

# State Aid and Fiscal Protectionism in the European Union from the Perspective of Competitors

**In this article, the author discusses various issues raised in the IFA/EU Seminar J on “State Aid” held on 2 September 2010 at the 64th Congress of the International Fiscal Association (IFA) in Rome. It focuses on questions of private state aid enforcement at a national level.**

## 1. Introduction

At the International Fiscal Association (IFA) 2010 Congress in Rome, the IFA/EU Seminar J (“the Seminar”) was on the topic of EU fiscal state aid.<sup>1</sup> First, the panellists discussed the very contentious “selectivity test” and its similarities with and differences from the discrimination analysis applied in the context of the EU fundamental freedoms.<sup>2</sup> Another important point of discussion was the effect of the EU state aid rules on regional tax autonomy as exists in some Member States.<sup>3</sup> The Seminar considered the phenomenon of fiscal protectionism not only in the light of the state aid prohibition,<sup>4</sup> but also with regard to the World Trade Organization (WTO) subsidy control system.<sup>5</sup> Finally, the Seminar explored how US courts approach tax incentives.<sup>6</sup> This article elaborates on the procedural part of the panel discussion, which placed special emphasis on aspects of private enforcement.

Under the state aid control system contained in article 108(3) of the Treaty on the Functioning of the European Union (TFEU) (2007),<sup>7</sup> Member States must inform the Commission of any plans to grant or alter a state aid measure. In other words, any state aid other than such that had already been in operation on the accession date of a particular Member State (“existing aid”) must be notified to the Commission before its implementation (“new aid”). Until the investigation procedure has resulted in a final decision, the Member State concerned should not put its proposed measure into effect (“standstill obligation”).

If a Member State has implemented a state aid measure without prior notification to the Commission, the national authorities must refrain from applying the provisions. If an authority grants a tax incentive in breach of article 108(3), last sentence of the TFEU (2007), the state aid is considered to be unlawful and the Commission must order its recovery. The national authorities must withdraw any state aid measures granted in disregard of the standstill obligation by their own action or on the application of a competitor, even if, to date, the case has not been taken up by the Commission.<sup>8</sup> This article examines some of the difficulties encountered by competitors in enforcing the standstill obligation.

## 2. Requirement to Protect Rights of Competitors under EU Law

The effectiveness of the state aid prohibition ultimately depends on the initiatives of competitors. It is very unlikely that a taxpayer that is just about to receive a preferential tax treatment would invoke the application of the standstill obligation. Naturally, a beneficiary of state aid would also not raise the issue of recovery. Particularly with regard to negative state aid (i.e. tax benefits), it may be extremely complex to determine whether or not the

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1. The panel members consisted of Prof. Tracy Kaye (Seton Hall Law School, United States), Prof. Raymond Luja (Maastricht University, the Netherlands), Pierpaolo Rossi-Maccanico (European Commission, Legal Service), Prof. Servatius van Thiel (EU Council of Ministers and Free University Brussels, Belgium) and Carsten Zatschler (European Court of Justice, Legal Secretary). Seminar J was chaired by Prof. Michael Lang (WU, Vienna University of Economics and Business, Austria) with the help of Lisa Paterno (WU, Vienna University of Economics and Business, Austria) as Panel Secretary.
2. This issue was raised by the ECJ in 2009 in IT: ECJ, 17 Nov. 2009, Case C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, ECJ Case L. IBFD. For a detailed analysis, see M. Lang, *Seminar J: Steuerrecht, Grundfreiheiten und Beihilfeverbot*, 19 *Internationales Steuerrecht* 15, p. 570 (2010) and P. Rossi, *Community Review of Direct Business Tax Measures: Selectivity, Discrimination and Restrictions*, 8 *Euro. St. Aid L. Q.* 4, p. 489 (2009).
3. PT: ECJ, 6 Sept. 2006, Case C-88/03, *Portuguese Republic v. Commission of the European Communities*; ES: ECJ, 11 Sept. 2008, Cases C-428/06 to 434/06, *Unión General de Trabajadores de La Rioja (UGT Rioja) (C-428/06), Comunidad Autónoma de La Rioja (C-429/06) v. Juntas Generales del Territorio Histórico de Vizcaya, Diputación Foral de Vizcaya, Cámara de Comercio, Industria y Navegación de Bilbao, Confederación Empresarial Vasca (Confebask), and Comunidad Autónoma de La Rioja (C-430/06), Comunidad Autónoma de Castilla y León (C-433/06) v. Diputación Foral de Álava, Juntas Generales de Álava, Confederación Empresarial Vasca (Confebask), and Comunidad Autónoma de La Rioja (C-431/06), Comunidad Autónoma de Castilla y León (C-432/06) v. Diputación Foral de Guipúzcoa, Juntas Generales de Guipúzcoa, Confederación Empresarial Vasca (Confebask), and Comunidad Autónoma de Castilla y León (C-434/06) v. Diputación Foral de Vizcaya, Juntas Generales del Territorio Histórico de Vizcaya, Cámara de Comercio, Industria y Navegación de Bilbao, Confederación Empresarial Vasca (Confebask)*, ECJ Case L. IBFD; and UK: CFI, 18 Dec. 2008, Cases T-211/04 and T-215/04, *Government of Gibraltar v. Commission of the European Communities*, ECJ Case L. IBFD. For a detailed analysis, see C. Palao Taboada, *State Aid and Autonomous Regions: The ECJ's Ruling in the Basque Country Case*, 63 *Bull. Intl. Taxn.* 5/6 (2009), Js. IBFD.
4. Article 107 TFEU (2007).
5. R. Luja, *Assessment and Recovery of Tax Incentives in the EC and the WTO: A View on State Aids, Trade Subsidies and Direct Taxation* (Intersentia 2003).
6. T. Kaye, *The Gentle Art of Corporate Seduction: Tax Incentives in the United States and the European Union*, 57 *Kan. L. Rev.* 93 (2008/09).
7. Treaty on the Functioning of the European Union of 13 December 2007, OJ C 115 (2008), EU L. IBFD.
8. F.P. Sutter, *Das EG-Beihilfenverbot und sein Durchführungsverbot in Steuersachen* p. 271 (Linde 2005).

standstill obligation applies.<sup>9</sup> Accordingly, the national authorities are unlikely to detect suspicious rules. An authority representative would also only with difficulty admit that a tax incentive had been granted in breach of the standstill obligation. Consequently, an authority representative would normally be hesitant to initiate recovery proceedings.<sup>10</sup>

A requirement to protect the rights of competitors can be derived from EU law. Specifically, in *Finanzamt Eisleben v. Feuerbestattungsverein Halle eV* (Case C-430/04), the European Court of Justice (ECJ) held that:

a private person who is in competition with a body governed by public law and alleges that that body is, in respect of the activities in which it engages as a public authority, treated as a non-taxable person for VAT purposes or undertaxed is *entitled to rely*, before the national court, on the second subparagraph of Article 4(5) of the Sixth Directive in proceedings, such as the main proceedings, between a private person and the national tax authorities (emphasis added).<sup>11</sup>

This case concerned a charitable association, which operated a crematorium in the town of Halle in Germany. It applied to the competent authority, seeking information as to the tax reference number under which the last notice of tax assessment was issued to a competing undertaking, a local authority that also operated a crematorium. The charitable association claimed that, if the local authority were subject to tax as a non-taxable person for the purpose of VAT, the local authority could offer its services at lower prices than those which the charitable association charged.<sup>12</sup>

However, *Feuerbestattungsverein Halle* is not supportive when it comes to the question of whether or not the Member States must give competitors the possibility to defend their rights under EU law.<sup>13</sup> The referring court, rather, asked if article 4(5) of the Sixth VAT Directive (1977)<sup>14</sup> (now article 13(1) of Directive 2006/112/EC)<sup>15</sup> is also intended to safeguard private competitors, as the treatment of bodies governed by public law as non-taxable persons could result in significant distortions of competition. Accordingly, the reference concerned the interpretation of article 4(5) of the Sixth VAT Directive (1977) and not the question of whether or not a requirement to protect the rights of competitors could be derived from EU law.<sup>16</sup> Consequently, the ECJ's decision in *Feuerbestattungsverein Halle* is limited to cases falling within the scope of article 4(5) of the Sixth VAT Directive (1977).<sup>17</sup>

The ECJ acknowledges the principle that individuals, who consider themselves adversely affected by a measure that deprives them of a right under EU law, must have access to a remedy against that measure and be able to obtain complete judicial protection.<sup>18</sup> Article 108(3), last sentence of the TFEU (2007) confers rights on individuals.<sup>19</sup> Accordingly, the Member States must establish a system of legal remedies that ensures effective judicial protection in cases in which tax incentives are granted in breach of the standstill obligation.<sup>20</sup> Consequently, competitors who are put in a worse position compared to the recipient of state aid must be given the possibility to defend the rights conferred to them by the direct application of the

standstill obligation. In this regard, the ECJ has repeatedly held that:

national courts must offer to *individuals in a position to rely on such breach* the certain prospect that all the necessary inferences will be drawn, *in accordance with their national law*, as regards the validity of measures giving effect to the aid, the *recovery of financial support* granted in disregard of that provision and possible interim measures (emphasis added).<sup>21</sup>

The exact scope of this phrase formulated by the ECJ is, however, still to some extent unclear.

### 3. Who May Bring an Action?

First, the formula described in section 2. states that the rights to enforce a breach of the standstill obligation are restricted to persons "in a position to rely on such breach". However, the ECJ has not taken a clear and universally valid position as to who qualifies as such a person. Accordingly, the national authorities must determine whether or not a competitive relationship exists between the applicant of the claim and the unlawful beneficiary.<sup>22</sup>

9. See also M. Struys & H. Abbot, *The Role of National Courts in State Aid Litigation*, 28 Eur. L. Rev. 2, p. 178 (2003).
10. M. Lang, *Die Auswirkungen des gemeinschaftsrechtlichen Beihilferechts auf das Steuerrecht* p. 95 et seq. (Manz 2009).
11. DE: ECJ, 8 June 2006, Case C-430/04, *Finanzamt Eisleben v. Feuerbestattungsverein Halle eV*, para. 32, ECJ Case L. IBFD.
12. Id., para. 8.
13. See, in detail, Lang, *supra* n. 10, at p. 96 et seq.
14. EC Sixth VAT Directive: Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, OJ L 145 (1977), EU L. IBFD.
15. EU VAT Directive: Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347 (2006), EU L. IBFD.
16. M. Mamut, *Konkurrentenschutz im Abgabenrecht* p. 143 et seq. (Lexis Nexis 2010).
17. T. Ehrke-Rabel, *Konkurrentenrechtsbehelf gemeinschaftsrechtlich geboten! – Part I*, 60 Österreichische Steuerzeitung 5, pp. 102 and 104 (2007) and F.P. Sutter, *EU-Recht gewährt umsatzsteuerliche Konkurrentenklage!*, 68 Anwaltsblatt 9, p. 482 (2006).
18. UK: ECJ, 15 May 1986, Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, paras. 18 and 19 and ES: ECJ, 25 July 2002, Case C-50/00, *Unión de Pequeños Agricultores v. Council of the European Union*, para. 39.
19. DE: ECJ, 11 Dec. 1973, Case 120/73, *Gebrüder Lorenz GmbH v. Federal Republic of Germany and Land Rheinland-Pfalz*, para. 8.
20. NL: Opinion of Advocate General Alber, 20 Sept. 2001, Cases C-430/99 and C-431/99, *Sea-Land Service Inc. and Nedlloyd Lijnen BV v. Inspecteur van de Belastingdienst Douane, district Rotterdam*, para. 136; Sutter, *supra* n. 8, at p. 344 et seq.; and Lang, *supra* n. 10, at p. 98.
21. FR: ECJ, 21 Nov. 1991, Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v. French Republic ("FNCE")*, para. 12; FR: ECJ, 11 July 1996, Case C-39/94, *Syndicat français de l'Express international (SFEL) and others v. La Poste and others*, para. 39 et seq.; AU: ECJ, 8 Nov. 2001, Case C-143/99, *Adria-Wien Pipeline GmbH, Wietersdorfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten*, para. 26 et seq., ECJ Case L. IBFD; ES: ECJ, 21 July 2005, Case C-71/04, *Administración del Estado v. Xunta de Galicia*, para. 50; BE: ECJ, 15 June 2006, Cases C-393/04 and C-41/05, *Air Liquide Industries Belgium SA v. Ville de Seraing (C-393/04), Province de Liège (C-41/05)*, para. 42, ECJ Case L. IBFD; AU: ECJ, 5 Oct. 2006, Case C-368/04, *Transalpine Ölleitung in Österreich GmbH, Planai-Hochwurzten-Bahnen GmbH, Gerlitzten-Kanzelbahn-Touristik GmbH & Co. KG v. Finanzlandesdirektion für Tirol, Finanzlandesdirektion für Steiermark, Finanzlandesdirektion für Kärnten*, para. 47, ECJ Case L. IBFD; and FR: ECJ, 12 Feb. 2008, Case 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) ("CELF I")*, para. 41.
22. AU: Opinion of Advocate General Jacobs, 29 Nov. 2005, Case C-368/04, *Transalpine Ölleitung in Österreich GmbH v. Finanzlandesdirektion für Tirol, Planai-Hochwurzten-Bahnen GmbH v. Finanzlandesdirektion für*

In the view of the ECJ, a sufficiently distinct market requires the possibility to distinguish the goods or services in question by virtue of particular characteristics from other goods or services, which are goods or services that are only to a limited degree interchangeable.<sup>23</sup>

With regard to fiscal state aid favouring individual undertakings (i.e. personal tax exemptions or lower tax rates for certain undertakings), the application of this test appears to be possible. This can be illustrated by an example referred to by the Advocate-General's Opinion in *Adria-Wien Pipeline GmbH, Wietersdorfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten* (Case C-143/99). In this regard, it is obvious that the services of a dental surgeon can be distinguished from the goods of a bicycle manufacturer, as they are completely different in character. Although both dental surgeons and bicycle manufacturers address consumers who can only spend their money once, their services and goods are not interchangeable. Consequently, it is suggested that "taxing dental surgeons at a higher rate does not provide any advantage for bicycle manufacturers", as these undertakings are not in competition.<sup>24</sup>

When unlawful state aid schemes in favour of entire business sectors, i.e. entities whose activities consist of the production of goods, are at issue, it can be hard to define who can be deemed to be a competitor in relation to the beneficiary of the state aid.<sup>25</sup> For instance, it is questionable whether or not undertakings producing goods and undertakings supplying services are in competition.<sup>26</sup> In this respect, the test cannot give rise to reasonable results. In *Adria Wien Pipeline*, which concerned an "energy tax rebate" that was limited to entities whose activities could be demonstrated to consist primarily of the production of goods, the ECJ decision implied a rather extensive understanding of a competitive relationship, although not explicitly answering the question as to whether or not undertakings producing goods and undertakings supplying services are, in fact, in competition.<sup>27</sup> In the view of the ECJ, the fact that "the advantageous terms granted to undertakings manufacturing goods were intended to preserve the competitiveness of the manufacturing sector" was sufficient to conclude a "distortion of competition".<sup>28</sup> This extensive approach indicates that practically anyone who is not subject to the energy tax rebate could be deemed to be a competitor.

Accordingly, with regard to taxation, the number of competitors can be very high. Under national procedural laws, it remains, in any event, to be considered which parties might in the end be entitled to bring proceedings to protect their rights. In other words, the Member States may limit the circle of those entitled to bring proceedings against unlawful beneficiaries by determining qualified preconditions for an individual's standing and legal interest, in principle, on a case-by-case basis. EU law merely requires that the national legislation does not undermine the right to effective judicial protection.<sup>29</sup> In order to comply with this principle, consideration could be given to reverting to the concept of "individual concern", which a competitor traditionally has to demonstrate to be

granted a hearing before the European courts.<sup>30</sup> Broadly, a competitor is "individually concerned" by a measure if its position on the market is sufficiently affected by the state aid.<sup>31</sup>

#### 4. Reference to National Law

The reference by the ECJ to national law is not intended to deprive a competitor of his rights conferred by article 108(3), last sentence of the TFEU (2007).<sup>32</sup> Specifically, the ECJ held in *Gebrüder Lorenz GmbH v. Federal Republic of Germany and Land Rheinland-Pfalz* (Case 120/73) that:

while the direct effect of the prohibition in question requires national courts to apply it without any possibility of its being excluded by rules of national law of any kind whatsoever, it is for the internal legal system of every Member State to determine the legal procedure leading to this result.<sup>33</sup>

However, such rules cannot be less favourable than those governing similar national actions and may, in no circumstances, make the exercise of the rights that the national courts must uphold virtually impossible to exercise.<sup>34</sup> Apparently, the obligation of a Member State to provide an adequate legal remedy cannot solely depend on whether or not competitors enjoy similar rights when corresponding "national" rights are at stake. According to the principle of effectiveness, competitors must be given the possibility to enforce the application of the standstill obligation at national level, even if national law does not allow for similar national actions.<sup>35</sup>

Steiermark and Gerlitz-Kanzelbahn-Touristik GmbH & Co. KG v. Finanzlandesdirektion für Kärnten, para. 94, ECJ Case L. IBFD.

23. For example, DE: CFI, 21 Oct. 1997, Case T-229/94, *Deutsche Bahn AG v. Commission of the European Communities*, para. 54.
24. AU: Opinion of Advocate General Mischo, 8 May 2001, Case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten*, para. 78, ECJ Case L. IBFD.
25. C. Staringer, *Das Durchführungsverbot im Beihilfenrecht und das Abgabenverfahrensrecht*, in *Abgabenverfahrensrecht und Gemeinschaftsrecht* p. 362 et seq. (M. Lang & M. Holoubek eds., Linde 2006).
26. AG Opinion in *Adria Wien Pipeline* (C-143/99), para. 78.
27. For a detailed analysis, see Mamut, *supra* n. 16, at p. 67 et seq.
28. *Adria Wien Pipeline* (C-143/99), para. 54.
29. AG Opinion in *Transalpine Ölleitung* (C-368/04), para. 91 et seq. and, in this sense, already previously, Sutter, *supra* n. 8, at pp. 274 et seq. and 281 et seq.
30. T. Ehrke-Rabel, *Gemeinschaftsrecht und österreichisches Abgabenverfahren* p. 190 et seq. (Manz 2006) and Mamut, *supra* n. 16, at p. 67.
31. DE: ECJ, 15 July 1963, Case 25/62, *Plaumann & Co. v. Commission of the European Economic Community* and NL: ECJ, 28 Jan. 1986, Case 169/84, *Société Cdf Chimie azote et fertilisants SA and Société chimique de la Grande Paroisse SA v. Commission of the European Communities*, para. 25. For a detailed analysis, see C. Quigley, *European State Aid Law and Policy* (Hart Publishing 2009) and L. Paterno, *Individualrechtsschutz im Beihilfenverfahren: Neue Tendenzen in der Rechtsprechung der europäischen Gerichte*, in *Jahrbuch Beihilferecht* 2010 p. 449 with further references (T. Jaeger & B. Rumersdorfer eds., Neuer Wissenschaftlicher Verlag 2010).
32. F.P. Sutter, *The Influence of the European State Aid Rules on National Tax Policy, in National Tax Policy in the EU – To be or not to be* p. 121 et seq. (K. Andersson, E. Eberhartinger & L. Oxelheim eds., Springer 2007).
33. *Lorenz* (Case 120/73), Para. 7.
34. DE: ECJ, 2 Feb. 1989, Case 94/87, *Commission of the European Communities v. Federal Republic of Germany*, para. 12; BE: ECJ, 14 Dec. 1995, Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, para. 12; and UK: ECJ, 20 Sept. 2001, Case C-390/98, *H.J. Banks & Co. Ltd v. The Coal Authority, Secretary of State for Trade and Industry*, para. 121 et seq. See also K. Borgsmidt, *Principles of equivalence and effectiveness*, 5 EC Tax J. 1, p. 11 (2001).
35. Sutter, *supra* n. 8, at pp. 284 et seq. and 343.



In this context, the question arises as to how the fact that, in most jurisdictions, tax proceedings are of an essentially bilateral nature can be brought in line with the principle of effectiveness. An effective legal protection presupposes that a competitor is informed of the beneficial tax treatment of a competing company. In other words, the disclosure of information on the tax assessment of the beneficiary of state aid enables the competitor to take legal steps. However, national fiscal secrecy rules normally limit the information to be disclosed. In the light of the principle of effectiveness, it is debatable to what extent a competitor can be involved in a tax procedure in respect of a beneficiary of state aid. Indeed, the ECJ has acknowledged the protection of confidential information and business secrets as a general principle of EU law.<sup>36</sup>

However, this principle must be observed in such a way “as to reconcile it with the requirements of effective legal protection and the rights of defence”.<sup>37</sup> It is, therefore, suggested that national law must allow for an appropriate procedural mechanism to obtain information disclosure when a competitor suspects a beneficial tax treatment in respect of a competitor undertaking. This does not mean that the competitor is entitled to unlimited and absolute access to all of the information relating to the tax assessment of the competing undertaking. Otherwise, the authorities must isolate the question as to whether or not the taxpayer in question had been taxed beneficially from all other tax aspects. The right of access to information must be balanced against the right of the beneficiary of the state aid to the protection of confidential information and business secrets.<sup>38</sup>

## 5. Recovery of Unlawful State Aid

The ECJ requires the recovery of financial support granted in disregard of article 108(3), last sentence of the TFEU (2007).<sup>39</sup> The formula stated in *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v. French Republic* (Case C-354/90) emphasizes the interests of individuals, i.e. competitors. This does not permit the conclusion that the standstill obligation can only be enforced on the request of a competitor. Given the typically bilateral nature of tax proceedings, this would significantly impair the effectiveness of article 108(3), last sentence of the TFEU (2007). In most cases, the competitor, as a result of the tax secrecy rules, cannot even hazard a guess that an authority has committed a breach of the standstill obligation by beneficially taxing a competing undertaking. The duty of the national authorities to recover unlawful state aid as a result of their own actions, therefore, considerably enhances the effective protection of a competitor’s interests.<sup>40</sup> Accordingly, the Advocate-General’s Opinion in *Streekgewest Westelijk Noord-Brabant v. Staatssecretaris van Financiën* (Case C-174/02) stated that “individuals may rely on [article 108(3), last sentence of the TFEU (2007)] and that national courts must apply it – if necessary, of their own motion”.<sup>41</sup> National authorities can refrain from recovering unlawful state aid only in exceptional circumstances, i.e. when the general principles of EU law, such

as the protection of legitimate expectations, run counter to this.<sup>42</sup> The concept of legitimate expectations has been shown to be understood restrictively.<sup>43</sup> For instance, in *Centre d’exportation du livre français (CELF), Ministre de la Culture et de la Communication v. Société internationale de diffusion et d’édition (SIDE)* (Case C-1/09) (“*CELF II*”), the ECJ held that:

the adoption [of three successive decisions] by the Commission ... declaring aid to be compatible with the common market, which were subsequently annulled by the Community judicature, is in itself, not capable of [giving rise to legitimate expectations] ... such as to justify a limitation of the recipient’s obligation to repay that aid, in the case where that aid was implemented contrary to [article 108(3), last sentence TFEU (2007)] .... The unusual succession of three annulments reflects ... the difficulty of the case and, far from giving rise to a legitimate expectation, would rather appear likely to increase the recipient’s doubts as to the compatibility of the disputed aid. (emphasis added)<sup>44</sup>

National authorities must safeguard the rights of individuals against a possible disregard of article 108(3), last sentence of the TFEU (2007) before the Commission has adopted a decision authorizing the state aid.<sup>45</sup> Accordingly, national judges cannot place proceedings on hold to await the outcome of a pending Commission investigation, as this would “amount to maintaining the benefit of aid during the period in which implementation is prohibited”.<sup>46</sup> In *CELF II*, the ECJ also stated that national courts must adopt appropriate measures such that “the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision”.<sup>47</sup> Taking into account previous case law on the purpose of the standstill obligation, it appears to be reasonable to conclude that only the recovery of the financial support can properly meet this requirement, whether or not the Commission is already investigating the case.

The ECJ has taken a more extensive approach. Specifically, in the view of the ECJ, national courts may order either the repayment of the state aid with interest or, for

36. NL/UK: ECJ, 24 June 1986, Case 53/85, *AKZO Chemie BV and AKZO Chemie UK Ltd v. Commission of the European Communities*, para. 28.

37. BE: ECJ, 14 Feb. 2008, Case C-450/06, *Varec SA v. Belgian State*, para. 51.

38. Mamut, *supra* n. 16, at p. 125 et seq.

39. *FNCE* (C-354/90), para. 12.

40. M. Lang, *Rechtsschutzfragen abgabenrechtlicher Beihilfengewährung*, in *Beihilfenrecht 77* (Studiengesellschaft Wirtschaft und Recht ed., Linde 2008). Compare Sutter, *supra* n. 8, at p. 274 et seq.

41. NL: Opinion of Advocate General Geelhoed, 4 Mar. 2004, Case C-174/02, *Streekgewest Westelijk Noord-Brabant v. Staatssecretaris van Financiën*, para. 51, ECJ Case L. IBFD.

42. For example, DE: ECJ, 20 Mar. 1997, Case C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland GmbH*; DE: ECJ, 19 June 2008, Case C-39/06, *Commission of the European Communities v. Federal Republic of Germany*, para. 24; and NL: CFI, 14 Jan. 2004, Case T-109/01, *Fleuren Compost BV v. Commission of the European Communities*, para. 135.

43. Sutter, *supra* n. 8, at p. 272.

44. FR: ECJ, 10 Mar. 2010, Case C-1/09, *Centre d’exportation du livre français (CELF), Ministre de la Culture et de la Communication v. Société internationale de diffusion et d’édition (SIDE)* (“*CELF II*”), paras. 51 and 55. See also A. Giraud, *Judgment of the Court of the European Union in Case C-1/09, CELF v. SIDE*, 9 Eur. St. Aid L. Q. 3, p. 671 (2010).

45. *Transalpine Ölleitung* (C-368/04), para. 44.

46. *CELF II* (C-1/09), para. 31 et seq. For a detailed analysis, see K.D. Beiter & T. Jaeger, *Kein Zugriff auf rechtswidrige Beihilfen*, 21 *ecollex* 5, p. 505 (2010) and C. Vajda & P. Stuart, *Effects of the Standstill Obligation in National Courts – all said after CELF?*, 9 Eur. St. Aid L. Q. 3, p. 629 (2010).

47. *CELF II* (C-1/09), para. 30.

example, as the Commission suggested in paragraph 62 of Notice 2009/C 85/01<sup>48</sup> regarding the enforcement of state aid law by national courts, the placement of the funds on a blocked account so that they do not remain at the disposal of the recipient.<sup>49</sup> Remarkably, the ECJ made a significant reservation, i.e. the obligation to adopt safeguard measures should be subject to “conditions justifying such measures”, namely “that there is no doubt regarding the classification as state aid, that the aid is about to be, or has been, implemented, and that no exceptional circumstances have been found which would make recovery inappropriate”.<sup>50</sup> In other circumstances, the national court must dismiss the application. The ECJ, indeed, had to deal with a situation in which a Commission compatibility decision had been annulled by the Court of First Instance (CFI). However, the findings could be applied to all cases of unlawful state aid in which no compatibility decision has been taken by the Commission, as those situations are, in the view of the ECJ, similar to that in *CELF II*.<sup>51</sup>

There may be doubts as to whether or not the approach taken by the ECJ is completely consistent with the protective aim of the standstill obligation, particularly in as far as the first condition is concerned, according to which the authority arguably has to refuse to order safeguarding measures, i.e. recovery, if it has doubts regarding the classification as state aid. The author believes that such doubts must be removed by the ECJ in the course of a preliminary ruling procedure. In this case, national proceedings may be stayed so that the principal amount of the alleged state aid is left at the disposal of the recipient. If a national court or authority is unwilling to refer the qualification question to the ECJ for interpretation or if it is unable to do so, the alleged state aid should be subject to safeguard measures, i.e. recovery. If this is not the case, the adoption of safeguarding measures would depend on a national authority's prediction of the completely uncertain outcome of the Commission's investigation or a subsequent European court decision. In this way, national authorities draw on the competences that are, in reality, allocated to the Commission and the European courts.

Recently, the ECJ has several times had to consider the question how Commission decisions declaring unlawful state aid measures compatible with the internal market and the claims of the national competitors.<sup>52</sup> According to established ECJ case law “a Commission's final decision does not have the effect of regularizing ex post facto the implementing measures which were invalid because they had been taken in breach of the prohibition laid down by the last sentence of [article 108(3) TFEU (2007)]”.<sup>53</sup>

In other words, even though a state aid measure has finally been approved by the Commission, state aid granted in disregard of the standstill obligation is still unlawful and, therefore, subject to recovery. In *Centre d'exportation du livre français (CELF)*, *Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)* (Case C-199/06) (“*CELF I*”), the ECJ first held that EU law requires a court “to order the measures appropriate effectively to remedy the consequences of the unlawfulness”. However, if the Commission subsequently

approves a certain aid measure, EU law “does not impose an obligation of full recovery of the unlawful aid”.<sup>54</sup> In this case, from a competitor perspective:

its unlawfulness will, ... make them suffer, depending on the circumstances earlier than they would have had to, in competition terms, the effects of compatible aid. From the aid recipient's point of view, the undue advantage will have consisted, first, in the non-payment of the interest which it would have paid on the amount in question of the compatible aid, had it had to borrow that amount on the market pending the Commission's decision, and, second, in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasts. In a situation such as that in the main proceedings, the national court must therefore applying Community law, order the aid recipient to pay interest in respect of the period of unlawfulness.<sup>55</sup>

It follows that, in cases of a competitor's claim, the national courts must at least provide for the payment of interest by the state aid recipient, thereby reversing the advanced competitive situation it had enjoyed over its competitors due to the premature grant. If provided for in national law, the Member State may also order the recovery of the unlawful aid, without prejudice to its right to reimplement this later.<sup>56</sup> To summarize, a final decision of the Commission does not have retroactive effect in national proceedings. Accordingly, it cannot restore the unlawfulness of a state aid. However, Member States may exclude recovery. Notably, the ECJ in *CELF I* assumed that a positive Commission decision would result in the reimplementation of the state aid.

Consequently, the question arises as to whether or not the finding that Member States can waive recovery must be limited to cases in which the Member State re-grants the state aid measure after the Commission's final positive decision. Certainly, a positive Commission decision does not, in itself, give rise to the reimplementation of the state aid measure. So arguably, Member States cannot refrain from recovering a state aid measure if the political or budgetary conditions have changed in the meantime and the legislator decides not to reimplement that state aid.<sup>57</sup> In such cases, competitors can request the recovery of the full nominal amount of state aid plus interest by the direct application of article 108(3) last sentence of the TFEU (2007).

48. Notice 2009/C 85/01, OJ C 85 (2009), p. 1.

49. *CELF II* (C-1/09), para. 37.

50. *Id.*, at para. 36.

51. *Id.*, at para. 25.

52. *Transalpine Ölleitung* (C-368/04); *CELF I* (C-199/06); and DE: ECJ, 18 Dec. 2008, Case C-384/07, *Wienstrom GmbH v. Bundesminister für Wirtschaft und Arbeit*.

53. *FNCE* (C-354/90), para. 16.

54. *CELF I* (C-199/06), para. 46. For a detailed analysis, see T. Jaeger, *The CELF-Judgment: A Precarious Conception of the Standstill Obligation*, 7 Eur. St. Aid L. Q. 2, p. 279 (2008).

55. *CELF I* (C-199/06), para. 50 et seq.

56. *Id.*, at para. 53.

57. Lang, *supra* n. 10, at p. 82 et seq.

## 6. Conclusions

The awareness and willingness of competitors to act against illegal state aid is now greater than it was only a few years ago.<sup>58</sup> Accordingly, private actions against unlawful state aid have increased significantly and a number of competitors have been successful in their claims, particularly where they were seeking the recovery of unlawful state aid.<sup>59</sup> However, it has been demonstrated that the exact preconditions for national competitor claims are still far from settled. One of the main obstacles to actions brought by private parties, based on the violation of the standstill obligation, is the lack of a clear legal basis under national law.

The existing legal framework at a national level can most of the time be interpreted so as to allow for appropriate protection, albeit not without difficulties. For instance, in Austria, it has been

suggested that competitors should apply for a declaratory decision to open the possibility for judicial review.<sup>60</sup> Particularly in the area of taxation, national procedures have, however, proven not to be customized to effect actions in respect of private enforcement. The essentially bilateral nature of tax proceedings is only one obvious and major pitfall on the road to the private enforcement of the state aid rules.

Finally, it also cannot ultimately be derived from ECJ case law as to who qualifies as a competitor. If the criterion of “individual concern” is applied in a national context, the burden of proof may be overwhelming. The relevant criterion is by no means completely resolved. This has, in itself, given rise to convoluted case law and competitors are often unable to present evidence that their market position is sufficiently adversely affected.

58. T. Jaeger, *Austrian Report*, in *Enforcement of EU State Aid Law at National Level 2010* p. 2 (J. Derenne, A. Müller-Rappard & C. Kaczmarek eds., Lexxion 2010).

59. *European Report*, Derenne, Müller-Rappard & Kaczmarek, *supra* n. 58, at p. 2.

60. Lang, *supra* n. 10, at p. 105 et seq. with further references.