



Examining actions for damages claims based on the state aid rules – Part I

by **Lena Sandberg** and **David Wood**

This is the first of three articles examining damages claims and the state aid rules. The series starts with the existence of and need for damages, then looks at damages for state aid breaches under existing Community law, and concludes with some preliminary thoughts on how to make state aid damages claims more effective.

Introduction

The rules in the Treaty on the Functioning of the European Union (TFEU) on State Aid are unique since they effectively curb the right of Member States to grant support to companies established in their own territory when the latter face competition from other companies established in the EU. Indeed, it follows directly from Article 107(1) TFEU that the grant of state aid is prohibited unless it has been found to be compatible with the internal market and approved by the European Commission (the *Commission*) under Article 107(3) TFEU or any of the implementing provisions.

The starting point is therefore that state aid is prohibited and that the Commission is the only authority which may allow exemptions from this principle. As a natural corollary to this, the state aid rules also provide that Member States must notify their plans to grant state aid to the Commission in advance to allow the latter to assess whether the aid is compatible. If Member States do not notify in advance, and the Commission subsequently finds that the aid is incompatible, the Commission must order the full recovery of the aid, including compound interest, in order to eliminate the distortion of competition.

However, given that it normally takes several years before the Commission adopts a final decision on recovery, what happens if, in the meanwhile, the competitors of a state aid recipient have gone bankrupt or have had to cease operating because of the state aid? The fact that the recovery order must be implemented immediately and includes punitive interest does little to help such competitors.

For that reason, EU law and some national regimes recognise that a company which has suffered losses as a result of the grant of incompatible state aid is entitled to seek compensation for damages in national courts, also referred

to as the private enforcement of the state aid rules. Although it is still relatively untested, in the recent *Corsica Ferries* case a French court confirmed that competitors faced with such a scenario can seek damages in national court proceedings.

The SNCM case

An example of damages being awarded by national courts in the context of State aid decisions is the judgment of 23 February 2017 of the *Tribunal administratif de Bastia*, ordering the *Collectivité Territoriale de Corse* to award damages of over EUR 84 million to Corsica Ferries. Corsica Ferries is a competitor of SNCM which had received incompatible state aid.[1]

SNCM had received legal state aid for its obligation to provide a ferry service between Marseille and Corsica for the period 2007-2013. However, on 2 May 2013, the Commission found that it had received too much in compensation from the Corsican regional authorities as the aid also financed an additional SNCM ferry service to cover peak periods during the holiday season.[2] The Commission found that the aid financing the additional ferry service constituted incompatible state aid and the French State authorities were ordered to recover the aid from SNCM.[3]

However, due to the fact that the aid had enabled SNCM to operate two additional vessels during peak periods, the competing ferry service operated by Corsica Ferries had missed out on the opportunity to carry considerable numbers of additional passengers. The state aid recovery order did not compensate Corsica Ferries for this loss, which accordingly sought to obtain damages from the Corsican regional authorities for the harm suffered.

During the procedure before the French administrative court of Bastia, the Corsican regional authorities did not submit any evidence to dispute the amount of the loss suffered by Corsica Ferries. Recalling that state aid granted without first having been notified to the Commission constitutes unlawful state aid, and that the Commission had confirmed both the unlawfulness and the incompatibility of the aid in its decision of 3 May 2013, the court concluded that SNCM's additional ferry service had indeed deprived Corsica

Ferries of a net benefit for the relevant period and ordered the Corsican regional authorities to pay damages of over €84 million.[4]

Importance of damages claims for breaches of state aid law

While the Commission enjoys a central role within the system of state aid control,[5] the Union Courts have consistently referred to the important role of national courts in order to safeguard the rights of individuals. The Union Courts have also ensured that individuals can bring actions for the breach of state aid rules before national courts. In particular, national courts may be called upon to ensure that Member States comply with the notification obligation. In this context, national courts are usually required to rule also on the presence of state aid under Article 107(1) TFEU.[6] National courts also play an important role in obtaining remedies in cases of incompatible state aid, such as by enforcing the recovery claims, and imposing interim measures.[7]

The recovery of unlawful aid is at the heart of the enforcement of state aid rules. The Commission's obligation to order the recovery of unlawful aid was established by the Union Courts already in the 1970s[8] and was subsequently codified in Article 16(1) of the Procedural Regulation which provides that: “[w]here negative decisions are taken in cases of unlawful aid, the Commission **shall** decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (*‘recovery decision’*)” (emphasis added).[9]

Bar those few cases where recovery would breach a general principle of EU law (such as legitimate expectations which is very narrowly interpreted by Union Courts), a recovery order can only be restricted by the ten-year limitation period under the Procedural Regulation and where the national authorities demonstrate that it is absolutely impossible to recover the aid [10]

In this context, the Commission has also made it clear that the underlying purpose of recovery is the **“re-establishment of the previously existing situation [which] is obtained once the unlawful and incompatible aid is repaid by the recipient who thereby forfeits the advantage which he enjoyed over his competitors in the market, and the situation as it existed prior to the granting of the aid is restored”** (emphasis added).[11] For the same reason, a recovery claim must be implemented immediately and national authorities are usually ordered to submit evidence that the necessary steps for recovering the aid have been taken within a few months of the Commission's decision.[12]

However, the Commission's investigation of state aid cases may easily last two years and often takes as long as three. While recovery claims must be implemented immediately, the national authorities often receive rather long extensions due to disputes on the aid amount or the interest accrued. In the meanwhile, a competitor facing a financially reinforced state aid recipient may have become forced to reduce or cease operations in the sector concerned by the aid, or more broadly. By the time recovery is executed, the state

aid recipient may therefore no longer have any significant competitors left. In such a scenario, the recovery order does little to restore the situation which existed prior to the grant of aid.

In such cases, national courts can therefore play an essential role not only in order to ensure a more efficient recovery of the aid,[13] but also as regards damages claims which, if successful, will provide the claimant with direct financial compensation for its losses, something that is unattainable in the context of recovery of state aid.[14]

The Union Courts have explicitly recognised that damages claims is one way for national courts to safeguard the rights of individuals in such cases,[15] and the Commission has also stressed the necessity of entitling competitors and other third parties to bring damages claims against aid granting authorities or even the beneficiary of the aid.[16]

The next article in this series looks at damages for state aid breaches under existing Community law.

Lena Sandberg is of counsel – and David Wood is a partner – at Gibson Dunn in Brussels. The authors wish to thank Pablo Figueroa & Ilias Georgiopoulos for their invaluable contributions to this series of articles.

Endnotes

1. See Ruling of 23 February 2017 of the *Tribunal Administratif Bastia* N° 1500375 *Société Corsica Ferries*, available at: [http://bastia.tribunal-administratif.fr/Media/TACAA/Bastia/1500375-Corsica-Ferries \(Corsica Ferries\)](http://bastia.tribunal-administratif.fr/Media/TACAA/Bastia/1500375-Corsica-Ferries (Corsica Ferries)).
2. The public service agreement was concluded with the Corsican regional authorities and the Corsican Transport Board.
3. Commission Decision of 2 May 2013, SA.22843 2012/C (ex 2012/NN), available at: http://ec.europa.eu/competition/state_aid/cases/245220/245220_1437480_221_2.pdf
4. The Court also referred to the fact that the administrative Court in Marseille had already (on 12 May 2016) annulled the contract under which the Corsican regional authorities required SNCM to carry out a ferry service between Marseille and Corsica.
5. See Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 38; Case C-17/91 *Lornoy and Others v Belgian State* [1992] ECR I-6523, paragraph 30; and Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others (FNCE) v France* [1991] ECR I-5505, paragraph 14.
6. See Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraphs 38 and 44; Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, paragraph 75; and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 31. See, also, Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1-22 (the “Enforcement Notice”), paragraphs 21 and 24 et seq.
7. See *Enforcement Notice*, paragraphs 26 et seq.
8. See Case 121/73 *Markmann KG v Germany and Land of Schleswig-Holstein* [1973] ECR 01495; Case 122/73 *Nordsee, Deutsche Hochseefischerei GmbH v Germany and Land Rheinland-Pfalz* [1973] ECR 01511; Case 141/73 *Fritz Lohrey v Germany and the Land Hessen* [1973] ECR 01527; and Case 70/72 *Commission v Germany* [1973] ECR 813, paragraph 13. See, also, Commission communication, OJ C 318, 24.11.1983, p. 3-4.

9. 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. 9-29 (the “Procedural Regulation”).
10. See *Procedural Regulation*, Art. 17 for the ten year limitation period. See Case C-280/95, *Commission v Italian Republic*, ECR [1998] I-00259, paragraph 16 for the “absolute impossibility” exception.
11. See 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, p. 4-17 (the “Recovery Notice”), paragraphs 13 et seq. See further C-348/93 Case C-348/93 *Commission v Italy* [1995] ECR I-673, paragraph 27.
12. See *Recovery Notice*, paragraphs 40 et seq.
13. See *Recovery Notice*, paragraphs 30 and 55 et seq. In addition, in principle, if national courts are called upon to rule on unlawfully granted aid (that is, aid which has not been notified by Member States), it may order the full recovery of unlawful State aid from the beneficiary irrespective of the Commission’s exclusive power to rule on compatibility of the aid. However, it almost never happens. See for example Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraph 49; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 40 and 68 and the *Enforcement Notice*, paragraphs 30 et seq.
14. See *Enforcement Notice*, paragraph 43.
15. Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraphs 53 and 55; Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraph 56; and Case C-334/07 P *Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraph 54. See, also, *Enforcement Notice*, paragraphs 43 et seq.
16. See *Enforcement Notice*, paragraphs 43 et seq. For a discussion on the necessity of damages claims for the effective legal protection of individuals, see Montag, F., *European State aid Law. A Commentary*, Beck, Hart, Nomos, page 1551, paragraph 169.

Examining actions for damages claims based on the state aid rules – Part II

by **Lena Sandberg** and **David Wood**

This is the second of three articles examining damages claims and the state aid rules. Part I of the series started with the existence of and need for damages. This Part looks at damages for state aid breaches under existing Community law. Part III will conclude by looking at the main obstacles to damages actions and contains some preliminary thoughts on how to make State aid damages claims more effective.

General principles under EU law

An undertaking may bring damages claims before the national courts either on the basis of EU rules or on the basis of the national rules.^[1] Given that it is beyond the scope of this article to examine the status of the national legislation in all member states, the following focuses on damages claims founded on EU rules.

Substantive rules for damages claims

On the basis of the principle of state liability for a breach of the EU rules and the general principle of the effectiveness of EU law (*l'effet utile*), undertakings may seek compensation from national authorities for damages caused by their breach of EU rules, such as the state aid rules.^[2] Undertakings may also seek compensation from *other undertakings* for harm caused by their breach of EU rules, typically the antitrust rules.^[3]

Given that the state aid rules (notably Article 108 TFEU on the notification of state aid) are addressed to, and impose obligations on, the member states (as opposed to undertakings), state aid related damages claims are normally brought against the national authorities which granted the aid and not against the undertakings which received it.^[4] The following therefore focuses on damages claims brought against national authorities.

Breaches of state aid rules

Under the state aid rules, Article 108 TFEU imposes notification and standstill obligations on member states and state aid related damages claims are normally introduced on the basis of that article. Damages claims founded on State aid rules may, however, also be brought on the basis of the failure by a member state to implement a Commission decision ordering a member state to recover unlawful and incompatible state aid from the beneficiaries.^[5]

Article 108 TFEU requires member states to notify the grant of state aid to the Commission and to await approval before implementing the aid. A breach of the notification obligation arises therefore where a member state has granted aid without submitting a prior notification to the Commission as required under Article 108(3) TFEU. A breach of the standstill obligation arises where the aid has been notified, but was nonetheless implemented before the Commission's approval under Articles 107(2) and (3) TFEU was obtained.

[6] The Commission refers to these obligations jointly as the standstill obligation and a breach of either of them will render the aid unlawful.^[7]

As regards recovery decisions, national authorities may bring an action in order to force an aid beneficiary to implement a recovery order. Aid beneficiaries may also request national courts to review the legality of the national authorities' repayment order. Third parties may seek compensation for damages due to a delayed implementation of a recovery decision, provided they have suffered a loss directly related to the delayed recovery.

While damages claims based on recovery decisions are usually more straightforward, damages claims based on unlawful aid (namely a breach of Article 108 TFEU) may be introduced in two ways.

Once the Commission has issued a final decision declaring that a member state has granted unlawful and incompatible state aid (as in the SNCM case discussed in Part I of this series), competitors or third parties affected by the aid may bring damages claims under Article 108(3) TFEU. While this is grounds for a damages claim since the Commission has already established the unlawfulness of the aid, such a claim may only be introduced at the end of the Commission's investigation, which may take two or more years.

The other way of introducing damages claims before national courts is to bring the action when an undertaking becomes aware that aid is being granted without having been notified to the Commission, or where the aid has been notified but is being implemented prior to the Commission's approval decision.

Such claims are not precluded by the mere fact that the Commission may start to investigate the aid in parallel. Even if the Commission should ultimately consider that the aid is compatible, damages may still be justified due to the fact that the aid was unlawful at the time it was granted.^[8] This also applies even if the Commission issues an approval decision prior to the national court's decision, provided that the claimant can demonstrate that a loss was suffered due to the premature implementation of the aid.^[9]

Conditions for successful damages claims

Member states are liable to compensate for damages occurred as a result of member states' breaches of EU law.^[10] The conditions for such a liability are that: (i) the infringed rule of law is intended to confer rights on individuals; (ii) the breach is sufficiently serious; and (iii) there is a direct causal link between the breach of the member state's obligation and the damages suffered by the injured parties.^[11]

The first and second conditions are relatively straightforward.^[12] The Union Courts have confirmed that

Article 108(3) TFEU is directly applicable and confers rights on individuals,[13] and the breach of this provision will also generally be considered a sufficiently serious breach of EU law.[14]

The third condition (direct causal link) is more cumbersome as it requires an in-depth assessment of the alleged loss suffered (for example, a loss of profit, business opportunity or market share) as a result of the unlawful and incompatible aid at issue.[15] While that assessment is based on national rules, the EU principles of equivalence and effectiveness precludes the national rules from excluding a member state's liability for loss of profit.[16]

However, there are no specific EU rules for determining the amount of damages in the form of lost profit, which in practice is one of the most problematic factual issues. One possibility, suggested by the Commission, is to compare the actual income with the hypothetical situation had the unlawful aid not been granted (which appears also to have been the method applied in the SNCM case).[17]

Procedural rules for damages claims

As in all other cases concerning breaches of the EU rules, the principle of member states' procedural autonomy requires that the procedural rules applied to proceedings before national courts are those available under national law.[18]

However, the principle of procedural autonomy is subject to two essential conditions, namely the principle of equivalence[19] and the principle of effectiveness.[20] According to these principles, national procedural rules may not be less favourable than those governing claims under domestic law and they may not render the exercise of the rights conferred by EU law excessively difficult or practically impossible. These conditions are not merely theoretical and the Union Courts have reminded member states of the limitations imposed by those principles, including that national courts must refrain from applying national procedural rules which would violate the principles.[21]

For example:

- National procedural rules may not exclude a member state's liability for loss of profit – for example, by making it dependent on the loss of an asset or on preventing the claimant from improving his asset position.[22]
- National procedural rules may not limit legal standing only to the competitors of the beneficiary.[23]
- National courts are required to use all means available under national procedural rules to give the claimant access to evidence where the burden of proof makes it impossible or excessively difficult for the claimant to substantiate its claim.[24]

It follows from the above that the Union Courts have gone a long way in limiting member states' procedural autonomy in the field of state aid in order to facilitate the access to bring damages claims. Nevertheless, as described in the following Part of this series, damages claims based on the state aid rules are still very limited.

The next article in this series concludes by looking at the main obstacles to damages actions and contains some preliminary thoughts on how to make State aid damages claims more effective.

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Endnotes

1. See Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 75.
2. The principle of state liability for a breach of the EU rules, as established in the Francovich case. Joined Cases C-6/90 and 9/90 *Andrea Francovich and Others v Italian Republic* [1991] ECR I-5357.
3. See C-453/99 *Courage v Crehan* [2001] ECR I-06297.
4. See Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 72-74.
5. See the Enforcement Notice, paragraphs 69 etc.
6. See, for example, Case C-354/90 *FNCE v France* [1991] ECR I-5505, paragraph 11.
7. See, for example, the Enforcement notice, at paragraph 15(a).
8. This becomes particularly noteworthy given that Article 14(2) of the Procedural Regulation and paragraph 11 of the Recovery Notice clearly indicate the amount recovered will include an amount corresponding to the interest for the period during which the aid was unlawful.
9. C-199/06 *Centre d'exportation du livre français (CELF)*, ECLI:EU:C:2008:79, paragraph 55.
10. See Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, paragraphs 31-37;
11. See Case C-173/03 *Traghetti del Mediterraneo v Italy* [2006] ECR I-5177, paragraph 45.
12. This has also been confirmed by commentators such as Pastor-Merchante, see Pastor-Merchante, F., *The Role of Competitors in the Enforcement of State aid Law*, Bloomsbury, 2017, at page 76.
13. See for instance Case C-354/90 *FNCE v France* [1991] ECR I-5505, paragraphs 12-14;
14. See *Enforcement Notice*, paragraph 47.
15. *Ibid*, paragraphs 48 et seq. See also Pastor-Merchante, F., *The Role of Competitors in the Enforcement of State aid Law*, Bloomsbury, 2017, at page 76.
16. See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraphs 87 and 90.
17. See Corsica Ferries and Enforcement Notice, at paragraph 49(c).
18. See Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraph 45.
19. See Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraph 45.
20. See Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraph 45; Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 18; and Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5.
21. See Case 106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECR 629, paragraphs 21-24. See, also, *Enforcement Notice*, paragraph 71.
22. See Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraphs 14-21. See, also, *Enforcement Notice*, paragraph 72.
23. This can include, where provided for under national law, the obligation for the national court to order the defendant or a third party to make the necessary documents available to the claimant.

Examining actions for damages claims based on the state aid rules – Part III

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This is the final of three articles examining damages claims and the state aid rules. Part I of the series started with the existence of and need for damages. Part II looked at damages for state aid breaches under existing Community law. This part concludes the series by looking at the main obstacles to damages actions and contains some preliminary thoughts on how to make state aid damages claims more effective.

Obstacles to private enforcement of EU state aid rules

As discussed in the previous two parts of this series of articles, the Union Courts and the Commission have taken a number of steps to ensure a role for national courts in the enforcement of state aid rules. Despite these steps, however, the evidence suggests that the national route still remains, to a large extent, *terra incognita* for competitors and third parties wishing to enforce their rights under state aid rules. In particular, a number of studies have shown that the enforcement of state aid rules at national level (especially in the form of damages claims) is still in its infancy and not sufficiently effective.[1]

One reason often noted by practitioners is the limited knowledge of the state aid rules by competitors and national judges.[2] However, the Commission has now adopted numerous guidelines[3] and provides judges with information about the state aid rules.[4] There is also the possibility for national courts to refer issues to the CJEU for a preliminary ruling.[5]

Another reason frequently cited is the diversity of national rules. It is clear that while all member states' systems provide for some form of damages action against public authorities, the standards (for example on limitation periods) and whether private parties may claim damages on the basis of a breach of Article 108 TFEU, vary greatly. There are also the general difficulties associated with cross-border litigation.[6]

The third widely-recognised reason relates to the practical obstacles of establishing *locus standi*, access to evidence and the proof of causation between the breach of Article 108(3) TFEU and economic loss sustained by the claimant.[7] Related to this is also the issue of demonstrating and calculating the actual damages suffered.[8]

These considerations suggest that the reasons behind the underuse of private enforcement in the field of state aid law are at least to some extent similar to obstacles for bringing damages claims under the antitrust rules.

Lessons from antitrust damages claims

Damages litigation has played a vital role in the development of US antitrust law making: “private litigants are the primary

enforcers of antitrust rules”.[9] The right to damages for antitrust breaches is also an EU right,[10] and the possibility to bring antitrust related damages claims also exists in all member states.

However, just like state aid related damages claims, antitrust related damages claims in the EU are governed by national rules which often make it both costly and difficult to bring. In order to overcome these obstacles, in 2014 the European Parliament and the Council adopted Directive 2014/104/EU on Antitrust Damages Actions (the “Damages Directive”) which aims at guaranteeing a level playing field for companies in the EU and improving access for consumers to exercise their rights.[11] The Damages Directive entered into force on 27 December 2016, and as of 13 November 2017, 25 Member States have transposed the Directive into national law.

While the Damages Directive is limited to damages claims based on the antitrust rules, the rules are nevertheless aimed at facilitating claims and are therefore also indirectly relevant for the state aid rules, at least as an indication as to how to resolve problems which are common to both.

For example, the Damages Directive introduces rules on:

- Obligations to disclose documents. Given that the evidence in damages claims is usually held by the opposing party or third persons, the Damages Directive requires that member states' national courts must be able to order a defendant or a third party, including public authorities, to disclose relevant documents required by a claimant who presents “*a reasoned justification*” as to “*the plausibility of its claim*”.[12] In state aid cases, it is often of critical importance for a claimant to have access to the documentation of the national authorities or the aid beneficiary. State aid damages litigation could therefore benefit enormously from a facilitation of document disclosure. In turn, this could also partially make up for the lack of rights of third parties during the preliminary phase of a state aid procedure before the Commission or during the entire procedure if the aid is declared compatible.[13]
- Minimum limitation periods. Given that varying national limitation periods across the EU constitute an obstacle to bringing damages claims, the Damages Directive harmonises the rules by introducing a minimum limitation period of five years.[14] The Damages Directive also harmonises the point in time at which limitation periods begin to run by providing that they start only when the infringement has ceased and the claimant knows, or “*can be reasonably expected to know*” of the behaviour, that it constitutes

an infringement and that it caused harm, as well as the identity of the infringer.[15] Given that limitation periods for bringing damages claims under the state aid rules also vary (for example, it is three years in Germany, four years in France, and five in Italy), this provision could usefully be extended to state aid damages litigation.

- Proof of harm. One of the most difficult obstacles in damages claims is to establish a nexus between an antitrust infringement and the alleged harm. The Damages Directive establishes a rebuttable presumption that cartel infringements cause harm and that national courts should be empowered to estimate the amount of the harm, “if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available”.[16] State aid damages claims would benefit from a similar rule (suitably adapted to the state aid rules).

Is a Damages Directive under the state aid rules justified?

In order to determine whether a Damages Directive would pave the way for more state aid related damages claims it is useful to recall how damages claims may reach the national courts on the basis of the state aid rules.

As discussed in the previous articles in this series, a final Commission decision declaring that a member state has granted unlawful and incompatible state aid is a *prima facie* basis for bringing damages claims under Article 108(3) TFEU. In such cases, the Commission has clearly established the unlawfulness of the aid. The other way of introducing damages claims before national courts is to bring an action where aid has been granted without prior notification to the Commission, or where the aid has been notified but is implemented prior to the Commission’s approval decision.

Since it is the unlawfulness (and not the incompatibility) which provides the basis for the damages claims, such damages claims will not automatically be nullified by the mere fact that the Commission has opened a parallel state aid case on the matter. In fact, a positive Commission decision (declaring aid compatible) may even be used as a basis for bringing damage claims before national courts since it establishes the prior unlawfulness.

However, it is also clear that if the Commission’s case is initiated on the basis of a notification by the member state (which in the case of aid schemes removes the unlawfulness of the aid for the future, provided that the grant of aid is also ceased), this will shorten the period during which damages may be claimed, or even make them negligible. In such cases, damages claims will be limited to the period during which the aid was unlawful.[17] For that reason, the appetite for state aid damages claims based on the unlawfulness of aid may be somewhat reduced.

Therefore, while a Damages Directive may significantly facilitate the introduction of damages claims in the area of state aid, it is also fair to say that the inherent limitations in the state aid rules themselves reduce some of the scope of such claims, at least as regards those that are based on the unlawfulness of the aid.

Conclusion

Recovery of the aid is not the only remedy for a breach of the state aid rules, as actions for damages claims may provide a competitor or third parties with compensation for the harm suffered by the grant of unlawful aid. In particular, state aid related damages claims may be introduced on the basis of a final Commission decision declaring the aid unlawful (as in the *Corsica Ferries* case) and on the basis of recovery decisions.

However, private litigants have so far failed to make full use of the opportunity to bring damages claims. The problem is not only establishing a causal link between the breach of the State aid rules and the harm suffered, but that some state aid related damages claims based on unlawfulness of aid may even become pointless if the State aid is subsequently notified.

The Damages Directive provides a useful model for further study into the ways in which state aid-related claims may be facilitated before national courts. Apart from the general interest in seeing a stronger deterrent for unlawful acts, competitors and third parties would clearly benefit. The Commission might also benefit given that it is likely to contribute to reducing the number of complaints, and the resources required to deal with them.

This article concludes the series.

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Endnotes

1. See Flynn, J., ‘The Role of National Courts’ in Biondi, A., Piet Eeckhout and Flynn, J., (eds), *The Law of State aid in the European Union* (Oxford University Press, 2004), page 330; Sinnave, A., ‘Editorial: What to Expect from National Courts in the Fight against Unlawful State aid?’, (2005) 4 *European State aid Law Quarterly* 1, p 1.
2. See Derenne, J and Kaczmarek, C., ‘La récupération des aides illégales : le rôle du juge national dans le « private enforcement » du droit des aides d’Etat’ (2009) 10 *ERA Forum*, pages 264 etc.
3. See, for example, the Enforcement Notice. A Compilation of the EU instruments on State Aid available at: http://ec.europa.eu/competition/state_aid/legislation/legislation.html.
4. See *Enforcement Notice*, paragraphs 77 et seq.
5. See 267 TFEU and *Enforcement Notice*, at paragraph 81.
6. Pastor-Merchante, F., *The Role of Competitors in the Enforcement of State aid Law*, Bloomsbury, 2017, at page 75.
7. See Derenne, J., (dir), 2009 update of the 2006 Study on the enforcement of State aid rules at national level, Final Report (Brussels: Lovells, 2009) (the “2009 Update”).

8. The new Notice addresses this point and gives detailed guidance to national courts and to potential claimants on the calculation of damages in different scenarios.
9. See, eg, Ginsburg, D. H., “Comparing Antitrust Enforcement in the United States and Europe”, *J. Competition L. & Econ*, 2005, 427, 429. In contrast, in the EU, and according to the Commission, “in practice most victims, particularly SMEs and consumers, rarely obtain compensation” in the field of antitrust, (see, eg, <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>).
10. See C-453/99 *Courage v Crehan* [2001] ECR I-06297.
11. Damages Directive, at Recital 9.
12. Damages Directive, at Article 5(1).
13. Article 108(2) TFEU only requires comments from “parties concerned” as regards a finding of incompatibility or misuse of aid. In relation to the lack of rights of competitors during the preliminary phase see Case C-367/95 *Commission v Sytraval* [1998] ECR – I-1719, at paragraphs 58 to 59.
14. Damages Directive, at Article 10(3).
15. Damages Directive, at Article 10(2).
16. Damages the Directive, Article 17(2).
17. In the case of *ad hoc* aid the aid has already been granted and no subsequent notification can repair the unlawfulness.

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