

# Study on the enforcement rules and decisions of State aid by national courts 2019

## Main findings

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# Trends 1

- 1) overall increase in the number of judgments handed down by national courts during the period covered by the Study;
- 2) private enforcement cases have exceeded the number of public enforcement ruling (172 < 594)
  - a. the number and size of State aid measures put in place in the aftermath of the 2008 financial crisis may have contributed to the substantial increase
- 3) national courts have rarely concluded that unlawful aid has been granted and hence rarely awarded remedies

# Trends 2

4) in 32% of the identified cases of public enforcement and in 66% of the identified cases of private enforcement, the national court rejected the claim

- a. in public enforcement, this can be considered as a positive trend: it shows that national recovery orders are rarely successfully challenged in national courts.
  - i. only in five cases did the national courts adopt interim measures to suspend the enforcement of the recovery order

5) low number of remedies awarded by national courts in private enforcement cases

- a. national courts rarely either order the recovery of the unlawful aid or adopt interim measures to suspend the implementation of the aid measure
- b. damages claims: only in six of the identified relevant rulings did national courts award compensation due to the harm caused by a breach of the standstill obligation by a Member State

# Reasons for trends 1

1. lack of familiarity with State aid rules among national courts,
2. the claimants do not usually put forward well-structured arguments to support their claims,
3. national courts face difficulties in verifying the conditions concerning the notion of aid
  - a. under Article 107(1) TFEU, u
  - b. under the GBER,
  - c. applying the CJEU case law in relation to Altmark and Market Economic Operator Principle (MEOP).

# Reasons for trends 2

4. State aid claims often require national courts to assess the legality of the measure under different areas of law, and the interaction of different legal regimes makes the evaluation of the measure under State aid rules more complex,

5. national courts are often reluctant to order the recovery of the unlawful aid while the case is awaiting a compatibility assessment by the Commission

# Reasons for trends 3

6. a State aid claim generally implies a rather high burden of proof for the claimant, especially in damages claims

a. in damages claims the plaintiff

- i. must prove that the challenged measure represents an unlawful aid not previously notified to the Commission and that the aid measure caused damage to the claimant.
- ii. must quantify the damage suffered (the breach of the standstill obligation may cause either a loss of profits and/or a loss of market share for the competitors of the aid beneficiary) during the entire period that the unlawful aid was in operation, while there are evident exogenous impacting the profits and market share of the claimant.

(2013 Commission Practical Guide on summarising the economic techniques concerning damages estimation in cases of private enforcement of EU competition rules)

# Best practices

## Mainly:

- national procedural rules, and
- judicial practices which can contribute to reducing the length of the aid recovery proceedings after a Commission decision

## 7 Best Practices (3 categories):

- related to recovery: specific legislation, recovery instructions in State aid instruments and national penalties for delays in recovery;
- national screening mechanisms: *ex-ante* (i.e. non-binding compatibility assessment with State aid rules) and *ex-post* mechanisms (i.e. State aid assessment as part of the decision-making process of the administrative authority);
- best institutional practices: rules clarifying the court jurisdiction in State aid disputes and the principle of investigation, according to which a court must ascertain the facts of the case on its own initiative and provide the parties with an explanation about the proceedings and the legal formalities.

# Cooperation tools 1

- Article 29 of the State aid Procedural Regulation:
  - request for information,
  - the request for opinion, and
  - amicus curiae observations.
- National courts seem to rely on the cooperation tools on a moderate scale:
  - at least seven requests for information to the Commission
  - at least 20 amicus curiae by the Commission
  - at least 21 opinions by the Commission since 2009.



# Cooperation tools 2

## Reasons for the limited use of cooperation tools

1) seeking guidance from the Commission regarding State aid-related questions does not seem to be the most likely approach for judges to take:

- the vast majority of judges prefer to invest time and effort themselves to try to find an answer to the (legal) question at hand,
- consultation with fellow judges at the same court is the second most likely action,
- furthermore, if the judge cannot find the answer to (legal) question at hand, judges are more likely to seek advice from the CJEU through a request for a preliminary ruling than to approach the Commission.

# Cooperation tools 3

Reasons for the limited use of cooperation tools

2) lack of awareness of the existence of the cooperation tools among judges:

- around 40% of judges participating in the online questionnaire indicated that they had not heard of any of the cooperation tools before participating in the Study,
- several of them also indicated that their fellow judges were not familiar with the tools' existence,
- even judges who are aware of some of the tools, are often not familiar with all of them.

# Cooperation tools 4

Overall:

- judges do value the possibility of approaching the Commission,
- the willingness to use the cooperation tools in future cases seems considerable among judges,
- feedback from judges who had made use of the cooperation tools, showed that the possibility to communicate in the national language is highly valued by the judges
- regarding the quality of the Commission's responses, in particular the usefulness of the response in the ongoing court case, judges differ in opinion:
  - some judges indicated being quite satisfied with the information,
  - while a minority indicated that they did not consider the information obtained to be very helpful
- with regard to the procedure:
  - the majority of judges are of the opinion that the procedure is easy and effective,
  - nevertheless, it does not always seem to be clear to judges which procedure they have to follow.