The Role of National Courts in State Aid Enforcement

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Outline

- Book presentation: *EU State Aid Law, Emerging Trends at the National and EU Level*
- DG Competition study on the role of national courts in State aid enforcement.
Florence Competition Programme

EU STATE AID LAW
Emerging Trends at the National and EU Level

Edited by
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ENTraNCE for Judges:

1) Training programme in EU competition law and economics for national judges.
2) Organized by EUI and co-funded by DG Competition.
3) Over 300 judges from 24 EU Member States attended the programme.

The present volume concludes the 7th edition of ENTranCE for Judges ➤ focus on the role of national courts in State aid enforcement.
ENTraNCE books

- Third ENTraNCE book.

- Previous volumes published by Edward Elgar:

- Focus of the **books collection**: emerging trends in competition law enforcement at the national and EU level.
Objectives of the volume

• Recent trends in State aid policy at the national and EU level ➔ 5 out of 9 contributions discuss the role of national courts in State aid proceedings.

• Aim of the book: contribution to the on-going debate on the effects of State Aid Modernization.

• Interdisciplinary approach: contributions from lawyers and economists.
Chapters

• MEROLA, CALIENTO: *Is the notion of aid broadening or shrinking over time, and if so why?*

• HEIMLER: *State aid control: Recent developments and some remaining challenges.*

• BRUZZONE, BOCCACCIO: *Infrastructures and SGEI.*

• PARCU, ROSSI: *State aid policy in the broadband sector.*

• MERCANTE, MONTI: *Remedies in the private enforcement of State aid law.*

• DONZELLI, WILLEMOT-NIEUWENHUYS: *Damages claims and the State aid cooperation tools.*

• SCOTT: *Parallel proceedings in State aid cases – the Micula case.*

• WEINZIERL: *Recent developments in German State aid jurisprudence.*

• PIERNAS: *Enforcement of State aid law at the national Level – recent trends in Spain.*
Emerging Trends

• **Evolving nature of the concept of aid:**
  1) MS develop new forms of aid ➞ conflicting case law by GC and ECJ on how to adapt existing legal concepts to new forms of aid (MEROLA, CALIENTO).
  2) Presumption of distortion of competition when conditions under Art. 107(1) are fulfilled ➞ lack of effect-based analysis in State aid policy (HEIMLER).

• **State aid control as an instrument of EU industrial policy:**
  1) 2014 GBER provides a long list of compatible aids ➞ SAM has led to a *de facto* EU industrial policy supervised by the Commission (BRUZZONE, CALIENTO).
  2) EU industrial policy might de-incentivize private investments by market operators ➞ the case of broadband infrastructures (PARCU, ROSSI).
Emerging Trends

• **Limited number of private enforcement cases** (MERCHANTE-MONTI)
  ➢ main finding DG Comp study.

• **Parallel State aid proceedings:**
  1) State Aid Modernization ➢ increasing overlap between Commission and national courts.
  2) National courts rarely ask for information/opinions from the Commission; few *amicus curiae* observations by the Commission (DONZELLI, WILLEMOT-NIEUWENHUYS).
  3) National courts are sometimes reluctant to accept the definition of aid by the Commission ➢ in Lübeck and Kletterhallen, BGH and BVerwG ruled that Commission preliminary decisions under Art. 4(3) Reg. 2015/1589 are NOT binding for national courts (WEINZERL).
  4) Spanish Supreme Court in *Digital Terrestrial Television*: in case of parallel proceedings, national court may adopt an interim measure to stop the implementation of the aid until the Commission final decision (PIERNAS).

• **Adoption of national recovery legislations** (ES, NL, FI, EE) (PIERNAS).

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Study on the role of national courts in State aid enforcement
Study

• **Aim:** study commissioned by DG Comp to assess trends in State aid enforcement by national courts, in order consider a possible revision of the 2009 Enforcement Notice.

• **Period:** July 2018 – July 2019

• **Consortium:**
Study - scope

Geographic
- ALL EU Member States.

Time
  - Few important judgements ruled in 2018 included in the Study.

Scope
- Public enforcement: disputes concerning EU Commission recovery decisions.
- Private enforcement: disputes concerning the breach of the standstill obligation.
Study - output

766 relevant rulings identified in 27 EU MS

145 case summaries

28 country reports:
- Trends in national case law
- Overview of national procedural rules

Interviews with national judges about State aid cooperation tools

Final report:
- Comparative findings
- Best practices
- Results of the interviews
Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)

Welcome to the home page of the project website for the Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001) carried out by Spark Legal Network, the European University Institute, Ecorys and Caselex in cooperation with a network of national legal experts, for DG Competition of the European Commission. The Study covers all 28 Member States and provides a comprehensive overview of the enforcement of State aid rules by national courts from 2007 until 2017, but important rulings decided in 2018 were also included, through a comprehensive Final Study and a Case Database that holds summaries of selected national State aid enforcement rulings throughout the EU.

On this project website, you can find the following information:

Go to Case Database  Go to Final Study

For more information on this project, please contact Patricia Ypma or go to Spark Legal Network

https://state-aid-caselex-accept.mybit.nl/
Trends – number of cases identified

Public enforcement: 172 cases (22%)

Private enforcement: 594 cases (78%)

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Trends – public v. private enforcement

• Statistical trends ➞ major difference with 2006 Study:
  1) Overall number of State aid rulings has increased.
  2) Prevalence of private enforcement ➞ 78% of the relevant rulings identified.

• Reasons lower number public enforcement cases:
  1) Direct applicability of Commission recovery decisions (e.g. UK, ES).
  2) Adoption specific legal framework governing aid recovery (e.g. BE, ES, NL, FI, SK).
  3) National courts rarely suspend Commission decisions in accordance with Zuckerfabrik/Atlanta case law.

• Reasons higher number private enforcement cases:
  2) Increased awareness by companies and law firms.
Trends – parties and aid measures

• Main category of aid measure:
  1) Public enforcement: tax breaks/rebates (33%).
  2) Private enforcement: others (43%).

• Parties in public enforcement cases:
  1) Plaintiff: aid beneficiary (62%).
  2) Defendant: public authority (70%).

• Parties in private enforcement cases:
  1) Plaintiff: competitor (36%).
  2) Defendant: public authority (60%).
Trends - courts

• Public and private enforcement cases can be heard by civil and administrative courts, depending on the category of aid measure and remedy requested.

• NO court specialization, exceptions:
  1) Ireland ➢ exclusive jurisdiction to High Court.
  2) Italy ➢ Law 234/2012 regulates courts jurisdiction in State aid case, BUT NO specialized court.

• Impact CJEU case law:
  1) Limited number preliminary ruling requests: 10% public enforcement; 13% private enforcement.
  2) Several reference to CJEU case law, especially from last instance courts.
Remedies awarded in public enforcement cases

- Recovery order of the unlawful/incompatible aid (28%)
- Case sent back to the lower court for re-assessment (9%)
- Direct challenge against Commission decision (11%)
- Indirect challenge against Commission decision via CJEU preliminary ruling (3%)
- Avoiding the aid recovery due to impossibility of recovery (3%)
- Liquidation of the aid beneficiary - i.e. aid recovery in the context of insolvency proceedings (3%)
- Identification of the aid beneficiary (2%)
- Requests of aid recovery suspension (2%)
- Other remedy imposed (1%)
- None - Claim rejected (32%)
Remedies awarded in private enforcement cases:

- None - Claim rejected: 66%
- Case sent back to the lower court for re-assessment: 8%
- Recovery order in relation to unlawful aid: 7%
- Interim measures: 2%
- Recovery of interest: 1%
- Damages awards to third parties / State liability: 1%
- Reimbursement of the taxes paid for financing an unlawful aid: 0%
- Other remedy imposed: 15%
Trends - remedies

- **Statistical trends ➔ claims mostly rejected:**
  1) Public enforcement: positive trend ➔ effective enforcement Commission decisions.
  2) Private enforcement: negative trend ➔ while the overall number of private enforcement cases has increased during the past decade, most of the claims are still rejected by national courts.

- **Reasons why private enforcement claims are rejected:**
  1) Claimants do NOT put forward well-structured arguments.
  2) National courts need to assess the legality of the measure under different areas of law (e.g. tax law, administrative law).
  3) National courts face difficulties in verifying whether a measure is indeed an aid under Art. 107(1).
  4) National courts are unlikely to order recovery of unlawful aid while the case is pending at the Commission.
  5) High burden of proof for the claimant, especially in damage claims ➔ damage quantification and causal link.
Compatibility with EU *acquis*

- Rulings adopted by national courts are generally compatible with EU State aid *acquis* (e.g. courts do NOT award an extension of the tax rebate in private enforcement cases).

- **Departures from the 2009 Enforcement Notice:**
  1. Recovery order annulled by national court due to the breach of the right of oral hearing (Alava, ES).
  2. Recovery ordered annulled by national court due to breach of the legitimate expectations of the illegal aid beneficiary (*Sardenia Hotels*, IT).
  3. Suspension national recovery order during national appeal proceedings (HR, PL).
  4. Hybrid cases: recovery ordered by national authorities without Commission intervention (e.g. *Sheeps*, NL; *Broadcasting Television*, AT) ➢ anticipation *Eesti Pagar* and BMW.
Conclusions – main findings of the Study

- **Increased litigation in national courts:**
  1) State aid rulings identified in ALL EU Member States, except Luxembourg.
  2) 78% of the rulings identified are private enforcement cases.

- **Remedies rarely awarded by national courts**, especially in private enforcement cases.

- **Compatibility with remedies under EU State aid *acquis has improved*** in comparison to 2006 Study.
Revision of the 2009 Enforcement Notice (personal view)

- Main problem identified in the Study: lack of remedies awarded by national courts in private enforcement cases ➢ more training/information for national courts and legal practitioners.

- Aspects of the Enforcement Notice to be clarified, on the basis of the findings of the Study:
  1) Damage quantification ➢ Practical Guide on State aid damage quantification?
  2) Consequences of CJEU rulings in Eesti Pagar and BMW:
     a) National authorities (subject to judicial review) can order the recovery of unlawful aid in breach of GBER, BUT compatibility assessment under Art. 107(3) TFEU remains an exclusive task of the EU Commission.
     b) ‘Preliminary’ decision by national authorities concerning aid compatibility with GBER does NOT create any legitimate expectation for the aid beneficiary.
Thank you for your attention!