merely opposed at the general level: (1) that the existence of State aid in this particular case was not sufficiently proven by the plaintiff, (2) that the State aid argument has been invoked too late, and (3) that State aid rules are irrelevant due to national procedural rules and due to the principle venire contra factum proprium.

Remedy(ies) sought

Other remedy sought

Annulment of the contract whose implementation may breach State aid rules.

Outcome of the case

Conclusions adopted by the national court

The Court of Appeal did not address any of the State aid arguments invoked by the plaintiff and, as a result, State aid rules as well as fundamental principles of the Union law, i.e. principle of effectiveness and principle of primacy, were not considered in the judgment.

The Court of Appeal rejected the State aid argument by asserting that it was invoked too late (although this argument was invoked before the end of the main proceeding at the first instance). The Court of Appeal did not explain which national procedural rule prevented it from the application of State aid rules nor why principle of effectiveness was not applicable in the case at hand.

Moreover, the Court of Appeal ruled that the State aid argument invoked by the plaintiff is merely a theoretical discussion which does not explain why Article 107 TFEU as well as Article 108 TFEU were breached.

And last but not least, the Court of Appeal explained that even if there were no procedural obstacles for the application of State aid rules, national substantive rules would have to be applied according to which the payment of claimed monetary sum must be carried out by the plaintiff. This could indicate that the Court of Appeal would be willing to give priority to the national rule over supranational one without due consideration of the fundamental principles of Union law.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

The Court of Appeal did not analyse the State aid argument from the substantive point of view because of national procedural rules. The Court did not clarify why the principle of effectiveness was not applicable in the case at hand.

As a result, State aid rules have not been considered at any of the three instances.

Case summary SI2

Date

26/12/2018

Case identifiers

Member State

Slovenia

Court which adopted the ruling (national language)

Ustavno sodišče Republike Slovenije

Court which adopted the ruling (English)

Constitutional Court of the Republic of Slovenia

Instance court which adopted the ruling

Constitutional Court

Official language of the court

Slovenian

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

ECLI:SI:USRS:2016:U.I.295.13

Procedural context of the case

The Constitutional Court of the Republic of Slovenia accepted to review of constitutionality of several provisions of the Banking Act drafted in order to establish a legal framework for rescue and reorganisation of certain credit institutions (the so-called system banks). In this regard, the Court adopted the judgment on 6 November 2014, (ruling No. U-I-295/13-132), by which it decided to refer a request for a preliminary ruling to the CJEU. The Court suspended the procedure until the CJEU gave a preliminary ruling.

The preliminary procedure was recorded/filed as a case under the Case Tadej Kotnik and Others v Državni zbor Republike Slovenije C-526/14. Grand Chamber of the CJEU issued a judgment on 19 July 2016.

After this judgment the Constitutional Court of the Republic of Slovenia continued with the case and adopted the final judgment on 10 October 2016, (ruling U-I-295/13-260, ECLI:SI:USRS:2016:U.I.295.13), by taking into consideration the judgment C-526/14.

Type of action

Private enforcement

Delivery date of the ruling

19/10/2016

Language

Slovenian

Headnote

In this ruling, the Court applied State aid rules in the context of rescuing and restructuring banks and, for this reason, it has referred a request for a preliminary ruling to the CJEU according to Article 267 TFEU.

Parties

Names of the parties to the action

Anonymised

Versus

Državni zbor Republike Slovenije

Interested parties to the proceedings were Vlada Republike Slovenije; Banka Slovenije; Okrožno sodišče v Ljubljani (supporting the defendant)

The relationship of the plaintiff to the measure

Other

The plaintiffs included numerous natural and legal persons: three of them are public authorities, one of them is an association of minor shareholders while the others are investors or holders of bonds or shares of the State aid beneficiary.

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

K - Financial and insurance activities

Banking sector

The type of State aid measure challenged in the court proceedings

Other

Writing off of equity capital, hybrid capital and subordinated debt; Recapitalisation

Substance of the case

Facts and parties' main arguments in the case

The national assembly, i.e. Državni zbor Republike Slovenije, amended the Banking Act in order to establish a legal framework for rescue and restructuring of certain credit institutions, i.e. of the so-called system of banks which were of crucial importance for the stability of the Slovenian financial system. For this reason, the legislator introduced several measures, also writing off of equity capital, hybrid capital and subordinated debt. In addition, by way of recapitalisation the Republic of Slovenia injected fresh capital into the banks.

The plaintiff invoked several arguments against the discussed way of rescue and restructuring of the banks. The plaintiff explicitly opposed to the writing off of equity capital, hybrid capital and subordinated debt. According to the plaintiff, the discussed approach did not follow the requests of the Commission as defined in the Communication from the Commission on the application, from 1 August 2013, of the State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 2016, 30. 7. 2013). However, as the plaintiff pointed out, even if the discussed approach had followed the communication in question, the latter was not binding. As regards the recapitalisation, the plaintiff was against qualifying it as a State aid measure.

The defendant explicitly referred to the aforementioned Commission's banking communication and indicated the importance of writing off of the equity capital, hybrid capital and subordinated debt. The defendant considered it a precondition for the compatibility of State aid in form of the necessary bank recapitalisation. More generally, the defendant stated that the discussed approach completely follows the EU acquis: hard law, case law and soft law.

Remedy(ies) sought

Other remedy sought

The annulment of several provisions of the legislative acts, including the provision of the Banking act establishing the writing off of the equity capital, hybrid capital and subordinated debt

Outcome of the case

Conclusions adopted by the national court

The national court followed the preliminary ruling given by the CJEU, Case Tadej Kotnik and Others v Državni zbor Republike Slovenije C-526/14, in which the CJEU elaborated on several aspects of the burden-sharing approach as described in paragraphs 40 to 46 of the aforementioned Commission's banking communication and, in this regard, it ruled that the discussed approach is in line with Article 107 - 109 TFEU and generally with Union law. Also, it ruled that the discussed approach is a prerequisite to the authorisation of State aid which is important, since the burden-sharing approach as established by national legislative act with respect of the EU acquis means an expropriation of the plaintiff's assets and, of course, the latter has caused the dispute.

The national court adopted the judgment, (ruling ECLI:SI:USRS:2016:U.I.295.13), in which the Court ruled, inter alia, that given the exclusive competence of the EU for the establishing of the competition rules necessary for the functioning of the internal market, given the powers of the Commission in the field of State aid where it enjoys a wide margin of discretion, and given the supreme power of the CJEU for interpretation the Union law, the discussed Communication, although it is 'merely' a soft law instrument, shall be considered as a relevant source for the resolution of the case.

As a result, the national court decided that the legislative measure in question did not breach State aid rules which means in this regard the Court agreed with the defendants' position.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

The interpretation of State aid rules posed some difficulties to the Constitutional Court, therefore, it decided to refer a request for a preliminary ruling to the CJEU in the sense of Article 267 TFEU. The Constitutional Court had doubts regarding the nature of the discussed Communication (which is a typical instrument of the soft law). Namely the Court asked if the Banking Communication must be regarded as binding on Member States seeking to remedy a serious disturbance in the economy by granting State aid to credit institutions, where such aid is intended to be permanent and cannot be easily revoked. Moreover, the Court had doubts regarding the possibility envisaged in the Banking Communication to grant State aid intended to remedy a serious disturbance in the national economy conditional upon the following factors: compliance with the requirement to write off equity capital, [and subordinated rights] and/or to convert [subordinated rights] into equity, in order to limit the amount of aid to the minimum necessary in the light of the need to take account of moral hazard. The Court asked whether these provisions were compatible with Article 107 - 109 TFEU due to the fact that they exceeded the Commission's competence, as defined in the provisions of the Treaty relating to State aid. Furthermore, the Court had doubts regarding the requirement for the conversion or writing down [subordinated rights] before granting State aid. The Court was not sure if the Banking Communication may be interpreted as meaning that those measures do not compel Member States that seek to remedy a serious disturbance in their economy by granting State aid to credit institutions to impose an obligation to adopt such conversion and writing down measures as a condition for the grant of State aid on the basis of Article 107(3)(b) TFEU. Alternatively, the Court considered whether the Banking Communication provisions should mean that, in order to be able to grant State aid, it is sufficient that the conversion or writing down measure should merely operate in a manner that is proportionate.

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-526/14, Tadej Kotnik and Others v Državni zbor Republike Slovenije (2016) ECLI:EU:C:2016:570

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24. 9. 2015, p. 9
- Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27. 6. 2013, p. 1
- Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 216, 30.7.2013, p. 1
- Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 356, 6.12.2011, p. 7
- Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 329, 7.12.2010, p. 7
- Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195, 19.8.2009, p. 9
- Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.3.2009, p. 1
- Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.1.2009, p. 2

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-526/14, Tadej Kotnik and Others v Državni zbor Republike Slovenije, (2016) ECLI:EU:C:2016:570 (http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-526/14)

Any other comments (optional)

The Constitutional Court of the Republic of Slovenia has followed the preliminary ruling given by the CJEU in the case C-526/14, Tadej Kotnik and Others v Državni zbor Republike Slovenije, ECLI:EU:C:2016:570, parts of which could be useful also for other similar cases in other Member States.

Moreover, the national judgment contains several statements relating to the field of State aid which are, useful in spite of their general character, having in mind the lack of national case law on State aid.

Case summary SI3

Date

26/12/2018

Case identifiers

Member State

Slovenia

Court which adopted the ruling (national language)

Republika Slovenija, Upravno sodišče

Court which adopted the ruling (English)

Republic of Slovenia, Administrative Court

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

Slovenian

Hyperlink to ruling

http://www.sodnapraksa.si/?q=id:2012032113061515&database[SOVS]=SOVS&database[IESP]=IESP&database[VDSS]=VDSS&database[UPRS]=UPRS&_submit=i%C5%A1%C4%8Di&page=0&id=2012032113061515

Case reference

ECLI:SI:UPRS:2013:I.U.289.2012.13

Procedural context of the case

The Public Agency of the Republic of Slovenia for Energy adopted an administrative decision regarding a grant of subsidy for electricity production from renewable sources in favour of the plaintiff.

However, after the latter gained an additional subsidy for development of micro enterprises from the Public Agency of the Republic of Slovenia for Agricultural Markets and Rural Development, the Public Agency of the Republic of Slovenia for Energy started a new procedure, according to the valid regulation and to first administrative decision, and it has adopted new administrative decision with which it annulled its own previous decision regarding a subsidy and reduced the subsidy.

The plaintiff lodged an appeal against this decision, but a second instance organ rejected it as unfounded.

Then, the plaintiff lodged a lawsuit with which triggered an administrative dispute before the Administrative Court. The Court adopted a judgment in which it also rejected the plaintiff's claim as unfounded, (ruling ECLI:SI:UPRS:2013:I.U.289.2012).

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

12/03/2013

Language

Slovenian

Headnote

In this ruling, the Court rejected the plaintiff's claim to retain a subsidy and it confirmed the administrative decision according to which the subsidy in question must be reduced.

Parties

Names of the parties to the action

Anonymised

Versus

Javna agencija RS za energijo

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Electricity production

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

In 2010, the plaintiff (a person of private law, a producer of electricity from renewable sources and a micro entreprise) gained a subsidy for electricity production from renewable sources (photovoltaics), followed by another subsidy for development of micro enterprises. As a result, according to the valid legislative act and regulation, the Public Agency of the Republic of Slovenia for Energy (the defendant) adopted a new administrative decision which annulled the previous decision regarding a subsidy, and reduced the subsidy so that the income from the electricity production does not exceed the costs of its production, including also the reasonable profit on invested resources.

The plaintiff lodged an appeal against this decision, but the second instance organ has rejected it as unfounded. Therefore, the plaintiff decided to seek judicial protection and lodged a lawsuit triggering an administrative dispute before the Administrative Court.

The plaintiff invoked several arguments, for example breach of procedure, retroactivity, breach of acquired rights, as well as breach of State aid rules. Namely, the plaintiff argued that the disputed subsidy was granted as *de minimis* aid which means the public measure in question shall not be treated as State aid. Therefore, according to the plaintiff, this subsidy shall not be considered as a reason for reduction of another subsidy.

The judgment does not offer sufficient insight into the arguments of the defendant since it merely states that the defendant insisted that the disputed administrative decision must be fully respected.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

The national court rejected all plaintiff's claims as unfounded, including those relating to the State aid. In particular, the national court explicitly ruled that already a special legislative act, i.e. the Energy Act, contained provisions according to which financial support to the electricity producer from renewable sources shall not enable the electricity producer to achieve a surplus of earnings over costs, including also reasonable profit. Therefore, the legislator tried to prevent excessive profits due to the financial support from public resources.

The Energy Act also contained provisions according to which the financial support must be reduced in case the producer gains any other State aid, while the level of this reduction depends on the amount this other of State aid (according to the national Court, this approach has been also defined by the regulation and the first grant decision). In this regard, the national Court indicated that the reduction in question did not breach State aid rules. Moreover, the national Court did not endorse the plaintiff's argumentation that additional financial support in form of subsidy which was granted as *de minimis* aid according to the relevant *de minimis* rules shall not be considered as a ground for the reduction of the discussed subsidy due to the fact that *de minimis* aid is not considered as the State aid in the sense of Article 107(1) TFEU.

As a result, the national Court decided that the discussed subsidy must be appropriately reduced in order to prevent excessive profits arising out of the electricity production from renewable sources and, as a consequence, an immediate recovery was ordered.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- 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 (*de minimis* Regulation)
- Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ L 10, 13.1.2001, p. 30
- Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p. 1

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

25.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Upravno sodišče Republike Slovenije	Administrative Court of the Republic of Slovenia	Second to last instance court (administrative)	ECLI:SI:UPRS:2008:U.3.2005	21/03/2008	Private enforcement	Other remedy imposed	The Court decided in favour of the plaintiff who claimed he should receive a subsidy; the administrative organ rejected the request for a subsidy, but the Court decided in favour of plaintiff (*de minimis* aid should be granted in case the conditions from the *de minimis* Regulation are met). The Court clarified that when enforcing the *de minimis* rule, the special *de minimis* Regulation must be applied (if there is any). If a particular undertaking is not eligible for *de minimis* aid according to the general *de minimis* Regulation, the special *de minimis* Regulation must be considered.	The Court took a proactive approach in order to ensure equal treatment of undertakings who suffered damage due to an earthquake. According to the Court, all supranational State aid rules shall be checked in order to find a means of subsidising undertakings whose business activity is excluded from the scope of application of general *de minimis* Regulation.	
Upravno sodišče Republike Slovenije	Administrative Court of the Republic of Slovenia	Second to last instance court (administrative)	ECLI:SI:UPRS:2012:II.U.38.2011	09/05/2012	Private enforcement	Recovery order in relation to unlawful aid	The Court clarified that State aid in the form of a subvention for the production of electricity from renewable resources shall be decreased to the level of the other subventions for the same activity received from other public programmes (for which the resources originate from the EU).		
Upravno sodišče Republike Slovenije	Administrative Court of the Republic of Slovenia	Second to last instance court (administrative)	ECLI:SI:UPRS:2015:I.U.589.2015	27/08/2015	Private enforcement	Other remedy imposed	The Court decided in favour of the plaintiff; the administrative body should use national (administrative) procedural rules when deciding about *de minimis* aid. The Court clarified that when obtaining a statement about past aid for the purposes of present *de minimis* aid, the public body must define the deadline and its prolongation in accordance with the national act on administrative procedure.		
Vrhovno sodišče Republike Slovenije	Supreme Court of the Republic of Slovenia (Civil Department)	Last instance court (civil/commercial)	ECLI:SI:VSRS:2015:III.IPS.105.2013	28/10/2015	Private enforcement	Other remedy imposed	The Court did not apply State aid rules; State aid argument not considered. The dispute concerned a subsidy in favour of a private undertaking (concessionaire) for the provision of bus transportation. The concession agreement defined the subsidy and, in addition, defined the obligation that the parties shall mutually adapt the subsidy in case of new circumstances. Subsequently, a dispute arose since the concessionaire claimed a higher amount of subsidy while the municipality opposed this. Thus, an action was lodged for a higher amount of subsidy plus corresponding interest. The Court decided in favour of the concessionaire, applying only civil law (i.e. law of obligations), without any consideration of State aid rules.	The case is relevant with regard to the principle of effectiveness / national procedural autonomy.	
Republika Slovenija, Višje sodišče v Kopru	Republic of Slovenia, High Court in Koper	Second to last instance court (civil/commercial)	ECLI:SI:VSKP:2016:CPG.346.2015	11/03/2016	Private enforcement	None - Claim rejected	The Court did not consider arguments based on State aid, applying national law. The dispute concerned the purchase of documentation for a public private partnership prepared by a private company. An entity controlled by the public authority refused to pay the claimed amount to the private company. The latter lodged an action for the (damages) payment; the Court decided in favour of the private company. The Court dismissed the State aid argument, deciding that State aid rules were not applicable on the basis of national procedural rules (not applying the principle of effectiveness which limits national procedural autonomy) and national civil law.	The ruling forms a part of a trilogy (together with rulings Pg 909/2012 and ECLI:SI:VSRS:2016:III.DOR.52.2016.9) and is relevant with regard to the principle of effectiveness / national procedural autonomy.	
Ustavno sodišče Republike Slovenije	Constitutional Court of the Republic of Slovenia	Constitutional Court	ECLI:SI:USRS:2016:U.I.295.13	19/10/2016	Private enforcement	None - Claim rejected	The Court applied State aid rules following the CJEU ruling in the case C-526/14, ECLI:EU:C:2016:767 (preliminary ruling, Article 267 TFEU). The case deals with issues related to the writing off of equity capital, hybrid capital and subordinated debt in the context of the rescuing and reorganisation of banks.		
Upravno sodišče Republike Slovenije	Administrative Court of the Republic of Slovenia	Second to last instance court (administrative)	ECLI:SI:UPRS:2013:I.U.289.2012	12/03/2013	Public enforcement	Recovery order of the unlawful/incompatible aid	The Court clarified that in case the sum consisting of the production costs of electricity from renewable resources plus reasonable profit exceeds the market price, subsidies are allowed to cover the difference. However, the *de minimis* rule must be considered together with the cumulation rule.		
Upravno sodišče Republike Slovenije	Administrative Court of the Republic of Slovenia	Second to last instance court (administrative)	ECLI:SI:UPRS:2015:III.U.64.2015	20/03/2015	Public enforcement	Recovery order of the unlawful/incompatible aid; Requests of aid recovery suspension	The Court clarified that, bearing in mind the predominantly public interest in the procedure for the recovery of State aid, interim measures shall be adopted only exceptionally, namely, in case the beneficiary proves circumstances which prevail over public interest, and cannot be avoided by another kind of measure.		

26.1 Spain

26.1 Country report

Name national legal expert

Dr Juan Jorge Piernas López

Date

17/12/2018

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

In Spain, there are no specialised courts with jurisdiction to hear State aid cases. The competent courts in cases concerning the public enforcement of State aid rules are, in the majority of cases, the administrative courts (*jurisdicción contencioso administrativa*). As a general rule, actions are initially brought before an administrative court (*Juzgado de lo Contencioso-administrativo*). The decision of the administrative court can be appealed before a regional high court (administrative chamber), in particular before the high court of the region where the administrative court is based. Finally, the decisions of the regional high courts are subject to appeal in the last instance, on grounds of law only, before the Spanish Supreme Court (Contentious-Administrative Chamber). Apart from the standard procedure, there are also specific procedures provided for by law, which may affect the competent court on the basis of the organ adopting the measure subsequently considered as aid. For instance, decisions of the Spanish Council of Ministers are reviewed directly by the Spanish Supreme Court.

Secondly, in the infrequent case where the aid was granted through a private law instrument, the purpose of the contract or agreement will directly become illegal, thus allowing the granting authority to claim repayment of the aid before the civil or commercial courts.[364] In private law proceedings, the courts of first instance (*Juzgados de primera instancia*) or the commercial courts (*Juzgados de lo Mercantil*) will be competent in first instance, the provincial courts (*Audiencias Provinciales*) in the second instance, and the Supreme Court (Civil Chamber) in the last instance. Finally, civil and commercial courts are also competent in the case of insolvency proceedings in the context of which State aid questions often arise. Consequently, their decisions are subject to appeal before provincial courts in the second instance and before the Supreme Court (Civil Chamber) in the last instance.

A description of the procedural framework applicable in public enforcement of State aid rules

Recovery decisions are received at the Permanent Representation of Spain to the EU, which submits them to the Spanish Secretary of State for European Affairs. The Secretary then sends each recovery decision to the competent authority for the contested aid measure, which is the authority that disbursed the incompatible aid (the granting authority). The granting authority can be a central government body (*e.g*. ministry) or an infra-State body (*e.g*. autonomous communities, autonomous cities municipalities). Each granting authority will then request the repayment of the aid from the beneficiaries. The Secretary of State for European Affairs provides information and support to the granting authority during the recovery process, and sets deadlines in accordance with the recovery decision.

As for the specific procedure that is followed to recover unlawful and incompatible aid, save for fiscal aid, the Spanish authorities rely directly on the enforceable character of the recovery decisions. However, the Spanish Supreme Court has established that the recovery procedure must meet the basic procedural guarantees of hearing, motivation, determination of the amount, and indication of the appeals that may be lodged (see, *e.g.* Supreme Court, 14.10.2013 – ECLI:ES:TS:2013:4968; Supreme Court – ECLI:ES:TS:2015:1139; Supreme Court, 23.3.2017 - STS 198/2017). Therefore, the requests for repayment of aid that are sent to aid beneficiaries provide for a period of ten days within which representations can be made, specify the amount and interest to be paid and indicate the appeals that can be made against them.

In the case of fiscal aid, an *ad hoc* recovery procedure has been introduced by Law 34/2015 of 21 September 2015, partially amending General Taxation Law 58/2003 of 17 December 2003 (GTL), and by the corresponding acts adopted by the two Spanish regions with a high degree of fiscal autonomy, namely, Navarre and the Basque Country. Law 34/2015, which entered into force on 12 October 2015, added a new Title VII (Articles 260 to 271) to the GTL, regulating the procedures to be followed for the enforcement of decisions to recover State aid. This filled a gap in national legislation that had been identified by the Supreme Court for the first time in one of the judgments included in the selection of cases for Spain in this Study (Supreme Court, 13.5.2013 - case STS 3083/2013 (ES8)), in particular, the gap concerning the need to give aid beneficiaries the right to be heard in recovery proceedings under both national and Union law. In addition, as set out in the explanatory statement, the objective of the new Title VII is to adapt Spanish legislation to the requirements of Council Regulation (EC) 659/1999 of 22 March 1999, subsequently replaced by Council Regulation (EU) 2015/1589 of 13 July 2015[365], and particularly to comply with the principles of effective and immediate enforcement of State aid recovery decisions. For these purposes, the explanatory statement highlights the two main novelties introduced by the new Title VII, namely: (i) the possibility of modifying firm administrative acts, even if they have acquired the force of *res judicata* (Article 263 GTL) and (ii) the impossibility of requesting the deferral, or payment in instalments, of tax debts resulting from the enforcement of recovery decisions (Article 65 GTL).

Furthermore, in order to bring Spanish legislation in line with the abovementioned regulations, the new Title VII, which clarifies that the Spanish tax administration is responsible for enforcing recovery decisions, introduces a specific ten-year statute of limitation in this field, different from the four-year statute of limitation generally applicable,

[364] See in this regard Buendía Sierra, J.L., "Spanish Report on State aid enforcement", report for the XXII FIDE Congress, 2006, published as Chapter 20 in P.F. Nemitz (ed.) *The Effective Application of EU State Aid Procedures*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 371.

[365] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*

from the day following that on which the application of the State aid had legal effects under tax law (Article 262 GTL) and provides that late-payment interest will be governed by the relevant provisions of Union law (Article 263(2) GTL). This legislation has been developed by Royal Decree 1070/2017 of 29 December 2017. The new Title VII differentiates the recovery procedure that involves the regularisation of a tax obligation, regulated under Chapter II (Articles 265–268), from that applicable in other cases, dealt with under Chapter III (Articles 269–271).

In the first case, the Tax Administration shall confine itself to the verification of the elements of the tax obligation included in the recovery decision. The recovery procedure shall be initiated *ex officio* by the Tax Administration and it should not last more than six months under Article 104 GTL. The maximum deadline under this provision is longer than the four-month standard deadline included in recovery decisions. In this regard, while it can be interpreted that the latter deadline should be observed, both by virtue of the primacy of Union law and in light of the fact that Article 104 GTL allows for the application of a different deadline if this is provided by Union law, it has also been submitted that the maximum deadline of six months should prevail in this case by virtue of the principle of national procedural autonomy.[366]

In the second case, the recovery procedure will start with a notification by the Tax Administration, which should already contain the provisional assessment/repayment proposal, opening from that moment a period of ten days for the taxpayer to make relevant submissions. The procedure must then be concluded within a maximum period of four months, unless the recovery decision establishes another deadline.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

The administrative courts have jurisdiction in the large majority of cases where the action is lodged against the granting authority. Therefore, the administrative courts are competent in the first instance, the regional high courts (administrative chamber) in the second instance and the Supreme Court (Contentious-Administrative Chamber) in the last instance.

As described below, civil or commercial courts have jurisdiction in cases where competitors initiate an action directly against the aid beneficiary under the Unfair Competition Act, Law number 3/1991 of 10 January 1991. In this case, as mentioned before, the courts of first instance or the commercial courts will be competent in the first instance, the provincial courts in the second instance and the Supreme Court (Civil Chamber) in the last instance.

A description of the procedural framework applicable in private enforcement of State aid rules

Private enforcement of State aid rules can take place within the framework of public or private law.

Regarding proceedings under public law (the most frequent in Spain in relation to State aid), competitors of aid beneficiaries may bring an action before the competent administrative courts in cases of unlawful State aid under the direct effect of Article 108(3) TFEU. Competitors, and any other interested parties, may also request the adoption of interim measures before the contentious-administrative courts under Article 129 of Law 29/1998. Interim measures may relate to the suspension of the national measure granting the aid or to the other measures adopted to execute it. In recent years, the national courts have accepted requests for interim measures in several State aid cases, as exemplified in some of the selected judgments.

Competitors may also seek to obtain damages from the granting authority under State liability for breach of Union law, established under national law pursuant to Articles 32 *et seq*. of Law 40/2015 on the Legal Regime of the Public Sector. However, national courts have been very reluctant to recognise those damages, which may be related to the difficulties for the competitor-plaintiff to prove, as required by national law. The competitor has to prove an actual and economically evaluable damage, that the damage is the consequence of the functioning of public authorities and a causal link between the national measure granting aid to a competitor and the damage actually suffered.

Competitors may also initiate administrative proceedings before the granting authority with a view to review *ex officio* the administrative act under which the aid was granted or, if there is a recovery decision, to request the administration to set in motion the *ad hoc* recovery procedure provided for in the national legislation for the recovery of subsidies.

Regarding the general procedure, any interested party, or the administration *ex officio*, may require the invalidation of an administrative act on the grounds stipulated in Article 47 of Law 39/2015 on the Common Administrative Procedure of Public Administrations, which includes the "complete and absolute omission of the legally established procedure" (Article 47(1)e), and which for the purposes of State aid would be the standstill obligation included in Article 108(3) TFEU. Articles 106 and 111 of Law 39/2015 describe the procedure and identify the competent organs for the revision of administrative acts in the sphere of the General Administration of the State (*Administración General del Estado*). The procedure requires a previous positive report from the Council of State or from the equivalent advisory organ at the regional level, if any, which makes it cumbersome and rarely used. The rejection of the administration to set in motion this process may be appealed before the contentious-administrative courts.

Regarding the *ad hoc* recovery procedure for State aid granted in the form of subsidies, Article 37(1)(h) of Law 38/2003, the General Law on Subsidies, provides for the recovery of subsidies and late-payment interest in the case of "the adoption, in accordance with Articles 107 to 109 TFEU, of a decision leading to the need for repayment". Articles 41 and 42 of Law 38/2003 describe the main tenets of the procedure and identify the competent authority for the recovery, which is the granting authority. The procedure is initiated by the competent authority, either *ex officio* or at the request of other authorities, or by a complaint, and is set to last in principle a maximum of 12 months from its initiation to the notification of the resolution. The procedure also provides for the right of interested parties to be heard. This legislation has been developed by Royal Decree 887/2006 of 21 July

[366] See in this regard, Martín Rodríguez, J.M., "Recuperación de ayudas de Estado que afecten al ámbito tributario", in Merino Jara, I., and Calvo Vérgez, J., *Estudios sobre la reforma de la ley general tributaria*, Huygens, España, 2016.

2006. The rejection by the administration to set in motion this process may be appealed before the contentious-administrative courts.

As for the *locus standi* of competitors, Article 19 of the Administrative Jurisdiction Law 29/1998, recognises the *locus standi* of individuals or legal entities that have a right or legitimate interest. This has been recognised by national courts in Spain in the case of competitors of aid beneficiaries.

Regarding the proceedings under private law, it has been argued that competitors may lodge a claim for damages against the State aid beneficiary under Article 22 of the Unfair Competition Act, Law number 3/1991, before the civil or commercial courts.[367] In this regard, as the Unfair Competition Act requires positive behaviour by the offending undertaking, questions have been raised as to whether the mere receipt of State aid satisfies that condition.[368] Furthermore, in a case related to the application of the Unfair Competition Act, the Supreme Court made clear that the civil courts do not have the competence to declare unlawful the acts of the public administrations, at least those of a clear administrative nature, which are liable to distort competition and to violate Articles 107(1) and 108(3) TFEU. The administrative courts are competent in that respect (*e.g.* ruling ECLI: ES:TS:2009:6155).

Main findings based on the case summaries

On the basis of the judgments reviewed, the following findings can be highlighted:

The number of relevant public and private enforcement cases in Spain has been similar, and the large majority of cases have been litigated before the administrative courts. Indeed, only a few cases have been decided by the civil courts, and they refer to cases related to insolvency proceedings.

Both in the case of public and private enforcement of State aid, a significant number of cases are concerned with fiscal measures (*e.g*. ruling ECLI:ES:TS:2013:3083 (ES8); ruling ECLI:ES:TS:2018:3097 (ES9); ruling ECLI:ES:TSJPV:2012:3337 (ES11); ruling ECLI:ES:TS:2009:2061 (ES1)). In these cases the plaintiffs were often not only the aid beneficiaries instituting proceedings against recovery decisions, but were also regional authorities requesting the annulment or suspension of fiscal measures adopted by other public authorities granting State aid.

Regarding the relevant sectors, several State aid cases to date have concerned the energy sector in recent years (*e.g*. ruing ECLI:ES:AN:2015:2585; ruling ECLI:ES:AN:2014:5192), usually brought by competitors of alleged beneficiaries of State aid. Competitors have also lodged claims in several cases against the public compensation granted for the provision of public services, particularly television broadcasting (*e.g*. ruling ECLI:ES:TS:2017:2428; ruling ECLI:ES:TS:2017:2429). Finally, a significant number of cases related to the public financing of the transition to digital television in Spain (*e.g*. ruling ECLI:ES:TS:2012:4955 (ES2); ruling ECLI:ES:TS:2018:7861A (ES5)). It can also be highlighted that several cases related to aid granted to Spanish football clubs.

Particularly in the case of public enforcement, beneficiaries often challenged the national measures requesting recovery. The main issues in these cases revolved around limitation periods, late-payment interest, liability between beneficiaries, and requests for State liability for having granted the aid.

Finally, in relation to challenges against recovery decisions, the Spanish courts have confirmed in many instances the primacy of Union law over conflicting national law[369] and the fact that plaintiffs may not challenge the content of Commission decisions in the framework of recovery proceedings (*e.g*. ruling ECLI:ES:TSJPV:2012:3337 (ES11); ruling ECLI:ES:TS:2013:2632 (ES8)). Importantly, in several cases the Supreme Court emphasised that the procedural rights of the beneficiaries, particularly the right to be heard, must be observed (*e.g*. ruling ECLI:ES:TS:2013:3083 (ES8) or ruling ECLI:ES:TS:2017:198). Supreme Court case law led the national legislator to adopt the *ad hoc* procedure for the recovery of fiscal State aid, which has been described above.

Qualitative assessment of the average time of court proceedings

The statistics provided by the General Council of the Judiciary, the autonomous body that exercises governmental functions within the judiciary in Spain, do not refer specifically to State aid proceedings. Therefore, the average duration of court proceedings provided below refers to the national average for the 'regular procedure' (*procedimiento ordinario*) and, where available, for cases of State financial liability (*Responsabilidad patrimonial*) in 2017:

- First instance, average procedure length before administrative courts: 13.5 months (regular procedure) and 10.6 months (State financial liability).
- Second instance average procedure length before regional high courts: 17.3 months (regular procedure) and 16.8 months (State financial liability).
- Last instance average procedure length before the Supreme Court (Administrative Chamber, cassation appeal, ordinary appeal): 14.6 months.

In light of the information available, the average duration of the court proceedings in State aid cases, at least in cases related to the State financial liability, appear to be within the average duration of court proceedings before the contentious-administrative courts in Spain, or slightly shorter.[370]

Qualitative assessment of the remedies awarded by national courts

[367] Callol García, P., "Spanish report", in *Study on the Enforcement of State Aid Law at National Level*, March 2006, Jones Day, Lovells, Allen & Overy, p. 389.
[368] See in this regard Buendía Sierra, J.L., "Spanish Report on State aid enforcement", *op.cit.*, p. 365.
[369] The assessment by national tax authorities resulting from the enforcement of the recovery decisions can be subject to an optional appeal for reconsideration (*recurso de reposición*) with the same tax authority and, if deemed appropriate, to an economic-administrative appeal before the economic-administrative courts. In these cases, the suspension of the decision will only be granted upon the lodging of security (cash deposit) in the *Caja General de Depósitos* (Government depository). Therefore, recovery orders may be suspended but the conditions are more stringent than those generally applicable, which allow for other options apart from lodging a cash deposit.
[370] The statistics of the General Council of the Judiciary regarding the average time of court proceedings for the period 2002-2017 available athttp://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Actividad-de-los-organos-judiciales/Estimacion-de-los-tiempos-medios-de-los-asuntos-terminados/ (last accessed on 17 December 2018).

To date, the Spanish courts have granted relatively few remedies in State aid cases. The possible reasons for the low number of remedies awarded, in comparison with the overall number of cases decided by national courts, may be related to the complexity of the notion of State aid in some cases, coupled with the serious consequences attached to the violation of the standstill obligation under Article 108(3) TFEU. For instance, in cases concerning fiscal selectivity or State resources, national courts may entertain legitimate doubts as to the State aid character of a given national measure, even taking into account the case law of the CJEU, and may therefore be reluctant to declare the annulment or the suspension of a national measure, often legislative ones (*e.g.* ruling ECLI:ES:TS:2009:2061 (ES1)).

In addition, when balancing conflicting interests in relation to the adoption of interim measures, the national courts have also highlighted the positive effects for society of the contested national measure. For example, in relation to bringing television signals to remote areas of the country, which would be limited or eliminated if the public measure that could possibly entail State aid was suspended, and the fact that the contested public funds were already disbursed by the time that the national court was requested to accord the suspension of the measure that granted those funds (*e.g*. ruling ECLI:ES:TS:2011:786).

The foregoing is exacerbated by the fact that a given national measure may constitute unlawful aid and yet be declared compatible by the Commission subsequently, which may cast further doubts on the national judges as to whether they should annul the contested national measure or whether they should suspend its effects and order recovery because the aid was not notified. Indeed, from the cases reviewed it appears that national courts are significantly less reluctant to grant remedies, including interim relief, in the presence of a Commission decision opening the formal investigation procedure, a final decision or even a communication from the Commission, alerting as to the possible State aid character of a national measure.

Notwithstanding the above, since 2007 a number of positive developments in this regard can be highlighted:

For instance, in a relevant case concerning the transition to digital television in Spain, the Supreme Court concluded, with reference to the Commission Notice on the enforcement of State aid rules by national courts, that the lower court should have afforded the interim relief requested by the plaintiffs in the form of ordering the placement of the contested funds in a blocked account in conformity with the principle of effectiveness of Union law (ruling ECLI:ES:TS:2012:4955 (ES2)).

Secondly, in relation to the same litigation concerning the transition to digital television in Spain, the Supreme Court concluded in 2018 that, even though a recent CJEU judgment had annulled the Commission decision declaring the contested measures to be State aid, the CJEU, so the Supreme Court held, did so on the basis of a formal reason and the Commission would adopt a new decision to address it. Consequently, the Supreme Court considered that the reasons that led to the original suspension of the procedure remained valid despite the CJEU´s judgment (ruling ECLI:ES:TS:2018:7861A (ES5)). While this course of action provides legal certainty by avoiding the adoption of decisions by national courts that may be contrary to foreseeable Commission decisions or CJEU judgments, the CJEU´s judgment in this case was final. Therefore, it was probably very relevant for the Supreme Court´s decision that the plaintiff, some of the defendants and also, to some extent, the State Attorney, had held that the reasons that justified the maintenance of the suspension subsisted until the Commission adopted a new decision ending the investigation procedure.

Thirdly, in a State aid case concerning an appeal against an order (from the previous instance court), the Supreme Court rejected the adoption of interim measures (ECLI: ES:TS:2015:5081). In coming to this conclusion, the Court analysed the "appearance of a *prima facie* case" (*apariencia de buen derecho*) and its applicability in order to grant interim measures, as well as CJEU jurisprudence (C-213/89 and C-143/88)[371] in a positive fashion for the enforcement of State aid rules. The Supreme Court concluded that in cases in which the challenged measure could be contrary to the Union law, the national judge (by virtue of the primacy of Union law) can grant interim measures aimed at suspending the national measure or guaranteeing the effectiveness of a future resolution. The Supreme Court ruled that in the case at hand, the requirements to grant the interim measure were met. Therefore, the Supreme Court annulled the order from the previous instance and granted the suspension (subject to the lodging of a security) of the payment of the tax on large retail establishments.

Finally, the Spanish courts confirmed in many rulings the primacy of the Union law over national law in this field. This was the case, for instance, in relation to the payment of interest provided for in a State aid decision by the Commission in apparent contrast to what the Spanish Civil Code provides (ruling ECLI:ES:AN:2011:5805 (ES7)) in relation to the limitation period for recovery (ruling ECLI:ES:TSJPV:2012:3337 (ES11)), or to alter the characterisation of the credit that would correspond under national insolvency law with reference to the *Simmenthal* case law of the CJEU in this regard,[372] as well as to several other CJEU judgments concerning the principle of effective recovery of State aid (ruling ECLI:ES:APA:2017:3109).

Qualitative assessment of the application of the State aid *acquis*; preliminary references

Spanish courts generally applied the State aid *acquis* properly, both in relation to the interpretation of the notion of aid under Article 107(1) TFEU for the purposes of the application of Article 108(3) TFEU and in relation to the recovery of aid declared unlawful and incompatible by the Commission. In this regard, the courts granted interim relief in some instances. In particular, the recent judgments of the Supreme Court, as those included in the selected judgments, reveal a mature assimilation of the State aid discipline by the last instance court in Spain. In this regard, the new regulation on cassation appeal before the Supreme Court established by Organic Law 7/2015, which introduced the criterion for admission known as "objective cassation interest for the formation of case law" in the administrative courts, may have positive effects for the enforcement of State aid rulings as, predictably, more State aid cases will be reviewed by the Supreme Court.

[371] Cases C- 213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (1990) ECLI:EU:C:1990:257; Joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* (1991) 143/88 ECLI:EU:C:1991:65.

[372] Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* (1978) ECLI:EU:C:1978:49.

Regarding preliminary rulings, Spanish courts have since 2007 made relatively few references to the CJEU in the field of State aid. The references related to the notion of State aid under Article 107(1) TFEU. Some of the references were concerned with fiscal measures, that is, regarding the powers of some Spanish regions with a significant degree of fiscal autonomy under the Spanish Constitution, particularly the Basque Country,[373] some regional taxes on large retail establishments, tax exemptions in favour of public undertakings,[374] and tax exemptions in favour of the Catholic Church.[375] In these cases the main issues related to the notions of advantage and selectivity under Article 107(1) TFEU. Other references were related to the notion of State resources under Article 107(1) TFEU in the energy[376] and television broadcasting sectors.[377] The majority of the references were made by the Spanish Supreme Court;[378] the remainder, except for one,[379] stemmed from the administrative courts.

Qualitative assessment of any other relevant trends in State aid enforcement

Two main trends may be highlighted in recent years, namely: (i) the emergence of significant uncertainty in relation to the recovery of State aid, particularly in some relevant cases, involving large amounts of aid to be recovered, and (ii) the increasing observance by the Spanish judiciary, particularly by the Supreme Court, of the Commission Notice on the enforcement of State aid rules by national courts.

In relation to the first trend, a significant uncertainty has emerged in Spain in relation to the recovery of State aid, both in relation to fiscal and non-fiscal State aid. The foregoing is the result of a number of factors, including the adoption by the Commission of some decisions in Spanish high profile State aid cases, with large amounts of State aid to be recovered, which have been followed by appeals in relation to which the GC and the ECJ have reached contradictory judgments. Two sagas are particularly worth mentioning: (i) the Commission decisions concerning the amortisation of financial goodwill in Spain and (ii) the Commission decisions concerning the deployment of digital terrestrial television in Spain.

Other relevant cases refer to the recovery of the State aid granted by Spain to some football clubs. In this regard, for example, the High Court of Madrid - in ruling ECLI: ES:TSJM:2016:4090 - ruled that the measure set out in Article 12(5) of Corporation Tax Law, concerning the amortisation of financial goodwill in Spain, did not constitute State aid and did not have to be recovered as the Commission decision which was the legal basis of the resolution challenged in that ruling had been annulled by the GC (ruling ECLI:EU:T:2014:939). Consequently, the Madrid High Court accepted the appeal and annulled the challenged resolution. Subsequently, however, the GC judgment, cited by the High Court of Madrid, was annulled by the CJEU (ruling ECLI:EU:C:2016:981) and the decision was referred back to the GC. In November 2018, the GC upheld the challenged Commission decisions, which the High Court of Madrid had not observed on the basis of the previous GC ruling.[380]

In relation to the second trend, Spanish courts cited the Commission Notice on the enforcement of State aid rules by national courts,[381] in approximately 30 cases since its adoption in 2009.[382] A significant number of those cases concerned the abovementioned saga and related to the granting of State aid by Spain to finance the transition from analogue to digital terrestrial television in remote areas. Some of the cases pertaining to this saga brought about an interesting debate between the Spanish High Court and the Spanish Supreme Court regarding the remedies that can be adopted for the effective recovery of State aid, as discussed in the selected judgments.

In general, national courts have become more familiar with State aid rules since 2007, and the quality of national rulings has improved. As mentioned before, this is particularly the case with the Spanish Supreme Court.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

In general, the notion of State aid has been conducted well by national courts since 2007. For instance, the Supreme Court applied the criteria developed by the CJEU to determine the absence of selectivity in measures adopted by sub-national authorities, namely institutional autonomy, procedural autonomy and financial or economic autonomy in several cases (*e.g.* ruling ECLI:ES:TS:2012:2588). However, in some follow-up cases regarding references for preliminary rulings to the CJEU, the regional courts did not interpret the judgment of the CJEU correctly, in particular the *Navantia* judgment,[383] That judgment — contrary to what the regional courts concluded — established that the exception from property tax under review may constitute State aid prohibited by Article 107(1) TFEU. In this regard, the Supreme Court has agreed to review one of these judgments by its decision of 21 July 2017 (ruling ECLI:ES:TS:2017:8013A), considering that the lower court did not interpret the CJEU preliminary ruling correctly.

Any other relevant comments or findings

Not applicable

[373] See Cases C-428/06 to C-434/06 *UGT Rioja* (2008) EU:C:2008:488.
[374] See Case C-522/13 *Navantia* (2014) EU:C:2014:2262.
[375] Case C-233/16, *Anged / Catalonia* (2018) EU:C:2018:280; Case C-234/16 and C-235/16 *Anged/Asturias* (2018) EU:C:2018:281; and Cases C-236/16 and C-237/16 *Anged /Aragón* (2018) EU:C:2018:291.
[376] See Case Case C-275/13 *Elcogás*,(2014) EU:C:2014:2314.
[377] See Case C-222/07 *UTECA* (2009) EU:C:2009:124.
[378] See for these findings the recent study carried out by a Spanish Magistrate, Ordóñez Solis, D., "Enfoques y desenfoques en la aplicación del régimen europeo de ayudas de Estado por los jueces españoles", *Unión Europea Aranzadi*, No 6, 2018.
[379] See Case C-352/14 *Iglesias Gutiérrez* (2015) EU:C:2015:691. This case concerns an interesting question posed by a labour court asking, in essence, whether the decision on a bank restructuring and Articles 107 TFEU and 108 TFEU precluded the application of national legislation under which the compensation payable to an employee whose dismissal is held to be unfair is set at an amount higher than the legal minimum. The court concluded that neither the State aid decision nor Articles 107 TFEU and 108 TFEU precluded such application.
[380] All internal recovery procedures (related to the three Commission decisions concerning financial goodwill) have been appealed before the administration and/or the administrative courts and are suspended until the final decision of the CJEU in each case (first, second and third Commission decision).
[381] Commission Notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1–22.
[382] According to the search carried out by the author in Westlaw and CENDOJ (The Judicial Documentation Centre of the Spanish General Council of the Judiciary). The last search was conducted on June 23 2018.
[383] Case C-522/13 *Ministerio de Defensa and Navantia SA v Concello de Ferrol* (2014) ECLI:EU:C:2014:2262.

26.2 Case summaries

Case summary ES1

Date

18/12/2018

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Tribunal Supremo. Sala de lo Contencioso-Administrativo (Madrid, Sección 2)

Court which adopted the ruling (English)

Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=4532722&links=ayudas%20estatales%20Y%20medidas%20cautelares&optimize=20090507&publicinterface=true

Case reference

ECLI:ES:TS:2009:2061

Procedural context of the case

In 2007, a Decree modified the Corporation tax rate in Guipúzcoa (Decreto Foral-Norma 3/2007, of 29 December which modified the Norma Foral 7/1996, of 4 July, on Corporation Tax).

In 2008, the Autonomous Community of La Rioja lodged a contentious-administrative appeal against the regional measure, requesting the suspension of the tax rate at issue. By interim order (auto) of 6 March 2008, the High Court of the Basque Country denied the adoption of the interim measure. Against this order, the plaintiff brought an appeal which was dismissed by interim order of 9 April 2008 of the High Court of the Basque Country. The plaintiff thereupon lodged an appeal in cassation against that order before the Spanish Supreme Court.

Type of action

Private enforcement

Delivery date of the ruling

26/03/2009

Language

Spanish

Headnote

In this ruling, the Court decided to reject the adoption of interim measures, upholding the ruling of the lower instance court, even though the national measure had been adopted in violation of Article 88(3) of the EC Treaty (current Article 108(3) TFEU).

Parties

Names of the parties to the action

COMUNIDAD AUTONOMA DE LA RIOJA

Versus

Diputación Foral de Guipúzcoa y la Confederación Empresarial Vasca (CONFEBASK)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Public authority; Other (Trade association)

Sector relating to the State aid argument

Not applicable. The measure is generally applicable to companies (Corporation Tax).

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

By order of 6 March 2008, the High Court of the Basque Country denied the adoption of the interim measure, the suspension of the tax rate at issue. In its order, the High Court of the Basque Country assessed the criteria to grant interim measures (*periculum in mora, prima facie* case and balance of interests) and pointed out that the first instance court had referred a request for a preliminary ruling to the CJEU on whether the challenged tax measures had to be considered as State aid contrary to the TFEU.

In this context, even acknowledging the doubts of the first instance court regarding the State aid character of the measures under review, which led this Court to refer a request for a preliminary ruling to the CJEU, the High Court of the Basque Country rejected the adoption of the interim measure requested in view of the public interest in keeping the norm under review in force. This ruling was confirmed by order of 9 April 2008 of the High Court of the Basque Country.

The plaintiff argued that the Spanish Supreme Court, in a judgment of 9 December 2004, had annulled a similar regional tax measure. Furthermore, the plaintiff argued that the tax measure challenged in the case at hand aggravated the situation that was already declared contrary to the legal system by the Supreme Court.

Remedy(ies) sought

Other remedy sought

Interim measure - suspension of the national measure

Outcome of the case

Conclusions adopted by the national court

First of all, the Court highlighted that the jurisprudence of the Spanish Supreme Court has stated that in view of the doubts of the First Instance Court regarding the merits of the case (that had led this Court to refer a request for a preliminary ruling to the CJEU on the State aid character of the measures at issue) the appearance of a prima facie case (*fumus bonis iuris*) is weakened, and therefore the national measure cannot be suspended (even on a provisional basis) without a ruling on the merits on the case.

Furthermore, the Supreme Court noted that the First Instance Court could also take into account for the resolution of the case on the merits the findings of the ECJ (current CJEU) in Case Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others C-428/06, in which the ECJ (current CJEU) ruled that "Article 87(1) EC [current Article 107(1) TFEU] is to be interpreted as meaning that, for the purpose of assessing whether a measure is selective,

account is to be taken of the institutional, procedural and economic autonomy enjoyed by the authority adopting that measure. It is for the national court, which alone has jurisdiction to identify the national law applicable and to interpret it, as well as to apply Community law to the cases before it, to determine whether the Historical Territories and the Autonomous Community of the Basque Country have such autonomy, which, if so, would have the result that the laws adopted within the limits of the areas of competence granted to those infra State bodies by the Spanish Constitution of 1978 and the other provisions of Spanish law are not of a selective nature within the meaning of the concept of State aid as referred to in Article 87(1) EC [current Article 107(1) TFEU]".

In this regard, the Supreme Court noted that in light, inter alia, of Article 88 of the EC Treaty (current Article 108 TFEU) national authorities should have prudently notified the national measures at stake to the Commission, although, given the circumstances of the case, it could not be concluded that the authorities had acted with an elusive intent under the applicable national law.

Finally, the Court also recalled the judgment of the GC in Case Government of Gibraltar (T-211/04) and United Kingdom of Great Britain and Northern Ireland (T-215/04) v Commission of the European Communities, which stated that Gibraltar had the right to implement its own taxation and to apply a lower Corporate tax than that applicable in the United Kingdom. Lastly, the Court mentioned Case Portuguese Republic v Commission of the European Communities C-88/03 regarding the fiscal regime of the Azores.

In light of the foregoing, the Supreme Court dismissed the appeal and denied the requested interim measure.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-88/03, Portugal v Commission of the European Communities (2006) ECLI:EU:C:2006:511
- C-428/06 to C-434/06, Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others (2008) ECLI:EU:C:2008:488
- T-211/04 and T-215/04, Government of Gibraltar v Commission of the European Communities (2008) ECLI:EU:T:2008:595

National case law:
- Spanish Supreme Court, judgment of 12 July 2007
- Spanish Supreme Court, judgment of 9 December 2004
- Spanish Supreme Court, judgment of 12 July 2007 and 15 January 2008
- Spanish Supreme Court, judgment 13 March 2008
- Spanish Supreme Court, judgment of 6, 8 and 9 May 2008
- Spanish Supreme Court, judgment of 3 October 2008
- Spanish Supreme Court, judgment of 26 February 2007
- Spanish Supreme Court, judgment of 27 May 2008

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary ES2

Date

18/12/2018

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Tribunal Supremo. Sala de lo Contencioso-Administrativo (Madrid, Sección 3)

Court which adopted the ruling (English)

Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=6453084&links=ayudas%20estatales%20Y%20recuperaci%C3%B3n&optimize=20120727&publicinterface=true

Case reference

ECLI:ES:TS:2012:4955

Procedural context of the case

By orders (autos) of 2 June 2010 and 16 of September 2010, the Spanish National High Court rejected the suspension of the order requested by the plaintiff (Resolution by the State Secretariat for Telecommunications and the Information Society publishing the addendum to the collaboration framework between the Ministry of Industry, Tourism and Trade and Ceuta for the development of the telecommunications programme and infrastructures).

In 2010, the Commission initiated the procedure provided for in Article 108(2) TFEU in relation to the aid for the rollout of Digital Terrestrial Television. In 2011, in light of the procedure initiated by the Commission, the plaintiff requested the suspension of the abovementioned resolution until the Commission would take a decision about the compatibility of the aid with the 'common market'. The plaintiff also requested the recovery of the aid from the beneficiaries.

By order of 2 June 2011, confirmed by order of 4 October 2011, the Spanish National High Court rejected the interim measures requested. The plaintiff thereupon lodged an appeal with the Supreme Court against that order.

Type of action

Private enforcement

Delivery date of the ruling

16/07/2012

Language

Spanish

Headnote

In this ruling, the Court held that the lower court should have afforded the interim relief requested by the plaintiffs in the form of an order to place the contested funds in a blocked account in conformity with the principle of effectiveness of Union law.

Parties

Names of the parties to the action

SES ASTRA IBÉRICA, S.A.

Versus

ADMINISTRACIÓN DEL ESTADO

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

Telecommunications infrastructures

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The contested order stated that, due to the fact that the projects financed with the alleged aid had already been executed, their suspension was not possible. The Spanish National High Court therefore rejected the suspension of the measure at stake and the recovery of the aid already granted to the beneficiaries, since these interim measures went beyond the suspension of the contested resolution, affecting third parties that were not defendants in the case at hand. In addition, the Court noted that those affected by the contested resolution were not only the State and the alleged beneficiaries, but also the Autonomous City of Ceuta and the citizens more generally.

In these circumstances, the plaintiff argued that the contested measures should be considered as aid incompatible with the 'common market', reiterating the arguments that the Commission mentioned in its decision to initiate the formal investigation procedure. Moreover, the plaintiff stated that the contested resolution had not exhausted its effects, and requested that the beneficiaries that had received the aid could not invest the amounts received, and that the regional Administration ceased to assume the maintenance costs of the equipment and facilities affected by the contested measure. Ultimately, the plaintiff requested to place the contested funds in a blocked account, so that the beneficiaries would not have access to them until the Commission had taken a final decision regarding the granting of the aid.

Remedy(ies) sought

Recovery order in relation to unlawful aid; Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Spanish Supreme Court stated that, once the Commission had started an investigation regarding an aid measure, the suspension of the contested measure was compulsory. Nevertheless, the Court accepted that when the measures at issue have already been executed, they can hardly be suspended. The Court also considered that, in the case at hand, the recovery of the amounts received by the beneficiaries was not adequate, particularly as the Commission could still consider the alleged aid as compatible.

However, the Court, referring to the Commission Notice on the enforcement of State aid rules by national courts (2009/C 85/01), ruled that the Spanish National High Court should have afforded the interim relief requested by the plaintiffs in the form of an order to place the contested funds (including the interest) in a blocked account until the Commission had taken a decision. This interim

measure would satisfy the principle of effectiveness of Union law, as in the event that the aid is considered to be incompatible, the funds could be returned to the State.

In light of the foregoing, the Court accepted the appeal. Nonetheless, the Court found that it could not determine the identity of the beneficiaries of the aid subject to the obligation to place the contested funds in a blocked account, as this was competence of the previous instance court. Therefore, the Court sent the case back to the lower instance court to decide on the particular remedy/ies that should be granted.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

Subsequent ruling from the lower court is not available.

Difficulties referred to by the national court in deciding the case (optional)

The Court pointed out that its ruling in this case, and the fact of sending the case back to the lower court, presented practical and procedural drawbacks, but it complied with the obligations of Member States under the TFEU.

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

- Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009 (Commission Enforcement Notice)
- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary ES3

Date

18/12/2018

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Tribunal Supremo. Sala de lo Contencioso-Administrativo (Madrid, Sección 1)

Court which adopted the ruling (English)

Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 1)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8152934&links=15130%2F2016&optimize=20170928&publicinterface=true

Case reference

ECLI:ES:TS:2017:8013A

Procedural context of the case

The plaintiff challenged a Property Tax Ordinance of the Municipality of A Coruña in the region of Galicia. The High Court of Galicia ruled that the Property Tax Ordinance cannot be considered as State aid or contrary to the criteria set out in the Navantia judgment by the CJEU (Case Ministerio de Defensa and Navantia SA v Concello de Ferrol C-522/13). Therefore, by judgment of 1 February 2017, the Hight Court of Galicia dismissed the appeal.

The plaintiff thereupon lodged an appeal in cassation against that judgment before the Spanish Supreme Court.

Type of action

Private enforcement

Delivery date of the ruling

21/07/2017

Language

Spanish

Headnote

In this ruling, the Court found that the lower court did not interpret correctly the Navantia judgment of the CJEU of which this ruling is a follow-up (Case C-522/13, ECLI:EU:C:2014:2262).

Parties

Names of the parties to the action

Sociedad de Fomento y Desarrollo Turístico, S.A.

Versus

Ayuntamiento de A Coruña

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

A - Agriculture, forestry and fishing

Fishing

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The plaintiff argued that the contested judgment met the criteria for admission of the appeal before the Supreme Court under the "objective cassational interest for the formation of case law" introduced by Organic Law 7/2015 as it: (i) resolved a process where a general provision was challenged; (ii) affected a large number of situations; and (iii) set jurisprudence which can be seriously harmful to the general interest, making it advisable for the Supreme Court to adopt a ruling on the case.

Remedy(ies) sought

Other remedy sought

The plaintiff considered that there was an objective cassational interest for the formation of case law ('interés casacional objetivo') and requested the admission of the appeal so that the Supreme Court could adopt a ruling on the case.

Outcome of the case

Conclusions adopted by the national court

The Spanish Supreme Court found that the regional court had not interpreted the judgment of the CJEU in Case Ministerio de Defensa and Navantia SA v Concello de Ferrol C-522/13 correctly, as that judgment, contrary to what the regional court concluded, established that the exception from property tax under review may constitute State aid prohibited by Article 107 TFEU. Consequently, it could not be ruled out that the tax benefit at issue may constitute State aid. The contested judgment, by denying a priori the State aid character of the measure under review, could therefore be seriously damaging to the general interest insofar as it was capable of enshrining, by judicial decision, a situation of breach of Union law.

In light of the foregoing, the Spanish Supreme Court confirmed the existence of a relevant question that must be answered for the development of jurisprudence ('interés casacional objetivo'). Specifically, it must be answered whether the exception from property tax for commercial ports, where activities related to the fishing sector are developed, may constitute State aid prohibited by Article 107 of TFEU.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The Court confirmed the existence of a relevant question that must be answered by the Spanish Supreme Court for the development of jurisprudence ('interés casacional objetivo'). Therefore, the Court upheld the appeal.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-522/13, Ministerio de Defensa and Navantia v Concello de Ferrol (2014) ECLI:EU:C:2014:2262

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-522/13 - Ministerio de Defensa and Navantia v Concello de Ferrol (2014) ECLI:EU:C:2014:2262 (http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-522/13)

Any other comments (optional)

With regard to the CJEU State aid judgment, the High Court of Andalusia, similarly to the High Court of Galicia in the case under review, stated (in case ES:TSJAND:2017:16179) that the Navantia judgment of the CJEU was not conclusive regarding the characterisation of the measure at hand as State aid, a judgment that raises serious doubts in light of the ruling of the Supreme Court in this case.

Case summary ES4

Date

19/12/2018

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Tribunal Supremo. Sala de lo Contencioso-Administrativo (Madrid, Sección 2)

Court which adopted the ruling (English)

Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8531688&links=%221424%2F2018%22&optimize=20181015&publicinterface=true

Case reference

ECLI:ES:TS:2018:3358

Procedural context of the case

By Law 15/2000, a regional tax on large commercial establishments was introduced throughout the Autonomous Community of Catalonia in order to offset the potential impact of those large retail establishments on the territory and the environment. By Decree 342/2001 approving the regulations on the tax on large retail establishments of 24 December 2001, the Regional Government of Catalonia implemented that tax.

In 2002, the plaintiff (ANGED), a national association of large distribution companies, brought an action for annulment against the abovementioned decree before the High Court of Catalonia on the ground that it was incompatible with the principle of freedom of establishment and with the rules on State aid. That Court reserved its ruling pending the outcome of an action brought by the Spanish Government before the Spanish Constitutional Court against that legislation. Following the dismissal of that action by the Constitutional Court on 5 June 2012, the High Court of Catalonia also dismissed the action brought by the plaintiff. The plaintiff then appealed against that ruling before the Spanish Supreme Court.

The plaintiff had also lodged a complaint with the Commission concerning the introduction of the tax on large retail establishments and the claim that it amounted to State aid. Further to a request for further information submitted to the Spanish authorities, the Commission informed those authorities by letter of 2 October 2003 that it had closed its investigation and would take no further action on the complaint. It had concluded, after analysing the features of the tax on large retail establishments in the light of Article 107(1) TFEU, that that tax was compatible with the law on State aid, as the revenue from the tax was not intended to be used to support specific businesses or business sectors.

However, following a new complaint filed by the plaintiff in 2013, the Commission informed the Spanish authorities by letter of 28 November 2014 that, further to a new preliminary assessment of the tax on large retail establishments system, the exemption granted to small retail establishments and to certain specialist establishments could be regarded as State aid incompatible with the internal market, and requested the Spain to withdraw or amend that tax.

In those circumstances, the Spanish Supreme Court decided to stay the proceedings and to refer a request to the CJEU for a preliminary ruling. By judgment of 26 April 2018 (Case Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya C-233/16) the CJEU ruled that a tax imposed on large retail establishments according, in essence, to their sales area constituted State aid within the meaning of Article 107(1) TFEU, to the extent that it exempted collective large retail establishments with a surface area equal to or greater than 2,500 m2.

Type of action

Private enforcement

Delivery date of the ruling

26/09/2018

Language

Spanish

Headnote

In this ruling, the Court held that the Catalonian regional tax did constitute State aid to the extent that it exempted collective large retail establishments with a surface area equal to or greater than 2,500 m2, following the judgment of the CJEU in reply to a preliminary ruling request by the Supreme Court in this case.

Parties

Names of the parties to the action

Asociación Nacional de Grandes Empresas de Distribución

Versus

Generalidad de Cataluña

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

Not applicable. The measure is generally applicable to large commercial establishments.

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The Catalonia Regional Government was of the opinion that the CJEU judgment Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya C-233/16 concluded that the tax on large commercial establishments was not contrary to Union law, as it did not violate the freedom of establishment set in Articles 49 and 54 of TFEU. Moreover, the Regional Government considered that the different tax treatment granted to commercial establishments depending on their surface or in response to the lower environmental and territorial impact did not entail a selective advantage constituting incompatible State aid with the internal market under Article 107(1) TFEU.

The plaintiff argued that the tax on large retail establishments was incompatible with the principle of freedom of establishment and with State aid rules. In view of this, the plaintiff sought the annulment of the judgment of 27 September 2012 of the High Court of Catalonia and of Decree 342/2001.

Remedy(ies) sought

Other remedy sought

The annulment of Decree 342/2001 approving the regulations on the tax on large retail establishments and the judgment of 27 September 2012 of the High Court of Catalonia

Outcome of the case

Conclusions adopted by the national court

Following the judgment of the CJEU in this case, the Supreme Court ruled that the tax on large commercial establishments did not infringe the freedom of establishment under articles 49 and 54 TFEU. Similarly, the Supreme Court found that the different tax treatment granted to commercial establishments according to their surface or in response to the reduced environmental and territorial impact of certain specialised establishments did not entail a selective advantage under Article 107(1) TFEU.

However, the Court ruled that the Catalonian regional tax did constitute State aid to the extent that it exempted collective large retail establishments with a surface area equal to or greater than 2,500 m2. In this regard, the Court noted that, in accordance with the ruling of the CJEU, in the case of specific exemptions of commercial establishments based on their lower environmental and territorial impact, the judicial bodies may eventually check whether the specific establishments that enjoy such exemptions have the alleged lower environmental and territorial impact. A circumstance that did not occur in the case of the appeal under review, which did not refer to individualised legal situations but to the review of legality of a regulatory provision.

In light of the foregoing, the Court partly upheld the appeal and annulled the regional Decree 342/2001 approving the regulations on the tax on large retail establishments.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The annulment of Decree 342/2001 approving the regulations on the tax on large retail establishments

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-233/16, Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya (2018) ECLI:EU:C:2018:280

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-233/16, Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya (2018) ECLI:EU:C:2018:280 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=203075&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=6447358)

Any other comments (optional)

The judgment is relevant as there have been several proceedings related to the same contested tax in some Regional High Courts. However, this is the most relevant ruling as it has been adopted by the Supreme Court, which is the highest judicial instance in Spain.

Case summary ES5

Date

18/12/2018

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Tribunal Supremo. Sala de lo Contencioso-Administrativo (Madrid, Sección 3)

Court which adopted the ruling (English)

Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8457095&links=ayuda&optimize=20180723&publicinterface=true

Case reference

ECLI:ES:TS:2018:7861A

Procedural context of the case

In 2009, the plaintiff brought an appeal against an agreement of the Council of Ministers establishing the criteria and distribution of the funding for the actions aimed at switching over from the analogue television to the digital terrestrial television. The plaintiff sought the annulment of the agreement and the recovery of the aid (including the interest).

In 2010, the Commission started an investigation (Article 108(2) TFEU) to analyse whether the funds for the digital terrestrial television were in line with State aid rules. In this context, the Spanish Supreme Court decided in 2011 to suspend the case at hand until the Commission had taken a decision about the qualification of the aid.

In 2013, the Commission adopted Commission Decision 2014/489/EU of 19 June 2013 declaring that the State aid for the development of the digital terrestrial television was contrary to Union law, and therefore ordering the recovery of the aid at hand from the beneficiaries. Several actions were lodged before the GC seeking the annulment of the Commission decision at stake (Cases Comunidad Autónoma de Galicia and Redes de Telecomunicación Galegas Retegal, SA (Retegal) v European CommissionT-463/13 & T-464/13, Kingdom of Spain v European Commission T-461/13, Navarra de Servicios y Tecnologías, SA v European Commissio T-487/13). Accordingly, the Spanish Supreme Court issued an order declaring the suspension of the case until the GC had adopted a ruling.

By judgments of 26 November 2015, the GC dismissed the appeals and confirmed the Commission decision of 19 June 2013. The Kingdom of Spain lodged an appeal against the judgments of the GC before the CJEU and so did the Autonomous Community of Galicia and Retegal, an undertaking owned by the Autonomous Community of Galicia. The CJEU adopted two judgments on 20 December 2017. The first one, on the appeal lodged by the Kingdom of Spain, confirmed the GC´s judgment. The second one, conversely, set aside the judgment of the GC, and annulled the Commission decision at stake on the basis that the statement of reasons concerning the selectivity of the measure at issue was inadequate.

Type of action

Private enforcement

Delivery date of the ruling

10/07/2018

Language

Spanish

Headnote

In this ruling, the Court issued an interim order suspending the procedure until the Commission had taken a decision regarding the lawfulness of the measure at hand under State aid rules.

Parties

Names of the parties to the action

SES Astra Ibérica, S.A

Versus

Estado español

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

Telecommunications

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The State Attorney considered that the purpose of these proceedings was not affected by the doubts of the Commission about the compatibility of the alleged State aid with Union law. Therefore, the Supreme Court could issue a ruling. Alternatively, the State Attorney stated submitted that there were reasons for maintaining the suspension of the measure under review until the Commission adopted its new decision on the case, particularly given that the Commission had sent a letter to the Kingdom of Spain indicating its intention to reopen the investigation to determine whether the aid measures in question were compatible with Union law. The representative of the State argued that the reopening of the procedure implied maintaining the existence of indications of State aid, so that as long as the Commission did not decide on this issue, it was not possible to execute the contested measure. The plaintiff in the main proceedings claimed the suspension of the proceedings. By contrast, other parties, including the Autonomous Community of Galicia sought the resumption of the proceedings and the rejection of the appeal.

Remedy(ies) sought

Other remedy sought

The plaintiff requested the suspension of the procedure until the Commission had taken a new decision. Alternatively, the plaintiff requested the estimation of the appeal.

Outcome of the case

Conclusions adopted by the national court

The Supreme Court concluded that, even though a recent judgment of the CJEU had annulled the Commission decision that declared the contested measures as State aid, the Court did so on the basis of a formal reason concerning a failure to state reasons, and the Commission would adopt a new decision to address it. Consequently, the Supreme Court considered that the reasons that led to the original suspension of the procedure remained despite the CJEU´s judgment. Therefore, the Court decided to suspend the procedure until the Commission had taken a new decision. In this regard, the Court noted that the plaintiff, some of the defendants and also, although alternatively, the State Attorney, had argued that the reasons that justified the maintenance of the suspension existed until the Commission adopted a new decision ending the investigation procedure.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

Order suspending the procedure until the Commission has taken a decision regarding the lawfulness of the State aid

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-461/13, Kingdom of Spain v European Commission (2015) ECLI:EU:T:2015:891
- T-463/13, Comunidad Autónoma de Galicia and Retegal v Commission (2015) ECLI:EU:T:2015:901
- T-464/13, Comunidad Autónoma de Galicia and Redes de Telecomunicación Galegas Retegal, SA (Retegal) v European Commission (2015) ECLI:EU:T:2015:901
- T-487/13, Navarra de Servicios y Tecnologias v European Commission (2015) ECLI:EU:T:2015:899
- C-70/16 P, Comunidad Autónoma de Galicia and Retegal v European Commission (2017) ECLI:EU:C:2017:1002
- C-81/16 P, Kingdom of Spain v European Commission (2017) ECLI:EU:C:2017:1003

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Commission Decision 2014/489/EU of 19 June 2013 on State aid SA.28599 (C 23/2010), OJ L 217, 23.7.2014

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-70/16 P, Comunidad Autónoma de Galicia and Retegal v Commission (2017) ECLI:EU:C:2017:1002 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-70/16)

Any other comments (optional)

No other comments

Case summary ES6

Date

05/01/2019

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Audiencia provincial de Alicante, Sección 8 (Tribunal de marca de la Unión Europea)

Court which adopted the ruling (English)

Alicante Provincial Court, Section 8 (Community trade mark court)

Instance court which adopted the ruling

Specialised court

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8304185&links=%22243%2F2017%22%20%22476%2F2017%22&optimize=20180301&publicinterface=true

Case reference

476/17

Procedural context of the case

By decision of 4 July 2016, the Commission concluded that public support measures (public guarantees allowing the clubs at stake to obtain loans on more favourable terms) granted by Spain ('Instituto Valenciano de Finanzas') to three professional football clubs gave those clubs unlawful and incompatible State aid. As a result, Spain had to recover the incompatible and unlawful State aid from the clubs, being Elche C.F S.A.D ('Elche CF') one of them.

Elche CF had entered into an arrangement with creditors ('concurso de acreedores') on 6 August 2015. The credit in favour of the State which derived from the Commission decision was graded by the insolvency administration according to the national bankruptcy rules. Specifically, one half of the credit was graded as a credit with general preference ('crédito con privilegio general'), the other half as ordinary credit ('crédito ordinario') and the interest derived from the State aid, computed from the date of granting the aid until the date when the club entered into an arrangement with creditors, as subordinated credit ('crédito subordinado').

Both, the Instituto Valenciano de Finanzas and Elche CF appealed the credit grading.

By judgment of 6 March 2017, the Commercial Court Number 3 of Alicante (Juzgado de lo Mercantil número 3 de Alicante) upheld the appeal of the Instituto Valenciano de Finanzas and ruled that the entire credit deriving from the Commission decision had to be graded as a credit against the estate ('crédito contra la masa'). The Commercial Court also ordered the insolvency administration to pay the credit at stake without delay.

In this context, Elche CF and the insolvency administration lodged and appeal against the judgment of the Commercial Court.

Type of action

Public enforcement

Date of the Commission decision

04/07/2016

Delivery date of the ruling

01/12/2017

Language

Spanish

Headnote

In this ruling, the Court referred to the principles of effectiveness and primacy of Union law to alter the credit grading of an order to recover State aid that would correspond under national bankruptcy rules.

Parties

Names of the parties to the action

ELCHE CF SAD y Administración Concursal

Versus

INSTITUTO VALENCIANO DE FINANZAS

The relationship of the plaintiff to the measure

Beneficiary; Other (Insolvency administration)

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

R - Arts, entertainment and recreation

Sports activities

The type of State aid measure challenged in the court proceedings

Loan at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

Elche CF argued that the judgment of the Commercial Court violated the Spanish bankruptcy rules and the case law interpreting them. The plaintiff considered that, in principle, the credit deriving from the recovery order should have been graded as ordinary credit ('crédito ordinario'). However, the plaintiff added that, due to the fact that the claim was communicated late in the context of the bankruptcy proceedings, the credit at stake should have been graded as a subordinated credit ('crédito subordinado').

The insolvency administration considered that the credit should have been graded as a public law credit ('crédito de derecho público'). To this extent, the insolvency administration noted that, as stated in the Notice from the Commission 2007/C 272/05 "the Member State should immediately register its claims in the bankruptcy proceedings. According to the CJEU case law, recovery will be done according to national bankruptcy rules. The recovery debt will thus be refunded by virtue of the status given to it by national law."

The Instituto Valenciano de Finanzas argued that the total amount of the credit which derived from the Commission decision must be graded as a 'credit against the estate'. In addition, the Instituto Valenciano de Finanzas considered that according to the principles of effectiveness and primacy of Union law, the Spanish bankruptcy rules should not apply.

Remedy(ies) sought

Other remedy sought

The plaintiff claimed the graded of the credit as a subordinated credit ('crédito subordinado').

Outcome of the case

Conclusions adopted by the national court

The Court referred to the principles of effectiveness and primacy of Union law to alter the credit grading that would correspond under Spanish bankruptcy rules and referred to the ECJ (current CJEU) Case Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) in this regard, as well as to several judgments of the CJEU concerning the principle of effective recovery. In particular, the Court stated that the credit (in favour of the State and which derived from the Commission decision declaring aid unlawful and incompatible) is autonomous and derives from Union law. The payment of the credit could not therefore be frustrated by the ordinary application of national law in light of its full effectiveness. Therefore, the credit has to be paid regardless of the priority criteria set in the Spanish bankruptcy rules for the payment of the undertaking's debts. The credit must therefore be paid immediately and without delay (without prejudice to the suspension of the execution of the credit in response to the judgment of the CJEU).

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid; Liquidation of the aid beneficiary – i.e. aid recovery in the context of insolvency proceedings

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-480/98, Kingdom of Spain v Commission of the European Communities (2000) ECLI:EU:C:2000:559
- C-529/09, European Commission v Kingdom of Spain (2013) ECLI:EU:C:2013:31
- C-232/05, Commission of the European Communities v French Republic Opinion of Advocate General (2006) ECLI:EU:C:2006:337
- C-75/97, Kingdom of Belgium v Commission of the European Communities (1999) ECLI:EU:C:1999:311
- C-183/91, Commission of the European Communities v Hellenic Republic (1993) ECLI:EU:C:1993:233
- C-348/93, Commission of the European Communities v Italian Republic (1995) ECLI:EU:C:1995:95
- C-415/03, Commission of the European Communities v Hellenic Republic (2005) ECLI:EU:C:2005:287
- C-232/05, Commission of the European Communities v French Republic (2006) ECLI:EU:C:2006:651
- C-278/92, Kingdom of Spain v Commission of the European Communities (1994) ECLI:EU:C:1994:325
- T-268/13, Italian Republic v Commission (2014) ECLI:EU:T:2014:900
- C-6/64, Costa v Enel, (1964) ECLI:EU:C:1964:66
- C-106/77, Amministrazione delle finanze dello Stato v Simmenthal (1978) ECLI:EU:C:1978:49
- C- 170/88, Ford España v Kingdom of Spain (1989) ECLI:EU:C:1989:216
- C-142/87, Kingdom of Belgium v Commission of the European Communities (1990) ECLI:EU:C:1990:125
- C-499/99, Commission of the European Communities v Kingdom of Spain (2002) ECLI:EU:C:2002:408
- C-209/00, Commission of the European Communities v Germany (2002) ECLI:EU:C:2002:747
- C-369/07, Commission of the European Communities v Hellenic Republic (2009) ECLI:EU:C:2009:428
- C-210/09, Scott y Kimberly Clark v Ville d'Orléans (2010) ECLI:EU:C:2010:294
- C-507/08, European Commission v Slovakia (2010) ECLI:EU:C:2010:802
- C-610/10, European Commission v Kingdom of Spain (2012) ECLI:EU:C:2012:781
- C-353/122, European Commission v Italian Republic (2013) ECLI:EU:C:2013:651
- T-459/93, Siemens SA v Commission of the European Communities, (1995) ECLI:EU:T:1995:100
- C-249/85, Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v Bundesanstalt für landwirtschaftliche Marktordnung (1987) ECLI:EU:C:1987:245
- C-177/06, Commission of the European Communities v Kingdom of Spain (2007) ECLI:EU:C:2007:538
- C-188/92, TWD v Bundesrepublik Deutschland (1994) ECLI:EU:C:1994:90

National case law:
- Spanish Supreme Court, judgment of 7 July 2008 (STS 646/2008)
- Spanish Constitutional Court, judgment of 14 February 1991 (STC 28/1991)
- Spanish Constitutional Court, judgment of 5 November 2015 (STC 232/2015)

√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on 'equivalence'
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Notice from the Commission - Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (2007/C 272/05), OJ C 272, 15.11.2007
- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- 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 (Text with EEA relevance), OJ L 248, 24.9.2015
- Commission Decision (EU) 2017/365 of 4 July 2016 on the State Aid SA.36387 (2013/C) (ex 2013/NN) (ex 2013/CP) implemented by Spain for Valencia Club de Fútbol Sociedad Anónima Deportiva, Hércules Club de Fútbol Sociedad Anónima Deportiva and Elche Club de Fútbol Sociedad Anónima Deportiva, OJ L 55 2.3.2017
- Commission decision of 4 July 2016

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary ES7

Date

19/12/2018

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Audiencia Nacional. Sala de lo Contencioso-Administrativo (Madrid, Sección 4)

Court which adopted the ruling (English)

National High Court. Chamber for contentious administrative proceedings (Madrid, Section 4)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=6233395&links=ayudas%20estatales%20Y%20recuperaci%C3%B3n&optimize=20120117&publicinterface=true

Case reference

ECLI:ES:AN:2011:5805

Procedural context of the case

In 2000, the State Secretariat for Scientific and Technological Policy granted an interest-free loan to the plaintiff (SIDERURGICA AÑON, S.A.) for the installation of a ring-rolling mill.

By decision of 20 October 2004, the Commission declared that the Kingdom of Spain had granted incompatible aid to the plaintiff. The plaintiff repaid certain amounts. Nevertheless, by resolution of 3 May 2010, the General Director of Industry ordered the plaintiff to repay the interest for late payment from 24 May 2005 until 20 June 2006. Furthermore, the resolution also claimed an additional amount as interest accrued for the money to be recovered from 20 June 2006 until the date on which it would actually be recovered.

On 20 July 2010, the plaintiff paid to the state the interest for late payment from 24 May 2005 until 20 June 2006. By resolution of 4 August 2010, the General Director of Industry ordered the plaintiff to pay the amount for interest accrued from 20 June 2006 until the 20 July 2010 (date in which the aid was actually recovered).

Afterwards, the plaintiff brought an appeal against the resolution of 3 May 2010 of the General Director of Industry.

Type of action

Public enforcement

Date of the Commission decision

20/10/2004

Delivery date of the ruling

07/12/2011

Language

Spanish

Headnote

In this ruling, the Court confirmed the primacy of Union law over national law in relation to the payment of interest provided for in a Commission decision on State aid in apparent contrast with provisions of the Spanish Civil Code.

Parties

Names of the parties to the action

CELSA ATLANTIC, S.A.

Versus

Ministerio de Industria, Turismo y Comercio

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

F - Construction

Installation of a ring-rolling mill

The type of State aid measure challenged in the court proceedings

Loan at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The plaintiff argued that the Secretariat could not claim the interest, particularly given that the Spanish Civil Code (Article 1109) states that that interest (anatocismo or Compound interest) must be claimed in judicial proceedings. The plaintiff pointed out that this rule is applicable to administrative contracts and referred in this regard to the case law of the Spanish Supreme Court in this field. The plaintiff also argued that the Secretariat could not claim the interest when there had been no delay in payment.

The State Attorney argued that the contested resolution of 4 August 2010 must prevail over national law due to the primacy of Union law. Particularly, the State Attorney argued that the Commission decision of 20 October 2004, which provided for the payment of compound interest in addition to the legal interest, must be applied effectively.

Remedy(ies) sought

Other remedy sought

The plaintiff challenged the recovery of the interest of an incompatible aid, particularly the compound interest.

Outcome of the case

Conclusions adopted by the national court

The Court ruled that Union law overrides national law, particularly in order to ensure the effective compliance of a Commission decision declaring aid incompatible with the internal market. The Court observed that the amount claimed as interest aims to comply with a EU obligation. The Court further stated that there is no breach of the principles of good faith and legitimate expectations when the interest claimed responds to the content of a Commission decision. According to the Court, the plaintiff might disagree and exercise legal actions, yet there was no doubt that the Kingdom of Spain had to comply with the Commission decision. Therefore, the Court dismissed the appeal.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

Commission decision of 20 October 2004

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

Celsa Atlantic, SA., owner of the original plaintiff, subrogated itself in the position of the original plaintiff, SIDERURGICA AÑON, SA.

Case summary ES8

Date

05/01/2019

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Tribunal Supremo. Sala de lo Contencioso-Administrativo (Madrid, Sección 2)

Court which adopted the ruling (English)

Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=6759993&links=ayudas%20estatales%20Y%20recuperaci%C3%B3n&optimize=20130621&publicinterface=true

Case reference

ECLI:ES:TS:2013:3083

Procedural context of the case

By decision of 11 July 2001, the Commission declared the reduction in the corporation tax base granted to the Álava Provincial Council as unlawful and incompatible State aid.

In these circumstances, the 'Territorio Histórico' and the 'Diputación de Álava' lodged an appeal before the CFI (current GC) (Diputación Foral de Álava and Gobierno Vasco v Commission T-230/01) against the Commission decision, which was dismissed by judgment of 9 September 2009. This judgment was confirmed by the CJEU by judgment of 28 July 2011 (Joined cases Comunidad Autónoma de la Rioja v Territorio Histórico de Vizcaya - Diputación Foral de Vizcaya and Others C-474/09 P to C-476/09 P).

By resolution of 6 September 2007, the Finance Director of the Álava Provincial Council (Director de Hacienda de la Diputación Foral de Álava) ordered the recovery of the aid from one beneficiary (Euro Fleet Cars, S.L.). Euro Fleet Cars brought an administrative appeal against the resolution, which was confirmed by resolution of 29 January 2010 of the 'Organismo Jurídico Administrativo de Álava'.

Euro Fleet Cars lodged then an appeal against the latter resolution before the High Court of the Basque Country, which dismissed the appeal by judgment of 26 September 2011. Euro Fleet Cars thereupon brought an appeal against the judgment of the High Court of the Basque Country before the Spanish Supreme Court.

Type of action

Public enforcement

Date of the Commission decision

11/07/2001

Delivery date of the ruling

13/05/2013

Language

Spanish

Headnote

In this ruling, the Court held that the adoption of a resolution ordering the recovery of fiscal aid without giving the aid beneficiary the right to be heard, was contrary to national and Union law.

Parties

Names of the parties to the action

EURO FLEET CARS, S.L.

Versus

Diputación Foral de Álava

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

Not applicable. The measure is generally applicable to companies starting their business activity in Álava.

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The plaintiff argued that the contested judgment violated national law and was contrary to CJEU case law due to the fact that the resolution ordering the recovery of fiscal aid did not give the aid beneficiary the opportunity to be heard by making representations. Moreover, the plaintiff considered that the contested judgment violated national law by rejecting the compensation for the economic damages suffered by the plaintiff.

The 'Diputación Foral de Alava' underlined that the Commission decision was mandatory, and that national law did not provide for any specific procedure to execute the decisions of the Commission. The 'Diputación Foral de Alava' argued that the right to be heard claimed by the plaintiff was unnecessary in the case at hand. Furthermore, the Provincial Council of Alava argued that if the economic compensation claimed by the plaintiff was granted, the plaintiff would continue to enjoy the very same advantage that was declared incompatible with the internal market by the Commission.

Remedy(ies) sought

Other remedy sought

The plaintiff sought the annulment of the contested judgment, namely, the annulment of the resolution ordering the recovery of the contested aid, and a compensation for the economic damages suffered.

Outcome of the case

Conclusions adopted by the national court

The Supreme Court concluded that the adoption of a resolution ordering the recovery of fiscal State aid without giving the aid beneficiary the right to be heard was contrary to national and Union law. More specifically, the Supreme Court concluded that the adoption by the Spanish tax authorities of a resolution ordering the recovery of fiscal State aid implementing the Commission decision

ordering the recovery through an ad hoc procedure, without giving the aid beneficiary the right to be heard, was contrary to: (i) the procedural rights enshrined in the Spanish Constitution, Article 105(c); (ii) the right to good administration included in Article 41.2 of the European Union Charter of Fundamental Rights; and (iii) the need to analyse the particular situation of each aid beneficiary within the context of the recovery procedure enshrined in CJEU case law. Therefore, the Supreme Court decided to annul the administrative acts at stake and to roll back the administrative procedure.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The Spanish Supreme Court decided to annul the administrative acts under review and to roll back the administrative procedure.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-230/01 to T-232/01 and T-267/01 to T-269/01 Territorio Histórico de Álava - Diputación Foral de Álava and Comunidad autónoma del País Vasco - Gobierno Vasco and Others v Commission of the European Communities (2009) ECLI:EU:T:2009:316
- C- 474/09 P to C-476/09 P, Territorio Histórico de Vizcaya - Diputación Foral de Vizcaya (C-474/09 P), Territorio Histórico de Álava - Diputación Foral de Álava (C-475/09 P) and Territorio Histórico de Guipúzcoa - Diputación Foral de Guipúzcoa (C-476/09 P) v European Commission (2011) ECLI:EU:C:2011:522
- C-209/00, Commission of the European Communities v Federal Republic of Germany (2002) ECLI:EU:C:2002:747
- C-369/07, Commission of the European Communities v Greece (2009) (ECLI:EU:C:2009:428)
- C-210/09, Scott and Kimberly Clark v Ville d'Orléans (2010) ECLI:EU:C:2010:294
- C-507/08, European Commission v Slovakia (2010) ECLI:EU:C:2010:802
- C-610/10, European Commission v Kingdom of Spain (2012) ECLI:EU:C:2012:781
- C-529/09, European Commission v Kingdom of Spain (2013) ECLI:EU:C:2013:31
- C-183/91, European Commission of the European Communities v Greece (1993) (ECLI:EU:C:1993:233)
- C-404/97, European Commission of the European Communities v Portugal (2000) ECLI:EU:C:2000:345
- C-404/00, European Commission of the European Communities v Kingdom of Spain (2003) ECLI:EU:C:2003:373
- C-471/09 P to C-473/09 P, Territorio Histórico de Vizcaya - Diputación Foral de Vizcaya (C-471/09 P), Territorio Histórico de Álava - Diputación Foral de Álava (C-472/09 P) and Territorio Histórico de Guipúzcoa - Diputación Foral de Guipúzcoa (C-473/09 P) v European Commission (2011) ECLI:EU:C:2011:521
- C-310/99, Commission of the European Communities v Italian Republic (2002) ECLI:EU:C:2002:143
- C-71/09 P, C-73/09 P and C-76/09 P, Comitato «Venezia vuole vivere» (C-71/09 P), Hotel Cipriani Srl (C-73/09 P) and Società Italiana per il gas SpA (Italgas) (C-76/09 P) v European Commission (2011) ECLI:EU:C:2011:368

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on 'equivalence'
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Notice from the Commission - Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (2007/C 272/05), OJ C 272, 15.11.2007
- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999
- Commission decision of 11 July 2001

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

This ruling led to a reform of the Spanish legislation to reflect its findings, particularly to the introduction of an ad hoc procedure to recover fiscal State aid. The judgment is also often cited by the Spanish authorities in the process of recovery of non-fiscal aid. Finally, it is one of the few judgments that refers to the Charter of Fundamental Rights in this context.

Case summary ES9

Date

05/01/2019

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Tribunal Supremo. Sala de lo Contencioso-Administrativo (Madrid, Sección 1)

Court which adopted the ruling (English)

Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 1)

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8503142&links=%221361%2F2018%22&optimize=20180920&publicinterface=true

Case reference

ECLI:ES:TS:2018:3097

Procedural context of the case

By agreement of 7 September (540/2010), the Diputación Foral de Álava dismissed the appeal brought by 'Helados y Postres S. A' (the plaintiff) against certain legislative acts in respect of corporate tax incentives. The plaintiff brought an appeal against the mentioned agreement, which was dismissed by a new agreement of the Diputación Foral de Álava of 23 November (768/2010).

In this context, the plaintiff lodged a contentious-administrative appeal against the agreement 768/2010, which was dismissed by a judgment of the Administrative Court Number 2 of Vitoria-Gasteiz. The plaintiff appealed the aforementioned judgment before the High Court of the Basque Country, which upheld the contested judgment and dismissed the appeal.

Therefore, the plaintiff brought an appeal against the judgment of the High Court of the Basque Country before the Spanish Supreme Court.

There was a recovery decision by the Commission concerning the facts of this case, followed by a ECJ (current CJEU) ruling of 14 December 2006 ordering the execution of this decision.

Type of action

Public enforcement

Date of the Commission decision

11/07/2011

Delivery date of the ruling

05/09/2018

Language

Spanish

Headnote

In this ruling, the Court upheld the findings of the lower courts in the dispute at hand and stated that the conditions for Member State liability for damage caused to individuals by a breach of Union law for which it was responsible were not met.

Parties

Names of the parties to the action

Helados y Postres, S. A.

Versus

Excma. Diputación Foral de Álava

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

Not applicable. The measure is generally applicable to companies (corporate tax incentives).

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The plaintiff argued that the principle of legitimate expectations and that of good faith had been breached by the Basque administration, in particular by annulling a previously recognised tax benefit, causing a damage. In particular, the plaintiff argued that the Basque Provincial Council of Alava (i) committed an administrative fault (comportamiento lesivo) by rendering ineffective a previously recognised tax; (ii) this behaviour had caused an actual and economically evaluable damage to the complainant; and (iii) that there was a causal relationship between the inadequate behaviour and the damage. The plaintiff claimed, alternatively, that the Provincial Council had infringed its financial liability in relation to the interest that the company had to pay in addition to the actual aid amount recovered, particularly due to the six year delay that took place between the Commission decision ordering the recovery and the judgment of the ECJ (current CJEU) of 14 December 2006, ordering the Provincial Council to execute the original Commission decision.

The Diputación Foral de Álava considered that the principle of legitimate expectations had not been violated since the interruption of the tax benefits was the logical consequence of the unlawfulness of the aid. The Provincial Council also considered that the conditions for Member State liability were not met.

Remedy(ies) sought

Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

The Spanish Supreme Court refused the plaintiff claims on the basis of four main arguments, namely that, (i) the Provincial Council was not responsible for the Commission decision ordering the recovery of State aid; (ii) the requirements for State aid liability for breach of Union law were not met; (iii) the principles of legitimate expectations and good faith were not infringed; and (iv) there was no financial liability on the part of the Basque administration either in relation to the interest that accrued due to the six year delay that took place to recover the State aid at stake.

In relation to the second argument, upholding the findings of the lower courts in the dispute at hand, the Supreme Court considered that the conditions for Member State liability for damage caused to individuals by a breach of Union law for which it is responsible were not met. In particular, the Court focused on the first criterion, namely, that the purpose of the legal rule infringed must be to grant rights to the individual. In this regard, the Court found that the purpose of the legal rule allegedly infringed in this case, Article 108(3) TFEU, was not to grant rights to the beneficiaries of incompatible State aid, but rather to make effective the standstill obligation enshrined therein. Indeed, the right that could eventually be compromised would be, according to the Supreme Court with reference to CJEU case law, that of the competitors of the beneficiaries that would be placed in a situation of disadvantage.

Finally, the Supreme Court addressed the alternative claim, namely that the payment of the interest in this case was the result of the delay of almost six years for the requirement of the recovery by the Provincial Council. In this regard, the Supreme Court noted that the delay was the result of "two levels of jurisdictional conflict", namely, the litigation held in relation to the contested measures before the CJEU, and that followed before national courts. Consequently, the judgment concluded that the plaintiff had the legal duty to bear the consequences of the jurisdictional debate and, among them, the passage of the necessary time. The Supreme Court also underlined that the payment of interest constituted a necessary compensation for having enjoyed a benefit, a financial advantage that can be calculated objectively, that did not concern the plaintiff.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-6/90 and C- 9/90, Francovich and Bonifachi (1991) ECLI:EU:C:1991:428 – State liability
- C-46/93 and C-48/93, Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others (1996) ECLI:EU:C:1996:79 – State liability
- C-178/94, 179/94, 188/94 and 190/94 Dillenkofer and Others v Bundesrepublik Deutschland (1996) ECLI:EU:C:1996:375 - State liability
- C-424/97, Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein (2000) ECLI:EU:C:2000:357 – State liability
- C-445/06, Danske Slagterier v Bundesrepublik Deutschland (2009) ECLI:EU:C:2009:178 – State liability
- C-118/08, Transportes Urbanos y Servicios Generales SAL v Administración del Estado (2010) ECLI:EU:C:2010:39 – Principle of equivalence
- C-5/94, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) (1996) ECLI:EU:C:1996:205 – State liability
- C-224/01, Gerhard Köbler and Republik Österreich (2003) ECLI:EU:C:2003:513 - State liability
- C-524/04, Test Plaintiffs in the Thin Cap Group Litigation v Commissioners of Inland Revenue (2007) ECLI:EU:C:2007:161 – State liability
- C-127/95, Norbrook Laboratories v Ministry of Agriculture, Fisheries and Food (1998) ECLI:EU:C:1998:151 – State liability
- C-302/97, Klaus Konle and Republic of Austria (1999) ECLI:EU:C:1999:271 – State liability
- C- 39/94, Syndicat Français de l'Express International (SFEI) and Others and La Poste and Others (1996) ECLI:EU:C:1996:285 - State liability
- T-227/01, Diputación Foral de Álava and Gobierno Vasco v Commission of the European Communities (2006) ECLI:EU:T:2006:3
- C-471/09 P to 473/09 P, Comunidad Autónoma de la Rioja v Diputación Foral de Vizcaya and Others (2014) ECLI:EU:C:2014:2304
- C-184/11, European Commission v Kingdom of Spain (2014) ECLI:EU:C:2014:316
- C-89/14, A2A SpA v Agenzia delle Entrate (2015) ECLI:EU:C:2015:537

National case law:
- Spanish Supreme Court, judgment of 5 and 25 September 2015 (Appeals n° 893 and 895/2013)
- Spanish Supreme Court, judgment of 5 March 1993
- Spanish Supreme Court, judgment of 27 June 1994
- Spanish Supreme Court, judgment of 18 January 2012 (Appeal 588/2010)
- Spanish Supreme Court, judgment of 22 September 2014 (Appeal 390/2012 , ECLI:ES:TS:2014:3717)
- Spanish Supreme Court, judgment of 22 November 2013 (Appeal 4830/2010 , ECLI:ES:TS:2013:6164)
- Spanish Supreme Court, judgment of 27 February 2015
- Spanish Supreme Court, judgment of 23 June 2015
- High Court of the Basque Country, judgment of 19 June 2014 (ECLI:ES:TSJPV:2014:1723)
- Spanish Supreme Court, judgments of 17 September 2010 (RCA 149/2007, ECLI:ES:TS:2010:4976; RCA 273/2006, ECLI ES:TS:2010:4975; y RCA 153/2007, ECLI :ES:TS:2010:4974)
- Spanish Supreme Court, judgment of 18 January 2011 (Appeal 478/2007, ECLI:ES:TS:2011:49)
- Spanish Supreme Court, judgment of 29 September 2017 (Appeal 427/2015 , ECLI:ES:TS:2017:3506)
- Spanish Supreme Court, judgment of 20 October 2017 (RCA 6/2017)
- Spanish Supreme Court, judgment of 15 January 2018 (RCA 4998/2016 , ECLI:ES:TS:2018:87)
- Spanish Supreme Court, judgment of 17 November 2016 (RCA 196/2015, ECLI ES:TS:2016:5122)
- Spanish Supreme Court, judgment of 20 February 2017 (RCA 184/2015)
- Spanish Supreme Court, judgment of 17 July 2018 (RCA 397/2017 , ECLI:ES:TS:2018:2853)
- Spanish Supreme Court, judgment of 10 May 1999
- Spanish Supreme Court, judgment of 26 April 2012
- Spanish Supreme Court, judgment of 16 May 2012 (RCA 4003/2008)

√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on 'equivalence'
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty and Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council, OJ L 83, 27.3.1999
- Decision 2002/820/EC of 11 July 2001

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary ES10

Date

20/12/2018

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Tribunal Superior de Justicia de la Comunidad Valenciana (Sala de lo Contencioso-Administrativo, Sección 4ª)

Court which adopted the ruling (English)

High Court of the Valencian Community (Chamber for contentious administrative proceedings, Section 4)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8403102&links=%2294%2F2018%20%22&optimize=20180531&publicinterface=true

Case reference

ECLI:ES:TSJCV:2018:485

Procedural context of the case

The Institut Valencia de Finances (the financial institution of the Regional Government of Valencia) granted State guarantees for bank loans in favour of three football clubs, being one of them the Hércules Club de Fútbol Sociedad Anónima Deportiva ('Hercules CF').

By decision of 4 July 2016, the Commission found that the measures under review amounted to incompatible State aid, which was unlawfully put into effect in breach of Article 108(3) TFEU, and consequently ordered the recovery of the incompatible aid.

By order of 26 September 2016, the General Director of the Institut Valenciá de Finances required 'Hercules CF' to repay the aid with interest. This order was confirmed by resolution of 15 November 2016 of the General Director of the Institut Valenciá de Finances.

On the same day, the Institut Valenciá de Finances was informed by the Commission about an order of the President of the GC in case Hércules Club de Fútbol, SAD v European Commission T-766/16R, by which the GC decided to suspend the Commission decision with regard to Hercules C.F. until the date of the order terminating the proceedings for interim measures.

By order of 22 February 2017, the first instance court (Juzgado de lo Contencioso-administrativo nº 3 de Valencia) that was reviewing the appeal against the resolution of 15 November 2016 ordering the recovery of the State aid, granted the suspension of the contested resolution that had been requested by 'Hercules CF'.

Therefore, the Institut Valencia de Finances brought an appeal against the order of 22 February 2017 before the High Court of the Valencian Autonomous Community.

Type of action

Public enforcement

Date of the Commission decision

04/07/2016

Delivery date of the ruling

22/02/2018

Language

Spanish

Headnote

In this ruling, the Court ruled that the national procedure must be suspended entirely until the CJEU decided on the interim measures requested before it. It underlined the risk for legal certainty that could arise otherwise.

Parties

Names of the parties to the action

Institut Valencià de Finances

Versus

Hércules de Alicante Club de Futbol, S.A.D

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

R - Arts, entertainment and recreation

Sports activities

The type of State aid measure challenged in the court proceedings

Loan at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The Institut Valencià de Finances requested the annulment of the order granting the interim measure at stake arguing that the order violated both national and Union law. In particular, the Institut Valencià de Finances considered that the national court could not suspend a national measure adopted in application of a Commission decision that had already been suspended by the GC, and that such course of action violated, inter alia, Articles 278 and 279 TFEU. On the other hand, 'Hercules CF' argued that the contested order was lawful.

Remedy(ies) sought

Other remedy sought

The annulment of the contested order

Outcome of the case

Conclusions adopted by the national court

The High Court revoked the interim measure (suspension of the national measure that ordered Hercules C.F. to repay the aid) adopted by the lower instance court. The High Court considered that the lower instance court should not have decided on the adoption of the interim measure requested until the GC had decided on the legality of such measure, given that the GC had already suspended

the Commission decision at stake by an order. Consequently, the national court should not have reassessed whether the interim measure requested (suspension of the national measure) had to be granted, in particular due to the risks for legal certainty that would arise if the national court and the GC reached different decisions. Therefore, the Regional High Court annulled the lower instance court ruling.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The Court revoked the interim measure (suspension of the national measure that sets the reimbursement of the unlawful aid by the beneficiary) and annulled the contested order.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-766/16 R, Hércules Club de Fútbol v Commission of the European Communities (2008) ECLI:EU:T:2018:170
- C-334/18 P(R), Hércules Club de Fútbol v Commission of the European Communities (2018) ECLI:EU:C:2018:952

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Decision (EU) 2017/365 of 4 July 2016 on the State aid SA.36387 (2013/C) (ex 2013/NN) (ex 2013/CP) implemented by Spain for Valencia Club de Fútbol Sociedad Anónima Deportiva, Hércules Club de Fútbol Sociedad Anónima Deportiva and Elche Club de Fútbol Sociedad Anónima Deportiva, OJ L 55 2.3.2017
- Commission decision of 4 July 2016

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

On March 22, 2018, the President of the GC dismissed by order the application for provisional measures requested by Hercules C.F. (ECLI:EU:T:2018:170). The football club appealed this judgment before the ECJ. The appealed was upheld by order of 22 November 2018 of the judge hearing the application for interim measures (ECLI:EU:C:2018:952). Consequently, the CJEU annulled the order of 22 March 2018 of the President of the GC and referred the case back to the GC.

Case summary ES11

Date

20/12/2018

Case identifiers

Member State

Spain

Court which adopted the ruling (national language)

Tribunal Superior de Justicia del País Vasco (Sala de lo Contencioso-Administrativo, Sección 1ª)

Court which adopted the ruling (English)

High Court of the Basque Country (Chamber for contentious administrative proceedings, Section 1)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

Spanish

Hyperlink to ruling

http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7047497&links=%22C-470%2F09%22&optimize=20140520&publicinterface=true

Case reference

ECLI:ES:TSJPV:2012:3337

Procedural context of the case

A regional measure (Norma Foral Alavesa 5/1996) granted an exemption from corporation tax for certain newly established firms. By decision of 20 December 2001, the Commission qualified the measure as incompatible State aid, and ordered the Spanish authorities to recover the aid.

The Commission decision was appealed before the CFI (current GC) (Cases Territorio Histórico de Álava - Diputación Foral de Álava and Others v Commission of the European Communities T-30/01 to T-32/01, Diputación Foral de Álava v Commission T-86/02 to T-88/02), and the judgments of the CFI (current GC) were appealed before the ECJ (current CJEU) (Joined cases C-465/09 P to C-470/09 P). The appeals were dismissed.

In compliance with the Commission decision, the Department of Finance of the 'Diputación Foral de Álava' issued a resolution of 3 December 2007 ordering the recovery of the aid and the interest for late payment.

Type of action

Public enforcement

Date of the Commission decision

20/12/2001

Delivery date of the ruling

25/01/2012

Language

Spanish

Headnote

In this ruling, the Court stated that national courts are not competent to review or annul Commission decisions. Moreover, public authorities may not invoke the alleged legitimate expectations of the beneficiaries in order to avoid State aid recovery.

Parties

Names of the parties to the action

BEOTIBAR RECYCLING S.L.

Versus

DIPUTACIÓN FORAL DE BIZKAIA

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

Not applicable. The measure is generally applicable to companies starting their business activity in Álava.

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The plaintiff brought a contentious-administrative appeal against the Agreement of the Economic Administrative Court that dismissed the appeal against the resolution of the Department of Finance of the 'Diputación Foral de Álava' which ordered the recovery of the aid.

The plaintiff argued that the Agreement breached her rights of the defence and confirmed a Commission decision that was unlawful. Alternatively, the plaintiff requested the State liability for pecuniary loss.

Remedy(ies) sought

Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

The Court concluded that the Commission decision was firm and unquestionable. Additionally, the Court underlined that the recovery orders must be complied with without delay, irrespective of whether they have been challenged before the CJEU. Indeed, if as a result of the challenges before the CJEU the decisions at stake would be annulled, then the national measures would have to be reversed. The Court also mentioned that public authorities may not invoke the alleged legitimate expectations of the beneficiaries in order to avoid State aid recovery (judgment Comunidad Autónoma de la Rioja v Territorio Histórico de Vizcaya - Diputación Foral de Vizcaya and Others C-474/09 P and C-476/09 P). The Court noted that the plaintiff was aware of the procedure before the Commission and did not appear as an interested party. It also noted that the plaintiff did not appeal the Commission decision before the GC and did not seek before the latter the suspension of the Commission decision. Regarding the limitation periods, the Court observed that the limitation period provided for by Union law, particularly the applicable procedural Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999), against the opinion of the plaintiff that asked for the application of the limitation periods provided for under national law, in particular, Tax Law. Finally, the Court rejected the argument related to State liability.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-30/01, T-31/01, T-32/01, T-86/02, T-87/02, T-88/02, Diputación Foral de Guipúzcoa v Commission of the European Communities (2009) ECLI:EU:T:2009:314
- C-465/09 P to C-470/09 P, Comunidad Autónoma de la Rioja v Territorio Histórico de Álava - Diputación Foral de Álava and Others (2011) ECLI:EU:C:2011:372
- C-75/97 Kingdom of Belgium v Commission of the European Communities, (1999) ECLI:EU:C:1999:311
- C-183/91 Commission of the European Communities v Greece, (1993) ECLI:EU:C:1993:233

National case law:
- Judgment of the Spanish Supreme Court of 3 November 1997 – State liability
- Judgment of the Spanish Supreme Court of 12 March 1994 – State liability
- Judgment of the Spanish Supreme Court of 9 November 1994 – State liability
- Judgment of the Spanish Supreme Court of 21 October 1997 – State liability
- Judgment of the Spanish Supreme Court of 18 April 1962 – State liability
- Judgment of the Spanish Supreme Court of 3 January 1968 – State liability
- Judgment of the Spanish Supreme Court of 12 November 1973 – State liability
- Judgment of the Spanish Supreme Court of 27 February 1976 – State liability
- Judgment of the Spanish Supreme Court of 23 January and 25 February 1991 – State liability
- Judgment of the Spanish Supreme Court of 12 July 2004 – State liability
- Judgment of the Spanish Supreme Court of 13 April 2005 – State liability

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EC) No 659/1999 - detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (State aid), OJ L 83, 27.3.1999
- 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
- Commission Decision 2003/86/EC of 20 December 2001 on a State aid scheme implemented by Spain in 1993 for certain newly established firms in Vizcaya (Spain) (notified under document number C(2001) 4478) OJ L 40, 14.2.2003

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

Yes

Case C-470/09 Comunidad Autónoma de la Rioja v Territorio Histórico de Álava - Diputación Foral de Álava and Others (2011) ECLI:EU:C:2011:372 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-470/09)

Any other comments (optional)

No other comments

26.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2008 :2405	06/05/2008	Private enforcement	Other remedy imposed	The plaintiffs challenged the order (auto) from the previous instance that granted the suspension of Decreto Foral Normativo 1/2005 which established the rate of corporate tax for 2005. In particular, the previous instance granted the suspension of the national measure due to the fact that it was substantially identical to another measure already annulled by a final judgment. The Court rejected the arguments related to the breach of the duty to state reasons and the violation of Articles 10, 87 and 88 of the EC Treaty (current Articles 107 and 108 TFEU). Nevertheless, the Supreme Court accepted the last argument from the plaintiffs and pointed out that the previous instance had referred a request for a preliminary ruling to the ECJ (current CJEU) on whether the challenged tax measures should be considered selective according to the notion of State aid (Article 87(1) of the EC Treaty (current Article 107(1) TFEU) and should therefore be notified to the Commission (Article 88(3) of the EC Treaty (current Article 108(3) TFEU)). In this context, the Supreme Court stated that the appearance of a *prima facie* case was weakened, and the enforcement of the challenged measures must be maintained, without prejudice to what the ECJ (current CJEU) would decide. The Supreme Court decided to annul the judgments from the previous instance and did not grant the suspension of the challenged measures.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2008 :5835	03/10/2008	Private enforcement	Other remedy imposed	The plaintiffs challenged the order (auto) from the previous instance which granted the suspension of Decreto Foral 10/2006. The previous instance granted the suspension of the national measure due to the fact that it was substantially identical to another measure already annulled by a final judgment. The Court mentioned that the decision granting interim measures must consider the circumstances of the case at the moment when the measures are requested and take into account the purpose of the interim measures. In this context, the Court stated that the appearance of a *prima facie* case was a great innovation with respect to the traditional criteria used to grant interim measures, allowing for the assessment (on a provisional basis and without analysing the substantive issues) of the legal basis and the grounds for granting interim measures. In light of this, the Court found that the arguments of the plaintiffs that related to the violation of Union law could not be accepted as they related to the substantive issues. Nevertheless, the Supreme Court accepted the last argument from the plaintiffs and pointed out that the previous instance had referred a request for a preliminary ruling to the ECJ (current CJEU) on whether the challenged tax measures should be considered selective according to the notion of State aid (Article 87(1) of the EC Treaty (current Article 107(1) TFEU)) and should therefore be notified to the Commission (Article 88(3) of the EC Treaty (current Article 108(3) TFEU)). In this context, the Supreme Court stated that the appearance of a *prima facie* case is weakened, and therefore it is not appropriate to suspend the national measure, even if it is on a provisional basis, without prior resolution of the substantive issues. The suspension of the measure would give preference to the interest of the plaintiffs against the public interest. In addition, the Court mentioned that the ECJ (current CJEU) has resolved the preliminary questions related to the substantive issues (Joined cases C-428/06 a C-434/06) which must be considered by the previous instance when handing down its ruling. For all those reasons, the Supreme Court decided to annul the rulings from the previous instance and not grant the suspension of the challenged measure.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2008 :7458	17/12/2008	Private enforcement	Other remedy imposed	The plaintiffs challenged the order (auto) from the previous instance which granted the suspension of Decreto Foral 32/2005. The previous instance granted the suspension of the national measure due to the fact that it was substantially identical to another measure already annulled by a final judgment. In these circumstances, the Court analysed the conditions for granting interim measures and the intention of the national legislature when establishing these conditions. In particular, the Court stated that the appearance of a *prima facie* case was a great innovation with respect to the traditional criteria used to grant interim measures, allowing for the assessment (on a provisional basis and without analysing the substantive issues) of the legal basis and the grounds for granting the interim measures. In light of this, the Court found that the arguments of the plaintiffs that related to the violation of Union law could not be accepted as they related to the substantive issues. Nevertheless, the Supreme Court pointed out that the previous instance had referred a request for a preliminary ruling to the ECJ (current CJEU) on whether the challenged tax measures should be considered selective according to the notion of State aid (Article 87(1) of the EC Treaty (current Article 107(1) TFEU)) and should therefore be notified to the Commission (Article 88(3) of the EC Treaty (current Article 108(3) TFEU)). In this context, the Court mentioned case C-88/03 where the ECJ (current CJEU) set the requirements for analysing State aid when the rule comes from a subnational body (institutional autonomy, procedural		

							autonomy and economic autonomy), as well as Joined cases C-428/06 a C-434/06 where the ECJ (current CJEU) has resolved the preliminary questions related to the substantive issues in the case at hand. Finally, the Supreme Court stated that the appearance of a *prima facie* case is weakened, and therefore it is not appropriate to suspend the national measure, even if it is on a provisional basis, without prior resolution of the substantive issues. The suspension of the measure would give preference to the interest of the plaintiffs against the public interest. Therefore, the Supreme Court decided to annul the decisions from the previous instance and not grant the suspension of the challenged measures.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2009 :1350	26/02/2009	Private enforcement	Other remedy imposed	Interim measures to suspend the implementation of the challenged measures (Decreto Normativo de Urgencia Fiscal 4/2005) were granted by a previous instance court based on the appearance of a *prima facie* case. Nevertheless, the Supreme Court pointed out that the previous instance has referred numerous questions to the ECJ (current CJEU) on whether the challenged tax measures should be considered selective according to the notion of State aid (Article 87(1) of the EC Treaty (current Article 107(1) TFEU)) and should therefore be notified to the Commission (Article 88(3) of the EC Treaty (current Article 108(3) TFEU)). In this context, the Supreme Court stated that the appearance of a *prima facie* case weakens and the validity of the challenged measures must be maintained, without prejudice to what the ECJ (current CJEU) would decide. The Supreme Court decided to annul the rulings from the previous instance and not grant the suspension of the challenged measures.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2009 :2061	26/03/2009	Private enforcement	None - Claim rejected	The Court, taking into account the conditions for granting interim measures, rejects the interim measures requested against a regional measure in view of the doubts as to whether the first instance court has to take a decision on the merits of the case.	The ruling describes the conditions for granting interim measures. The Supreme Court decided to refuse to adopt interim measures, even though the measure had been adopted in violation of Article 88(3) of the EC Treaty (current Article 108(3) TFEU).	
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2009 :4104	28/05/2009	Private enforcement	None - Claim rejected	The plaintiff argued that the resolution from the previous instance that denied the requested interim measures was unlawful. The Court rejected this claim. Relying on the reasoning of case STS 2061/2009 (ECLI: ES:TS:2009:2061) to refuse to adopt interim measures, the Court reaffirmed the contested order (auto).		
Tribunal Supremo. Sala de lo Civil (Madrid, Sección 1)	Supreme Court, Chamber for civil proceedings (Madrid, Section 1)	Last instance court (civil/commercial)	ECLI: ES:TS:2009 :6155	15/10/2009	Private enforcement	None - Claim rejected	An action was brought against State aid granted by the Spanish General Administration to "AGENCIA EFE", claiming that it did not comply with Union law. The First Instance Court No. 14 of Madrid considered that the competent courts in the case at hand were not the courts of the civil judicial order but the courts of the administrative judicial order, and therefore, dismissed the claim. This judgment was later confirmed by the Madrid Provincial Court. In this context, the Supreme Court ruled that the courts of the civil judicial order do not have the competence to declare aid granted by the Public Administrations which is liable to distort competition and violate Articles 87(1) and 88(3) of the EC Treaty (current Articles 107(1) and 108(3) TFEU) to be unlawful. The case relates to the different competences of the civil and administrative courts.	Even though this ruling relates to the competences of the courts (difference between the civil and administrative jurisdictions), it has been included and considered as relevant due to the fact that it raises questions as to the relationship between the principle of procedural autonomy, and that of effective recovery of State aid and the need to observe the standstill obligation under Article 88(3) of the EC Treaty (current Article 108(3) TFEU).	
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI: ES:TS:2011 :91	26/01/2011	Private enforcement	None - Claim rejected	The National High Court rejected the suspension of the implementation of certain national resolutions of the Secretary of State for Telecommunications with regard to telecommunications infrastructures. The Spanish Supreme Court found that the rejection of the standstill obligation requested in previous instances was lawful. Specifically, the Court considered that the previous instance took into consideration the appearance of a *prima facie* case ('fumus boni iuris – apariencia de buen derecho') and adequately balanced the interests at stake. Thus, the Court reaffirmed the challenged order (auto).		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI: ES:TS:2011 :786	28/02/2011	Private enforcement	None - Claim rejected	In the Court's view, the rejection of interim measures requested in previous instances was lawful. The Court did not consider that the execution of the act (Addendum (2008) to an Agreement of the Government and the Autonomous Community of Asturias with regard to telecommunications infrastructures) could produce damage of an irreversible nature. Moreover, regarding the balance of the interests at stake, the Court highlighted the public benefits of the act. Additionally, in relation to the opening of a procedure by the Commission, the Court ruled that it must not affect the resolution of the appeal against orders (autos) prior to the proceedings. Furthermore, the Court observed that the reasons 1) the execution of the act could not produce damage of an irreversible nature; 2) the public benefits that the act implied for denying the interim measures subsisted when the contested orders (autos) were delivered. Lastly, the Court pointed out that the aid was financed with budgetary funds corresponding to the year 2008. Therefore, and taking into account that the ruling at hand was delivered in 2011, the Court could not grant the suspension of the actions, as they were already executed.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings	Last instance court (administrative)	ECLI: ES:TS:2012 :1853	06/03/2012	Private enforcement	None - Claim rejected	The Court affirmed that the contested national decision was lawful. Firstly, the Court recalled that the Spanish Government was not legally entitled to implement the system of incentives, due to the fact that it was not approved by the Commission. Moreover, the Court rejected the argument concerning the alleged breach of the principle of legitimate expectation. In view of the mandatory nature of the review of State aid by the Commission under Article 108 TFEU, undertakings		

	(Madrid, Section 3)						to which aid has been granted may not, in principle, claim a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article (C-148/04). In addition, regarding the attribution of the amounts to a different purpose, as the attempt of the Spanish Government to implement a system of incentives failed, the amounts provisionally approved for the system of incentives did not go toward their original purpose. The Court considered that the use of the amounts for other purposes was lawful.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2012 :2588	03/04/2012	Private enforcement	None - Claim rejected	The main question of the appeal is the determination of the concept of State aid and its requirements when the rule comes from a sub-national body (Autonomous Community of the Basque Country). In these circumstances, the Court affirmed that the requirements set by the CJEU (institutional autonomy, procedural autonomy and financial or economic autonomy) were met. Therefore, the Court ruled that the challenged provision did not constitute State aid and there was no obligation to notify the measure to the Commission.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2012 :2614	03/04/2012	Private enforcement	None - Claim rejected	After having analysed the concept of State aid, the Court affirmed that the requirements set by the CJEU (institutional autonomy, procedural autonomy and financial or economic autonomy) were met. In these circumstances, the Court ruled that the national provision did not constitute State aid and reaffirmed the contested judgment.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2012 :2675	03/04/2012	Private enforcement	None - Claim rejected	The plaintiff argued that the national provision constituted Staid aid. After analysing the concept of State aid, the Court found that the plaintiff did not challenge the existence of institutional autonomy, procedural autonomy and financial or economic autonomy which was affirmed in the contested judgment from the previous instance. Therefore, the Court ruled that the national provision did not constitute State aid and reaffirmed the contested judgment.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI: ES:TS:2012 :4955	16/07/2012	Private enforcement	Case sent back to the lower court for re-assessment	The Court sends back the case to the lower instance to decide on the remedy/ies that should be granted. It concludes that the lower court should have afforded the interim relief requested by the plaintiffs in the form of ordering the placement of the contested funds in a blocked account to ensure the full effectiveness of Union law.	In accordance with the principle of effectiveness of Union law, the Court stated that the lower court should have afforded the interim relief requested by the plaintiffs.	The subsequent ruling from the lower court is not available.
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI: ES:TS:2014 :1129	27/03/2014	Private enforcement	Case sent back to the lower court for re-assessment	A previous instance court granted the interim measures to suspend the implementation of aid for the transition to Digital Terrestrial Television (DTT). Nevertheless, the Supreme Court considered that the right of the Autonomous Region of the Canary Islands to submit its arguments was not respected, and therefore, the Court decided to annul the decision and send the case back to the lower court for re-assessment.		The subsequent ruling from the lower court is not available.
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2014 :1564	07/04/2014	Private enforcement	None - Claim rejected	The plaintiff requested a reference for a preliminary ruling regarding a national measure that set a deduction for export activities. The Court stated that the national measure had already been interpreted by the CJEU and analysed by the Commission. Specifically, the national measure was considered to constitute State aid incompatible with Union law. Therefore, the fiscal rebate claimed by the plaintiff could not be applied. As a result, the Court concluded that the non-application of the fiscal benefit to the export activity was not only compatible with Union law, but was also a consequence of the interpretation given by EU authorities in relation to the national measure.		
Audiencia Nacional. Sala de lo Contencioso (Madrid, Seccion 4)	National High Court. Chamber for contentious administrative proceedings (Madrid, Section 4)	Second to last instance court (administrative)	ECLI: ES:AN:2014 :5192	17/12/2014	Private enforcement	None - Claim rejected	The plaintiff argued that the challenged resolution did not include all costs relating to the price of energy, which was contrary to Union law, and particularly, to the Commission decision authorising the aid and to the principle of proportionality in relation to Article 3.2 of Directive 2009/72/EC concerning common rules for the internal market in electricity. In this regard, the Court considered that it was not appropriate to include the cost of taxes in the price of energy. Therefore, the Court rejected any compensation for damages derived from the non-inclusion of the aforementioned costs.		
Audiencia Nacional. Sala de lo Contencioso (Madrid, Seccion 4)	National High Court. Chamber for contentious administrative proceedings (Madrid, Section 4)	Second to last instance court (administrative)	ECLI: ES:AN:2015 :707	04/03/2015	Private enforcement	None - Claim rejected	The plaintiff argued that the resolution of the State Secretariat for Energy violated national law and Union law. Regarding Union law, the plaintiff considered that the challenged resolution violated the Commission decision approving the aid. In this respect, the Court considered that the benefit envisaged by the Member State could be considered as reasonable, and therefore, did not violate the principle of proportionality. Moreover, the plaintiff argued that the resolution violated the EU framework for State aid in the form of public service compensation, as well as the CJEU case law. In this regard, the Court pointed out that the Altmark judgment set the requirements that must be met for public service compensation not to grant a real financial advantage and not to be considered as State aid. However, the Court highlighted that it did not guarantee a minimum level of profitability to the entities that receive the compensation. Lastly, the plaintiff argued that the resolution violated Article 108(3) TFEU because it altered the conditions of the aid that were approved by the Commission. In this respect, the Court found that there had been no change in the conditions of the aid that were required to be notified to the		

							Commission. In view of this, the Court concluded that the challenged resolution of the State Secretariat for Energy did not violate Union law or national law.		
Audiencia Nacional. Sala de lo Contencioso (Madrid, Seccion 4)	National High Court. Chamber for contentious administrative proceedings (Madrid, Section 4)	Second to last instance court (administrative)	ECLI: ES:AN:2015 :2585	24/06/2015	Private enforcement	None - Claim rejected	The plaintiff argued that the resolution of the State Secretariat for Energy violated national law and Union law. Regarding Union law, the plaintiff considered that the challenged resolution violated the Commission decision approving the aid. In this respect, the Court considered that the benefit envisaged by Spain could be considered as reasonable, and therefore, did not violate the principle of proportionality. Moreover, the plaintiff argued that the resolution violated the EU framework for State aid in the form of public service compensation, as well as CJEU case law. In this regard, the Court pointed out that the Altmark judgment set out the requirements that must be met for public service compensation not to grant a real financial advantage and not to be considered as State aid. However, the Court highlighted that it did not guarantee a minimum level of profitability to the entities that receive the compensation. Lastly, the plaintiff argued that the resolution violated Article 108(3) TFEU because it altered the conditions of the aid that were approved by the Commission. In this respect, the Court found that there has been no change in the conditions of the aid that were required to be notified to the Commission. In view of this, the Court concluded that the challenged resolution of the State Secretariat for Energy did not violate Union law or national law.		
Tribunal Superior de Justicia de Galicia (Sala de lo Contencioso-Administrativo, Sección 4ª)	High Court of Galicia (Chamber for contentious administrative proceedings, Section 4)	Second to last instance court (administrative)	ECLI: ES:TSJGAL: 2015:5854	16/07/2015	Private enforcement	Other remedy imposed	The Court ruled that the State was entitled to an exemption from property tax. In view of this, the Court accepted the appeal and annulled the judgment of the previous instance.	Follow-up case from CJEU State aid judgment Navantia. Case C-522/13, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=158425&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=433648.	
Tribunal Superior de Justicia de Madrid (Sala de lo Contencioso-Administrativo, Sección 5ª)	High Court of Madrid (Chamber for contentious administrative proceedings, Section 5)	Second to last instance court (administrative)	ECLI: ES:TSJM:20 16:4090	13/04/2016	Private enforcement	Other remedy imposed	The plaintiff brought an action against a resolution of the Madrid Regional Economic-Administrative Tribunal regarding income tax settlement ("the challenged resolution"). In this context, the High Court of Madrid ruled that the measure set out in Article 12(5) of Corporation Tax Law did not constitute State aid and did not have to be recovered, due to the fact that the articles of the decision (Article 1(1) and Article 4 of Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions) which was the legal basis of the challenged resolution in this ruling, had been annulled by the GC. Consequently, the High Court accepted the appeal and annulled the challenged resolution.	Follow-up case from CJEU State aid judgment Amortisation of financial goodwill in Spain. Joined cases C-20/15P and C-21/15P, available at: http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-21/15%20P.	Article 12(5) of Corporation Tax Law: The measure provides that, in the event that an undertaking which is taxable in Spain acquires a shareholding in a 'foreign company' equal to at least 5% of that company's capital and retains that shareholding for an uninterrupted period of at least one year, the goodwill resulting from that shareholding, as recorded in the undertaking's accounts as a separate intangible asset, may be deducted, in the form of an amortisation, from the basis of assessment for the corporation tax for which the undertaking is liable. The measure at issue states that, to be classified as a 'foreign company', a company must be liable to pay a tax that is identical to the tax applicable in Spain and its income must derive mainly from business activities carried out abroad.
Tribunal Superior de Justicia del País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª)	High Court of the Basque Country (Chamber for contentious administrative proceedings, Section 3)	Second to last instance court (administrative)	ECLI: ES:TSJPV:2 016:1752	02/06/2016	Private enforcement	None - Claim rejected	The previous instance considered that the requirements for State liability were not met, and therefore rejected the compensation requested by the plaintiff. The plaintiff appealed the judgment and requested an indemnity in relation to the interest paid as a result of the delay in the recovery of the aid. The High Court of the Basque Country confirmed the decision from the previous instance and denied the compensation. In particular, the Court noted that for three years since the Commission adopted the decision, the plaintiff had been enjoying the benefits of the aid, knowing that it was unlawful.	Ruling regarding State liability for having granted State aid.	
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI: ES:TS:2016 :4219	29/09/2016	Private enforcement	None - Claim rejected	According to the Court none of the following interim measures requested were appropriate: 1) The Autonomous Community of Murcia submitted a question to the Commission regarding the compatibility with Union law of the measure granting State aid. However, the Autonomous Community later decided to withdraw the submitted question. The interim measure requested was the suspension of the effects of the withdrawal of the question while the present contentious-administrative appeal is being processed; and, should this not be possible; 2a) To roll back the procedure to the moment before the withdrawal of the procedure was submitted by the Autonomous Community; and 2b) To order to the Autonomous Community to restart the procedure before the Commission, providing the allegations, documents or necessary acts so the Commission can take a favourable decision to the question asked. The Court stated that the reasons given by the previous instance were well-founded and justified the rejection of the interim measures. Thus, the Supreme Court confirmed the lawfulness of the contested order (auto) and reaffirmed the rejection of the interim measures.		
Tribunal Supremo. Sala de lo Contencioso	Supreme Court, Chamber for contentious administrative	Last instance court (administrative)	ECLI: ES:TS:2016 :4939	14/11/2016	Private enforcement	None - Claim rejected	The Court ruled that the disputed national measure (Order IET/2013/2013) did not violate the principles of objectivity and non-discrimination. Moreover, the Court stated that the disputed national measure could not be considered as an arbitrary measure. Thus, the Court was of the opinion that the national measure did not restrict competition. In addition, the Court concluded that the disputed national		National measure: Order IET/2013/2013, regulating the competitive mechanism for the assignment of the demand-side interruptible load management service. Available at:

(Madrid, Sección 3)	proceedings (Madrid, Section 3)						measure was not State aid, as the requirements were not met. Specifically, the Court considered that the system designed by the disputed national measure did not constitute a selective advantage in favour of one or several undertakings.		https://www.boe.es/buscar/doc.php?id=BOE-A-2013-11461
Tribunal Superior de Justicia de Galicia (Sala de lo Contencioso-Administrativo, Sección 4ª)	High Court of Galicia (Chamber for contentious administrative proceedings, Section 4)	Second to last instance court (administrative)	ECLI: ES:TSJGAL: 2017:612	01/02/2017	Private enforcement	None - Claim rejected	The challenged provision does not constitute State aid prohibited by Article 107 TFEU, since it applies to all companies engaged in activities in the fisheries sector, without any advantage over those that are in a comparable factual and legal situation.	Follow-up case from CJEU State aid judgment Navantia. Case C-522/13, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=158425&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=433648.	
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2017 :289	02/02/2017	Private enforcement	None - Claim rejected	The plaintiff challenged a judgment of the National High Court, arguing that it violated Article 12(5) of Corporation Tax Law, which provides that in the event that an undertaking which is taxable in Spain acquires a shareholding in a 'foreign company' equal to at least 5% of that company's capital and retains that shareholding for an uninterrupted period of at least one year, the goodwill resulting from that shareholding, as recorded in the undertaking's accounts as a separate intangible asset, may be deducted, in the form of an amortisation, from the basis of assessment for the corporation tax for which the undertaking is liable. The Supreme Court confirmed the judgment from the previous instance and reaffirmed the rejection of the deduction in relation to the goodwill.	Follow-up case from CJEU State aid judgment Amortisation of financial goodwill in Spain. Joined cases C-20/15P and C-21/15P, available at: http://curia.europade.eu/juris/liste.jsf?language=en&td=ALL&num=C-21/15%20P.	Article 12(5) of Corporation Tax Law: The measure at issue states that, to be classified as a 'foreign company', a company must be liable to pay a tax that is identical to the tax applicable in Spain and its income must derive mainly from business activities carried out abroad.
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2017 :592	21/02/2017	Private enforcement	None - Claim rejected	Within the context of this ruling, the Court mentioned relevant rulings related to a fiscal benefit applicable to export activities before 2006 (no longer in force). The Court pointed out that the fiscal benefit, which was no longer in force at the time of the judgment, was considered non-compliant with Union law because it constituted State aid. Specifically, in 2006 the Commission adopted a decision declaring the fiscal benefit to be State aid incompatible with Union law and requiring its gradual phasing out. Moreover, the Court noted that the Commission's Communication (2009/C 85/01) which reflected the relevance that national courts have in relation to State aid matters, offers practical support to national courts, and calls for national courts to interpret the concept of State aid and to prevent the payment of unlawful aid.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2017 :2429	14/06/2017	Private enforcement	None - Claim rejected	The plaintiff argued that the challenged measures were contrary to Article 11 of Regulation 659/1999/EC due to the fact that they obliged telecommunications and television operators to pay retroactive contributions related to the period before the Commission approved the aid scheme envisaged in favour of the RTVE Corporation. In these circumstances, the plaintiff pointed out that the CJEU has stated that Article 93(3) of the EC Treaty must be interpreted as precluding the levying of charges which specifically finance an aid scheme that has been declared compatible with the internal market by a Commission decision, in so far as those charges are imposed retroactively in respect of a period prior to the date of that decision (C-261/01 y C-262/01). The Court ruled that the contributions of third parties to finance the State aid to the RTVE Corporation were carried out after the Commission decision which declared the aid compatible with the internal market. The Court also mentioned that the CJEU has stated that in order for a fiscal measure to form an integral part of an aid measure, it is not sufficient for there simply to be hypothecation between the fiscal measure and the aid. It is also necessary for the fiscal measure's direct impact on the amount of the aid to be established (T-151/11 and T-533/10) and this criterion is not met in the present case.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2017 :2426	14/06/2017	Private enforcement	None - Claim rejected	The Court observed that there were no formal defects in the processing of the contested Royal Decree that could justify its nullity. The Court also found that the challenged Royal Decree was not contrary to Union law (Article 12 of Directive 2002/20 / EC, Article 11 of Regulation (EC) 659/1999, in relation to Article 93 TEU). Specifically, the Court considered that the contributions of third parties to finance the State aid to the RTVE Corporation were materially carried out after the Commission decision declaring the aid compatible with the internal market. The Court also mentioned that the CJEU has stated that in order for a fiscal measure to form an integral part of aid, it is not sufficient for there simply to be hypothecation between the fiscal measure and the aid. It is also necessary for the fiscal measure's direct impact on the amount of the aid to be established (T-151/11 and T-533/10) and this criterion was not met in the present case.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 1)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 1)	Last instance court (administrative)	ECLI: ES:TS:2017 :8013A	21/07/2017	Private enforcement	Other remedy imposed	The Court confirmed the existence of a relevant question that must be answered for the development of jurisprudence ('interés casacional objetivo'). Therefore, the Court declared the appeal admissible. Specifically, the Supreme Court found that the regional court had not interpreted the judgment of the CJEU in case C-522/13 correctly, as that judgment - contrary to what the regional court concluded - establishes that the exemption from property tax under review may constitute State aid prohibited by Article 107 TFEU.	Follow-up case from CJEU State aid judgment Navantia. Case C-522/13, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=158425&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=433648.	ORDER (AUTO)
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI: ES:TS:2017 :3442	27/09/2017	Private enforcement	None - Claim rejected	The interim measures adopted in previous instances were held to be lawful. Specifically, the previous instance suspended the Agreement for the execution of the National Plan for the Transition to Digital Terrestrial Television. The plaintiff alleged that the objective of the suspension of the Agreement has lost its effectiveness, since the deadlines for its implementation have expired and, therefore, there is no danger that can be vitiated with the adoption of the interim measure. The Court concluded that even if the deadlines for the implementation		

							have expired, the interim measure may have effects in relation to the effect of the Agreement and the situations arising from it.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI: ES:TS:2017 :4004	16/11/2017	Private enforcement	None - Claim rejected	The judgment being appealed was contrary neither to the Commission's decision within the context of this case nor to the EU framework for State aid in the form of public service compensation. The Supreme Court also rejected the argument that there was a violation of Article 108(3) TFEU and reaffirmed the argument of the previous instance, which ruled that no alteration had been made to the terms in which the authorisation of the aid was given and, therefore, there had been no obligation to notify any changes to the Commission.		
Tribunal Superior de Justicia de Andalucia (Sala de lo Contencioso-Administrativo, Sección 1ª)	High Court of Andalucia (Chamber for contentious administrative proceedings, Section 1)	Second to last instance court (administrative)	ECLI: ES:TSJAND: 2017:16179	07/12/2017	Private enforcement	Other remedy imposed	Royal Legislative Decree No 2/2004 of 5 March 2004 approving the consolidated version of the law governing local finances established that the immovable property which is owned by the State and which is used for the purposes of national defence is exempt from property tax. Navantia is an undertaking wholly owned by the Spanish State. In accordance with an agreement concluded on 6 September 2001, the Spanish State, as owner of the plot of land on which the shipyard stands, made it available to Navantia by transferring the right of use in return for payment of EUR 1 per year. Under these circumstances, the Court of First Instance of Cadiz ruled that the use of the property for the purpose of national defence was very limited, and therefore the tax exemption in the case at hand was contrary to Article 107(1) TFEU. Nevertheless, the High Court of Justice of Andalucia considered that the challenged provision did not constitute State aid, as the use of the property for the purpose of national defence was demonstrated and the exemption from property tax should be applied. Thus, the High Court of Justice of Andalucia decided to uphold the appeal and annul the judgment of the previous instance.	Follow-up case from CJEU State aid judgment Navantia. Case C-522/13, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=158425&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=433648	
Juzgado de lo Contencioso-Administrativo nº 4 de Madrid	Administrative Court No. 4 of Madrid	Lower court (administrative)	ECLI: ES:JCA:201 8:1	08/01/2018	Private enforcement	None - Claim rejected	Tax exemptions for the Catholic Church may constitute unlawful State aid, if and to the extent to which, they are granted for economic activities. The requested tax exemption was thus not granted.	A tax exemption such as that at issue in the main proceedings, to which a congregation belonging to the Catholic Church is entitled in respect of works on a building intended to be used for activities that do not have a strictly religious purpose, may fall under the prohibition in Article 107(1) TFEU if, and to the extent to which, those activities are economic. Follow-up case from CJEU State aid judgment Escuelas Pías (notion of aid and Catholic Church). Case C-74/16, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=192143&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=433157.	
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI: ES:TS:2018 :7861A	10/07/2018	Private enforcement	Other remedy imposed	In 2010, the Commission informed the Kingdom of Spain that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid scheme. At that moment the Supreme Court decided to suspend the procedure until the Commission had adopted a decision. The Commission subsequently adopted a decision in which stated that the aid was put into effect in breach of Article 108(3) TFEU, and that it was incompatible with the internal market. The Autonomous Community of Galicia and Retegal brought actions for annulment of the decision before the GC which dismissed the actions in their entirety. The plaintiffs appealed the judgment before the CJ which found a formal defect (lack of motivation regarding the selective nature of the aid) with regard to the Commission decision. Thus, the CJ set aside the judgment of the GC and annulled the Commission decision. In this context, the Supreme Court suspended the procedure as long as the Commission has not taken a new decision regarding the lawfulness of the State aid.	Despite the judgment of the CJEU annulling the Commission decision that declared the contested measures to be State aid, the Supreme Court considered that the reasons that led to the original suspension of the procedure remained.	ORDER (AUTO)
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2018 :3224	19/09/2018	Private enforcement	None - Claim rejected	The disputed judgment violates neither Union law nor national law. Therefore, the Supreme Court reaffirmed the judgment from the previous instance. Among its arguments, the plaintiff alleged that the challenged judgment is contrary to the principle of freedom of establishment (Article 49 TFEU) and to the State aid regime provided for in Article 107 and 108 TFEU. In view of this, the plaintiff requested a reference for a preliminary ruling regarding the tax on large retail establishments (IGEC) situated in the Autonomous Community of Navarra. The Court recalled that questions were referred to the CJEU for a preliminary ruling concerning the IGEC in Catalonia, Asturias and Aragón (C-233/16, EU: C: 2018: 280, C-234/16 and C-235/16, EU: C: 2018: 281; C-236/16 and C-237/16, EU: C: 2018: 291). Given the similarity between the IGEC in Navarra and in the aforementioned regions, as well as the identity of the plaintiff (ANGED), the Court denied the request for a preliminary ruling to the CJEU.	Follow-up case from CJEU State aid judgment ANGED (cases C-233/16; EU:C:2018:280; C-234/16 y C-235/16; EU:C:2018:281; C-236/16 y C-237/16; EU:C:2018:291).	
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2018 :3358	26/09/2018	Private enforcement	Other remedy imposed	The Supreme Court decided to annul Decree 324/2001 which approves the Catalonian Regulation on taxes on large retail establishments. The Catalonian regional tax does constitute State aid to the extent that it exempts collective large retail establishments with a surface area equal to or greater than 2500 m2.	Follow-up case from CJEU State aid judgment ANGED (Cases C-233/16; EU:C:2018:280; C-234/16 y C-235/16; EU:C:2018:281; C-236/16 y C-237/16; EU:C:2018:291).	

Tribunal Supremo. Sala de lo Civil (Madrid, Sección 1)	Supreme Court, Chamber for civil proceedings (Madrid, Section 1)	Last instance court (civil/commercial)	ECLI: ES:TS:2008 :3973	07/07/2008	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered; Liquidation of the aid beneficiary - i.e. aid recovery in the context of insolvency proceedings	In 1990, the Spanish authorities informed the Commission that the company Hytasa S.A. was in the process of being privatised. One of the terms of privatisation was a capital contribution of 4 200 million PTA by the State ('Patrimonio del Estado'). The Commission concluded that it was aid incompatible with the 'common market' and required the aid granted to be repaid. The recovery of the incompatible aid took place in the context of an insolvency proceedings. The Spanish Supreme Court ruled that the amount of the State aid should have been included in the list of creditors.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI: ES:TS:2009 :5854	23/09/2009	Public enforcement	None - Claim rejected	In 2001, the Commission classified the financial rebate on coal as non-notified State aid. In this ruling, the Court confirmed that the Spanish authorities were obliged to recover from the beneficiaries the amounts received by them in excess of the maximum amount allowed, without prior notification to the Commission. Additionally, the Court observed that the principles of legitimate expectation and legal certainty had not been violated. In these circumstances, the Court dismissed the appeal.		
Tribunal Superior de Justicia del País Vasco (Sala de lo Contencioso-Administrativo, Sección 1ª)	High Court of the Basque Country (Chamber for contentious administrative proceedings, Section 1)	Second to last instance court (administrative)	ECLI: ES:TSJPV:2 011:5894	24/10/2011	Public enforcement	None - Claim rejected	The plaintiff requested the nullity of the resolution that executed the Commission's decision and by which the plaintiff should return the unduly obtained tax benefits and the interest for late payment. The High Court of the Basque Country rejected the appeal and confirmed the resolution.	Procedure for the recovery of fiscal State aid to follow.	
Audiencia Nacional. Sala de lo Contencioso (Madrid, Seccion 4)	National High Court. Chamber for contentious administrative proceedings (Madrid, Section 4)	Second to last instance court (administrative)	ECLI: ES:AN:2011 :5805	07/12/2011	Public enforcement	None - Claim rejected	In 2000, the State Secretariat for Scientific and Technological Policy granted an interest-free loan to the plaintiff for the installation of a ring-rolling mill. In 2004, the Commission declared that the Kingdom of Spain had granted incompatible aid to the plaintiff. The plaintiff repaid certain amounts but the General Director of Industry ordered the plaintiff to repay the interest for late payment. In these circumstances, the National High Court confirmed the Primacy of Union law over national law, in relation to the payment of interest provided for by a Commission State aid decision in apparent contrast to what the Spanish Civil Code provides.	The ruling confirms the primacy of Union law over national law (Spanish Civil Code).	
Tribunal Superior de Justicia del País Vasco (Sala de lo Contencioso-Administrativo, Sección 1ª)	High Court of the Basque Country (Chamber for contentious administrative proceedings, Section 1)	Second to last instance court (administrative)	ECLI: ES:TSJPV:2 012:3337	25/01/2012	Public enforcement	None - Claim rejected	The Court concluded that the Commission decision is firm and unquestionable. Moreover, the Court underlined that the recovery orders must be complied with without delay, even through the adoption of interim measures, irrespective of whether they have been challenged before the CJEU. Indeed, if as a result of the challenges before the CJEU the decision at stake would be annulled, then the national measures would have to be reversed. The Court also mentioned that public authorities may not invoke the alleged legitimate expectations of the beneficiaries in order to avoid State aid recovery (judgment C-474/09 P and C-476/09 P). Regarding the limitation periods, the Court stated that the acts of recovery of aid fall within the scope of the execution of a firm and unquestionable Commission decision, and therefore the limitation periods provided for Union law, particularly the then applicable procedural regulation (EC) 659/1999, will be preferred, by virtue of the primacy that Union law holds. Finally, the Court rejected the argument related to State liability.	The Court makes clear that national courts are not competent to review or annul Union law. Moreover, public authorities may not invoke the alleged legitimate expectations of the beneficiaries in order to avoid State aid recovery. Follow-up judgment to CJEU ruling C-470/09.	
Tribunal Superior de Justicia del País Vasco (Sala de lo Contencioso-Administrativo, Sección 1ª)	High Court of the Basque Country (Chamber for contentious administrative proceedings, Section 1)	Second to last instance court (administrative)	ECLI: ES:TSJPV:2 013:4177	27/02/2013	Public enforcement	None - Claim rejected	The Court reaffirmed the recovery of the aid and denied any State liability. Specifically, the Court ruled that the challenged national order (Acuerdo del Organismo Jurídico Administrativo de Álava of 7 May 2010) did not violate national law or Union law.	Procedure for the recovery of fiscal State aid to follow.	
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI:ES:TS: 2013:2632	09/05/2013	Public enforcement	Other remedy imposed	The plaintiff brought an action against a judgment of the High Court of the Basque Country, considering that it did not respect the limitation periods for the recovery of unlawful aid and the CJEU case law. The Supreme Court ruled that if the acts of recovery of aid fall within the scope of the execution of a firm and unquestionable Commission decision, the limitation periods provided for in the decision will always be preferred over national law, by virtue of the primacy of Union law. Therefore, the Court annulled the challenged judgment.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2013 :3083	13/05/2013	Public enforcement	Other remedy imposed	Due to a procedural mistake made during the administrative procedure to recover the State aid, the Supreme Court decided to annul the administrative acts and roll back the administrative procedure.	The Supreme Court concluded that the adoption of a resolution ordering the recovery of fiscal aid without giving the aid beneficiary the right to be heard, goes against national and Union law. This ruling led to a reform of the Spanish legislation to include the provisions of the judgment, and is one of the few rulings that mentions the Charter of Fundamental Rights in this context.	

Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2014 :2552	20/06/2014	Public enforcement	None - Claim rejected	The plaintiff alleged that the principle of legitimate expectation had been violated, thus the recovery of the aid could not be required. After mentioning the relevant CJEU and national case law regarding the principle of legitimate expectation in the field of State aid, the Court concluded that the principle had not been violated and, therefore, rejected the appeal.	CJEU case law: C-75/97; C-183/91; Joined Cases C-278/92, C-279/92 and C-280/92; C-348/93; C-459/93; C-415/03; C-232/05; C-305/2009. National case law: Supreme Court judgment of 23 of September 2009, cassation appeal 183/2007; Supreme Court judgment of 12 of February 2010, cassation appeal 175/2007; Constitutional Court judgment STC 248/2007.	
Tribunal Supremo. Sala de lo Civil (Madrid, Sección 1)	Supreme Court, Chamber for civil proceedings (Madrid, Section 1)	Last instance court (civil/commercial)	ECLI: ES:TS:2014 :3558	24/06/2014	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered; Identification of the aid beneficiary	In 1995, by a sales contract, the Provincial Government of Bizkaia acquired from a company vouchers redeemable for tickets to travel by ferry. In 2000, the Commission declared that the sales contract constituted State aid incompatible with Union law and ordered the Kingdom of Spain to recover the aid. The Provincial Government of Bizkaia paid EUR 9,666,956.11 in exchange for 35,707 tickets for the ferry line "Bilbao-Portsmouth". Nevertheless, the line Bilbao-Portsmouth was cancelled in 2010. The Supreme Court considered that three companies were joint and severally liable for the breach of the obligations towards the Provincial Government of Bizkaia. Thus, the Supreme Court declared the obligation of the companies to pay EUR 9,666,956.11 (and the statutory interest) to the Provincial Government of Bizkaia.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2014 :4109	09/10/2014	Public enforcement	None - Claim rejected	The Court considered that the company did not challenge, when it had the right, the Commission decision ordering the recovery of the aid. Once the Commission's decision has become final, the company cannot challenge the legality or other aspects of the decision during the recovery phase.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2015 :2443	08/06/2015	Public enforcement	None - Claim rejected	The Court noted that when the acts of recovery of aid fall within the scope of the execution of a firm and unquestionable Commission decision, the limitation periods provided for in the decision will always be preferred over national law. In these circumstances, the Court ruled that the national decision demanding the recovery was made within the limitation period. Moreover, the Court considered that the calculation carried out by the Administration was clear.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2015 :5081	14/12/2015	Public enforcement	Other remedy imposed	The plaintiff contested the order from the previous instance refusing the requested interim measures. In these circumstances, the Court analysed the appearance of a *prima facie* case ('apariencia de buen derecho') and its applicability in order to grant interim measures, as well as the jurisprudence from the CJEU (C-213/89 and C-143/88). From this doctrine, it can be concluded that in those cases in which the challenged measure could be contrary to Union law, the national judge (by virtue of the primacy that Union law holds) can grant interim measures aimed at suspending the national measure or guaranteeing the effectiveness of a future resolution. The Court ruled that in the case at hand, the requirements to grant the interim measure were met, and therefore, the Court annulled the order from the previous instance and granted the suspension (subject to the lodging of a security) of the payment of the tax on large retail establishments.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2016 :4661	27/10/2016	Public enforcement	Other remedy imposed	Recovery suspension (the 'Diputación Foral de Álava' needs to give back the money to the beneficiary and restart the process for the recovery of the aid). Due to a procedural mistake made during the administrative procedure to recover the State aid, the Supreme Court decided to annul the administrative acts and roll back the administrative procedure.		
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 2)	Last instance court (administrative)	ECLI: ES:TS:2017 :198	25/01/2017	Public enforcement	None - Claim rejected	The Supreme Court rejected the appeal and confirmed the challenged judgment from the previous instance. Specifically, the previous instance considered that within the procedure for the recovery of State aid the "hearing procedures" were not respected, and thus the High Court of the Basque Country decided to annul the decision to recover the aid.		
Tribunal Superior de Justicia del País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª)	High Court of the Basque Country (Chamber for contentious administrative proceedings, Section 3)	Second to last instance court (administrative)	ECLI: ES:TSJPV:2 017:675	23/02/2017	Public enforcement	None - Claim rejected	The requirements for State liability were not met. Firstly, the Court stated that Article 108(3) TFEU which is the legal rule allegedly infringed in this case and the legal basis to obtain State liability, does not grant rights to the beneficiaries of incompatible State aid (a condition that should be met for there to be Member State liability). Secondly, the Court rejected all the plaintiff's arguments and reaffirmed the obligation to pay the interest for the years that the plaintiff had benefitted from the aid.	Ruling regarding State liability for having granted State aid.	
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 2)	Supreme Court, Chamber for contentious administrative proceedings	Last instance court (administrative)	ECLI: ES:TS:2017 :1089	24/03/2017	Public enforcement	Other remedy imposed	After analysing the criteria for granting interim measures, how these criteria had developed and the jurisprudence from the CJEU, the Court ruled that the requirements for granting the interim measure were met. In this context, the Court granted the suspension (subject to the lodging of a security) of the payment of the tax on large retail establishments.		

	(Madrid, Section 2)								
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 3)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 3)	Last instance court (administrative)	ECLI: ES:TS:2017 :2161	25/05/2017	Public enforcement	None - Claim rejected	The Provincial Government of Bizkaia brought an action against a judgment of the High Court of the Basque Country which declared the breach of the right to be heard by the Provincial Government of Bizkaia during the administrative procedure. The Supreme Court analysed the jurisprudence related to the right to be heard, particularly within the process to recover State aid, and concluded that the Provincial Government of Bizkaia had not respected the mentioned right. Therefore, the Supreme Court reaffirmed the judgment of the High Court of the Basque Country.		
Tribunal Superior de Justicia del País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª)	High Court of the Basque Country (Chamber for contentious administrative proceedings, Section 3)	Second to last instance court (administrative)	ECLI:ES:TSJ PV:2017:23 49	26/06/2017	Public enforcement	None - Claim rejected	The requirements for State liability were not met. Particularly, the Court stated that Article 108(3) TFEU which is the legal rule allegedly infringed in this case and the legal basis for imputing State liability, does not grant rights to the beneficiaries of incompatible State aid. Furthermore, the Court considered that the principle of legitimate expectation has not been violated. In relation to the interest, the Court stated that the payment of interest is a requirement from tax regulations.	State liability for having granted State aid.	
Audiencia provincial de Alicante, Seccion 8 (Tribunal de marcas de la Union Europea)	Alicante Provincial Court, Section 8 (Community trade mark court)	Specialised court	476/17	01/12/2017	Public enforcement	Recovery order of the unlawful/incompatible aid; Liquidation of the aid beneficiary - i.e. aid recovery in the context of insolvency proceedings	The Court referred to the principles of effectiveness and primacy of EU Law to alter the credit rating that would correspond under Spanish bankruptcy rules and referred to the Simmenthal case law of the CJEU in this regard, as well as to several judgments of the CJEU concerning the principle of effective recovery. In particular, the Court stated that the credit (in favour of the State and which derived from the Commission decision declaring aid unlawful and incompatible is autonomous and derives from Union law. The payment of the credit could not therefore be frustrated by the ordinary application of national law in light of its full effectiveness. Therefore, the credit has to be paid regardless of the priority criteria set in the Spanish bankruptcy rules for the payment of the undertaking's debts. The credit must therefore be paid immediately and without delay (without prejudice to the suspension of the execution of the credit in response to the decision of the CJEU).	The Court refers to the principles of effectiveness and primacy of Union Law.	
Tribunal Superior de Justicia de la Comunidad Valenciana (Sala de lo Contencioso-Administrativo, Sección 4ª)	High Court of the Valencian Community (Chamber for contentious administrative proceedings, Section 4)	Second to last instance court (administrative)	ECLI: ES:TSJCV:2 018:485	22/02/2018	Public enforcement	Other remedy imposed	The Court revoked the interim measure (suspension of the national measure that sets the reimbursement of the unlawful aid by the beneficiary) granted by the previous instance court. The Court considered that the previous instance should not have granted any interim measures until the CJEU had decided on the interim measures requested given that the CJEU had already suspended the decision at stake by Order. Consequently, the national court should not have assessed again whether the interim measure requested (suspension of the national measures) had to be granted ('excepción de prejudicialidad'). The previous instance court had indeed argued that Spain had not transferred its sovereignty to the EU and that administrative law has not been harmonised at EU level. The Regional High Court annulled the previous instance court ruling.	Follow-up case from the State aid judgment Football clubs from Valencia State aid investigation of the GC. Case T-732/16, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=T-732/16R.	
Tribunal Superior de Justicia de la Comunidad Valenciana (Sala de lo Contencioso-Administrativo, Sección 4ª)	High Court of the Valencian Community (Chamber for contentious administrative proceedings, Section 4)	Second to last instance court (administrative)	274 /2018	22/06/2018	Public enforcement	Other remedy imposed	The Court suspended the execution of the national measure which required the reimbursement of the unlawful aid by the beneficiary. This was a result of the GC suspending the execution of the Commission decision declaring the aid unlawful in an Order in case T-901/16 R.	Follow-up case from the State aid judgment Football clubs from Valencia State aid investigation of the GC. Case T-901/16, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=T-901/16	
Tribunal Supremo. Sala de lo Contencioso (Madrid, Sección 1)	Supreme Court, Chamber for contentious administrative proceedings (Madrid, Section 1)	Last instance court (administrative)	ECLI: ES:TS:2018 :3097	05/09/2018	Public enforcement	None - Claim rejected	The requirements for State liability are not met. Firstly, the Court considered that the recovery of the unlawful aid could not be qualified as wrongful damage (one of the conditions for Member State liability). Secondly, Article 108(3) TFEU which is the legal rule allegedly infringed in this case and the basis to obtain State liability, does not grant rights to the beneficiaries of incompatible State aid (another condition that should be met for there to be Member State liability). Moreover, the Court considered that neither the principle of legitimate expectation nor the principle of good faith (general principles of conduct of Public Administrations) have been violated. Finally, the Court concluded that the recovery of the aid includes the corresponding accrued interest.	One of the conditions for Member State liability for damage caused to individuals by a breach of Union law is that the purpose of the legal rule infringed grants rights to the individual. In this context, the Court considered that the purpose of the legal rule allegedly infringed in this case (Article 108(3) TFEU) was not to grant rights to the beneficiaries of incompatible State aid.	

27.1 Sweden

27.1 Country report

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04/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

The courts dealing with public enforcement of State aid rules have so-called general jurisdiction. These courts have jurisdiction in relation to all cases concerning civil disputes and criminal cases, unless the law governing the dispute in question explicitly grants jurisdiction to other courts, that is, the administrative courts or other specialised courts. Most cases handled by these courts are therefore not State aid cases, but criminal law cases or civil disputes.

The following courts exist in Sweden:
- District courts (tingsrätt), 48 spread out over the whole of Sweden;
- Courts of appeal (*hovrätt*), six in total; and
- The Supreme Court (*Högsta domstolen*).

A description of the procedural framework applicable in public enforcement of State aid rules

According to the Law on the Application of the European Union State Aid Rules (*lag (2013:388) om tillämpning av Europeiska unionens statsstödsregler* (Law 2013:388)), those bodies that have granted unlawful State aid also have the obligation to recover it. Recovery decisions are enforced by those bodies that have granted the aid (Section 2 of Law 2013:388). According to Section 3 of Law 2013:388, aid beneficiaries have the obligation to repay unlawful aid to the State. Pursuant to Section 6 of Law 2013:388, a claim before national courts concerning granted State aid can only be invoked by the body that granted the aid in question. Recovery cases are dealt with by the courts with general jurisdiction.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

There are no specialised courts for the private enforcement of State aid rules. However, the competent court in cases concerning the private enforcement of State aid rules depends on the claim made by the parties.

The majority of State aid cases (in general) concern challenges (often by natural persons) to decisions made by the municipalities. Those challenges are governed by Chapter 10, Section 1 of the Swedish Local Government Act (*Kommunallag*, *1991:900*, recently replaced by *Kommunallag*, *2017:725* not addressed in this Study), which gives standing to all residents within a municipality to request the judicial review of decisions to the administrative courts. Decisions taken by the public authorities are also appealed to the administrative courts. Among the administrative courts, there are no courts specialised in hearing State aid cases. The courts are the following:

- Administrative courts (*Förvaltningsrätt*, formerly *Länsrätter*, as may be seen from some judgments), 12 spread across the country.
- Administrative courts of appeal (*Kammarrätt*), 4 in total.
- The Supreme Administrative Court (*Högsta Förvaltningsdomstolen*, formerly *Regeringsrätten,* as seen in cases Supreme Court, 22.10.2009 - Ö1261-08 (SE4) and Supreme Administrative Court, 10.12.2010 - 2597-09 (SE5)).

Cases regarding claims for damages or interim measures against future damage are dealt with by the courts with general jurisdiction (see above the relevant courts in cases concerning the public enforcement of State aid rules).

A description of the procedural framework applicable in private enforcement of State aid rules

The applicable procedural rules depend on the type of action (review of municipal decisions or decision by other public authorities, claim for damages, etc.). There are no special rules for the private enforcement of State aid rules or a particular set of procedural rules that will apply to all cases of private enforcement. This is illustrated by the cases referred to in this Study. For instance, as regards the cases on judicial review of municipality decisions (*e.g.* case 2597-09 (SE5) and case Administrative Court of Appeal in Stockholm, 16.2.2009 - 4514-07 (SE3)), the legal standing for such proceedings are governed by the Local Government Act, while the procedure as such is governed by the Administrative Judicial Procedures Act, which applies to all disputes before the administrative courts. In other cases, such as case Administrative Court of Appeal in Stockholm, 26.3.2007 - 4100-06 (SE2), concerning the challenge of an administrative decision, legal standing is governed by the Administrative Procedure Act (*Förvaltningslagen, 2017:900*), although the cases analysed in this Study refer to the previous act (1986:223). Furthermore, case Ö1261-08 (SE4), regarding a private party that sued a municipality to stop future payments of potential State aid was categorised as a 'civil' dispute. Thus, the legal standing and the procedure were governed by the Code of Judicial Procedure (*Rättegångsbalken, 1942:740*).

Main findings based on the case summaries

As follows from the case summaries analysed in this Study, all cases concern the private enforcement of State aid rules. Even though Law 2013:388 (Law on the Application of the European Union State Aid Rules) aimed at facilitating enforcement of State aid rules by clarifying the bodies responsible for public enforcement and issues of jurisdiction, there has been no court case dealing with public enforcement of State aid rules. Moreover, there

is no publicly available information on the reasons for this issue and the topic is not really discussed in Swedish doctrine.

Even though perhaps it is not reflected by the case summaries in this Study, the 'easiest recourse' for private enforcement is to challenge municipality decisions granting unlawful State aid. Those rules are quite clear in terms of the parties having standing under the procedural rules. With regard to the challenging of other administrative decisions, it is not so self-evident, as illustrated by case 4100-06 (SE2) in the Study.

A case of the Supreme Court of 2009, regarding the request to stop further payments of unlawful State aid constituted a ground-breaking judgment at the time, opening up an additional avenue of challenging unlawful aid. However, even after that case, there have not been many such cases. This unclear situation regarding private enforcement was recognised when discussing the introduction of Law 2013:388. However, Law 2013:388 did not include private enforcement and thus the possibility for interested private parties to gain access to the courts in private enforcement cases was not clarified.

There are no general trends in terms of sectors that follow from the selected rulings. Most cases in Sweden concern municipality decisions and these may relate to a variety of sectors. Going outside the sample of cases dealt with in this Study, there are several cases regarding land sales.

The majority of cases concern two types of actors:
(1) Residents in municipalities, which is probably due to the relatively clear rules regarding the possibility of challenging unlawful aid granted by municipalities, as well as the fact that many potential aid measures are decided by municipalities; and
(2) Competitors that want to challenge public authorities' decisions that may give their competitors or aid beneficiaries an advantage.

Qualitative assessment of the average time of court proceedings

There is no publicly available information on the average duration of court proceedings specifically on Swedish cases regarding State aid.

It should be noted that the assessment only refers to cases (regarding the private enforcement of State aid rules) from the administrative courts of appeals (second-to-last instance), as the number of cases from the last instances, discussed in this country report (including both selected and relevant rulings) is very low (4 out of 17).

It is also important to note that the statistics referred to below (acquired directly from the Swedish National Courts Administration (*Domstolsverket*) include a number of different types of cases, from so-called mass cases to disputes regarding driver's licence, immigration and tax cases. In the period between 2009 and 2017, the average duration of proceedings was between 3.4 and 4.9 months. However, it is important to note that the wide variety of types of cases influences the average duration. For instance, while the average duration of so-called mass cases in 2009 was 2.4 months, the average duration for tax cases was 10.7 months. In this specific time period, the duration of tax cases and social insurance cases were consistently and considerably longer than other categories of cases and thus seem to represent two categories of more 'complex' cases handled by these courts.

The selected and relevant rulings from the administrative courts of appeals discussed in this Study (three of the selected rulings and ten relevant rulings) fall in neither of these two categories, but probably in a category labelled as 'other cases' in the statistics. Looking at the rulings the proceedings lasted approximately between 8 and 22 months. These cases are consistently longer or very close to the average duration of the tax cases, which have been identified above as the more complex and longer type of cases. Thus, *prima facie*, it seems that State aid cases dealt with by the administrative courts of appeals belong to the more complex and longer cases. It is important to emphasise that this is a suggestion, not a definite conclusion.

Furthermore, the duration of proceedings may vary widely over the years and/or between individual administrative courts of appeals. For instance, in 2017, the Stockholm Administrative Court of Appeals dealt with 75% of its cases within 24 months or less.[384] This can be compared to the corresponding figures of that Court for 2016 and 2018 which was eight and six months, respectively. The figure can also be compared to duration of proceedings in 2017 of the Gothenburg Administrative Court of Appeals, which dealt with 75% of its cases within six months or less.

Accordingly, even though the duration of the proceedings in the group of relevant and selected rulings in this Study suggests that State aid cases are more complex and take longer than an 'average' case, it should also be taken into account that the length of the procedure in individual cases may have been influenced by a heavy workload at a particular court in a certain year.

Qualitative assessment of the remedies awarded by national courts

Firstly, it should be noted that due to the small number of court rulings regarding State aid in general, it is difficult to draw any conclusions with a sufficient degree of certainty.

Secondly, many cases are brought before courts by natural persons against municipality decisions. Some of these cases are also lost. It could be questioned to what extent natural persons are in the best position to challenge alleged State aid measures considering the complexity of CJEU case law on the subject of State aid rules. It is therefore not surprising that in cases, such as Ö1261-08 (SE4) and 2597-09 (SE5), either the court invalidated the measure in question on the basis of national law (case Ö1261-08 (SE4)) or the court rejected the claim (case 2597-09 (SE5)).

It seems, in particular, burdensome for natural persons to counter sophisticated evidence regarding certain market evaluations. It is open to speculation whether the situation would be a little different in these cases if they were litigated by competitors to the aid beneficiary. However, as explained above, it may be difficult for competitors to have

[384] See Swedish National Courts Administration, 'Verksamhetsmål – enskilda domstolar resultat', available at http://www.domstol.se/upload/Lokala_webbplatser/Domstolsverket/Statistik/Enskilda%20domstolars%20resultat.pdf (last accessed on 9 February 2019).

standing to challenge municipality decisions as they are not necessarily residents in the municipality.

Lastly, the major issue regarding the low number of cases concerning State aid rules, and even the fewer number of successful challenges to unlawful aid, concerns the procedural rules. The lack of specific rules granting interested parties the possibility of challenging unlawful aid makes it difficult (or at least uncertain) to get access to court.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

The rulings of the courts are often concise. Accordingly, judgments do not include any detailed analysis of Union law sources. For instance, case 2597-09 (SE5) in which the plaintiff had invoked a Commission notice regarding the sale and methods of valuation of land, shows that the court did not really address whether the valuation of land in the case complied with the requirements included in the notice. Nor did the court address the issue of whether the fact that the market evaluation had been done after the transaction made a difference. The style of the judgments makes it difficult to assess to what extent EU sources have been taken into account and applied in a given case.

Furthermore, judgments rarely make explicit references to EU sources (*e.g.* CJEU case law, the GBER, the *de minimis* Regulation, Commission guidelines or notices). When such references are made, they are made to well-established principles like the principle of national procedural autonomy and the requirements of effectiveness and equivalence. In complex cases, the courts do not seem to, on their own initiative, make a deeper inquiry of case law or the Commission's decisional practice.

However, it is also important to emphasise, as mentioned above, that many cases are started by natural persons, who perhaps are not in the best position to present all the relevant sources before the court. With regard to the relevant rulings included in this Study, case 4514-07 (SE3) constitutes a clear deviation from the trend described above. The in-depth assessment in that particular case could probably be explained by two facts. Firstly, there was a State aid expert among the judges. Secondly, the arguments presented by the party challenging the municipality decision were well-elaborated with multiple references to Commission decisional practice and soft law.

Furthermore, the case summaries show a lack of requests for preliminary rulings by Swedish courts. This does not specifically concern State aid cases but follows a general trend regarding Swedish courts. It seems that the delay caused by making a request for a preliminary ruling is an important factor based on which the courts tend not to make such requests. Moreover, as can be seen from the sample cases, there have been few cases reaching the last instance where a court would have an obligation to make such a request.

Qualitative assessment of any other relevant trends in State aid enforcement

Arguments based on State aid against municipality decisions have become a common practice when challenging such decisions. While in the past, sometimes the courts seemed to intentionally avoid the issue and instead dealt with the case on the basis of the Swedish provision on aid to private undertakings, nowadays it appears that courts generally deal more explicitly with the State aid prohibition.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

Only two of the relevant rulings analysed in this Study dealt with the notion of State aid. One of these cases (case 2597-09 (SE5)) has been criticised above as the court did not make an in-depth assessment of the market evaluation and whether it was in line with the Commission's view. However, the court did not seem to have made a clear misapplication of the notion of State aid. In the second case, concerning broadband investments (case 4514-07 (SE3)), the court made a more meticulous assessment of the notion of State aid in the light of several sources of Union law. The court seems also to have reached the right conclusion in the case. As discussed above, it seems that the court was clearly aided by the arguments and sources presented by the plaintiff, which perhaps also explains the level of analysis in the court's judgment.

It is not possible to draw any clear conclusions from these cases. However, the courts seem to rely to a great extent on the sources invoked by the parties. This may indicate difficulties for national judges to have an adequate overview of the EU *acquis* on State aid rules. An appropriate measure could be to increase the training in State aid rules for judges.

Any other relevant comments or findings

Not applicable

27.2 Case summaries

Case summary SE1

Date

04/01/2019

Case identifiers

Member State

Sweden

Court which adopted the ruling (national language)

Kammarrätten i Stockholm

Court which adopted the ruling (English)

Administrative Court of Appeal in Stockholm

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

Swedish

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

864-15

Procedural context of the case

A.B. and others requested the judicial review of a Municipality decision granting a public award to an undertaking under the Swedish Local Government Act. The claim was made under Chapter 10, Section 1 of the Swedish Local Government Act that gives standing to all residents within a Municipality to request for the judicial review of Municipality decisions to the administrative courts. Chapter 10, Section 8 of the Local Government Act lists a number of grounds for such a claim of invalidity, including that the decision constituted a breach of law.

The First Instance Court, the Administrative Court of Stockholm (ruling 5756-14), found that the case concerned a public procurement contract and that only the Procurement Act was applicable. Thus, the plaintiffs were unable to make their claim on basis of the Swedish Local Government Act. This ruling precedes the one discussed in this summary.

A.B. and others, the plaintiff, appealed the judgment to the Stockholm Administrative Court of Appeal claiming that even if the Procurement Act was applicable, it would not hinder the review of the municipality's decision as regards the possibility that it could constitute State aid. The Court rejected the claim on the basis that the plaintiffs did not belong to the limited group of private parties identified as competitors, that could invoke the standstill obligation under Article 108(3) TFEU. The Court thus affirmed the lower court's ruling declaring the plaintiffs claim inadmissible.

Type of action

Private enforcement

Delivery date of the ruling

28/09/2015

Language

Swedish

Headnote

In this ruling, the Court held that individuals that were not competitors to an alleged aid beneficiary could not invoke Article 108(3) TFEU to challenge a public procurement decision made by a Municipality.

Parties

Names of the parties to the action

A.B.; P.F.; K.F.; M.H.; S.H.; L.Ö.; U.Ö. (anonymised)

Versus

Nacka Kommun

The relationship of the plaintiff to the measure

Third party

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

R - Arts, entertainment and recreation

Sport, amusement and recreation activities

The type of State aid measure challenged in the court proceedings

Concession/privatisation of State-owned land/property at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The municipality of Nacka (the defendant), after carrying out a public procurement procedure, selected a company to operate a public swimming pool. A number of individuals (A.B. and others) challenged the municipality's decision on basis of the Swedish Local Government Act which provides the right for individuals to request judicial review of decisions made by the Municipalities. The plaintiffs argued that procedural errors had occurred during the procurement procedure which made the final award invalid. Additionally, in the view of the plaintiffs, the decision also encompassed the grant of unlawful aid to the selected operator.

A.B. and others (the plaintiffs) argued that even if challenges against public awards are governed by the Public Procurement Act, those rules would not exclude a challenge based on Article 108(3) TFEU under the Swedish Local Government Act.

The municipality (the defendant) claimed that the decision could only be challenged on the basis of the Swedish Public Procurement Act (Procurement Act) that exclusively governs actions against public procurement decisions. Thus, the claim made by the plaintiffs was inadmissible.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The case concerned access to court for the challenge of alleged aid measures and therefore did not address the issue of whether the measure constituted State aid.

The Court referred to the standstill obligation in Article 108(3) TFEU and stated that certain individuals have rights according to the provision and therefore also right to legal remedies. The Court could not find that the plaintiffs in the case (which consisted of several

natural persons residing in the Municipality) belonged to the limited group of individuals who could invoke Article 108(3) TFEU, like for example competitors to the aid beneficiary. Thus, the challenge was declared inadmissible.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

While it was not explicitly stated by the Court, it may be inferred from the ruling that individuals that belong to the group of individuals that have an interest under Article 108(3) TFEU, like competitors to the aid beneficiary, may challenge a Municipality decision regarding public procurement under the Swedish Local Government Act. Such challenges are normally exclusively governed by the Public Procurement Act. Thus, the ruling, at least in theory, facilitates challenges to the granting of alleged unlawful State aid. However, the main problem with the Swedish Local Government Act is that it reserves the possibility to challenge Municipalities' decisions to residents. The wider group of undertakings that may have an interest to challenge such decisions will often fall outside this group of privileged plaintiffs as they may come from outside the Municipality in question.

Case summary SE2

Date

04/01/2019

Case identifiers

Member State

Sweden

Court which adopted the ruling (national language)

Kammarrätten i Stockholm

Court which adopted the ruling (English)

Administrative Court of Appeal in Stockholm

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

Swedish

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

4100-06

Procedural context of the case

The public authority (RTTV) had reduced a concession fee for the holder of the concession. Both the holder of the concession (TV 4) and a competitor (Kanal 5) appealed the RTTV's decision to the Administrative Court in Stockholm according to the rule in Section 22 Administrative Procedure Act (Section 22 förvaltningslagen). The provision allows appealing an administrative decision by those affected adversely by the decision and under the condition that the decision may be subject to an appeal. Kanal 5 argued that the reduction in the concession fee constituted aid under Article 87 of the EC Treaty (current Article 107(1) TFEU). TV 4 argued that Kanal 5 did not have standing as it was not adversely affected by the decision.

The Administrative Court in Stockholm held by judgment of 31 May 2006 (ruling 6477-06) that Kanal 5 was not adversely affected as the reduction of concession fee did not constitute aid. The Court rejected the claim on the basis that Kanal 5 lacked standing.

Kanal 5 appealed the ruling on standing to the Stockholm Administrative Court of Appeal, which by judgment of 26 March 2007 reversed the lower court's ruling.

Type of action

Private enforcement

Delivery date of the ruling

26/03/2007

Language

Swedish

Headnote

In this ruling, the Court held that a competitor could challenge an administrative decision under the general rule for judicial review of administrative decisions to evaluate whether the decision constitute unlawful aid.

Parties

Names of the parties to the action

Kanal 5 AB

Versus

Radio- and TV-verket; 2. TV 4 AB

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

TV-broadcasting

The type of State aid measure challenged in the court proceedings

Other

Broadcasting fees

Substance of the case

Facts and parties' main arguments in the case

The public authority (RTTV) had reduced a concession fee for the holder of the concession. Both the holder of the concession (TV 4) and a competitor (Kanal 5) appealed the decision of the RTTV to the Administrative Court in Stockholm according to the rule in section 22 Administrative Procedure Act (Section 22 förvaltningslagen). The provision allows appealing administrative decisions by those affected adversely by the decision and under the condition that the decision may be subject to an appeal.

Kanal 5 claimed that the reduction of the concession fee constituted aid. Accordingly, the principle of primacy of Union law would require the protected interests under Article 88(3) of the EC Treaty (current Article 108(3) TFEU) to be taken into account. Otherwise, the company would lack any possibility to request a legal assessment of the measure. The defendant, TV 4, argued that there was no support for the proposition that the measure would distort or restrict competition, therefore granting standing to Kanal 5 under section 22 of Administrative Procedure Act.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Court stated that Article 88(3) of the EC Treaty (current Article 108(3) TFEU) has direct effect and gives rights to individuals that national courts must protect, irrespectively of what is stated in applicable national rules. National courts also have an obligation to set aside national rules that would result in the implementation of aid. For those reasons Kanal 5 had the right to have its arguments on State aid reviewed by the national court. Accordingly, the Court held that Kanal 5 had standing under section 22 of the Administrative Procedure Act.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The lower court found that there was no aid in the re-assessment of the case. Thus, there was no remedy.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- 120/73, Lorenz v. Germany (1973) ECLI:EU:C:1973:152

√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Notice on cooperation between national courts and the Commission in the State aid field, C 312/8, OJ C 85, 9.4.2009

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary SE3

Date

04/01/2019

Case identifiers

Member State

Sweden

Court which adopted the ruling (national language)

Kammarrätten i Stockholm

Court which adopted the ruling (English)

Administrative Court of Appeal in Stockholm

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

Swedish

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

4514-07

Procedural context of the case

T.S. appealed the municipality of Stockholm's decision approving investments made by three public undertakings in the development of broadband infrastructure and services. The claim was made under Chapter 10, Section 1 of the Swedish Local Government Act that gives standing to all residents within a Municipality to request for the judicial review of Municipality decisions to the administrative courts. Chapter 10, Section 8 of the Local Government Act lists a number of grounds for such a claim of invalidity, including that the decision constitutes a breach of law.

In its ruling (25240-05) of 25 May 2007, the Administrative Court of Stockholm rejected the claim on the ground that the investments were based on the MEOP. Thus, there was no aid.

By judgment of 16 February 2009, the Stockholm Administrative Court of Appeal reversed the lower court's ruling and invalidated the Municipality's decision.

Type of action

Private enforcement

Delivery date of the ruling

16/02/2009

Language

Swedish

Headnote

In this ruling, the Court held that an action plan adopted by Municipality decision for the development of broadband infrastructure through public undertakings did not comply with the MEIP and therefore constituted State aid that should have been notified to the Commission according to Article 88(3) of the EC Treaty (current Article 108(3) TFEU).

Parties

Names of the parties to the action

T.S. (anonymised)

Versus

Stockholm City (kommunen)

The relationship of the plaintiff to the measure

Third party

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

J - Information and communication

Information and communication services

The type of State aid measure challenged in the court proceedings

Other

Investments in the development of broadband infrastructure

Substance of the case

Facts and parties' main arguments in the case

The Municipality of Stockholm had approved investments made by three public undertakings for the development of broadband infrastructure and services.

The plaintiff argued that the decisions made by the Municipality approving the broadband investments constituted State aid. According to the plaintiff, it follows from the MEIP that a determination must be made of how a market operator would estimate the profitability of the investments. The plaintiff argued that the transactions concerned a broadband investment and estimated a rate of return of approximately 12 %.

The defendant argued that the transactions were not investments in the broadband infrastructure but in real estate. The estimated rate of return should therefore be much lower, approximately 5-6 %.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Stockholm Administrative Court of Appeal found that the investment in question constituted a broadband investment. Accordingly, a rate of return of 5-6 % was found to be too low. Moreover, the Court found that the business plan failed to disclose the purpose of the measure (concerning the type of investment), economic calculations of profitability and the rate of return. Accordingly, the Court found that the Municipality's business plan lacked essential information and as such it seemed unlikely that a private operator would have made the same investment decision as the Municipality.

The Court found also that, as the decision failed the MEIP, it would result in advantages granted to the public undertakings as well their subsidiaries, like providers of broadband networks. Moreover, the Court found that the advantages granted to undertakings on markets subject to international competition would distort competition and trade between Member States.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

Judicial review of decisions made by the Municipality result in the invalidation of the decision in question. Normally, judicial review occurs before the measure is implemented.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- 730/79, Philip Morris v. Commission of the European Communities (1980) EU:C:1980:209
- 248/84, Germany v. Commission of the European Communities (1987) EU:C:1987:437
- C-482/99, French Republic v. Commission of the European Communities (Stardust Marine), (2002) EU:C:2002:294
- C-368/04, Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others (2006) ECLI:EU:C:2006:644

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Commission Communication, Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, C 307/3, OJ C 307, 13.11.1993
- Commission decision of 19 July 2006, C 35/2005 (ex N 59/2005), which the Netherlands are planning to implement concerning broadband infrastructure in Appingedam, OJ L 86, 27.3.2007
- Commission Decision C 53/2006 (ex N 262/2005, ex CP 127/2004) of 11 December 2007, Investment by the city of Amsterdam in a fibre-to-the home (FttH) network

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary SE4

Date

04/01/2019

Case identifiers

Member State

Sweden

Court which adopted the ruling (national language)

Högsta Domstolen

Court which adopted the ruling (English)

Supreme Court

Instance court which adopted the ruling

Last instance court (general jurisdiction)

Official language of the court

Swedish

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

Ö1261-08

Procedural context of the case

The Municipality in Stockholm had made several payments to a company fully owned by the Municipality. A competitor to the aid beneficiary, the Nya Destination Stockholm or NDSHT, notified the alleged aid to the Commission. However, the Commission found that there was no ground to initiate the formal investigation procedure. NDHST took an action before the CFI (current GC) (NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v Commission of the European Communities T-152/06) and subsequently to the ECJ (current CJEU) (Case NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v European Commission C-322/09P). The litigation before the Union Courts concerned procedural matters and did not deal with the substance of the case. After the case was remanded to the CFI (current GC), the case was closed (Case NDSHT v Commission T-152/06 RENV).

During this litigation NDHST also made a claim before the District Court of Stockholm requesting for interim measures to halt possible future payments from the Municipality to the aid beneficiary.

By judgment of 9 February 2007, the District Court of Stockholm approved the plaintiff's (the company Nya Destination Stockholm or NDSHT) request for interim measures to stop the further payments of potential aid which was admissible. As Swedish law did not regulate the possibilities for competitors to the aid beneficiary to have access to court for enforcing the standstill clause set out in Article 88(3) of the EC Treaty (current Article 108(3) TFEU), it was unclear whether the plaintiff was entitled to bring the action before the District court. As the alleged aid measure had been taken by decision of the Municipality, the defendant (the Municipality and the aid beneficiary) alleged that the plaintiff should have made its claims before the administrative courts. However, the District Court found that the challenged issue was not the decision to grant money as such, but the possibility to suspend the implementation of the grant while the case was decided by the Commission and the Union Courts. Thus, in the light of the Commission's Notice on cooperation between the national courts and the Commission (OJ [1995] C 312/8), the Court found that such an interim measure should be granted.

The judgment was appealed by the Municipality and the aid beneficiary to the Svea Court of Appeal. By judgment of 19 February 2008, the Svea Court of Appeal confirmed the judgment of the Stockholm District Court.

The plaintiffs (Municipality and aid beneficiary) brought an action before the Supreme Court. The Supreme court declared in its judgment of 22 October 2009 that districts court have jurisdiction to hear cases regarding damages or the prevention of future harm. As there were no other rules that specifically gave jurisdiction to another court for the claim made by the defendant, the request to stop further payments of potential aid to avoid harm for the defendant could be tried by the District Court according to Swedish Code of Procedure, Chapter 10, Section 17 paragraph 1 point 1.

Type of action

Private enforcement

Delivery date of the ruling

22/10/2009

Language

Swedish

Headnote

In this ruling, the Court held that a third party that could be harmed by the future payments of alleged aid could bring an action before the district courts requesting interim measures to suspend such payments.

Parties

Names of the parties to the action

Stockholms kommun; Stockholms Stadshus AB

Versus

NDHST – Nya Destination Stockholm Hotell och TeaterpaketAB

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Competitor

Sector relating to the State aid argument

I - Accommodation and food service activities

Destination advertising and accommodation

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The Municipality in Stockholm had made several payments to a fully owned company. A competitor to the aid beneficiary, NDHST, requested interim measures at the Stockholm District Court to suspend future payments. However, as no rules specifically gave NDHST the right to make such a claim before the district courts, the main issue discussed in the case concerned whether NDHST's claim was admissible.

NDHST, the defendant, argued that the payments made by the Municipality of Stockholm constituted unlawful aid as the payments had not been notified to the Commission. Accordingly, there was a risk that the Municipality in the future would make further payments contrary to Article 88(3) of the EC Treaty (current Article 108(3) TFEU) which would distort competition and cause injury to NDHST.

While the arguments by the plaintiffs (the Municipality and the aid beneficiary) are not disclosed in the judgment by the Swedish Supreme Court, it had previously been argued before lower courts that the case concerned whether the Municipality's decisions regarding previous payments were unlawful and whether they had caused NDHST harm. NDHST had therefore made its claim before the wrong court as administrative courts have jurisdiction for challenges against Municipality decisions.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

The Swedish Supreme Court found that there were no rules specifically determining jurisdiction in cases concerning the future payments which may cause harm. Thus, according to the Swedish Code of Procedure, Chapter 10, Section 17 paragraph 1 point 1, the district court, which has general jurisdiction, was competent to adjudicate the dispute.

Remedy(ies) granted – including assessment public enforcement issues

Case sent back to lower court for re-assessment

The case was settled so there is no final judgment by the lower court after re-assessment.

Difficulties referred to by the national court in deciding the case (optional)

The Court did not refer to a specific difficulty. However, the Court recognised that there were no rules specifically addressing the possibility for competitors or other third parties to request for interim measures to halt the future payments constituting aid.

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary SE5

Date

04/01/2019

Case identifiers

Member State

Sweden

Court which adopted the ruling (national language)

Regeringsrätten

Court which adopted the ruling (English)

Supreme Administrative Court

Instance court which adopted the ruling

Last instance court (administrative)

Official language of the court

Swedish

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

Case No. 126-10 (not discussed below) and Case No. 2597-09.

Case No. 126-10 was ultimately decided on the basis of Swedish law (finding the granting of aid in question unlawful according to the Swedish Local Government Act). It was thus not necessary to make an assessment under State aid rules.

Procedural context of the case

The judgment deals with two cases. As mentioned above, only one of them is discussed in this case summary (ruling 2597-09 or part II of the judgment).

A natural person (P.G.) had requested the judicial review of a Municipality decision (Årjängs kommun) (31/3/2008) regarding one transaction, including both the purchase and sale of land, with the same counterparty. The claim was made under the Chapter 10, Section 1 of the Swedish Local Government Act (Local Government Act), which permits residents of the Municipality to challenge the legality of municipality decisions. Under Chapter 10, Section 8 of the Local Government Act lists a number of grounds for such a claim of invalidity, including that the decision constitutes a breach of law.

On 6 November 2008, the Administrative Court rejected the request made by P.G. on the basis that it had not been demonstrated that there was overvaluation and undervaluation of the lands subject to the transaction when compared to the market value involved in the transaction. Thus, no State aid was granted by the Municipality.

On 24 March 2009, the Administrative Court of Appeal in Gothenburg affirmed the lower courts judgment.

On 10 December 2010, the Supreme Administrative Court affirmed the previous judgments.

Type of action

Private enforcement

Delivery date of the ruling

10/12/2010

Language

Swedish

Headnote

In this ruling, the Court held that a rule imposing the burden of proof on the plaintiff to demonstrate that a Municipality decision constituted State aid complied with Union law. The fact that the Municipality had not subjected the sale of land to a public bid or to a market evaluation before the transaction was made, did not result in the transaction been classified as aid when the plaintiff had not demonstrated that the transaction deviated from market values.

Parties

Names of the parties to the action

P.G. (anonymised)

Versus

Årjängs kommun (anonymised)

The relationship of the plaintiff to the measure

Third party

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

F - Construction

Construction of buildings

The type of State aid measure challenged in the court proceedings

Concession/privatisation of State-owned land/property at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The Municipality had made a transaction with a private party, including both the purchase and the sale of land. No market evaluation was made for any of the transactions and there was no public bid for the sale of land. However, a market evaluation was carried out after the transaction, which indicated that the Municipality in fact had purchased the land to a lower price than market value and sold the land to higher price than market value.

The plaintiff argued that the failure to submit the sales of land to a public bid and to carry out a market evaluation before the transaction meant that the transaction constituted the grant of State aid. The plaintiff also criticised the market evaluations submitted by the defendant.

The defendant argued that the transaction did not intend and did not constitute aid which was also demonstrated by the market evaluations made after the transaction.

Remedy(ies) sought

Interim measures to suspend the implementation of an unlawful aid

Outcome of the case

Conclusions adopted by the national court

Ruling 2597-09:
The Court held that the plaintiff had the burden of proof for showing that the Municipality decision was illegal according to one of the grounds listed in Chapter 10, Section 8 of the Swedish Act on Local Government (Local Government Act). The Court also held that

Union law allows the application of national rules on procedure as long as these comply with the principles of effectiveness and equivalence according to the ruling Rosmarie Kapferer v Schlank & Schick GmbH C-234/04. The Court found that the rules on the burden of proof under the Local Government Act complied with the requirements under Union law. Accordingly, the Court found that the plaintiff had not discharged its burden of proof in the case. The Court acknowledged that the Municipality had not procured the sales of land or made a market evaluation before the transaction took place. The transaction had not been notified to the Government for notification to the Commission. A market evaluation of the transaction had only been carried out some time after the transaction had taken place. The market evaluation did not show that any overcharge and undercharge had been made that could constitute State aid. The plaintiff's arguments were not seen as being able to refute the view of the Municipality.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-234/04, Rosmarie Kapferer v Schlank & Schick GmbH (2006) EU:C:2006:178

√ CJEU case law on 'effectiveness' (effet utile)

References by the court to other relevant aspect of the EU acquis

- Commission Communication on State aid elements in sales of land and buildings by public authorities, C 209/3, OJ C 209, 10.7.1997 (currently replaced by 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 C/2016/2946, OJ C 262, 19.7.2016)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

27.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
Kammarrätten i Stockholm	Administrative Court of Appeal in Stockholm	Second to last instance court (administrative)	4100-06	26/03/2007	Private enforcement	Case sent back to the lower court for re-assessment; None - Claim rejected	This case concerned the possibility of a third party challenging a concession agreement between the State and a TV-operator that potentially constituted State aid. In particular, the issue was whether the plaintiff was an interested party according to the national rules on standing.		The lower court subsequently found that there was no State aid as the selectivity requirement was not met. The appeal of this judgment was subsequently dismissed. No public links to this judgment are available.
Hovrätten över Skåne och Blekinge	Court of Appeal of Skåne and Blakinge	Second to last instance court (civil/commercial)	916-07	26/04/2007	Private enforcement	Interim measures to suspend the implementation of unlawful aid	The Court rejected an appeal against the lower court's decision on interim measures. The Court found that there was a certain likelihood that future payments made by a municipal company to another undertaking would constitute State aid.	The case concerned, in particular, the possibility of third parties challenging potential State aid measures and to suspend further payments to potential State aid recipients through civil courts.	The case was later settled before the courts made any final determination on whether the payments in question constituted State aid.
Kammarrätten i Sundsvall	Administrative Court of Appeal in Sundsvall	Second to last instance court (administrative)	1715-06	09/04/2008	Private enforcement	Interim measures to suspend the implementation of unlawful aid	Invalidation of the municipality's decision to sell the land as it constituted State aid.	The Court followed Commission Decision C35/2006 Konsum Jämtland (30/1/2008). The Court gave effect to the Commission decision on the same case and thus found that there was State aid.	The decision was later quashed by the CFI (current GC) in T-244/08 Konsum Nord EU:T:2011:732.
Kammarrätten i Stockholm	Administrative Court of Appeal in Stockholm	Second to last instance court (administrative)	4514-07	16/02/2009	Private enforcement	Other remedy imposed	Invalidation of the municipality's decision to invest in the development of broadband infrastructure as a result of a judicial review. The Court found that the investment constituted State aid. Normally, judicial review occurs before the measure is implemented.	The ruling concerns a number of issues, *inter alia,* the issue of State resources and imputability, the MEIP and effect on trade.	
Högsta domstolen	Supreme Court	Last instance court (civil/commercial)	Ö1261-08 (NJA 2009 s. 625)	22/10/2009	Private enforcement	Case sent back to the lower court for re-assessment	The case concerned a preliminary issue of access to the Court, which the Court granted. The ruling confirmed the possibility for a plaintiff to stop further payments of unlawful aid to the recipient through a civil action against the municipality paying out the aid.	The ruling set the possibility for a plaintiff to stop further payments of unlawful aid to the recipient through a civil action against the municipality paying out the aid. The case thus concerned the principle of effectiveness.	The case was later settled.
Regeringsrätten	Administrative Supreme Court	Last instance court (administrative)	2812-09 (RÅ 2010 ref. 100)	01/10/2010	Private enforcement	Interim measures to suspend the implementation of an unlawful aid	Invalidation of the municipality's decision to sell the assets. The municipality had failed to include the value of intangible assets in the sale. The transaction was thus not considered to have occurred at market value.	The ruling concerned the application of the MEIP applied to the sale of assets by a municipality.	
Regeringsrätten	Administrative Supreme Court	Last instance court (administrative)	126-10 and 2597-09 (RÅ 2010 ref. 119)	10/12/2010	Private enforcement	Interim measures to suspend the implementation of unlawful aid; None - Claim rejected	Interim measure to suspend the implementation of unlawful aid (case 126-10); None - Claim rejected (case 2597-09). Two cases concerned the invalidation of a decision by municipalities to sell land (which are formally not interim measures). The Court did not get into the issue of whether the sale constituted unlawful State aid as the sale was invalidated on basis of national law (case 126-10); State aid was not proven (case 2597-09).	The ruling concerned the application of the MEIP applied to the sale of assets by a municipality.	
Regeringsrätten	Administrative Supreme Court	Last instance court (administrative)	2597-09	10/12/2010	Private enforcement	None - Claim rejected	The Court found that the municipality had acted like a private actor. Thus, there was no State aid. The ruling concerned the application of the MEIP applied to the sale of land by a municipality. The plaintiff failed to establish as a matter of evidence that the municipality intended to or had actually granted aid to the buyer of the land.		
Kammarrätten i Sundsvall	Administrative Court of Appeal in Sundsvall	Second to last instance court (administrative)	1765-10	07/06/2011	Private enforcement	Interim measures to suspend the implementation of an unlawful aid	Invalidation of the municipality's decision to sell the land. The Court found that the sale of land was not proven to have occurred at market value. The Court also found that the aid had an effect on trade between Member States.	The case concerned the question of whether the municipality had acted as a private seller. The Court found that the municipality had, to some extent, the burden of proof that the assessment of the value of the land had been done correctly. While the Court referred to the judgment by the Administrative Supreme Court (2010 ref 119), it differed in the assessment of the sale of land. In particular, the burden of proof regarding the valuation of the sale shifted over to the Municipality when there had been a serious offer made by a private company exceeding the sales price. The Court also criticised features of the valuation process that were accepted previously by the Administrative Supreme Court.	

Kammarrätten i Jönköping	Administrative Court of Appeal in Jönköping	Second to last instance court (administrative)	239-11	26/01/2012	Private enforcement	None - Claim rejected	The ruling concerned the application of the MEIP to the sale of stock. In particular, the case concerned the burden of proof regarding whether the measure constituted aid. The Court found that the municipality had acted like a private actor. Thus, there was no State aid.	The case concerns, in particular, what constitutes a serious bid when valuing the sale of stock. The case concerned the burden of proof regarding whether the measure constituted State aid.	
Kammarrätten i Stockholm	Administrative Court of Appeal in Stockholm	Second to last instance court (administrative)	1745-11	31/01/2012	Private enforcement	Interim measures to suspend the implementation of unlawful aid	Invalidation of the municipality's decision to grant financing to two sporting clubs. The grant was found to constitute State aid.	The ruling concerned the application of the MEIP. The Court found that the finance granted for an infrastructure project constituted an economic advantage and thus State aid. The Court concurred with the lower court's judgment which made an explicit and detailed analysis pursuant to the case law of the CJEU on the MEIP.	
Kammarrätten i Göteborg	Administrative Court of Appeal in Gothenburg	Second to last instance court (administrative)	2153-11	11/05/2012	Private enforcement	None - Claim rejected	The Court found that the municipality had acted like a private actor. Thus, there was no State aid. The ruling concerned the application of the MEIP to the sale of land by a municipality. The Court found that the expert opinion on the value of the land had to been assessed in the light of the zoning plan made by the municipality and that the assessment of the value was acceptable.		
Kammarrätten i Stockholm	Administrative Court of Appeal in Stockholm	Second to last instance court (administrative)	4946-12	29/04/2013	Private enforcement	None - Claim rejected	The ruling concerned whether the lease agreements between the municipality and a sporting stadium constituted an economic advantage. The Court found that the municipality had acted like a private actor. Thus, there was no State aid.		
Kammarrätten i Sundsvall	Administrative Court of Appeal in Sundsvall	Second to last instance court (administrative)	3007-12	20/12/2013	Private enforcement	None - Claim rejected	The Court found that the municipality had acted like a private actor. Thus, there was no State aid. The ruling concerned whether the sales of real estate to a mining company constituted an economic advantage and thus State aid. In particular, the case concerned whether the calculation of the sale price should consider future profits. The Court found that in practice it would not be possible to sell the real estate on the market.	The ruling concerned whether the sales of real estate to a mining company constituted an economic advantage and thus State aid. The case deals with the interesting situation where it is very difficult to estimate the market value.	
Kammarrätten i Sundsvall	Administrative Court of Appeal in Sundsvall	Second to last instance court (administrative)	2145-13	10/06/2014	Private enforcement	None - Claim rejected	The ruling concerned whether a capital injection into an undertaking owned by the municipality constituted an economic advantage. The Court found that the municipality had acted like a private investor. Thus, there was no State aid.	The case concerned the assessment of a capital injection into a company that was in economic difficulty complied with the MEIP. The Court did not address whether the company was in difficulty but treated the transaction as any other capital injection.	
Kammarrätten i Stockholm	Administrative Court of Appeal in Stockholm	Second to last instance court (administrative)	864-15	28/09/2015	Private enforcement	None - Claim rejected	The ruling concerned the possibility to appeal a public procurement award that potentially constituted State aid. At the time, it was not possible for third parties such as the plaintiffs to challenge the award under Swedish public procurement law. The case concerns the scope of the persons protected under Article 108(3) TFEU. The plaintiffs were found not to have standing in the proceedings as they were not considered to be competitors under Article 108(3) TFEU.		
Kammarrätten i Göteborg	Administrative Court of Appeal in Gothenburg	Second to last instance court (administrative)	5245-15	01/11/2016	Private enforcement	None - Claim rejected	The Court rejected a claim that the municipality had failed in its supervision of a controlled undertaking suspected of granting aid by selling a subsidiary.	The case concerned mainly the judicial review of municipality decisions. However, the ruling affects the possibilities to challenge potential State aid granted by undertakings that are controlled by municipalities. The Municipality had not reviewed the specific transaction that potentially constituted unlawful aid. Accordingly, the Court held that the Municipality's decision could not be criticised.	This case was later reaffirmed by the Supreme Administrative Court (no. 6335-16) in 2018. Available at http://www.rattsinfosok.dom.se/lagrummet/Detalj_Ram.jsp?detaljTyp=detalj&detaljTitel=6335-16%20H%F6gsta%20f%F6rvaltningsdomstolen&tmpWebLasare=Netscape.

28.1 United Kingdom

28.1 Country report

Name national legal expert

Dr Nele Dhondt

Date

13/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

There is no specialised court with specific jurisdiction for State aid cases, including cases concerning the public enforcement of State aid rules. The standard courts are therefore competent to hear these cases and, as the summarised rulings illustrate, State aid arguments have been raised before a wide variety of courts in the UK. There have not been many instances, however, of State aid recovery before UK courts:

- In the *DTI* case, the UK Government brought a recovery action against the aid beneficiary in the English High Court of Justice;[385] and
- In *Advocate General for Scotland v John Gunn & Sons*, the Crown brought such an action before the Scottish Court of Session, Outer House.[386]

Unless recovery is based on contractual arrangements (see further below), the main type of court proceedings available to the aid beneficiary to challenge the public authority's attempt or intention to recover the aid granted are judicial review proceedings before the:

- High Court of Justice, Queen's Bench Division (Administrative Court) in England and Wales;
- Court of Session, Outer House in Scotland; and
- High Court of Northern Ireland, Queen's Bench Division in Northern Ireland.

An appeal can be made before the Court of Appeal of England and Wales, the Court of Session, Inner House, and the Court of Appeal (Northern Ireland), respectively, and subsequently before the UK Supreme Court.

Timing and standing for judicial review[387]

In England and Wales, when applying for judicial review, an application for permission to apply for judicial review must be brought first. This application must be done promptly and in any event within three months from the date when grounds for the application first arose.[388] Only parties that have "sufficient interest in the matter to which the application relates" can make an application for judicial review.[389] Whether a party has sufficient interest is assessed taking into account the merits of the case and must involve a personal interest in the decision that the party wishes to challenge.[390] Generally, this concept of 'sufficient interest' is considered to be broader in scope than the concept of 'direct and individual concern' as laid down in Article 263 TFEU.[391] In the context of State aid cases, not only the aid beneficiary but also its competitors, for example, have been regarded as meeting the 'sufficient interest' criteria.[392] This means that there are several routes for the enforcement of State aid rules before the national courts in the UK.

A description of the procedural framework applicable in public enforcement of State aid rules

Procedural framework including available remedies

The UK does not have any specific legislation relating to the enforcement of State aid rules, including the recovery of unlawful aid. General procedural rules are therefore applicable. Under these rules, an aid beneficiary can seek to challenge the public authority's attempt or intention to recover the aid granted using judicial review (provided the authority's decision is subject to review). An undertaking that has been unsuccessful in applying for (additional) aid can also use judicial review to challenge the public authority's negative decision.

Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a public body's decision or action. The grounds for judicial review (in England & Wales) are generally classified under the following four headings: (i) illegality; (ii) irrationality; (iii) procedural unfairness; and (iv) legitimate expectations.

A 'plaintiff' (i.e. claimant) may seek one or more of six forms of final relief, three of which are specific to judicial review proceedings:

- An order quashing the decision in question (quashing order);
- An order restraining the body under review from acting beyond its powers (prohibiting order); and
- An order requiring the body under review to carry out its legal duties (mandatory order).[393]

The three other (general) remedies available are:

- A declaration;
- A stay or injunction; and
- Damages.[394]

[385] *DTI v British Aerospace and Rover*, case (1991) 1 CMLR 165.
[386] Scottish Court of Session, 13.4.2018 - [2018] CSOH 39 (UK10).
[387] We have limited a summary of the rules on timing and standing as well as other (procedural) rules in this report to those that are applicable in England and Wales.
[388] Civil Procedure Rules (CPR) 54.5(1).
[389] Senior Courts Act 1981, Section 31(3).
[390] *IRC v National Federation of Self Employed and Small Businesses*, case[1982] AC 617; *R v Independent Broadcasting Authority, ex parte Whitehouse*, case[1984] Times 14 April.
[391] See also Global Competition Review, State aid 2018, response to question 22, available at: https://globalcompetitionreview.com/jurisdiction/1005137/united-kingdom (last accessed on 13 January 2019).
[392] See for example for competitors: *R v Attorney-General ex parte ICI* case (1987) 1 CMLR 72 (CA).
[393] CPR 54.2 and section 31(1), SCA 1981.
[394] CPR 54.3 and sections 31(2) and (4), SCA 1981.

All of the above-listed remedies are discretionary, meaning that even if the court concludes that the public body has acted wrongfully it does not have to grant a remedy.

Specifically on damages, it is worth noting that these are available in principle for competitors of an aid beneficiary and other third parties that have suffered loss as a result of the unlawful grant of aid and the recovery of such aid (*e.g.* where a creditor of an aid beneficiary is harmed by the recovery of the aid).[395] In *BETWS Anthracite Limited v DSK Anthrazit Ibbenburen GmbH*, the national court held, however, that a competitor cannot claim damages from a recipient of unlawful aid (suggesting the action must be directed against the State).[396] Whether an aid beneficiary is able to claim damages against the State in relation to the suspension or annulment of unlawful aid is also doubtful.[397]

The conditions for awarding damages against the State for granting unlawful aid (and therefore breaching Union law that was intended to confer rights on individuals) are set out in *R v Secretary of State for Transport ex parte Factortame*:[398]

- The breach complained of must be "sufficiently serious"; and
- There must be a causal link between the breach complained of and the loss suffered.

As a matter of procedure, a party may bring a claim for damages based on these principles by way of judicial review, if it brings the claim as part of a challenge to the decision itself.[399]

We are not aware of any parties, including competitors, that have successfully claimed damages in a UK court for State aid related reasons, including a decision to grant unlawful State aid.

Legal basis for recovery

Due to a lack of specific legislation and case law, the legal basis for recovery is also not clearly established in the UK. Recovery of aid appears to be based on the direct effect of EU legislation and decisions. In *Advocate General for Scotland v John Gunn & Sons*, the Court of Session accepted Union law as a sufficient basis for recovery. In this case, the Court of Session also rejected the argument that repayment of the aid would constitute a breach of human rights.[400] In practice, grant agreements will often include 'clawback' provisions that provide authorities with a contractual mechanism to recover aid (should this be required).[401]

Finally, there is not one single national authority in charge of recovering State aid in the UK. The authority that granted the aid is therefore most likely to be the one that will recover it.[402]

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

There is no specialised court with specific jurisdiction in relation to the private enforcement of State aid rules. Judicial review of the decision to grant State aid will usually be the most appropriate means of challenging the grant of State aid to, for example, a competitor. An application for judicial review should be made to the competent courts listed above. The defendant will be the public authority that issued the contested decision, not the aid beneficiary. As also mentioned above, the courts have accepted that competitors of the beneficiary of allegedly unlawful aid have sufficient standing to challenge the decision awarding the aid.[403]

State aid arguments have also been raised in proceedings other than judicial review or (related) actions for damages, for example, as a defence in a criminal case (before the England & Wales Court of Appeal (Criminal Division))[404] and to resist enforcement of an arbitration award granted by the International Centre for Settlement of Investment Disputes (ICSID) (before the England & Wales High Court (Commercial Court)).[405]

A description of the procedural framework applicable in private enforcement of State aid rules

As mentioned above, the UK has not adopted any specific legislation in order to implement State aid rules. The general procedural framework is therefore applicable to the private enforcement of State aid rules (see above). See also above for an overview of the available remedies, including damages.

Main findings based on the case summaries

Type of action and main actors

Compared to some of the other Member States, the number of relevant rulings for the UK is relatively low for both public and private enforcement. This is probably, at least partly, the result of the UK's good record of compliance with State aid rules.[406] The UK also provides less State aid than most other Member States.[407]

The number of relevant (and selected) rulings is low in relation to public enforcement, which reflects the low number of recovery decisions and recovery orders issued in the UK.

[395] See also Bacon, K., *European Union Law of State Aid*,2017, Oxford, para. 20.31.
[396] Case [2003] EWHC 2403.
[397] See also Bacon, K., *European Union Law of State Aid* , *op.cit.*, para. 20.34.
[398] Joint cases C-46 and 48/93 *Factortame Ltd and others*(1996)ECLI:EU:C:1996:79, para. 51.
[399] Senior Courts Act 1981, Section 31(4), and CPR 54.3(2).
[400] *Advocate General for Scotland v John Gunn & Sons*, case [2018] CSOH 39 (UK10).
[401] See also Global Competition Review, State aid 2018, response to question 23, available at: https://globalcompetitionreview.com/jurisdiction/1005137/united-kingdom (last accessed on 13 January 2019).
[402] *Id.*, response to question 46.
[403] See for example *R v Attorney-General ex parte*, case ICI (1987) 1 CMLR 72 (CA).
[404] See *JC & Ors v The Crown*, case[2015] EWCA Crim 210 (UK7).
[405] *Micula and Ors v Romania and Anor*, case [2017] EWHC 31 (Comm) (UK9).

[406] Between January 2007 and December 2017, the Commission opened 21 formal investigations into State aid measures provided or proposed by the UK with a recovery decision with recovery in two cases, according to the DG Competition's State aid database (available at: http://ec.europa.eu/competition/elojade/isef/index.cfm (last accessed on 13 January 2019). The Commission also took a recovery decision with recovery on 19 December 2018 in the Gibraltar corporate tax case. See also DG Comp information on recovery (available at: http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html (last accessed on 13 January 2019.
[407] UK State aid in 2017 was 0.38% of GDP. The average across the EU was 0.76%. Source: European Commission, DG Competition, State Aid Scoreboard 2018, available at: http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html (last accessed on 13 January 2019. See also the analysis in the UK Government's Review of the Balance of Competences between the UK and the EU, Competition and Consumer Policy Report, 2014, p. 29-30.

As for private enforcement, the selected cases suggest that a wide range of parties are involved in proceedings before the national courts with a State aid element, as main actors (in addition to public authorities) for a variety of reasons, in particular:

- State aid beneficiaries resisting recovery or seeking the payment of (authorised/additional) aid;[408]
- Competitors claiming unlawful aid was granted to their competitor;[409] and
- Third parties claiming unlawful aid to attack a public authority decision that is negatively affecting them (*i.e.* the granting of a planning permission or a loan).[410]

In terms of the remedies requested in the private enforcement cases, in the majority of cases it is unclear which remedy the plaintiffs requested because the application for judicial review was unsuccessful and remedies were not discussed.[411] We are not aware of any cases where the court decided that the public authority had acted wrongly but used its discretion not to grant a remedy.

Sectors and purpose of aid measures

Most of the summarised cases relate to sectors such as mining and quarrying; electricity, gas, steam and air conditioning supply; transportation and storage services; and construction and manufacturing. To some extent this can be explained by the distribution of State aid. The sectors that receive most support from the UK are those concerning the environment, research and development and support for small and medium-sized enterprises.[412] In particular, more than half of the summarised rulings relate to aid schemes with an environmental protection objective.[413]

Qualitative assessment of the average time of court proceedings

There are no fixed time frames for judicial review proceedings or private actions for damages in England and Wales. The duration of proceedings can vary quite significantly depending on how the parties and/or the courts decide to conduct them. For example, as illustrated by the *BAA v HMT* case,[414] a stay on national proceedings to await the conclusion of EU proceedings can add significant time to the national proceedings.

The average time taken from lodging a case to the final hearing for judicial reviews at the Administrative Court in England & Wales for the period January to December 2017 was 176 days.[415]

From the case summaries, there is nothing to suggest the average duration of court proceedings for State aid rulings is generally longer (or shorter) than this.

Qualitative assessment of the remedies awarded by national courts

Four of the ten cases summarised concerned challenges against a public authority's decision or policy by competitors of the aid beneficiary or other third parties arguing that the decision or policy amounted to unlawful State aid. This State aid argument failed in all of these actions and, with the exception of one action (which was successful on another ground), none resulted in any remedies.[416]

More generally, we are only aware of two instances[417] where the argument that a decision under review amounted to unlawful State aid was successful in a UK court (resulting in a declaration of unlawfulness) despite the fact that such challenges have been brought more frequently in recent years.[418] In our view, the low level of success is not due to a reluctance of the courts to apply/enforce State aid rules. More likely, this is linked to:

- The good compliance record of the UK, which has seldom been the subject of recovery decisions and the fact that it spends relatively little on State aid; and
- The weakness of the plaintiff's arguments, including the fact that the State aid argument is often not the primary argument but one of many arguments.[419]

In *British Academy of Songwriters, Composers and Authors (BASCA) v Secretary of State for Business, Innovation and Skills*, the judge made exactly this point when he said: "State aid issues arise in public law litigation not infrequently. Article 107 TFEU is an important provision of law but it has acquired a reputation as an argument of last resort because it is often thrown in at the end of a long list of other arguments and is not always given the

[408] *Advocate General for Scotland v John Gunn & Sons*, case [2018] CSOH 39 (UK10); *Renewable Heat Association Northern Ireland Ltd & Anor*, case [2017] NIQB 122 (UK8); *Tate & Lyle Industries Ltd) and another v Secretary of State for Energy and Climate Change and the Gas and Electricity Markets Authority (IP*), case [2010] EWHC 2752 (Admin) (UK1); and *Tate and Lyle Sugars Ltd v Secretary of State for Energy and Climate Change*, case [2011] EWCA Civ 664 (UK2).

[409] *Eventech Ltd v The Parking Adjudicator and Another*, case [2012] EWHC 1903 (Admin) (UK3); British *Aggregates v HM Treasury*, case [2013] EWCA Civ 720 (UK4); and *JC & Ors v The Crown*, case [2015] EWCA Crim 210 (UK7).

[410] *Sky Blue Sports & Leisure Ltd & Ors, R (On the Application Of) v Coventry City Council*, case [2014] EWHC 2089 (Admin) (UK6); and *Brown v Carlisle City Council*, case [2014] EWHC 707 (Admin) (UK5).

[411] Six applications for judicial review or appeals are dismissed/refused. One application is successful (on other than the State aid ground) and the local authority's planning permission is quashed. One request for a stay of proceedings to be lifted is granted.

[412] See data in DG Competition, State Aid Scoreboard 2018, available at: http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html (last accessed on 13 January 2019.

[413] See *John Gunn & Sons,* case [2018] CSOH 39 (UK10); *Renewable Heat Association NI, case* [2017] NIQB 122 (UK8); *Tate & Lyle* High Court, case [2010] EWHC 2752 (Admin) (UK1); *Tate & Lyle* case [2011] EWCA Civ 664); Court of Appeal, 3.6.2011 - [2011] EWCA Civ 664 (UK2); *JC & Ors v Crown, case* [2015] EWCA Crim 210 (UK7); and *BAA v HMT, case*[2013] EWCA Civ 720 (UK4).

[414] *BAA v HMT,* case [2013] EWCA Civ 720 (UK4).

[415] Source: Ministry of Justice statistics (including Civil Justice Statistics Quarterly, England and Wales, which provides judicial review figures for January to December 2017), available at: https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2017 (last accessed on 13 January 2019). The Ministry of Justice statistics suggest that the average time taken from lodging a case to the final hearing for judicial reviews has fallen quite significantly over recent years. The 2013 figure stood at 368 days while the 2014 figure was 245 days.

[416] *Eventech Ltd v The Parking Adjudicator and Another*, case [2012] EWHC 1903 (Admin) (UK3); *Sky Blue Sports & Leisure Ltd & Ors, R (On the Application Of) v Coventry City Council*, case [2014] EWHC 2089 (Admin) (UK6); *Brown v Carlisle City Council*, case [2014] EWHC 707 (Admin) (UK5); *JC & Ors v The Crown*, case [2015] EWCA Crim 210 (UK7).

[417] *R v AG ex parte*, case ICI [1985] 1 CMLR 588 (Div Ct) and [1987] 1 CMLR 72 (CA); *R v Commissions of Customs & Excise ex parte Lunn Poly*, case [1998] EuLR 438 (Div Ct) and [1999] EuLR 653 (CA).

[418] For an overview of these unsuccessful challenges (including those that were summarised), see Kelyn Bacon, European Union Law of State Aid (2017), paragraph 20.11.

[419] For example, in *JC & Ors v The Crown, case* [2015] EWCACrim210 (UK7), at paragraph 26, the Court noted: "Numerous proposed objections, all by reference to Union law, had previously been mooted in these proceedings by the defence. But by the time the matter came on for hearing before the judge they had reduced to the two mentioned." See also *Eventech*, case[2012] EWHC 1903 (Admin) (UK3) where the State aid argument was raised in addition to arguments based on the breach of the freedom to provide services (Article 56 TFEU), freedom of establishment (Article 49 TFEU), the principle of equal treatment and a breach of the reasonableness test.

level of attention that is required if the arguments are to be made good. The present case is an illustration."[420]

The fact that UK courts are not reluctant to apply State aid rules is illustrated by the two summarised cases (resulting in three rulings) involving requests by aid beneficiaries to review measures granting them less aid than that requested or hoped for. In both cases, the high courts refused the application for judicial review (and therefore any remedies), noting that the aid beneficiaries could not be allowed an increased grant or subsidy as this would result in the payment of unlawful aid.[421] Another example of the proactive approach to State aid enforcement by a UK court is the Court of Session (Outer House) ruling in *John Gunn & Sons,* supporting the Crown's efforts to recover unlawful aid, which the Court of Session considered a valid claim in itself.[422]

Qualitative assessment of the application of the State aid *acquis*; preliminary references

Eight of the ten rulings analysed contain references to CJEU case law and a few of those rulings also refer to Commission guidance (including the enforcement notice and the (draft) notice on the notion of State aid). On balance, the courts appear to have applied this State aid *acquis* appropriately (see, *e.g.* the court's application of the MEIP test in *Sky Blue Sports*).[423]

In one case, the national court stayed proceedings where EU proceedings were pending on a Commission decision that could affect the outcome of the case and there was therefore a potential for conflicting or inconsistent rulings. While referring to its obligations under the principle of sincere cooperation in Article 4(3) TEU, the court took this approach despite the fact that the Commission decision concerned alleged State aid granted by a Member State other than the UK.[424] However, in another case the national court agreed to lift a stay on proceedings that had been granted for similar reasons, because the stay had already lasted for a decade and it was unclear when the EU process would conclude.[425]

None of the rulings analysed refer to any cooperation between the Commission and the national court with the exception of the *Micula* case;[426] the Commission acted as an intervener in this case.[427]

In terms of preliminary rulings, the number of cases referred to the CJEU in general fluctuates around the EU average.[428] As for cases specifically involving State aid questions, UK case law suggests that UK courts do not feel the need for such preliminary rulings, solely relying on an analysis of CJEU case law, guidance and legislation available to them. This is consistent with the lack of requests for preliminary rulings referred by the courts in the selected rulings. Of the ten cases analysed, parties made a request for a preliminary ruling in three of the cases, but the courts rejected all three of these requests.[429]

In one instance, the national court indicated that a preliminary ruling was unnecessary, because it believed that there was no merit in the State aid argument. Interestingly, however, the court added: "even if I felt that a reference might be justified, I would have refused to make it leaving it to a higher court, if the claim went further, to consider whether such a reference should be made. This approach is consistent with authorities on the making of a reference: see *Commissioners of HM Revenue & Customs v Loyalty Management UK Ltd* [2007] STC 536 applying the indications given by the Court of Appeal as to the need for restraint in making a reference in, for example, *R(Professional Contractors Group Ltd) v IRC* [2002] 1 CMLR 1332."[430]

Multiple references to the State aid *acquis* and the lack of requests for cooperation and preliminary rulings suggest that the UK courts consider themselves capable of dealing with State aid questions (including the question of whether a measure constitutes State aid) without support from the EU institutions.[431]

Qualitative assessment of any other relevant trends in State aid enforcement

No other trends identified.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

Where relevant, the national courts conducted a relatively thorough analysis of the notion of State aid in the rulings that were analysed. However, in the one case where the CJEU issued a preliminary ruling (in response to a request for such a ruling in the national appeal proceedings), the CJEU's responses were mostly but not entirely aligned with the lower national court's conclusions (in particular on the effect on trade between Member States criterion).[432] We also came across one case where the Court of Appeal (Civil) took a different approach from that of the High Court (Administrative) in relation to the State aid argument. The questions involved in both cases were, however, relatively complex.[433]

[420] *R v Secretary of State for Business, Innovation and Skills*, case [2015] EWHC 1723 (Admin), paragraph 300. In this case, the State aid argument was added to a more general judicial review action on the UK Government's proposed policy of introducing a limited private use exemption to copyright infringements.
[421] *Renewable Heat Association Northern Ireland Ltd & Anor*, case [2017] NIQB 122 (UK8); *Tate & Lyle Industries Ltd) and another v Secretary of State for Energy and Climate Change and the Gas and Electricity Markets Authority (IP)*, case [2010] EWHC 2752 (Admin) (UK1).
[422] Case [2018] CSOH 39 (UK10).
[423] Case [2014] EWHC 2089 (Admin) (UK6).
[424] *Micula and Ors v Romania and Anor,* case [2017] EWHC 31 (Comm) (UK9).
[425] *BAA v HMT,* case [2013] EWCA Civ 720 (UK4).
[426] *Micula and Ors v Romania and Anor*, case [2017] EWHC 31 (Comm) (UK9).
[427] *Ibid.*
[428] Institute for Government, *Who's afraid of the ECJ? Charting the UK's relationship with the European Court* (https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_ECJ_v10FINAL%20web.pdf) (last accessed on 13 January 2019), p. 16.
[429] *Brown v Carlisle City Council,* case[2014] EWHC 707 (Admin) (UK5); *JC & Ors v The Crown*, case [2015] EWCA Crim 210 (UK7); *Micula and Ors v Romania and Anor*, case[2017] EWHC 31 (Comm) (UK9).
[430] *Brown v Carlisle City Council* (UK5), para. 62.
[431] See also Global Competition Review, State aid 2018, response to question 18, available at: https://globalcompetitionreview.com/jurisdiction/1005137/united-kingdom#answer59 last accessed on 13 January 2019.
[432] See *Eventech*, case [2012] EWHC 1903 (Admin) and Case C-518/13 *Eventech v Parking Adjudicator* (2015) ECLI:EU:C:2015:9.
[433] *Tate & Lyle Industries Ltd) and another v Secretary of State for Energy and Climate Change and the Gas and Electricity Markets Authority (IP)*, case [2010] EWHC 2752 (Admin) (UK1) and *Tate and Lyle Sugars Ltd v Secretary of State for Energy and Climate Change*, case [2011] EWCA Civ 664 (UK2).

Based on the limited sample of rulings that were analysed, the UK courts also seem to understand their role in State aid enforcement. In some cases, the court expressly noted that it was concerned with whether a measure amounted to State aid (and whether it could grant remedies to enforce the standstill obligation under Article 108(3) TFEU) but that the Commission has exclusive competence to determine whether any aid measure is compatible with the internal market.[434]

Where available, the courts usually analysed Commission decisions in relation to the aid measures under review in quite some detail (see, *e.g.* the High Court's ruling in *Tate & Lyle v Secretary of State*).[435]

Any other relevant comments or findings

No other comments

[434] See *Sky Blue Sports*, case([2014] EWHC 2089 (Admin) (UK6), paragraph 88 and *Renewable Heat Association Northern Ireland Ltd & Anor*, case [2017] NIQB 122 (UK8), paragraph 403. In the latter ruling, the Court considers that this limited role for national courts is "problematic" given the facts and nature of the State aid issue in this case.

[435] Case [2010] EWHC 2752 (Admin) (UK1).

28.2 Case summaries

Case summary UK1

Date

18/12/2018

Case identifiers

Member State

United Kingdom

Court which adopted the ruling (national language)

England and Wales High Court (Administrative Court)

Court which adopted the ruling (English)

England and Wales High Court (Administrative Court)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/ew/cases/EWHC/Admin/2010/2752.html

Case reference

[2010] EWHC 2752 (Admin)

Procedural context of the case

The present ruling concerns an application for permission for judicial review of the Renewables Obligation Order 2009 and of a further decision made following an 'Early Review' under the 2009 Order. Tate & Lyle Industries Limited and the new owner of its sugar business, T & L, (Tate & Lyle) contend that both in the Order and in the further decision following 'Early Review' the Secretary of State has unlawfully allocated to Tate & Lyle only 1.0 Renewables Obligation Certificate per Megawatt hour (1 ROC/MWh) in relation to the category of Co-firing of biomass with CHP (combined heat and power).

The proceedings originally challenged the allocation in the Renewables Obligation Order 2009, after it had come into force on 1 April 2009, in proceedings commenced in June 2009. Following the Secretary of State's decision to undertake an Early Review, these proceedings were treated as stayed and subsequently amended to challenge the decision following the Early Review.

The ruling was appealed to the Court of Appeal in ruling [2011] EWCA Civ 664 (see case summary on the Court of Appeal ruling for more details).

Type of action

Private enforcement

Delivery date of the ruling

02/11/2010

Language

English

Headnote

In this ruling, the Court held that the plaintiffs could not be allowed an increased subsidy (irrespective of what others received) as this would lead to over-compensation in breach of Article 107 TFEU.

Parties

Names of the parties to the action

The Queen on the Application of Tate & Lyle Industries Ltd; The Queen on the Application of T & L Sugars Ltd

Versus

The Secretary of State for Energy and Climate Change and the Gas and Electricity Markets Authority (IP)

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Co-firing of biomass with CHP (combined heat and power)

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The case concerned a subsidy scheme (the Renewables Obligation or RO scheme) introduced (under a 2009 Order) to ensure targets were met for electricity from renewable energy sources pursuant to an EU Directive. This involved a certain level of subsidy being granted to incentivise electricity generators to invest in renewable energy technologies. In calculating the appropriate level of subsidy, various factors were considered, such as costs, revenues and the desirability of encouraging certain technologies more than others. The 2009 scheme replaced a less sophisticated scheme set up in 2002 (which provided the same support for all technologies).

The RO scheme had been notified to the Commission, which requested some clarifications to satisfy itself that there was no 'over-compensation' involved. Prior to the coming into force of the 2009 Order (on 1 April 2009), the Commission (by letter dated 11 February 2009) raised no objections to the introduction of the scheme.

Tate & Lyle was allocated 1 ROC (RO Certificate) per MWh under the scheme in respect of the technology it used, co-firing of biomass with CHP (CoCHP). Following discovery of an error in the Government's prediction of the costs of such technology, the Secretary of State ordered an early review pursuant to the 2009 Order and commissioned some consultants to advise on the relevant costs. This resulted in an alteration of the costs from the figures used for the original assessment. More significant, however, was the fact that, in conducting the review, the Secretary of State also took into account up to date information on the revenue side. Since the wholesale electricity price had increased substantially from the price when the original assessment was made, this improved the revenue position and therefore reduced the level of subsidy that would be necessary to cover the costs of setting up and operating the technology.

On 31 March 2009, the Government therefore maintained its decision to allocate, in respect of CoCHP, 1 ROC/MWh. That allocation was the subject of the judicial review proceedings that the plaintiffs, Tate & Lyle, initiated. Tate & Lyle contended that the Secretary of State, having erred in his original allocation under the 2009 Order, had maintained and aggravated that error following his Early Review. It estimated a loss of £ 1.5 million per year, attributable to a failure to allocate 1.5 ROC/MWh.

The essence of Tate & Lyle's complaint was that it was unfair and discriminatory to allocate 1 ROC/MWh on the basis of updated figures (i.e. updated and increased wholesale electricity prices) without applying that increase to each and every other technology, and re-allocating ROCs/MWh on that basis. To apply a different approach solely to the technology, CoCHP, developed by Tate & Lyle, unlawfully discriminated between Tate & Lyle as a generator and all other generators from renewable sources.

Remedy(ies) sought

Other remedy sought

The specific remedy sought is not explicitly mentioned in the Case Report.

Outcome of the case

Conclusions adopted by the national court

The Court noted that the dispute essentially related to the fact that, in an early review, the Secretary of State, in allocating 1 ROC/MWh to Tate & Lyle, had applied an updated figure in respect of wholesale electricity that it had not applied to other technologies. The question therefore resolved into whether the early review justified such a difference in approach. The Court held that:

- The Secretary of State was right not to ignore 'in the interests of consistency' the conclusion, on updated figures, that a particular technology would be over-compensated if the allocation of ROCs was increased; and
- The basis of the allocation of subsidy would inevitably become outdated in the period between reviews. But it did not justify allocating to Tate & Lyle an increase in ROCs/MWh merely because others may also, pending a review, be in receipt of an excess of subsidy; and
- "Avoiding State aid which leads to distortion in the market is as much a cardinal principle as consistency of treatment. Pending a complete review, there are bound to be some technologies which benefit from changes in the predicted costs and revenues and others which suffer."

The Court therefore took the view that the Secretary of State was justified in maintaining an allocation of 1 ROC/MWh for Tate & Lyle and it refused its application for judicial review.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

The High Court placed great emphasis, in its summary of the facts of the case, on the Commission decision not to raise objections to the aid scheme on the basis that it had satisfied itself that the scheme did not result in over-compensation. The Court then held (in its conclusions) that the level of subsidy received by the plaintiffs should not be higher because a higher subsidy would amount to over-compensation "which would be contrary to the prohibition against competitive distortion attributable to State aid (Article 107 TFEU)".

Case summary UK2

Date

18/12/2018

Case identifiers

Member State

United Kingdom

Court which adopted the ruling (national language)

England and Wales Court of Appeal (Civil Division)

Court which adopted the ruling (English)

England and Wales Court of Appeal (Civil Division)

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/ew/cases/EWCA/Civ/2011/664.html

Case reference

[2011] EWCA Civ 664

Procedural context of the case

This case is an appeal of the ruling of the High Court in relation to a judicial review (ruling [2010] EWHC 2752 (Admin)).

Type of action

Private enforcement

Delivery date of the ruling

03/06/2011

Language

English

Headnote

In this ruling, the Court of Appeal expressed doubt about the High Court's reasoning in relation to the 'State aid argument', but rejected the plaintiff's case nonetheless on another ground.

Parties

Names of the parties to the action

Tate And Lyle Sugars Ltd

Versus

The Secretary of State for Energy and Climate Change & Anr

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Co-firing of biomass with CHP (combined heat and power)

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The case concerned a subsidy scheme (the Renewables Obligation or RO scheme) introduced (under a 2009 Order) to ensure targets were met for electricity from renewable energy sources pursuant to an EU Directive. This involved a certain level of subsidy being granted to incentivise electricity generators to invest in renewable energy technologies. In calculating the appropriate level of subsidy, various factors were considered, such as costs, revenues and the desirability of encouraging certain technologies more than others. The 2009 scheme replaced a less sophisticated scheme set up in 2002 (which provided the same support for all technologies).

The RO scheme had been notified to the Commission, which requested some clarifications to satisfy itself that there was no 'over-compensation' involved. Prior to the coming into force of the 2009 Order (on 1 April 2009), the Commission (by letter dated 11 February 2009) raised no objections to the introduction of the scheme.

Tate & Lyle was allocated 1 ROC (RO Certificate) per MWh under the scheme in respect of the technology it used, co-firing of biomass with CHP (CoCHP). Following discovery of an error in the Government's prediction of the costs of such technology, the Secretary of State ordered an early review pursuant to the 2009 Order and commissioned some consultants to advise on the relevant costs. This resulted in an alteration of the costs from the figures used for the original assessment. More significant, however, was the fact that, in conducting the review, the Secretary of State also took into account up to date information on the revenue side. Since the wholesale electricity price had increased substantially from the price when the original assessment was made, this improved the revenue position and therefore reduced the level of subsidy that would be necessary to cover the costs of setting up and operating the technology.

On 31 March 2009, the Government therefore maintained its decision to allocate, in respect of CoCHP, 1 ROC/MWh. Tate & Lyle sought judicial review of the 2009 Order and related early review decision, which was refused by the High Court.

The present case is the appeal against the High Court's ruling. In the appeal, the plaintiff's arguments in substance repeated the submissions which had failed to find favour with the High Court judge. They also submitted that the only reason the judge found against them was a reason relating to State aid. The Court of Appeal, however, did not think that was a fair reading of the High Court's judgment noting that quite independently of State aid, the judge had found that it would be inappropriate to impose a duty on the Secretary of State which would involve granting a greater subsidy than was necessary to compensate for the necessary investment and that this would not constitute unfair discrimination when compared with other technologies.

Remedy(ies) sought

Other remedy sought

The specific remedy sought is not explicitly mentioned in the Case Report.

Outcome of the case

Conclusions adopted by the national court

The Court of Appeal considered that the key to resolving this case was to identify the purpose of an early review. According to the Court, it was important to remember that what was being assessed was the subsidy appropriate for a particular technology and not the payment appropriate to the particular person or body which operates it.

The Court also held that fairness was an important principle of public law but in determining what was fair in any particular context it was necessary to have regard to the wider public interest. The Court was not convinced that, as a consequence of the early review, the plaintiff was being unfairly treated. They were in fact "receiving the appropriate subsidy for someone incurring the costs involved in developing their particular technology." The Court accepted that they were not obtaining the windfall resulting from the increase in electricity prices which they would have received had no error been made. However, the fact that other producers may have received a windfall as a result of that price increase was, in the Court's view, not a sufficient reason to confer this benefit on the plaintiff.

The Court then noted that in view of its conclusion on the principal ground of appeal it was not necessary to determine and "finally decide" on the other arguments advanced before the Court, including the Secretary of State's argument, accepted by the High Court judge, that "if the Secretary of State had simply corrected the error and used historic figures for the revenue side of the equation, it would have infringed the State aid principles by providing unlawful state support for this particular technology." The Court nevertheless added that it doubted whether that argument was correct. It noted that if it had ruled that the Secretary of State's allocation was unfair, the fact that remedying that allocation might result in more State aid being granted than had been envisaged in the Commission approval of the scheme - and therefore in overcompensation for the plaintiff - would not necessarily have been an obstacle to the Court finding in the plaintiff's favour. The Court concluded that "one would hope that if the court said that the Government had acted unfairly in failing to reassess on the basis of the historic costs figure, the Commission would have found that an acceptable reason for approving the subsidy."

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

No references

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

Judgment noted that the plaintiff had raised Commission Decision N 65/2010 of 30 March 2010 in their submissions.

Case summary UK3

Date

18/12/2018

Case identifiers

Member State

United Kingdom

Court which adopted the ruling (national language)

England and Wales High Court (Administrative Court)

Court which adopted the ruling (English)

England and Wales High Court (Administrative Court)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/ew/cases/EWHC/Admin/2012/1903.html

Case reference

[2012] EWHC 1903 (Admin)

Procedural context of the case

The challenge arises out of two penalty charge notices, issued on 13 and 20 October 2010, against the plaintiff, in respect of the use of a private hire vehicle owned by the plaintiff in a bus lane, issued by the London Borough of Camden. The plaintiff appealed the penalties, in particular, challenging the validity of Article 3 of the Camden Bus Lanes (No 1) Traffic Order 2008 (the Camden Order). The Parking Adjudicator concluded that he did not have jurisdiction to disapply Article 3 and was not required to determine a potential conflict of domestic and Union law but was only permitted to enforce the Order. The Adjudicator therefore dismissed the appeal on 16 August 2011. On 16 December 2011, the plaintiff applied for judicial review of the policy of Transport of London ('TfL') and London Boroughs permitting black cabs to drive in most London bus lanes but preventing private hire vehicles (minicabs) from doing so. Permission to apply for judicial review was granted on 2 March 2012.

It is interesting to note that the High Court confirmed that:

- Neither the Parking Adjudicator (joined as defendant) nor the London Borough of Camden (first interested party) had taken any part in the proceedings before the High Court, which had been defended by TfL as second interested party; and
- It was common ground between the parties, "and rightly so, that the Parking Adjudicator had erred in his approach, and that, as an emanation of the State, such a tribunal should have considered the [Plaintiff's] arguments as to the validity of the Camden Order under both EU and domestic law."

The High Court ultimately dismissed the application and the decision was appealed to the Court of Appeal. The latter referred a State aid question to the CJEU under Article 267 TFEU.

In appeal, the Court of Appeal referred questions to the CJEU in particular on whether (for the purposes of Article 107(1) TFEU) the policy of allowing black cabs to use bus lanes but not minicabs: (i) involved State resources; (ii) was selective; and (iii) whether there was the requisite effect on trade between Member States. In Case Eventech v Parking Adjudicator C-518/13, the CJEU held that, although it was for the referring court to determine, the policy did not appear to involve a commitment of State resources or confer a selective economic advantage for the purpose of Article 107(1) TFEU. The CJEU also held that it was "conceivable" that the policy "may be such as to affect trade between Member States within the meaning of Article 107(1) TFEU."

The Court of Appeal ruling is unreported.

Type of action

Private enforcement

Delivery date of the ruling

11/07/2012

Language

English

Headnote

In this ruling, the Court did not accept the argument raised by the plaintiff that, as a result of a particular policy, black cabs received a selective advantage from state resources which had an effect on trade between Member States.

Parties

Names of the parties to the action

Eventech Ltd

Versus

The Parking Adjudicator

Interested parties to the proceedings were London Borough of Camden;TfL

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Minicab/taxi services

The type of State aid measure challenged in the court proceedings

Other

A traffic rule (which granted an exemption for a particular class of transport vehicle)

Substance of the case

Facts and parties' main arguments in the case

This case arose in the context of a fine issued to a minicab firm whose cars were using bus lanes. The plaintiff argued that the policy of fining minicabs on using these lanes, while black cabs could use the lanes without incurring a fine (the Bus Lane Policy):

- Offended against the EU right of freedom to provide services (Article 56 TFEU) and of freedom of establishment (Article 49 TFEU) and/or the EU general principle of equal treatment;
- Was Wednesbury unreasonable at common law; and/or
- Amounted to favourable treatment of black cabs as against minicabs, such as to constitute unlawful State Aid, contrary to Article 107 TFEU.

As for the State aid argument, the Court considered that:

- It was common ground in the case that the disadvantage to the plaintiff of not driving in the bus lane was capable of amounting to an economic advantage to its competitor, granted through State resources and/or imputable to the State. The plaintiff needed to show that the measure was liable to distort competition and affect trade between Member States, and that it was

favouring certain undertakings in a way that was not justifiable by the nature or the general scheme of the Bus Lane Policy (i.e. the selectivity requirement); and
- If the measure amounted to State aid, it could only be rendered lawful and compatible with the internal market by notification to, and approval by, the Commission.

Remedy(ies) sought

Other remedy sought

Declaration of unlawfulness of the relevant measure

Outcome of the case

Conclusions adopted by the national court

The Court considered whether the plaintiff's arguments that the Bus Lane Policy:
- Offended against the EU right of freedom to provide services (Article 56 TFEU) and of freedom of establishment (Article 49 TFEU) and/or the EU general principle of equal treatment; and
- Was Wednesbury unreasonable at common law.

The Court was unpersuaded by these arguments.

The Court also considered the question of whether the Bus Lane Policy amounted to unlawful State aid. It cited the four conditions which must be satisfied for there to be aid in the sense of Article 107 TFEU, i.e. the measure: (i) confers an economic advantage; (ii) must be granted by a Member State or through state resources; (iii) must distort or threatens to distort competition by favouring certain undertakings (the selectivity requirement); and (iv) must affect trade between Member States.

The first two conditions were not disputed by the parties, as a benefit is conferred on black cabs, by allowing them to use bus lanes, and the benefit is conferred by law (thus granted by the Member State).

Thus, it fell to the Court to consider conditions (iii) and (iv). With regard to (iv), the Court was "not satisfied that the Bus Lane Policy, even though it may have an impact on competition between minicabs and those black cabs who can be pre-booked, affects trade between Member States."

With regard to (iii), the Court ruled that the selectivity requirement was not fulfilled concluding that it was "exactly in accordance with the nature and general scheme of the Bus Lane Policy imposed pursuant to the Regulations to allow into the bus lanes those vehicles which can pay for hire and exclude those who cannot." The Court was therefore satisfied that "minicabs and black cabs [were] not in a comparable legal and factual situation in the light of the objective pursued by the measure concerned."

The Court therefore found that the rule did not constitute State aid and dismissed the plaintiff's application.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-172/03, Heiser v Finanzamt Innsbruck (2005) ECLI:EU:C:2005:130
- C-279/08, European Commission v Kingdom of the Netherlands(2011) ECLI:EU:C:2011:551
- C-88/03, Portuguese Republic v Commission of the European Communities(2006) ECLI:EU:C:2006:511
- T-210/02, British Aggregates Association v Commission of the European Communities (2006) ECLI:EU:T:2006:253
- C-143/99, Adria-Wien Pipeline v Wieterstorfer & Pettauer Zementwerke (2001) ECLI:EU:C:2001:598
- C-42/84 – Remia BV and others v Commission of the European Communities (1985) ECLI:EU:C:1985:327 (case concerning Article 101 TFEU and effect on trade between Member States condition)

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

Note that the High Court ruling was appealed, and the Court of Appeal referred a request for a preliminary ruling to the CJEU, which to a certain extent agreed with the analysis of the High Court.

Case summary UK4

English

Date

21/12/2018

Headnote

In this ruling, the Court lifted the stay on an appeal, which had initially been granted to avoid incompatible decisions between the UK courts and the EU institutions, having regard to (i) the fact that the stay had endured for a decade; and (ii) the lack of a clear indication regarding the timing of action at the EU level.

Case identifiers

Member State

United Kingdom

Court which adopted the ruling (national language)

Court of Appeal (Civil Division)

Court which adopted the ruling (English)

Court of Appeal (Civil Division)

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

English

Hyperlink to ruling

No publicly accessible hyperlink available

Case reference

[2013] EWCA Civ 720

Procedural context of the case

In 2001, the UK notified its plans for an aggregates levy to the Commission. The levy aimed to maximise the use of recycled aggregate and other alternatives to freshly extracted aggregate, and to promote the efficient extraction and use of aggregates with a view to reduce environmental damage. Certain materials and production processes were exempted from paying the levy. Shortly before the levy was introduced, British Aggregates Association and others brought a judicial review claim challenging the levy, amongst other things, on the grounds that it amounted to State aid.

On 19 April 2002, the High Court dismissed the claim, concluding that the levy did not constitute State aid (ruling [2002] EWHC Admin 926). On 24 April 2002, the Commission concluded that the planned exemptions from the levy involved no State aid within the meaning of Article 107(1) TFEU and it decided not to raise any objections to the UK measure.

British Aggregates Association and others lodged an appeal against the High Court ruling ([2002] EWHC 926 (Admin)) and challenged the 2002 Commission decision before the GC. They also requested that the national court stay proceedings pending the resolution of the issues at EU level. In March 2012, the GC annulled the Commission decision (after the ECJ (current CJEU) had set aside its first ruling upholding the decision) and remitted the case to the Commission to make another decision (Case British Aggregates v Commission T-210/02). A year later, the Commission had still not taken a new decision.

The present case is a request by British Aggregates Association and others to lift the stay that had been granted in 2002.

Type of action

Private enforcement

Delivery date of the ruling

10/04/2013

Language

Parties

Names of the parties to the action

British Aggregates Association and Others

Versus

Her Majesty's Treasury

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

B - Mining and quarrying

Quarrying

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

For the facts preceding, and related to, this case, see the description of the procedural context of the case above.

The 'plaintiffs'' arguments to have the stay of the national court proceedings lifted included:

- Further delay would mean that the 'plaintiffs' would be denied any prospect of relief of any kind.

The arguments against lifting the stay included:

- The risk of inconsistent decisions;
- The fact that aspects of the case, in particular in relation to compatibility with the EU Treaty were within the Commission's exclusive competence; and
- The requirements of mutual cooperation, which meant that an appeal should only proceed if there was scarcely any risk of inconsistent decisions between the court and the EU institutions.

Remedy(ies) sought

Other remedy sought

Lifting of a stay to allow appeal to proceed

Outcome of the case

Conclusions adopted by the national court

The Court decided to lift the stay, bearing in mind that the stay had already endured for a decade and there was no clear timeline for the conclusion of the EU process. It should be noted that, at a later date in 2015, once the Commission had initiated a formal investigation, the stay was re-imposed.

The Commission ultimately adopted a new decision on 27 March 2015 concluding that all but one of the exemptions from the aggregates levy introduced in 2002 are free of State aid. The 'plaintiffs' had appealed this Commission decision before the GC but they subsequently withdrew their appeals.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

Court lifted the stay and allowed the appeal to proceed.

Difficulties referred to by the national court in deciding the case (optional)

The Court noted that the matter was complicated "by the fact that, as a result of the passage of the ten years, new Union law apparently gives the plaintiffs an opportunity to argue not merely that the exemptions which have been granted in respect of the levy amount to impermissible State aid, which if true might (…) mean that the monetary equivalent of that State aid could be recovered from the beneficiaries, but also in some circumstances the entire levy can be said to be unlawful and therefore that any money paid pursuant to the levy can be recovered."

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-210/02, British Aggregates Association v Commission of the European Communities (2006) ECLI:EU:T:2006:253
- C-487/06 P, British Aggregates v Commission of the European Communities (2008) ECLI:EU:C:2008:757

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary UK5

Date

21/12/2018

Case identifiers

Member State

United Kingdom

Court which adopted the ruling (national language)

England and Wales High Court (Administrative Court)

Court which adopted the ruling (English)

England and Wales High Court (Administrative Court)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/ew/cases/EWHC/Admin/2014/707.html

Case reference

[2014] EWHC 707 (Admin)

Procedural context of the case

The defendant had granted planning permission to Stobart Air Limited (an interested party in this case) on 6 February 2013. In this case, the plaintiff sought to have this planning permission quashed.

Type of action

Private enforcement

Delivery date of the ruling

21/03/2014

Language

English

Headnote

In this ruling, the Court did not accept the argument of the plaintiff contending that an agreement executed along with a planning permission constituted State aid, and concluded that there were no State resources involved.

Parties

Names of the parties to the action

Thomas Gordon Brown

Versus

Carlisle City Council

The relationship of the plaintiff to the measure

Third party

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

H - Transporting and storage

Airport Management services

The type of State aid measure challenged in the court proceedings

Other

Agreement accompanying a grant of planning permission

Substance of the case

Facts and parties' main arguments in the case

This plaintiff sought to quash a planning permission granted by Carlisle City Council to Strobart Air Limited (the interested party) in 2013. It enabled Strobart Air to erect a Freight Distribution Centre (FDC) over some 28.6 hectares of land at Carlisle Airport. The permission included the raising and re-profiling of the main runway. The construction of the FDC was contrary to the relevant plan but the planning committee of the Council was persuaded to grant permission because the work to the airport runway would enable commercial flights to operate from the airport and would keep the airport, which was making a loss, open and so preserve the jobs of the number of persons working there.

The grant of permission was subject to a legal agreement. This agreement (to be made pursuant to Section 106 of the Town & Country Planning Act 1990) was to ensure that Strobart Air would maintain the airport for commercial flights in the short to medium term and would only be able to close it down if its non-commercial use was not economically viable. It was recognised that the airport could not operate at a profit, whether for commercial or non-commercial use, but income derived from the FDC would be used to cover the losses until they became too great.

The plaintiff was the managing partner of his family farming business. His father was a tenant of agricultural land including that which would be taken for the FDC development. He brought forward a number of arguments including the argument that the granting of the planning permission was a form of State aid.

Remedy(ies) sought

Other remedy sought

Plaintiff sought to have the planning permission quashed

Outcome of the case

Conclusions adopted by the national court

The Court considered the scope of State aid rules, citing case law of the CJEU to hold that State aid can go beyond the mere concept of subsidies. Thus, prima facie, this could mean that any grant of planning permission which gives an advantage, as will often be the case, to the recipient could engage State aid. But the CJEU has also made clear that the exercise of a power which only the State or a public body (such as a local authority) can exercise will not amount to State aid. The Court concluded that the grant of planning permission would not therefore by itself constitute State aid. The Court then went on to consider the four grounds which must be satisfied in order for State aid to be present.

Regarding the intervention by the State or through State resources, it was accepted that a grant of planning permission being a regulatory role reserved to the State would not involve State Aid. But the plaintiff submitted that the use of a Section 106 agreement was a different matter. This, it argued, had required the company that received the planning permission, Strobart Air Limited, to direct resources to a particular market operator, namely the owner of the airport. The permission to construct the FDC was contingent on the financing of the airport. The Court noted the possibility of State aid arising where there is no link between the provider and the recipient of the finance. It was not necessary to show that State resources were directly or even indirectly involved, but, according

to the Court, "there must be some direct link between the advantage conferred and a reduction or a risk of reduction in the State budget."

In fact, the operator of the airport was a different company in the same group as the company which received the planning permission and was constructing the FDC. Thus, in reality, the group was subsidising itself "in order to establish the planning advantage which enabled planning permission to be granted." For that reason, the Court concluded that there was "no question of any State resources being involved". The Court therefore rejected the State aid argument. The Court also refused to refer a request for a preliminary ruling to the CJEU on the basis that it was not necessary to resolve the question, and if it were, the judge would prefer to leave it to a higher court to refer the question (see also below).

The plaintiff ultimately won the case on non-State aid grounds.

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

The claim succeeded and the planning permission was quashed, but for other reasons than the State aid argument, which the Court rejected.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-30/59, Steenkolenmijnen v High Authority (1961) ECLI:EU:C:1961:2
- C-677/11, Doux Élevage SNC and Coopérative agricole UKL-ARREE v Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement du territoire and Comité interprofessionnel de la dinde française (CIDEF) (2013) ECLI:EU:C:2013:348
- C-379/98, PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein (2001) ECLI:EU:C:2001:160
- C-401/10, France and Others v Commission, OJ C 317, 20.11.2010

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

The Court refused a request by the plaintiff to make a request to the CJEU for a preliminary ruling on the question whether State aid applied to the circumstances of this case. The Court held that such a reference was not needed since it was persuaded that there was no merit in the State aid argument. However, it added that if a reference might have been justified, the Court would still have refused to make it "leaving it to a higher court, if the claim went further, to consider whether such a reference should be made." The Court believed that this approach was consistent with authorities on the making of a reference: "see Commissioners of HM Revenue & Customs v Loyalty Management UK Ltd [2007] STC 536 applying the indications given by the Court of Appeal as to the need for restraint in making a reference in, for example, R(Professional Contractors Group Ltd) v IRC [2002] 1 CMLR 1332."

Case summary UK6

Date

18/12/2018

Case identifiers

Member State

United Kingdom

Court which adopted the ruling (national language)

England and Wales High Court (Administrative Court)

Court which adopted the ruling (English)

England and Wales High Court (Administrative Court)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/ew/cases/EWHC/Admin/2014/2089.html

Case reference

[2014] EWHC 2089 (Admin)

Procedural context of the case

The present case is a High Court ruling concerning a State aid question.

The case was later appealed to the Court of Appeal (ruling [2018] EWCA Civ 2252), which came to the same conclusion on the State aid argument as the High Court. Prior to the present ruling, there was a High Court ruling concerning disclosure of certain documents by the Council (ruling [2013] EWHC 3366 (Admin)).

Type of action

Private enforcement

Delivery date of the ruling

30/06/2014

Language

English

Headnote

In this ruling, the Court examined whether a loan provided by Coventry City Council amounted to State aid by reference to the MEIP. The Court concluded that a 'rational' private economic operator may have entered into the transaction on the same terms and that, therefore, there was no State aid.

Parties

Names of the parties to the action

The Queen on the application of Sky Blue Sports & Leisure Limited; Arvo Master Fund Limited; Coventry City Football Club (Holdings) Limited

Versus

Coventry City Council

The relationship of the plaintiff to the measure

Third party

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

F - Construction

Construction of Large Sports Infrastructure

The type of State aid measure challenged in the court proceedings

Loan at more favourable terms than market conditions

Substance of the case

Facts and parties' main arguments in the case

The plaintiffs own Coventry City Football Club (CCFC), which, from 2005 to 2013, played its home games at the Ricoh Arena in Coventry (the Arena) under a sublease and licence from ACL, the leaseholder of the ground. Coventry City Council (the defendant) owns the freehold of the Arena and is the ultimate owner of 50% of ACL. The Club had originally been the other 50% shareholder in ACL until late 2003 when it sold its interest. The sale of the shares included a buyback option that, however, required the Council's consent.

From circa October 2011, the worsening performance of the Football Club – both on the pitch and financially – had caused its owners to start discussions for a fundamental restructuring of the business of both the club and ACL. The Club's owners wanted to obtain an interest in the Arena again, but multiparty negotiations stalled, and the Club ultimately went on rent strike from April 2012. ACL suffered a financial crisis as a result. There were concerns that ACL would not continue to be able to service a loan to a bank. The Council negotiated with the bank to purchase ACL's debt itself. These negotiations resulted in the Council deciding to pay £ 14.4 million in full and final settlement of all sums owned to the bank by ACL in 2013.

The plaintiffs sought to challenge the Council's decision to loan ACL £ 14.4 million relying on three grounds, including a State aid ground. The latter contended that a private investor in the shoes of the Council would not have entered into the transaction on the terms agreed by the Council (or, indeed, on any terms). Consequently, the transaction was State aid within the meaning of Article 107(1) TFEU, not notified to the Commission in advance as required by Article 108(3) TFEU and therefore unlawful as contrary to Union law.

Remedy(ies) sought

Recovery order in relation to unlawful aid; Recovery of interest; Damages awards to third parties / State liability

Outcome of the case

Conclusions adopted by the national court

The Court first summarised the principles that can be derived from the CJEU case law when applying the MEIP, such as:

- "Whether the transaction was one which a rational private market operator might have entered into in the same circumstances is a question for the court to consider objectively and to decide, on the basis of the information available at the time of the decision, and developments then foreseeable";
- "The market economy operator comparator is, of course, hypothetical; but whilst, for the purposes of applying this test, all policy considerations relating to the State's role as a public authority have to be ignored, the comparator rational private operator must be assumed to have similar operational characteristics to the public body concerned";
- "Some private investors look to speculative or other short-term profit. However, some have long-term objectives with a structural policy and are guided by a longer-term view of profitability; and, if an investor is a shareholder in the relevant undertaking, he may be more likely to have such long-term objectives;"

- "In particular, the EU cases draw a distinction between a private creditor and a private investor: the creditor is primarily concerned with the most effective means of recovering his debt, whereas the investor's commercial interests may well include ensuring that the undertaking concerned avoids going into liquidation because, in the investor's view, profitability might reasonably return in the future."
- "Although the test is an objective one, the law recognises that there is a wide spectrum of reasonable reaction to commercial circumstances in the private market. Consequently, a public authority has a wide margin of judgment. (…) Therefore, in practice, State aid will only be found where it is clear that the relevant transaction would not have been entered into, on such terms as the State in fact entered into it, by any rational private market operator in the circumstances of the case."

The Court then made three over-arching points:
- It was relevant to the analysis that the Council was not a new investor;
- A number of contemporaneous statements as to the value of ACL were not considered reliable evidence (as the negotiation strategy of the Club owners was to talk down the value of ACL); and
- Although the case had a commercial background, the claim was categorised as one of public law.

The Court then considered each of the five specific arguments put forward by the plaintiffs, including the claim that the interest rate was inadequate (upon application of the Commission's related methodology). After examining a few further factors and considering the issue of State aid "as a whole and therefore as a global question", the Court found that "a rational private economic operator may have made the loan to ACL on the terms the loan was in fact made by the Council." Thus, the Court found that the loan was not State aid. In reaching this conclusion, the Court emphasised that "the transaction fell within the wide ambit extended to public authorities in this area; and clearly so."

The High Court judge also refused the plaintiffs' application seeking permission to appeal to the Court of Appeal noting that the question before him was a simple one and that the legal principles were "uncontroversial". The case ultimately ended up before the Court of Appeal (see above).

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-16/96, Cityflyer Express v Commission of the European Communities (1998) ECLI:EU:T:1998:78
- T-97/96, Neue Maxhütte Stahlwerke v Commission of the European Communities (1999) ECLI:EU:T:1999:7
- C-124/10 P, European Commission v Électricité de France (2012) ECLI:EU:C:2012:318
- T-565/08, Corsica Ferries France SAS v European Commission (2012) ECLI:EU:T:2012:415
- C-256/97, Re Déménagements-Manutention Transport SA (1998) ECLI:EU:C:1998:436
- T-228/99 and T-233/99, Westdeutsche Landesbank Girozentrale v Commission of the European Communities (2003) ECLI:EU:T:2003:57
- 730/79, Philip Morris Holland BV v Commission of the European Communities (1980) ECLI:EU:C:1980:209
- C-457/00, Kingdom of Belgium v Commission of the European Communities (2003) ECLI:EU:C:2003:387

National case law:
- R v Customs & Excise Commissioners ex parte Lunn Poly [1999]
- R (Professional Contractors Group Limited) v Inland Revenue Commissioners [2001] EWCA Civ 1945

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Commission communication to the Member States - Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (1993) (OJ C307/3), OJ C 307, 13.11.1993
- Draft Commission Notice on Notion of State aid pursuant to Article 107(1) TFEU (2014), OJ C 262, 19.7.2016
- Commission's Communication on the Revision of the Method for Setting the Reference and Discount Rates (OJC14/6), OJ C 14, 19.1.2008

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary UK7

Date

19/12/2018

Case identifiers

Member State

United Kingdom

Court which adopted the ruling (national language)

England and Wales Court of Appeal (Criminal Division)

Court which adopted the ruling (English)

England and Wales Court of Appeal (Criminal Division)

Instance court which adopted the ruling

Second to last instance court (criminal)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/ew/cases/EWCA/Crim/2015/210.html

Case reference

[2015] EWCA Crim 210

Procedural context of the case

The case is an appeal of a ruling by Chelmsford Crown Court on 20 March 2014 (ruling T20120250).

Type of action

Private enforcement

Delivery date of the ruling

26/02/2015

Language

English

Headnote

In this ruling, the Court considered whether Article 107 TFEU might be used as a defence to prosecution for infringement of national laws (the Sea Fish (Conservation) Act 10967). The Court held that the plaintiffs did not satisfactorily show that over 10 metre vessels and under 10 metre vessels were in a "comparable factual and –legal situation" and the selectivity requirement – necessary for a finding of State aid – was therefore not met.

Parties

Names of the parties to the action

JC; TS; DS (anonymised)

Versus

The Crown

The relationship of the plaintiff to the measure

Competitor

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

A - Agriculture, forestry and fishing

Fishing

The type of State aid measure challenged in the court proceedings

Other

Licencing system for fishing vessels which made a distinction between certain vessels when allocating quotas

Substance of the case

Facts and parties' main arguments in the case

The plaintiff, the owner of a fishing vessel under 10 metres in length, had been charged with an offence of exceeding the monthly catch limit contrary to Section 4(6) of the Sea Fish (Conservation) Act 1967 (which provides for the licensing of fishing boats), read with Article 3 of the Sea Fish Licensing Order 1992. The second and third plaintiffs were also owners of fishing vessels under 10 metres in length and similar proceedings had been brought against them for over-fishing in breach of their respective licences.

In their appeal, the plaintiffs challenged the fishing quota system on the grounds that it breached State aid rules because it conferred selective advantages on over 10 metre vessels and not on under 10 metre vessels. In particular, the plaintiffs alleged that:

- The method of allocation of quota to the over 10 metre fleet as compared to the under 10 metre fleet involved a reduced likelihood of over 10 metre vessels being prosecuted (and so fined) by the State as compared to under 10 metre vessels; and
- A system that results in the State foregoing the collection of fines amounts to an aid measure from State resources.

On the morning of the hearing, the plaintiffs also introduced the argument that the very fact that the 'fixed quota allocation' applicable to over 10 metre vessels was 'a valuable tradable asset' received 'free of charge' in itself constituted a selective advantage. However, the Court did not allow this new argument and only examined the arguments initially put forward by the plaintiffs. The Court declined a request to refer a request to the CJEU for a preliminary ruling.

Remedy(ies) sought

Other remedy sought

The plaintiffs sought to overturn the ruling of the trial court which had found them guilty of over-fishing in breach of their licenses.

Outcome of the case

Conclusions adopted by the national court

It is worth noting that at the outset the Court of Appeal paid tribute to "the manifest thoroughness and care which the judge [in first instance] had given to his ruling: on a matter which can hardly be said to be the usual fare of the Crown Courts."

The Court then considered the State aid issue at play by first listing the conditions that needed to be fulfilled for there to be State aid in the sense of Article 107(1) TFEU, i.e.: (1) An 'aid' in the sense of a benefit or advantage which (2) is granted by the State or through State resources, (3) favours certain undertakings over others (the 'selectivity' condition), (4) distorts or threatens to distort competition, (5) is capable of affecting trade between Member States, and (6) has not been notified to the Commission.

The Court also noted that the main argument before it centred on the selectivity condition. It considered that, if there was State aid here, it had to be indirect aid (as the position was quite different from, for example, the subject of the Commission decision in re Orkney Islands [2003] OJL 211/63.)

After examining all submissions, the Court ruled that the plaintiffs' submission that over 10 metre vessels and under 10 metre vessels were in a "comparable factual and legal situation" could not be accepted and that this conclusion was fatal to their case as a result of the general principle that a measure is selective only if it is such as to favour certain undertakings over other undertakings which are in a comparable legal and factual position.

The Court of Appeal considered this conclusion to be sufficient to dispose of the appeals. It nevertheless also briefly analysed whether the requirement in Article 107(1) TFEU that any aid be granted by the use of State resources was fulfilled. Referring to the analysis of this requirement in the CJEU ruling in the Eventech case (Case Kingdom of Spain v European Commission C-513/13), the Court concluded that this requirement posed further difficulties to the plaintiffs' reliance on a State aid argument.

The Court notes: "We also decline to direct a reference to the Court of Justice."

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-295/97, Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa (1999) ECLI:EU:C:1999:313
- C-379/98, PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein, ECLI:EU:C:2001:160
- C-279/08, European Commission v Kingdom of the Netherlands(2011) ECLI:EU:C:2011:551
- C-518/13, Eventech Ltd v The Parking Adjudicator (2015) ECLI:EU:C:2015:9

National case law:
- Professional Contractors Group v Commissioners of Inland Revenue [2002] 1 CMLR 46, [2001] EWCA Civ 1945
- re Orkney Islands [2003] OJL 211/63

√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

No references

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary UK8

Date

20/12/2018

Case identifiers

Member State

United Kingdom

Court which adopted the ruling (national language)

Northern Ireland High Court (Queen's Bench)

Court which adopted the ruling (English)

Northern Ireland High Court (Queen's Bench)

Instance court which adopted the ruling

Second to last instance court (administrative)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/nie/cases/NIHC/QB/2017/122.html#para369

Case reference

[2017] NIQB 122

Procedural context of the case

The case concerns a renewable energy scheme whereby grants or tariffs were paid in respect of certain renewable heat installations. The scheme was notified to the Commission on 20 December 2011. On 12 June 2012, the Commission approved the State aid. The Commission noted that cost calculations were based upon estimates which may result in an over- or under-estimation in specific cases but would avoid 'systematic overcompensation' and represented a fair approach. Following the Commission's approval, the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 (2012 Regulations) were passed.

However, in August 2016, an internal audit carried out by the Department as well as a report by Price Waterhouse Coopers ('PwC') identified problems with the scheme, including issues which had led to overcompensation of the participants since the introduction of the scheme. The scheme was therefore changed (by way of the 2017 Regulations). State Aid approval for the amended scheme was confirmed on 21 March 2017. The changes came into effect on 1 April 2017.

The plaintiffs challenged the 2017 Regulations in the present action.

Type of action

Private enforcement

Delivery date of the ruling

21/12/2017

Language

English

Headnote

In this ruling, the Court dismissed an application for judicial review of regulations that altered the level of grant that the plaintiffs received under a scheme. The amended scheme had been approved by the Commission and to revert to the original scheme would have resulted in the payment of unlawful aid.

Parties

Names of the parties to the action

The Renewable Heat Association Northern Ireland Limited; Another (anonymised)

Versus

Department for the Economy

The relationship of the plaintiff to the measure

Beneficiary

The relationship of the defendant to the measure

Public authority

Sector relating to the State aid argument

D - Electricity, gas, steam and air conditioning supply

Renewable energy installations

The type of State aid measure challenged in the court proceedings

Grant / subsidy

Substance of the case

Facts and parties' main arguments in the case

The 2017 Regulations changed the way tariffs were calculated by providing for 'tiering' and by introducing a cap on the amount of heat usage eligible for payment under the scheme. This resulted in a reduction in the amount of tariff payable to the plaintiffs. They brought judicial review proceedings against the 2017 regulations arguing, amongst other things, that these regulations were (i) ultra vires; (ii) unlawfully interfered with their property rights; and (iii) breached their legitimate expectation to payments at a higher tariff.

The defendant (the Department) argued that the tariffs under the original 2012 scheme were in fact over-generous and were being used to support private businesses in breach of the terms of the Commission's State aid approval. Striking down the 2017 Regulations and continuing the un-amended 2012 scheme, would therefore result in unlawful State aid.

Remedy(ies) sought

Other remedy sought

The case concerns an application for judicial review, which if successful, would presumably result in a declaration of unlawfulness or the quashing of the measure which reduced the level of the grant. There is, however, no discussion of remedies in the ruling.

Outcome of the case

Conclusions adopted by the national court

The Court concluded that:

- The 2017 Regulations were not so unfair that Parliament could not have intended that the defendant lacked power to make them. The Regulations were therefore not ultra vires;
- There had been an interference by the defendant with the second plaintiff's property rights, but that interference sought to pursue legitimate aims, including the aim of ensuring that the scheme operated in a manner consistent with the State aid approval, and was therefore in the general interest; and
- The interference with the second plaintiff's substantive and procedural legitimate expectations was also justified for similar reasons.

As for compliance with State aid approval, the Court analysed both the 2012 and 2017 Commission decisions declaring the aid compatible in some detail. It ultimately concluded that neither it nor the Department could determine what the Commission's view would be on whether or not the aid provided under the 2012 Regulations was in accordance with the initial decision declaring the aid compatible and was compatible with the internal market. However, the Court accepted that there was "an evidential basis for the Department's belief that the continuation of the 2012 Regulations had the potential to expose the State and individuals to an inquiry or enforcement proceedings by the Commission". Therefore, the Department was entitled to take this into account in deciding to make the 2017 Regulations. The fact that the Commission "approved the 2017 Regulations suggests that this view may well be shared by the Commission".

Remedy(ies) granted – including assessment public enforcement issues

None - Claim rejected

Difficulties referred to by the national court in deciding the case (optional)

The Court noted that the passing of the 2017 Regulations, with the approval of the Commission, meant that any potential enforcement proceedings by the Commission had been averted. The difficult issue for the court was, however, "whether or not if the 2012 Regulations were to continue without the amended 2017 Regulations would the State be in breach of State aid rules and susceptible to an investigation and enforcement procedure by the Commission? In this regard, the role of a national court is problematic. It is the Commission which has exclusive competence to determine whether any aid measure is compatible with the internal market. However, a national court is empowered to determine whether a measure amounts to 'aid' and can grant remedies to enforce the obligation of Member States under Article 108(3) TFEU not to put aid into effect without prior notification to the Commission and a positive decision."

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-138/09, Todaro Nunziatina & C. Snc v Assessorato del Lavoro, della Previdenza Sociale, della Formazione Professionale e dell'Emigrazione della regione Sicilia (2010) ECLI:EU:C:2010:291
- C-590/14, Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission (2016) ECLI:EU:C:2016:797
- T-89/09 Pollmeier Massivholz GmbH & Co. KG v European Commission (2015) ECLI:EU:T:2015:153

√ CJEU case law on public enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

- Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015 (State aid Procedural Regulation)
- Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009 (Commission Enforcement Notice)

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

Case summary UK9

Date

20/12/2018

Case identifiers

Member State

United Kingdom

Court which adopted the ruling (national language)

England and Wales High Court (Commercial Court)

Court which adopted the ruling (English)

England and Wales High Court (Commercial Court)

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/ew/cases/EWHC/Comm/2017/31.html

Case reference

[2017] EWHC 31 (Comm)

Procedural context of the case

This application arises out of an ICSID arbitration award (ruling ARB/05/20) rendered against Romania in favour of the plaintiffs on 11 December 2013. ICSID is the International Centre for Settlement of Investment Disputes set up under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

On 9 April 2014, and in accordance with ICSID procedures, Romania filed an application for the annulment of the award to the ICSID 'ad hoc Committee', which was unsuccessful, and requested a stay of enforcement of the award, which was granted provisionally.

On 26 May 2014, the Commission issued a suspension injunction to restrain Romania from taking any action to execute or implement the award until it had taken a final decision on the compatibility of State aid.

On 7 August 2014, the ICSID ad hoc Committee agreed to a continuation of the stay of enforcement of the award, provided that Romania filed an assurance that it would pay the award in full and subject to no conditions whatsoever if the annulment application was dismissed. Romania did not give this assurance and the stay was revoked.

On 2 September 2014, the plaintiffs applied to the CJEU to annul the Commission's injunction decision.

On 17 October 2014, the award was registered in the England and Wales High Court by Order of Burton J pursuant to the provisions of the Arbitration (International Investment Disputes) Act 1966, which implemented the ICSID Convention in the UK (the Registration Order).

The present ruling concerns, Romania (supported by the Commission) applying to set aside the Registration Order, or alternatively to stay the Registration Order, or alternatively that the questions which arose should be referred to the CJEU for a preliminary ruling. This application resulted in a ruling on 20 January 2017, which is summarised in this note.

On 30 March 2015, the Commission adopted Commission Decision 2015/1470 in which it declared that payment of the award by Romania would constitute new State aid within the meaning of Article 107(1) of TFEU.

On 30 November 2015, Micula launched an appeal which sought to annul the Commission decision before the GC (Case Micula v Commission T-694/15). Those proceedings had not yet concluded at the time of the High Court ruling.

Following the judgment in this case, the following rulings were passed:

- On 15 June 2017, the High Court of England and Wales (Commercial Court) (ruling [2017] EWHC 1430 (Comm)) considered the plaintiffs' attempt to make the stay conditional upon Romania giving security. The court held that there was no need to accede to the plaintiffs' request at this time (evidently influenced by the fact that a nation State is in a different position to an ordinary litigant), but did not preclude it in the future.
- England and Wales Court of Appeal (Civil Division) (ruling [2018] EWCA Civ 1801). Also, in relation to the same matter (but in 2018), the plaintiffs sought to challenge the decision to grant the stay. On 27 July 2018, the Court of Appeal (Civil Division) rejected this appeal, holding that the decision to grant the stay was a "principled and pragmatic conclusion". The Court had regard to the fact that, if the GC overturned the Commission decision, the stay would not need to be extended, and if there was a further appeal of the GC's judgment, a new application would need to be made to the High Court to extend the stay, which would be a matter for another day. However, the Court allowed the security appeal awarding the plaintiffs £ 150 million as a security payment (so overturning the separate High Court ruling that had rejected such a payment).

Type of action

Public enforcement

Date of the Commission decision

Not applicable

Delivery date of the ruling

20/01/2017

Language

English

Headnote

In this ruling, the Court focused on, inter alia, issues of res judicata and the duty of sincere cooperation under Union law.

Parties

Names of the parties to the action

Romania

Versus

Viorel Micula; Ioan Micula; S.C. European Food S.A.; S.C. Starmill S.R.L.; S.C. Multipack S.R.L.; European Commission (intervener)

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Other

Parties that won an arbitration award, the payment of which would constitute State aid, according to the Commission.

Sector relating to the State aid argument

C - Manufacturing

Highly-integrated food production

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

Prior to joining the EU in 2007, Romania had put in place a tax incentive scheme for investors, with a view to rapid privatisation of its economy. Micula invested a significant sum of money in a large, highly integrated food production operation. In 2004, Romania passed a Government Ordinance repealing all but one of the tax incentives [provided under EGO 24], effective 22 February 2005. This was because it considered the incentives to amount to State aid.

Micula brought arbitration proceedings and received an arbitration award against Romania on 11 December 2013.

The arbitration tribunal found that Romania had violated the plaintiffs' legitimate expectations and had failed to act transparently. It did not deal with the issue of enforceability under State aid rules, stating that it was "not desirable to embark on predictions as to the possible conduct of various persons and authorities after the award has been rendered, especially but not exclusively when it comes to enforcement matters".

The plaintiffs registered the arbitration award in the High Court of England and Wales. However, the Commission adopted a decision in which it declared that payment of the award by Romania constituted new State aid within the meaning of Article 107(1) TFEU.

Main arguments were:
1) Micula accepted that the UK courts bore duties under Article 4(3) EC Treaty not to take decisions in conflict with decisions of the Commission. However, their submission was that no conflict arose by upholding the registration of the award with the prospect of the award's eventual execution against commercial property held by Romania in the UK. This would not entail any infringement of obligations binding the UK under Union law primarily because of the principle of res judicata as upheld in the CJEU case law, and because Article 351 TFEU preserves the force of a Member States' pre-accession international obligations. So far as there is any conflict, their submission was that the UK court must put its obligation under the ICSID Convention first.
2) Romania and the Commission (an intervener in the case) submitted that the Court was obliged to refuse recognition and any further enforcement of the award because of the terms of the Commission decision. They submitted that (i) the court could not act in a way contrary to the decision; (ii) the questions of law raised by the plaintiffs were already before the CJEU in the plaintiffs' appeal against the Commission decision; and (iii) it was the CJEU that was the correct forum in which to resolve them, not this court.
2a) Micula submitted that there was no authority to support the proposition that a court of Member State A can be prevented by that State's duty of sincere cooperation under Article 4(3) EC Treaty from awarding or enforcing an award of damages because the effect of such a decision would be to enable Member State B to circumvent the EU rules on State aid, particularly where (as they submit) this would put State A in violation of international obligations. All of the State aid cases cited by Romania and the Commission were ones in which the courts obliged to refrain from determining a certain matter belonged to the same Member State whose authorities were responsible for the granting of the State aid in question.
2b) Romania and the Commission pointed out that the effect of the plaintiffs' submissions would be that a Commission decision on State aid would be observed only in the country directly concerned, and in no other Member State.

Remedy(ies) sought

Other remedy sought

The remedy sought by Romania, with the Commission intervening, was the setting aside or stay an order registering an ICSID arbitration award.

Outcome of the case

Conclusions adopted by the national court

The application of Romania and the Commission to set aside the Court's Order registering the award was refused, because the registration of the award did not place Romania in breach of the Commission's injunction decision of 26 May 2014, and Micula was not in breach by registering the award.

However, enforcement of the award was stayed pending the resolution of the plaintiffs' proceedings in the CJEU seeking the annulment of the final Commission decision of 30 March 2015. This is because the Commission decision prohibits Romania from paying the award, and the 'principle of sincere cooperation' in Article 4(3) EC Treaty as interpreted both in EU and in English case law precludes national courts from taking decisions which conflict with a decision of the Commission.

Remedy(ies) granted – including assessment public enforcement issues

Other remedy imposed

The Court granted a stay on the enforcement of the award until the GC could decide on Micula's action for annulment of the Commission decision. The latter had concluded that the payment of the award by Romania would constitute State aid.

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- C-590/14 P, Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission (2016) ECLI:EU:C:2016:797
- C-505/14, Klausner Holz Niedersachsen v Land Nordrhein-Westfalen (2015) ECLI:EU:C:2015:742
- C-119/05, Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA (2007) ECLI:EU:C:2007/434
- C-507/08, European Commission v Slovak Republic (2010) ECLI:EU:C:2010:507
- 61/79, Amministrazione delle Finanze dello Stato v Denkavit Italia (1980) ECLI:EU:C:1980:100

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on definition of aid under Article 107(1) TFEU
√ CJEU case law on Article 108 TFEU and private enforcement of State aid rules

References by the court to other relevant aspect of the EU acquis

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 (notified under document C(2015) 2112), OJ L 232, 4.9.2015

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

Romania had referred a request for a preliminary ruling to the CJEU, but the Court refused this request on the basis that the question to be referred was not easy to identify, and in any event the case was already before the GC in the form of annulment proceedings. The Commission did not provide amicus curiae observations, but did act as an intervener (an entity which is not one of the main parties to the proceedings, but which is allowed to join the proceedings) in the case. In this case, the Commission made submissions in support of several of the Romanian arguments.

Case summary UK10

Date

21/12/2018

Case identifiers

Member State

United Kingdom

Court which adopted the ruling (national language)

Scottish Court of Session (Outer House)

Court which adopted the ruling (English)

Scottish Court of Session (Outer House)

Instance court which adopted the ruling

Second to last instance court (civil/commercial)

Official language of the court

English

Hyperlink to ruling

https://www.bailii.org/scot/cases/ScotCS/2018/%5B2018%5D_CSOH_39.pdf

Case reference

[2018] CSOH 39

Procedural context of the case

On 20 December 2001, the United Kingdom notified the Commission of its intention to introduce an Aggregates Levy with effect from 1 April 2002. On 24 April 2002 the Commission decided to raise no objection to the Aggregates Levy (the initial decision). On 12 July 2002 the BAA initiated proceedings for annulment of the initial decision. On 13 September 2006 the GC dismissed the proceedings in their entirety. On 27 November 2006 the British Aggregates Association appealed the judgment of the GC. On 22 December 2008 the ECJ (current CJEU) set aside the appealed judgment and referred the case back to the GC. On 7 March 2012 the GC annulled the initial decision on the ground of errors in the Commission's original assessment. The Commission therefore had to reassess its decision to raise no objection to the levy. By letter dated 31 July 2013 the Commission confirmed that the levy itself was lawful but at the same time informed the United Kingdom that it had decided to initiate the formal investigative procedure in respect of certain exemptions, exclusions and reliefs. In its final decision, it concluded that the exemptions were incompatible State aid. It issued a recovery decision. The BAA has launched the following applications: (i) for annulment of the decision to open a formal investigation; and (ii) for annulment of the final Commission decision.

The present ruling concerns an attempt by the State to recover the State aid.

Type of action

Public enforcement

Date of the Commission decision

27/03/2015

Delivery date of the ruling

13/04/2018

Language

English

Headnote

In this ruling, the Court held that the amount of aid to be recovered was the amount of a levy which was not paid as a result of an unlawful exemption. The Court also ruled that recovery could only take place against the corporate entity that should have paid the levy and not its holding company.

Parties

Names of the parties to the action

The Advocate General for Scotland (the AG)

Versus

John Gunn and Sons Limited; John Gunn and Sons Holdings Limited

The relationship of the plaintiff to the measure

Public authority

The relationship of the defendant to the measure

Beneficiary

Sector relating to the State aid argument

B - Mining and quarrying

Extraction of aggregate materials for the purpose of commercial exploitation

The type of State aid measure challenged in the court proceedings

Tax break/rebate

Substance of the case

Facts and parties' main arguments in the case

The British aggregates levy aimed to maximise the use of recycled aggregate and other alternatives to freshly extracted aggregate, and to promote the efficient extraction and use of aggregates with a view to reduce environmental damage. Certain materials and production processes were exempted from paying the levy.

Following annulment of its initial 2002 decision relating to the levy by the GC, the Commission held, in March 2015, that, while the levy itself was lawful, the exemptions for shale and spoil for shale extraction were not justified because they did not contribute to the environmental goal pursued by the levy. As a result, the beneficiaries of these exemptions had received an undue advantage that the UK had to recover.

In this case the Crown sought to recover from the defenders the value of unlawful State aid granted to John Gunn and Sons Limited (the first defender) in the form of the aggregates levy exemptions. The first defender was a limited company that engaged in extracting of aggregate materials, including the extraction of shale and shale spoil and its commercial exploitation as aggregate. The second defender, John Gunn and Sons Holdings Limited, did not engage in these activities but wholly owned the first defender.

Quantum of the aid

The defenders challenged the quantum of the aid to be repaid, as calculated by HMRC. They argued in particular that there was no lawful basis for HMRC to seek to recover a sum equivalent to the aggregates levy "that would have been charged on the tonnage of shale commercially exploited, if shale had been a taxable commodity". In their view, such a recovery:

- Was not mandated or required by the final Commission decision;
- Would run counter to well-established EU legal principles governing the recovery of unlawful State aid;
- Would unlawfully interfere with the first defender's property rights protected by the Human Rights Act 1998; and
- Contradicted the guidance relating to exemptions from the aggregates levy given in HMRC's Brief 11/15.

They argued that the recovery of State aid must be limited to the financial advantages actually arising from the placing of the aid at the disposal of the beneficiary and must be proportionate to them. They also argued that it was therefore necessary to assess, as

accurately as the circumstances allowed, the actual value of the financial advantage which the beneficiary received from the aid and that:
- The first defender passed on the whole financial advantage of the exemption to its customers;
- The purpose of recovery is to remove the distortion of competition caused by the granting of the aid;
- Recovering more than the actual financial advantage would distort the market and be contrary to the applicable EU legal principles.

Amongst other things, the AG (Advocate General) however:
- Disputed the defenders' submission that the first defender passed on some or all of the benefit to its customers and consequently did not benefit itself to the full amount, as being without merit.
- Argued that the terms of the final Commission decision were clear: the UK had to recover the sums not paid as a result of the exemptions, together with interest. It was not open to the defender to argue that their liability to repay was other than that provided for in the final Commission decision. The Commission "being the body charged with enforcing Union law on State aid, it was not open to the defenders to challenge its decision in the Court of Session as being itself unlawful under State aid rules."

In addition, the AG included an alternative claim for unjust enrichment at common law in the action arguing that while his case primarily depended upon the court's obligation to enforce the Commission decision to recover the unlawful and incompatible aid, "the Court could also order recovery on the basis of the common law concept of unjustified enrichment."

Identification of aid beneficiary
As for the identity of the aid beneficiary, the AG argued that the second defender should also be regarded as a recipient of the unlawful and incompatible aid, "notwithstanding that it did not itself benefit in the most direct way by being itself exempted from paying the aggregates levy. It had benefited through forming part of the single economic unit and through its receipt of enhanced economic value." However, if recovery of the unlawful aid occurred by means of payment from the first defender, the resulting decrease in value of the first defender would serve to extinguish any benefit received by the second defender and repayment by the second defender would then become unnecessary. For that reason, the AG considered that the appropriate form of liability was joint and several liability between the first and second defenders.

Remedy(ies) sought

Recovery order of the unlawful/incompatible aid

Outcome of the case

Conclusions adopted by the national court

Quantum of the aid
The Court held that it was clear that the amount to be recovered was "what would have been paid as aggregates levy by the first defender had the exemption not existed. In other words, it is the amount of underpaid tax due now that the exemption has been found to be unlawful." Any other view was, in the opinion of the Court, wholly unrealistic.

The Court was also of the opinion that the interpretation of the final Commission decision put forward on behalf of the defenders was "tortuous and untenable" concluding that "what a recipient of State aid did or did not do with the financial benefit gained from the application of an unlawful exemption [was] immaterial as far as the Commission is concerned. If the defender were correct in their proffered interpretation it would mean that in every case the Commission or the national court giving effect to the Commission decision would have to undertake a detailed investigation into what the beneficiary of the unlawful exemption did with the benefit gained by him. That cannot be right."

The Court also dismissed the other arguments put forward by the defenders in relation to the quantum of the aid to be recovered.

It further noted that it did not know "why the pursuer thought it either necessary or appropriate to include an alternative claim for unjust enrichment at common law [to] this action." This action was about the application of Union law to the aggregates levy and the Court saw "no good reason for the inclusion of a case based on unjust enrichment, which raises considerations of equity which do not arise in the claim based on [Union] law."

Identification of the aid beneficiary
The Court concluded that this was an action to enforce payment of the aggregates levy, which should have been, but was not, paid by the first defender. The second defender was never under any liability to the Crown for aggregates levy at the material time and could therefore not be made liable now.

Remedy(ies) granted – including assessment public enforcement issues

Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered; Identification of the aid beneficiary

Difficulties referred to by the national court in deciding the case (optional)

No difficulties referred to

Other

References by the court to any CJEU / national case law

CJEU case law:
- T-308/00, Salzgitter AG v European Commission (2013) ECLI:EU:T :2013:30
- T-366/00, Scott v Commission (2007) ECLI:EU:T:2007:99
- C-164/15P and C-165/15, European Commission v Aer Lingus Ltd and Ryanair Designated Activity Company (2016) ECLI:EU:C:2016:990
- C-271/13 P, Rousse Industry v European Commission (2014) EU:C:2014:175
- C-415/03, Commission of the European Communities v Hellenic Republic (2015) ECLI:EU:C:2005:287

√ CJEU case law on public enforcement of State aid rules
√ CJEU case law on 'effectiveness' (effet utile)
√ CJEU case law on definition of aid under Article 107(1) TFEU

References by the court to other relevant aspect of the EU acquis

- Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009 (Commission Enforcement Notice)
- Commission Decision C(2015) 2141 of 27 March 2015

Cooperation with the EU institutions

No cooperation

Preliminary ruling request follow-up

No

Any other comments (optional)

No other comments

28.3 List of relevant rulings

Court which adopted the ruling (national language)	Court which adopted the ruling (English)	Instance court which adopted the ruling	Case reference	Delivery date of the ruling	Type of action	Remedy(ies) granted	Reasons for granting the remedy(ies)	Comments on the relevance of the ruling	Any other comments
UK Competition Appeals Tribunal	N/A	Specialised court	Neutral citation [2008] CAT 36	10/12/2008	Private enforcement	None - Claim rejected	Challenge to a decision by the Secretary of State not to refer a merger to the Competition Commission. It was claimed that, in taking the decision, it had erred in law by overlooking certain developments in the Commission Communication on compliance with State aid rules in the context of the current financial crisis. The Court rejected the argument that the Secretary of State had failed to have regard to the latest position on State aid.		The UK Competition Appeals Tribunal is a specialist competition judicial body.
England and Wales High Court (Administrative Court)	N/A	Second to last instance court (administrative)	Neutral Citation Number: [2010] EWHC 223 (Admin)	16/02/2010	Private enforcement	None - Claim rejected	Involved an argument that State aid was granted to a bus company providing public services on the basis that an advantage was granted to it by the State. Court did not find there to be State aid.		
England and Wales High Court (Administrative Court)	N/A	Second to last instance court (administrative)	Neutral Citation Number: [2010] EWHC 2752 (Admin)	02/11/2010	Private enforcement	None - Claim rejected	The Court held that, even if it were the case that competitors were receiving more than they should, the solution would not be to increase the plaintiff's subsidy, and this would increase the distortion. A form of subsidy was provided for renewable energy generators, to take into account the less developed nature of their technology. The measure was notified to the Commission, which requested some clarifications, in order to satisfy itself that there was no 'over-compensation' involved. Once satisfied, the Commission raised no objections. The plaintiffs claimed that due to a later review, generators using other technologies received an increased subsidy, but the plaintiffs did not. The Court held that the plaintiffs could not be allowed an increased subsidy (irrespective of what others received) as this might lead to the kind of over-compensation which the Commission was originally concerned about. The Court noted that there will often be cases where regulatory changes benefit some technologies more than others.		
England and Wales Court of Appeal (Civil Division)	N/A	Second to last instance court (civil/commercial)	Neutral Citation Number: [2011] EWCA Civ 664	03/06/2011	Private enforcement	None - Claim rejected	The case concerned a subsidy scheme introduced in order to ensure targets for renewables pursuant to an EU Directive were met. This involved a certain level of subsidy being granted to incentivise electricity generators to invest in alternative technologies, which would develop the generation of electricity from renewables. In calculating the appropriate level of subsidy, various factors were considered, such as costs, revenues, and the desirability of encouraging certain technologies more than others. A level of subsidy (1 ROC/MWh) was applied to the plaintiffs. They claimed the figures used to calculate the costs were erroneous, and if the correct figures were used, the subsidy would be 1.5 ROC/MWh. As it happened the Government conducted a review of the scheme, which reflected the amended costs. However, as the wholesale price of electricity had substantially increased, the net effect was to arrive at a subsidy calculation of between 0.6 and 0.7 ROC/MWh. The High Court rejected the plaintiffs judicial review proceedings. The State had argued that if the plaintiff were right, the State would have to over-subsidise the technology in question, which would risk breaching State aid rules. In the Court of Appeal, the plaintiff alleged that the reason the judge in the High Court decided against them was the State aid argument. Court of Appeal rejected this, holding that the High Court would have found against the plaintiffs in any event, based on other considerations. The Court of Appeal briefly expressed doubt about the State aid argument before the High Court, noting that if the Secretary of State had decided to change the level of subsidy it would have had to notify the change to the Commission.		This is an appeal of a High Court decision (Neutral Citation Number: [2010] EWHC 2752 (Admin)).
England and Wales High Court (Administrative Court)	N/A	Second to last instance court (administrative)	Neutral Citation Number: [2012] EWHC 1903 (Admin)	11/07/2012	Private enforcement	None - Claim rejected	The Court found there to be no State aid. The case concerned the claim that allowing black cabs to use bus lanes but not minicabs was a form of State aid. The Court held that the distinction applied between the two categories was entirely consistent with the different factual and legal situations which these categories of transport providers face.		Case was appealed to Court of Appeal, and a reference was made to the CJEU.
England and Wales Court of Appeal (Civil Division)	N/A	Second to last instance court (civil/commercial)	Neutral Citation Number: [2013] EWCA Civ 720 C1/2002/0940(B)	10/04/2013	Private enforcement	Other remedy imposed	The Court lifted the stay on appeal. Given the lack of clear indication regarding timing for Commission action, and the fact that the stay had already endured for a decade, the Court held that the fear of incompatible decisions should not be allowed to be decisive. The case involved a Commission decision not to raise any objections to an aid measure. The plaintiffs appealed to the GC which agreed with the Commission. Meanwhile, the High Court in the UK granted a stay pending an EU outcome. It was appealed to ECJ, which set aside the GC's decision. Remitted to GC which annulled the Commission's original decision. As the Commission had not yet taken a decision, the plaintiffs sought to have the stay lifted. Argument against lifting the stay: risk of inconsistent decisions; aspects of the case such as compatibility with the TFEU which fell within Commission's exclusive competence; requirement of mutual cooperation. However, the Court decided to lift the stay, bearing in mind that the stay had already endured for a decade and there was no clear timeline	This case concerns the staying of national proceedings pending a decision regarding the State aid issue at EU level.	

							regarding when/whether the Commission would act. It should be noted that, at a later date in 2015, once the Commission had initiated a formal investigation, the stay was re-imposed.		
England and Wales Court of Appeal (Civil Division)	N/A	Second to last instance court (civil/commercial)	Neutral Citation Number: [2013] EWCA Civ 492	09/05/2013	Private enforcement	None - Claim rejected	The Court held that, as there was an independent valuation, the sale was compatible with rules on State aid.	This ruling illustrates the use of State aid rules as an aid to domestic statutory interpretation.	
Scottish Court of Sessions (Outer House)	N/A	Second to last instance court (civil/commercial)	[2013] CSOH 203	27/12/2013	Private enforcement	None - Claim rejected	The case involved a petition to the Court to stop the tax authority collecting a tax on the basis that it may constitute State aid. The petition failed, and the Court did not regard it as being a State aid case. However, the case is interesting because the Court seeks to delineate the distinction between a situation where a tax levied on one party and not on a competitor constitutes State aid, and where does is not.		
England and Wales High Court (Administrative Court)	N/A	Second to last instance court (administrative)	Neutral Citation Number: [2014] EWHC 707 (Admin)	21/03/2014	Private enforcement	None - Claim rejected	The State aid argument arose where planning permission was granted to a company to build a freight centre on condition that the company keeps commercial flights going. In practice, it was the company agreeing to subsidise itself, rather than the advantage for the commercial flight operator coming from the State. The Court ruled there was no State aid, and did not refer a request for a preliminary ruling to the CJEU.		
England and Wales High Court (Administrative Court)	N/A	Second to last instance court (administrative)	Neutral Citation Number: [2014] EWHC 2089 (Admin)	30/06/2014	Private enforcement	None - Claim rejected	The case involved a claim that aid had been granted, which had not been notified to the Commission. The Court applied the MEIP. The Court did not need to decide on whether a specific market investor would have made the loan, but rather found that the loan could have been made by a private investor. Thus, the Court found that it was not State aid.		
England and Wales Court of Appeal (Criminal Division)	N/A	Second to last instance court (criminal)	Neutral Citation Number: [2015] EWCA Crim 210	26/02/2015	Private enforcement	None - Claim rejected	The Court rejected the State aid argument, noting that there could not be a selective advantage which favours certain undertakings over others. It held that the factual and legal circumstances mean that under 10 metre vessels and over 10 metre vessels are not in a comparable situation. Therefore, it is acceptable to treat them differently in the licensing process.	The case is interesting in the sense that the State aid issue is raised by someone subject to a criminal prosecution.	Defence to a criminal case, was categorised as private enforcement in the sense that it is raised by a private individual.
England and Wales High Court (Administrative Court)	N/A	Second to last instance court (administrative)	Neutral Citation Number: [2015] EWHC 1723 (Admin)	19/06/2015	Private enforcement	None - Claim rejected	The case concerned a challenge to an amendment of the Copyright Act, which provided an exemption - it was claimed it granted a selective advantage to the technology sector. The Court held that 1) no aid was granted "through State resources"; and 2) the benefit that accrues is an incidental consequence of a legislative change which is designed to meet other objectives.		
England and Wales High Court (Administrative Court)	N/A	Second to last instance court (administrative)	Neutral Citation Number: [2015] EWHC 2164 (Admin)	23/07/2015	Private enforcement	None - Claim rejected	The Court found there to be no State aid. The case involved a decision of an energy regulator to change the methodology for calculating tariffs. It was claimed that this constituted State aid, as it benefited certain generators. The Court rejected this argument, holding that the charging methodology treats different classes of generators differently due to objective factors related to the needs of energy infrastructure. Thus, there is no selective advantage conferred on an undertaking or a class of undertakings.		
Northern Ireland High Court (Queen's Bench)	N/A	Second to last instance court (administrative)	Neutral Citation No: [2017] NIQB 122	21/12/2017	Private enforcement	None - Claim rejected	This ruling concerned a challenge to the amendment of the 2012 aid scheme in 2017. However, it was held that the Commission approved the 2017 amendment. In any event, part of the reason for the 2017 amendment was the fear that the continuation of the 2012 scheme may have led to unlawful State aid.		
England and Wales High Court (Commercial Court)	N/A	Second to last instance court (civil/commercial)	Neutral Citation Number: [2017] EWHC 31 (Comm)	20/01/2017	Public enforcement	Other remedy imposed	The Court did not grant the remedy sought by the plaintiffs (enforcement of the arbitration award), but rather decided to stay the grant of the award pending the outcome of the plaintiffs' attempt to have the Commission decision annulled. The plaintiffs won an arbitration award against Romania and registered it at the UK High Court. The plaintiffs sued Romania for it. But the Commission had found that payment of the award by Romania would constitute a grant of unlawful new State aid. Romania defended the claim on this basis. The Court considered the fact that the UK High Court had a duty of sincere cooperation with the Commission, and thus could not make a finding contrary to the Commission decision. Ultimately, the Court stayed proceedings to allow the plaintiffs challenge the Commission decision.		In relation to the same matter, in case [2017] EWHC 1430 (Comm), the plaintiffs tried to make the stay conditional upon Romania giving security. The Court considered the arguments and held that there was no need to accede to the plaintiffs' request at this time (evidently influenced by the fact that a nation State is in a different position to an ordinary litigant), but did not preclude it in the future (https://www.bailii.org/ew/cases/EWHC/Comm/2017/1430.html). Also, in relation to the same matter (but in 2018), the plaintiffs sought to challenge the decision to grant the stay. The Court rejected this appeal, holding that the decision to grant the stay was a "principled and pragmatic conclusion". The Court had regard to the fact that, if the GC overturned the Commission decision, the stay would not need to be extended, and if there was a further appeal of the GC's decision, a new application would need to be made to the High Court to extend the stay, which would be a matter for another day (https://www.bailii.org/ew/cases/EWCA/Civ/2018/1801.html). However, the Court did allow the appeal concerning the payment of 150 million pounds security, which shows a divergence among national courts on this point. Recently (31 October 2018), the

									Supreme Court granted Romania permission to appeal the order for security and continued the stay.
Scottish Court of Sessions (Outer House)	N/A	Second to last instance court (civil/commercial)	[2018] CSOH 39	13/04/2018	Public enforcement	Recovery order of the unlawful/incompatible aid; Quantification of the aid to be recovered; Identification of the aid beneficiary	The Commission had held certain exemptions under the scheme to be incompatible with the internal market. Thus, the Court granted the Advocate General's claim to have the aid recipient repay the amount of the advantage which accrued to it due to the aid. Thus, the Court had a role in quantification. However, the Court ruled there was no liability on the part of the aid recipient's holding company.	This case is relevant in the sense that it is a rare case of public enforcement *via* the UK courts.	


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