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10.00h National judges and state aids in the European Union: annulment, responsibility and action for damages.

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NATIONAL COURTS AND STATE AID IN THE EUROPEAN UNION: ANNULMENT, LIABILITY AND ACTIONS FOR DAMAGES

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SUMMARY: **I. INTRODUCTION II. THE ANNULMENT OF NATIONAL ACTIONS DUE TO LACK OF NOTIFICATION TO THE EUROPEAN COMMISSION (UNLAWFUL AID AND REPAYMENT OF UNLAWFUL AND INCOMPATIBLE AID)** *1. Annulment ordered by a national judge as a result of unlawful State aid. 2. Recovery of unlawful State aid found to be incompatible with the common market (by annulment or less onerous procedural measures)* **III. NATIONAL AUTHORITIES' LIABILITY FOR HAVING GRANTED UNLAWFUL AID AND FAILING TO RECOVER UNLAWFUL AND IMCOMPATIBLE AID.** *1. Enforcement of the Court of Justice's judgements declaring non compliance with State aid rules for failing to recover State aid 1) 1) lump sum penalty and penalty payments for the enforcement of declaratory judgements on the non-recovery of aid. 2) Reasons for the non-recovery or repayment of unlawful and incompatible State aid: absolute impossibility and liquidation of the recipients 2. Actions related to the liability of national authorities lodged by competing (and recipient) undertakings* **IV. ACTIONS FOR DAMAGE TO UNDERTAKINGS CAUSED BY INFRINGEMENTS OF THE STATE AID REGIME** *1. Compensation for losses and damage sustained by competing undertakings 2. Compensation for losses and damage sustained by recipient undertakings* **V. CONCLUSION**

I. INTRODUCTION

The Treaty of Rome established a State aid regime that is still implemented with a few modifications in the Treaty on the Functioning of the European Union (Lisbon Treaty). On the one hand, it has the same purpose as the anti-trust rules, with which it shares certain parallelisms. On the other hand, it has certain peculiarities that should be mentioned[1].

The State aid regime is regulated in the founding Treaty; currently in Articles 107-109 of the Treaty on the Functioning of the European Union, almost in the same terms as in the EEC Treaty[2]. Its purpose is to ensure free competition in the internal market. Thus, it is the second component of European competition law. The Court of Justice considers that it is essential for the implementation of the regime[3].

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[1] To give an example, see my book, *Administraciones, Ayudas de Estado y Fondos Europeos*, Editorial Bosch, Barcelona, 2006; and the successive updates and approach to specific aspects in the articles and chapters of subsequent books: "El Estado y las Comunidades Autónomas ante los Tribunales europeos en materia de ayudas de Estado: *bellum omnium contra omnes*?", *Gaceta Jurídica de la Unión Europea y de la Competencia* No 8, March-April 2009, pp. 25-46; "La ejecución forzosa de la recuperación y de la devolución de las ayudas de Estado en la Unión Europea y en España", *Gaceta Jurídica de la Unión Europea y de la Competencia* No 9, May-June 2009, pp. 75-96; "El derecho de las subvenciones y ayudas públicas en la Unión Europea. Principios inspiradores. El control y el régimen de responsabilidad derivado de la gestión de los fondos europeos", in Mario Garcés Sanagustín and Alberto Palomar Olmeda (coord.), Derecho de las Subvenciones y Ayudas Públicas, Civitas, Navarra, 2011, pp.

[2] Given the successive amendments and re-numbering, it should be remembered that the State aid regime was originally regulated in Articles 92-94 of the EEC Treaty, which were subsequently re-numbered as Articles 87-89 of the EC Treaty. Currently they correspond to Articles 107-109 of the FEU Treaty.

[3] ECJ (Grand Chamber) judgement of 7 July 2009, Commission v Greece (C-369/07, Rec. p. I-5703, paragraphs 118 and 119).

However, it is much less important, as demonstrated in the study by Jonathan Faull and Ali Nikpay, *The EC Law of Competition*, 2nd edition, Oxford University Press, Oxford, 2007, which only dedicates 81

However, in the founding Treaty there are substantial differences in the competition rules that apply to undertakings. It proclaims incompatibility with the interior market and the prohibition of anti-trust agreements, and the abuse of market position by dominant undertakings, and yet it declares that the only aid that is incompatible with the interior market is the aid granted by States or any form of State funds that distort or threaten to distort competition, thereby favouring certain undertakings or productions[4].

Similarly, the prohibited anti-trust agreements are null and void in the terms stipulated in Article 101.2 TFEU. In the case of State aid, however, the European Commission is entrusted to use a control procedure to supervise aid compatibility.

The procedure is unique in that national authorities must send notice of all forms of aid to the European Commission. In this case, the so-called 'standstill clause' or 'suspensive clause' laid out in Article 108.3 of the TFEU applies, according to which: "The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision". National courts intervene in two precise circumstances: when the procedure of notifying aid to the European Commission is infringed, that is, when the aid is deemed to be unlawful; and when the national authorities do not recover the aid, or the recipients refuse to return aid that was unlawfully granted or has been declared incompatible by the Commission.

Despite the fact that it is a constitutional system that had no implementation provisions until 1998 , it has posed and continues to pose a vast number of issues that the Court of Justice is gradually resolving, to the point that it is actually a system based on case law. In practice, it is interminable.

Essentially, in the context of the European Union, State aid control is a matter between the national authorities targeted by the control procedure and the European Commission. Therefore, it is the competence of the Court of Justice of the European Union to clarify whether it is lawful for the Commission to decide which State aid is compatible or incompatible with the interior market. Similarly, the only the Court of Justice of the European Union can hold the European Commission accountable. However, it is curious that a relationship subject to European judicial control should have a national dimension arising from the legitimate attempt by competing undertakings and other national authorities to prevent the recipients of State aid from using it (when, for instance, they have not sent notice to the Commission in compliance with the European requirement). Alternatively, they may try to make the national authorities recover the aid or, conversely, the recipient undertakings to return aid that has been declared incompatible.

In this sense, the Court of Justice has pointed out: "the protection of the rights [to individuals] which they derive from the relevant provisions of the Treaty [on the State aid regime] depends, to a great extent, on successive operations of legal classification of the facts". These operations are, firstly, if it is a matter of State aid; next, if it is new aid

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pages (1703-1984) out of 1785 pages to State aid.

[4] Surprisingly, the magnificent handbook edited by Martin Heidenhain, *European State Aid Law: A Handbook*, Verlag C.H. Beck, Munich, 2010, p. 1, refers to the prohibition of State aid.

that needs to be notified to the European Commission to avoid incurring in an infringement; and finally, if it proceeds to recover or return the aid[5].

The European Commission can make its attitude on the classification of State aid known, under supervision by the Court of Justice. This is useful for national courts as a preliminary measure for the following operations: suspension of the granting of unlawful aid and the mandatory recovery or repayment of unlawful and incompatible aid. This is why national courts are authorised to declare the liability of the parties involved, i.e. the national authorities and recipients of the aid, but not the European Commission. The latter is only answerable to the Court of Justice. The national courts may also recognise the competitors' right to compensation and even that the recipients will have to repayment the aid received, at least for dialectic purposes.

In the light of European case law, the European Commission has discovered the importance of national courts' role in making State aid effective[6]. It has made statements to that effect in a 2007 Commission Notice on the recovery and repayment of unlawful and incompatible aid[7] and a Commission Notice on the enforcement of State aid law by national courts[8]. Specifically, the Commission has offered national courts, not the parties, to collaborate with them by sending information within one month or by delivering judgement within four months on the more decisive issues regarding the implementation of the State aid regime in the European Union[9].

I propose to study the regime applied to State aid by the European Union from the perspective of enforcement by national courts. To this end, I will approach three key aspects that could be called a private enforcement of the State aid regime: annulment, liability and action for damages[10].

II. THE ANNULMENT OF NATIONAL ACTIONS DUE TO LACK OF NOTIFICATION TO THE EUROPEAN COMMISSION (UNLAWFUL AID AND REPAYMENT OF UNLAWFUL AND INCOMPATIBLE AID)

[5] ECJ (Grand Chamber), judgement of 13 June 2006, Tranco del Mediterraneo SpA (C-173/03, *Rec*. p. I-5177, paragraph 41).

[6] European Commission, *Enforcement of EU State aid law by national courts*, Publications Office of the European Union, 2010.

[7] European Commission, *Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid* (OJEU No C 272, of 15 November 2007, p. 4).

[8] European Commission, *Notice on the enforcement of EU State aid law by national courts* (OJEU No C 85, of 9 April 2009, pp. 1-22). It should be remembered that cooperation of this nature was introduced in 1995 when the Commission adopted its *Notice on cooperation between national courts and the Commission in the State aid field* (OJEU No C 312, of 23Rd November 1995, p. 8). The Commission Notice of 1995 laid down the basis for volunteer cooperation between national courts and the Commission in the enforcement of the standstill clause. It also indicated, as implemented in *Commission Notice 2009*: "The judge may, as appropriate, grant interim relief, for example by ordering the freezing or return of monies illegally paid, and award damages to parties whose interests are harmed" (paragraph 10).

[9] The Commission's email address for courts to seek consultation on the enforcement of the State aid regime is ec-amicus-state-aid@ec.europa.eu.

[10] The Commission has referred to the considerable benefits of 'private litigation' for State aid policy because it resolves many State aid-related concerns at national level. In addition, national courts can offer very effective remedies, which can contribute to stronger overall State aid discipline (paragraph 5).

The essential concepts of the State aid regime is limited to what is known as 'unlawful aid' and issues involving the recovery or repayment of unlawful and incompatible aid, despite the complications of administrative and judicial procedures at the level of the European Union and the Member States.

Obviously, the enforcement of the State aid regime requires that the measure concerned should involve aid. In fact, this is the first consideration a national court must address, and to do so they can turn to the Commission or the Court of Justice.

It bears mention that the effect of the aid is more relevant than its purpose, as the Court of Justice recalls in its judgement of 29 March 2012, 3M Italy, at the request of the Corte suprema di cassazione (Italy). The Court recalls that the effects of State aid are more important than their aims for classification purposes, and indicates the following requirements to be fulfilled: "First, there must be intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer an advantage on the recipient. Fourthly, it must distort or threaten to distort competition" (paragraph 37). Therefore, a fiscal measure may constitute State aid (paragraph 38), although, on the other hand, "the advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid" (paragraph 39)[11].

After a national court has settled the matter of whether or not State aid is involved, the next question is whether it is unlawful. In other words, the term 'unlawful aid' refers to aid that has been granted without complying with the obligation of prior notice to the Commission. In the event that a national court comes to the conclusion that it is a matter of unlawful aid, to use Court of Justice terminology, "all the necessary inferences will be drawn, in accordance with its 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"[12].

The Commission has emphasised the important complementary function of national courts for cases of unlawful aid by recognising that they may adopt the following measures, consisting in: "a) preventing the payment of unlawful aid; b) recovery of unlawful aid (regardless of compatibility); c) recovery of illegality interest; d) damages for competitors and other third parties; and e) interim measures against unlawful aid" (paragraph 26 of *Commission Notice 2009*). Furthermore, the Commission refers to the role of national courts in cases where the Commission has ordered recovery which, in its opinion, is displayed in the challenging of the validity of a national recovery order and the claim for damages for failure to implement a recovery decision (paragraphs 63-69 of *Commission Notice 2009*).

So, let us examine the role of courts in cases of unlawful aid and their authority in the event of a decision to recover unlawful or incompatible aid.

1. Annulment ordered by a national court as a result of unlawful State aid.

[11] ECJ, judgement of 29 March 2012, 3M Italia SpA (C-417/10).

[12] ECJ, judgement of 21 November 1991, Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon (C-354/90, *Rec*. p. I-5505, paragrtaph12).

Annulment is one of the most obvious consequences of granting State aid without complying with the procedure of prior notification to the Commission. So the Court of Justice has established in its substantial case law on the distribution of roles between the Commission and national courts, the scope of annulment and the effects it may have on a potential acceptance of the unlawful aid's compatibility by the Commission.

The Court of Justice has repeatedly expressed its opinion on the different yet complementary roles of the Commission and national courts. Thus, for instance, in the judgement of 8 December 2011, Residex, the Court of Justice points out that: "whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the European Union Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 88(3) EC has been infringed"[13].

With regards to the effects of infringements of the standstill obligation, the judgement of 21 July 2005, Xunta de Galica, is highly instructive[14]. The origin of the preliminary ruling was a confrontation between the Spanish government and the regional Galician government. It was brought before the Supreme Court in relation to a regional decree that granted aid for shipbuilding[15].

One of the grounds alleged before the Supreme Court by the State Prosecutor was based on the fact that prior notice of the the regional decree that granted the aid had not been sent to the Commission. Nonetheless, it is revealing that, when the Supreme Court announced the intention of referring the question to a preliminary ruling, the State was opposed to allowing the case to reach the European Court.

The Court of Justice deems that the controversial aid is subject to the EU's State aid regime and recalls the obligation to notify such aid to the Commission. Next, it repeats its previous case law, according to which: "It is for the national courts, in cases of infringement of the latter provision [currently, Article 108.3 of the TFEU], to draw the necessary consequences, in accordance with their national law, with regard to both the validity of t he acts giving effect to the aid and the recovery of financial support granted in disregard of that provision" (paragraph 49).

In a judgement given on 7 February 2006, the Supreme Court upheld the appeal and expeditiously annulled regional Galician decree 217/1994 on aid to the shipbuilding industry in Galicia, for failing to send notice thereof to the Commission before ratifying it[16].

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[13] ECJ, judgement of 8 December 2011, Residex Capital IV v Municipality of Rotterdam (C-275/10), pending publication in the *Reports*, paragraph 27).

[14] ECJ, judgement of 21 July 2005, Xunta de Galicia (C-71/04, *Rep*. p. I-7419).

[15] Supreme Court (Chamber for Contentious Administrative Proceedings Chamber, Section Three), proceeding No 13599/2003, of 22 December 2003 (appeal No 2250/1997, judge writing for the court: Trujillo Mamely).

[16] Supreme Court (Chamber for Contentious Administrative Proceedings Chamber, Section Three), judgement of 7 February 2006 (appeal No 2250/1997, judge writing for the court: González González). Subsequently, the Spanish Supreme Court has repeatedly given judgements on the coal subsidies claimed from the Spanish government by undertakings such as Gas Natural and Endesa. The government alleged the lack of authorisation for aid by the Commission, in direct enforcement of the State aid regime and the standstill clause in Article 108.3 of the TFEU: judgement of 9 February 2012 (Contentious

Finally, the intervention of national courts does not prevent the Commission's intervention in order to determine aid compatibility. However, the fact that the Commission declares its compatibility does not detract from the effects caused by an infringement of the obligation of prior notice to the Commission.

Such was the Court of Justices reasoning in the judgement of 5 October 2006, Transalpine Ölleitung in Österreich: "A Commission decision finding aid that was not notified compatible with the common market does not have the effect of regularising ex post facto implementing measures which were invalid because they were taken in disregard of the prohibition laid down by the last sentence of Article 88(3) EC, since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance of that provision by the Member State concerned and would deprive it of its effectiveness"[17].

2. Recovery of unlawful State aid found to be incompatible with the common market (by annulment or less onerous procedural measures)

The recovery of unlawful and incompatible aid constitutes the second essential element of the aid regime with regards to the intervention of national courts. By its very nature, unlawful aid implies repayment, and national courts are responsible for ensuring it. On the other hand, the Commission is the body that declares incompatibility and decides that the aid involved should be repaid[18].

For instance, the Court of Justice explains in the judgement of 14 April 2011, Commission v Poland, on the aid granted to Technologie Buczek, that the aim of the obligation to recover and repay unlawful and incompatible aid is: "that recovery of unlawful aid is the logical consequence of the finding that it is unlawful"[19]. As a reminder of previous case law, the Court emphasises that: "as long as the aid is not recovered, the beneficiary of the aid is able to keep funds deriving from the aid declared incompatible and to benefit from the resulting unfair competitive advantage" (paragraph 56).

That is why, in the judgement of 8 December 2011, Residex, the Court of Justice adds that by repaying the aid, the beneficiary forfeits the advantage which it had over its competitors on the market, and the situation prior to payment of the aid is restored (paragraphs 33 and 34). This aim requires the national courts to " ensure that the measures which they take with regard to the validity of the aforementioned acts make it possible for such an objective to be achieved" (paragraph 45). "There may be situations

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Administrative Proceedings Chamber, Section Three) Bandrés Sánchez-Cruzat, Legal Grounds 2) or the judgement of 6 March 2012 (appeal No 430/2010, Contentious Administrative Proceedings Chamber, Section Three, judge writing for the court: Espín Templado, Legal Grounds 3).

[17] ECJ, judgement of 5 October 2006, Transalpine Ölleitung in Österreich (C-368/04, *Rep*. p. I-9957, paragraph 41).

[18] In 2000-2011, the European Commission issued 157 decisions on the repayment of unlawful and incompatible aid (European Commission, Commission Staff Working Paper - Autumn 2011 Update – COM (2011) 848 final, SEC (2011) 1487 final, Brussels, 1 December 2011, p. 102.

[19] ECJ, judgement of 14 April 2011, Commission v Poland (aid to Technologie Buczek) (C-331/09), pending publication in the *Reports*, paragraph 54).

in which the cancellation of a contract, in so far as this is liable to lead to the mutual restitution of the services performed by the parties or the disappearance of an advantage for the future" (paragraph 47) or the adoption of "less onerous procedural measures" (paragraph 48) may be appropriate, providing that in either case the competitive situation prior to granting the aid is re-established.

At the same time, the Court of Justice has developed principles on the repayment of aid that we summarize below.

Firstly, unlawful and incompatible aid must be repaid with interest. In the Commission's opinion, "the aid to be recovered pursuant to a recovery decision shall include interest at an appropriate level to be fixed by the Commission. Interest shall be payable from the time the unlawful aid was at the disposal of the beneficiary until the date of its recovery" (paragraph 39 of *Commission Notice 2007*).

The Court of Justice issued a judgement in this sense in the CELF case, in which unlawful aid was in the process of being recovered under the supervision of the French administrative court, and at the same time it was being examined by the European Commission and reviewed by the Court of Justice.

CELF is a cooperative company that carried out activity as a book export agent. From1980 to 2002, CELF received operating subsidies from the French State to offset the extra costs of handling small orders placed by booksellers established abroad. Following a complaint made in 1992 by SIDE, a competitor of CELF, the European Commission started an investigation that ended in a decision issued in 1993 that the aid was compatible. The SIDE, however, took the case to a Court of First Instance that partially annulled the Commission's decision in 1995. In a decision issued in 1998, the Commission declared the aid to be unlawful, but accepted that it was compatible with the common market. This was again challenged by France and SIDE, and the Court of First Instance annulled the decision again in 2002. The Commission's third decision was also annulled by the Court of First Instance in 2008. At the same time, national procedures were initiated in which SIDE required the French authorities to put an end to the aid and recover the unlawful aid. After going through the administrative courts of first instance and appeal, the Conseil d'État had to arrive at a decision on two occasions: First, on the interest on the repayment of the unlawful aid, and then on the refund of the principle. In both cases, the Conseil requested the interpretation of the Court of Justice.

In the CELF I judgement of 12 February 2008, the Court of Justice made a clear distinction between the scope of the obligation of recovering unlawful aid in two cases: Unlawful aid that is subsequently declared compatible by the Commission, and unlawful aid that is declared compatible by the Commission, but the Court of Justice annuls the declaration of compatibility[20].

In the first case, the Court of Justice deems that the national court is not bound to order the recovery of aid when the Commission has adopted a final decision declaring that aid to be compatible with the common market. However, the national court must order the aid recipient to pay interest in respect of the period of unlawfulness. The national court

[20] ECJ (Grand Chamber), judgement of 12 February 2008, CELF and Ministre de la Culture et de la Communication (C-199/06, *Rep*. p. I-469, paragraphs 55 and 69).

may also order the recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it, subsequently. "It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid" (paragraph 55).

However, when the unlawful aid on which the European Commission's decision on aid incompatibility is annulled, the Court of Justice deems that: "the obligation […] to remedy the consequences of the aid's unlawfulness extends also, for the purposes of calculating the sums to be paid by the recipient, and save for exceptional circumstances, to the period between a decision of the Commission declaring the aid to be compatible with the common market and the annulment of that decision by the Community court" (paragraph 69).

In the CELF II judgement of 11 March 2010, the Court of Justice refers to the national courts' task of implementing state aid and that it "is based on the preservative purpose of ensuring that incompatible aid will never be implemented"[21]. In this way, a national court before which an application has been brought for repayment of unlawful State aid "may not stay the adoption of its decision on that application until the Commission has ruled on the compatibility of the aid with the common market following the annulment of a previous positive decision" (paragraph 40). And then it points out that: "the objective of the national courts' tasks is therefore to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid may not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision" (paragraph 30). Certainly, although the Court of Justice recognises that a case in which "the adoption by the Commission of three successive decisions declaring aid to be compatible with the common market, which were subsequently annulled by the Community judicature, is not, in itself, capable of constituting an exceptional circumstance such as to justify a limitation of the recipient's obligation to repay that aid, given that "abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. Accordingly, the recovery of such aid, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the provisions of the EC Treaty relating to State aid" (paragraphs 54 and 55).

Secondly, the European Commission has emphasised the need to apply what is known as 'Deggendorf jurisprudence', which refers to the implementation of new aid on the one hand, and a challenge to the decision to recover aid on the other.

Firstly, it does not proceed to implement new aid before unlawful and incompatible aid is repaid. The Court of Justice confirms the analysis made by the Court of First Instance and considers in its judgement of 15 May 1997, TWD v Commission: "the new aids could not be compatible with the common market as long as the old unlawful aid had not been repaid, since the cumulative effect of the aids was to distort competition in the common market to a significant extent. in those circumstances, the failure to repay the unlawful aid constituted an essential factor which was lawfully taken into account when the compatibility of the new aids was examined, so that the suspension of payment of the new aids cannot be treated in the same way as a simple demand for payment" (paragraph 25)[22].

[21] ECJ, judgement of 11 March 2010, CELF II (C-1/09, *Rep*. p. I-2099, paragraph 40).
[22] TPICE, judgement of 13 September1995, TWD Textilwerke Deggendorf v Commission (T-244/93 and

This principle has been expressed by the Court of Justice, in the judgement of 16 December 2010, AceaElectrabel Produzione v Commission, for instance, when it indicates that: "the TWD v Commission case-law allows the Commission to make compatibility of aid conditional upon prior repayment of earlier unlawful aid"[23].

On the other hand, pursuant to the judgement of 9 March 1994, TWD Textilwerke Deggendorf, if a recipient undertaking is aware of the European Commission's decision on the recovery of aid and does not appeal to the Community courts, when the same undertaking goes to a national court to challenge the measures to implement the recovery it may not allege the unlawfulness of the decision because the national court, by virtue of the principle of legal certainty, is bound by finality of the European Commission's decision[24].

Thirdly, the principle of institutional and procedural independence applies to the recovery of aid. On this subject, and in the terms established by the Court of Justice in the aforementioned judgement of 5 October 2006, Transalpine Ölleitung in Österreich: "it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from Community law, provided, firstly, that those rules are not less favourable than those governing rights which originate in domestic law (principle of equivalence) and, secondly, that they do not render impossible or excessively difficult in practice the exercise of rights conferred by the Community legal order (principle of effectiveness)" (paragraph 45).

However, the European Commission verifies that the national methods of recovering aid are different, although it declares that: "administrative procedures, on the whole,[25] tend to be much more efficient than civil procedures[26], because administrative recovery

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T-486/93, *Rep*. p. II-2265); ratified by the Court of Justice in the judgement of 15 May 1997, TWD v Commission (C-355/95 P, *Rep*. p. I-2549).

[23] ECJ, judgement of 16 December 2010, AceaElectrabel Produzione v Commission (C-480/09 P), pending publication in the *Reports*, paragraph 96).

[24] ECJ, judgement of 9 March 1994, TWD Textilwerke Deggendorf (C-188/92, *Rep*. p. 1-833, paragraphs 25 and 26).

[25] In Spain, the Supreme Court has indicated, for instance, in the judgement of 23 September 2009 (Contentious Administrative Proceedings Division, Section Three, appeal No 183/2007, judge writing for the court: Campos Sánchez-Bordona) on the subsidy for consuming Spanish coal: "The recovery of State aid received in contravention of Community provisions is protected by Treaty regulations, and the Community regulations and decisions that apply in each case" In the same vein, the administrative procedure followed by the Basque provincial councils to recover unlawful aid has been allowed to proceed by the High Court of Justice in the Basque Country on a number of occasions, as inferred by judgement No 830/2011, of 2 December (Contentious Administrative Proceedings Division, appeal No 508/2010, judge writing for the court: de la Fuente Guerrero), which indicates: "With regards to the manner of recovery, Community law does not state which procedure the Member State should apply to implement a recovery decision. It only requires the choice of a national procedure that permits the immediate and effective implementation of the Commission's decision. In other words, it leaves the authorities free to select the procedure, providing it ensures immediate implementation. Thus, it rules out procedures that would make recovery impossible or too difficult". In the same vein, the High Court of Justice in Aragón (Contentious Administrative Proceedings Division, Section One), judgement of 16 March 2001 (repayment of regional aid to Pyrsa) (appeal No 959/1997, judge writing for the court: Juste Díez de Pinos, Legal Grounds 3); High Court of Justice in Navarre (Contentious Administrative Proceedings Division, Section One), judgement of 4 May 2005 (unlawful aid to Paneles Eléctricos, S.A.) (appeal No 1260/2003, judge writing for the court: Merino Zalba, Legal Grounds 2).

[26] However, this does not mean that civil jurisdiction would be particularly sensitive to the

orders are or can be made immediately enforceable" (paragraph 51 of *Commission Notice 2007*).

However, there is a clear limit to autonomy. It does not consolidate undue competitive edge, for example, by permitting the reinstatement of aid that was recovered by the national authorities. This is indicated by the Court of Justice in the judgement of 20 May 2010, Scott v Ville d'Orléans, in answer to the Cour administrative d'appel in Nantes, when it was reminded that the national court must not prevent the immediate restoration of the situation prior to the unlawfully granted aid[27].

The Court of Justice explains it as follows: "If, however, the annulment of the assessments in question were to lead, even provisionally, to a repayment of the aid previously reimbursed by its recipients, they would once again have at their disposal amounts of aid which have been declared incompatible with the common market and would enjoy the resulting unfair competitive advantage. Immediate and stable restoration of the previously existing situation would thus be compromised and the unfair competitive advantage would be re-established in favour of the applicants in the main proceedings." (paragraph 31). This means that the Court of Justice deems that a national court may annul assessments issued in order to recover the unlawful State aid, but it is contrary to Community law for those amounts being paid once again, even provisionally, to the beneficiary of that aid (paragraph 33).

III. NATIONAL AUTHORITIES' LIABILITY FOR HAVING GRANTED UNLAWFUL AID AND FAILING TO RECOVER UNLAWFUL AND IMCOMPATIBLE AID.

Liability for infringements of European Union law has two very different but related dimensions in the implementation of the State aid regime. One is the Court of Justice's enforcement, at the Commissions request, of judgements declaring non compliance due to a national authorities' failure to recover unlawful and incompatible aid. The other is the non-contractual liability of the national authorities who have granted or failed to recover aid that is normally demanded by competing undertakings, but which may also be claimed by the recipient undertakings.

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implementation of aid regimes, as can be inferred from the judgement of 7 July 2008 (temporary receivership of the trading company Mediterráneo Técnica S.A., formerly HYTA, S.A.) (Civil Division, appeal No 4139/2001, judge writing for the court: Marín Castán) on the grounds that: "Let us add to the foregoing that the State credit against the accused undertaking is based on such a fundamental principle of Community law as free competition, the incompatibility of State aid with the common market due to the distortion of competition, Art. 92.1 of the EEC Treaty (87), and therefore on the infringement of a rule of primary Community law. Thus, when the jurisdictional bodies of the Kingdom of Spain apply the foregoing to national legislation to recover aid, they promote its effectiveness. This is due to the basic principles of the primacy and effectiveness of Community law, combined with the principle of equivalence, but also because in Spain's internal legal system, Art. 6.3 of the Civil Code imposes the complete nullity of actions that are contrary to mandatory and prohibiting rules. Moreover, Art. 62.1 a) of Spanish Act 30/92 establishes the complete nullity of actions by the public administrations that violate rights and freedoms guaranteed by the constitution. In this case, state aid is incompatible with the common market, and therefore with such a fundamental principle of primary Community law as undistorted competition between undertakings" (Legal Grounds 3).

[27] ECJ, judgement of 20 May 2010, Scott v Ville d'Orléans (C-210/09, *Rep*. p. I-4613).

In either case, it is the duty of the national authorities to recover the aid that has been violated, after verification of the fact by the Court of Justice, and aid that constitutes a case of non-contractual liability. In the former case, the European Commission requests the Court of Justice to enforce repayment of the aid. In the latter case, private individuals, normally competitors, may go before the national courts to claim the liability of the national authorities who granted unlawful aid.

1. Enforcement of the Court of Justice's judgements declaring non compliance for failing to recover State aid

The Member States are more bound by their obligation to adapt to the enforcement imposed by the Court of Justice than by a non-contractual liability. To date, the Court of Justice has delivered judgements declaring non compliance in two cases. One was when Greece gave aid to Olympic Airways, and the other involved aid by Italy. It is likely that the third judgement will be delivered against Spain for what is known as the Basque 'fiscal breaks'. The Court of Justice has also been highly restrictive in the interpretation of cases that justify the non-recovery of aid.

1) lump sum penalty and penalty payments for the enforcement of declaratory judgements on the non-recovery of aid.

The first fine involving State aid was imposed in 2009. Nine years before, Greece had been fined[28]with regard to the environment[29]. In the judgement of 12 May 2005, the Court of Justice found hat Greece had infringed the obligations it had incurred by virtue of a Decision issued by the European Commission in 2002, for failing to adopt the measures required to be repaid the aid granted to Olympic Airways. The Commission considered that the aid was unlawful and incompatible with the common market[30]. When the judgement was not enforced, the European Commission lodged a new appeal that ended in the judgement of 7 July 2009, in which the Court of Justice imposed a lump sum penalty of two million euros on the Greek authorities. The Court also stipulated a penalty payment of 16,000 euros per day of delay in the enforcement of the measures required to comply with the 2005 judgement.

To quantify the lump sum penalty and penalty payments, the Court of Justice examines the severity of the infringement and emphasises that "the vital nature of the Treaty rules on State aid" (paragraph 118), as pointed out by the Advocate General in his Conclusions. The Court of Justice also explains that the rules constitute one of the essential tasks and actions of European convergence (paragraph 119).

In the judgement of 17 November 2011, the Court of Justice ordered the Italian Republic to pay a penalty of 30 million euros and stipulates a penalty payment for every six months of delay until enforcement of the judgement of 1 April 2004. The amount is calculated by multiplying the basic amount of 30 million euros by the percentage of the unlawful aid that had not yet been recovered, or not shown to have been recovered[31].

[28] ECJ, judgement of 4 July 2000, Commission v Hellenic Republic (infringement of the judgement on the Kurupitos open dump) (C-387/97, *Rep*. p. I-5047).
[29] ECJ (Grand Chamber) judgement of 7 July 2009, Commission v Hellenic Republic (C-369/07, *Rep*. p. I-5703).
[30] ECJ, judgement of 12 May 2005, Commission v Hellenic Republic (C-369/03, *Rep*. p. I-3875).
[31] ECJ, judgement of 17 November 2011, Commission v Italian Republic (C-496/09), pending publication

The infringed judgement was delivered on 1 April 2004. It verified Italy's non compliance with the obligation to recover certain aid granted by Italy to employ workers which was declared unlawful and incompatible by a decision issued by the European Commission in 2000[32].

In the judgement, the Court of Justice imposed a lump sum penalty or penalty payment, recalling that "It is for the Court, in each case, in the light of the circumstances of the case before it and the degree of persuasion and deterrence which appears to it to be required, to determine the financial penalties appropriate for making sure that the judgement which previously established the breach is complied with as swiftly as possible and preventing similar infringements of European Union law from recurring" (paragraph 36). In this sense, the Court of Justice considers that the Commission's suggestions or guidelines are not binding on the Court and merely constitute a useful point of reference (paragraph 37). To determine the amount of the lump sum penalty, the Court of Justice took into account that Italy had already been 'sentenced' in four previous judgements for infringing the obligation of immediate and effective recovery of the aid paid under regimes that were declared unlawful and incompatible with the common market (paragraphs 90 and 91).

Finally, in April 2011, the European Commission requested the Court of Justice to impose a lump sum penalty and a penalty payment on Spain for infringement of a judgement delivered in 2006, which found that Spain had not recovered the aid given to undertakings in Álava, Guipúzcoa and Biscay, granted in the form of fiscal credits for 45% of the investment or a reduction in the companies tax base. The European Commission had considered that the aid was unlawful and incompatible in six decisions in 2001, and that it should be recovered or payment of the outstanding amounts should be waived[33]. The Commission considered that 87 percent of the unlawful and incompatible aid was pending repayment.

In an appeal, the European Commission suggested that the lump sum penalty should be calculated by multiplying a daily sum of 25,817.4 euros by the number of days the infringement persisted after the date on which the 2006 judgement was delivered. The penalty payment was to be 236,044.8 euros for every day of delay in the enforcement of the judgement[34].

It is obvious that these proceedings to enforce judgements declaring infringement are only intended to make the European Commission's decisions effective. In the case of national courts, the national authorities' acceptance of liability can be readily identified if their declarative judgements do not serve to recover the aid found unlawful or incompatible by the Commission, as the Court of Justice has verified.

2) The reasons that justify the failure to recover or repay unlawful and incompatible aid are: absolute impossibility and liquidation of the recipients.

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in the *Reports*).

[32] ECJ, judgement of 1 April 2004, Commission v Italian Republic (C-99/02, *Rep*. p. I-3875).

[33] ECJ, judgement of 14 December 2006, Commission v Kingdom of Spain (C-490/03, *Rep*. p. I-11887).

[34] ECJ, Commission v Kingdom of Spain (C-184/11): appeal lodged on 18 April 2011.

The only grounds for non-recovery of aid under the European Commission's terms are absolute impossibility and limitation.

Thus, for instance, in the same aforementioned judgement of 17 November 2011, Commission v Italian Republic, the Court of Justice refers to the cases in which a Member State does not need to recover unlawful aid, and more specifically to the cases of absolute impossibility of enforcing the recovery decision: "where the Commission's decision requiring the cessation of State aid that is incompatible with the common market has not been the subject of a direct action or where such an action has been dismissed, the only defence available to a Member State against an action for failure to fulfil obligations is that it was absolutely impossible for it to implement the decision properly, the Court pointed out, in paragraphs 22 and 23 of that judgement, that neither the apprehension of even insuperable internal difficulties nor the fact that the Member State in question finds it necessary to examine the individual situation of each undertaking concerned can justify a failure by that Member State to comply with its obligations under European Union law" (paragraph 30).

However, the Court of Justice examines the national authorities' actual behaviour and finds that, in general and specifically in the case of Italy, "as required for compliance with a judgement finding a failure to fulfil obligations in such a case, all the measures taken with a view to recovering the aid in question were the subject of permanent and effective monitoring" (paragraph 32).

Moreover, in cases in which orders for recovery are challenged in the national courts, the Court of Justice requires the national authorities to contest any national decision depriving the Commission's decision of effect, in particular on grounds relating to the application of limitation rules or rules of evidence that the recipient undertakings have been cancelled from the registry as proof that they no longer exist (paragraph 78).

In any case, there is a ten year limitation period, as an exception arising from the principle of legal certainty, during which the recovery of unlawful and incompatible aid can be contested. This period is stipulated in Article 15 of (EC) Regulation No 659/1999. Also, it has been verified in the Court of Justice's judgement of 8 December 2011, France Télécom v Commission, which begins to run on the day on which the unlawful aid is awarded to the beneficiary and not from the date on which the aid regime was adopted[35].

The Court of Justice also considers that the decision of repayment or recovery is met if the undertaking that receives the aid has disappeared or is being liquidated.

Thus, in the judgement on Polish aid to Technologie Buczek, the Court of Justice recalls that: " as follows from the case-law on bankrupt undertakings that have received aid, the restoration of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may, in principle, be achieved by registration of the liability relating to the repayment of the aid in question in the schedule of liabilities[36].

[35] ECJ, judgement of 8 December 2011, France Télécom v Commission (C-81/10 P), pending publication in the *Reports*, paragraphs 80 and 81).

[36] ECJ, judgement of 14 April 2011, Commission v Poland (aid to Technologie Buczek) (C-331/09), aforementioned, paragraph 60).

2. Actions related to the liability of national authorities lodged by competing (and recipient) undertakings

Competing undertakings may direct their non-contractual liability action against the national authorities for granting unlawful aid or not recovering unlawful and incompatible aid. In theory, at least, competing undertakings may also request an acceptance of liability from undertakings that receive unlawful and incompatible aid.

The origin of the liability lies in the national authorities' breach of the standstill clause and in the failure to recover unlawful and incompatible aid. Therefore, the national courts' task of determining national authorities' non-contractual liability with regards to competing undertakings is made easier by the European Commission decisions that verify the existence of unlawful aid and declare its incompatibility with the interior market. Confirmation of the legality of the European Commission's decisions and the declaration of non compliance due to failure to recover the aid, to the point of imposing penalties for persistent non compliance, also facilitate the national authorities' task.

Cada vez es más frecuente la reclamación de responsabilidad y, de hecho, la Comisión Europea se refiere a dos tipos las acciones: las interpuestas de conformidad con el Derecho nacional y las fundadas en la violación del Derecho de la Unión (apartados 43 a 52 de la *Comunicación de 2009*).

Action for non-contractual liability against national authorities based on a violation of EU law requires the concurrence of the requirements stipulated by the Court of Justice. Namely, the requirements are: when the law is infringed with the intention of conferring rights to individuals; the infringement is sufficiently described; and a causal link exists between the State's breach of its obligation and the damage sustained by the claimants.

On the other hand, liability actions directed against the recipients of unlawful and incompatible aid by competing undertakings must now be based on national law, if any, rather than on a violation of EU law.

This is illustrated in the judgement of 11 July 1996, Syndicat français de l'Express international (SFEI), in which the Court of Justice replies to a reference of a preliminary ruling from the Tribunal de commerce in Paris. However, it should be mentioned that the recipient of the aid was the public Post Office corporation in France and its subsidiaries[37]. In this regard, the Court of Justice indicates very clearly: "Community law does not provide a sufficient basis for the recipient to incur liability where he has failed to verify that the aid received was duly notified to the Commission" (paragraph 74), given that "the machinery for reviewing and examining State aids established by the Treaty does not impose any specific obligation on the recipient of aid but are directed to the Member State. The Member State is also the addressee of the decision by which the Commission finds that aid is incompatible with the common market and requests the Member State to abolish the aid within the period determined by the Commission" (paragraphs 72 and 73).

[37] ECJ, judgement of 11 July 1996, Syndicat français de l'Express international (SFEI) and others against La Poste and others (C-39/94, *Rep*. p. I-3547)

However, the Court of Justice leaves the way open to a possible application of national law concerning non-contractual liability. If, according to national law, the acceptance by an economic operator of unlawful assistance of a nature such as to occasion damage to other economic operators may in certain circumstances cause him to incur liability, the principle of non-discrimination may lead the national court to find the recipient of aid paid in breach of Article 93(3) of the Treaty liable." (paragraph 75),

The undertakings that receive unlawful and incompatible aid tend to be against repayment and strongly oppose recovery by the national authorities. Despite the difficulties, they only try to obtain a finding of non-contractual liability of the national authorities as an alternative.

Recipient undertakings seeking to lodge liability action against the national authorities rely mainly on their legitimate expectations. However, the Court of Justice has weakened this method of invocation considerably. In the aforementioned judgement of 8 December 2011, France Télécom v Commission, for instance, it points out that, in view of the mandatory nature of the review of State aid by the Commission, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 88 EC and a diligent business operator should normally be able to determine whether that procedure has been followed. In particular, where aid is unlawful, the recipient of the aid cannot have a legitimate expectation that its grant is lawful (paragraph 59).

Although the Court of Justice recognises that there are exceptional circumstances that could justify a legitimate expectation that aid is lawful, in this case they are not taken into consideration (paragraph 63 and 64).

In all the other cases it would be difficult for the recipients to attain an acceptance of liability from the national authorities when they are granted unlawful and incompatible aid[38].

IV. ACTIONS FOR DAMAGE TO UNDERTAKINGS CAUSED BY INFRINGEMENTS OF THE STATE AID REGIME.

The Court of Justice has recognised that it pertains to national courts to deliver a judgement on damages caused by unlawful aid[39]. It is easy to arrive at a decision on national authorities' liability when the violation is sufficiently described and the Treaties

[38] See the issue successfully settled by the High Court of Justice in the Basque Country by dismissing an appeal lodged against the decision to recover unlawful aid that requested annulment and the liability of the Provincial Council: Judgement No 753/2011, of 11 November 2011 (Contentious Administrative Proceedings Division, Section One, appeal No 488/2010, judge writing for the court: de la Fuente Cabeza), which points out that: "the compensation sought does not arise from annulment of the action to recover fiscal aid. On the contrary, it is the result of reaching the final enforcement and ratification of the annulment, and it pertains to the claimant to view its right as conditional and forward-looking. This is not a case of re-establishing the compensation stipulated in what is currently Article 31.2 of Jurisdiction Law, arising from the annulment of the administrative act. Rather, it is an action for civil liability, subject to the principle of review and non-enforceability. As such, it is in the same process that seeks to annul the act and as an alternative that is incompatible with said principle".

[39] ECJ, judgement of 5 October 2006, aforementioned Transalpine Ölleitung in Österreich, paragraph 56).

are being contravened. However, providing evidence of the existence of losses and damages and calculating the extent thereof is much more complicated.

In effect, the measures for bringing action for damages are, by nature, exclusively national, insofar as they are lodged against national authorities or against the recipient undertakings, if the action is based solely on national law. However, in both cases the problems of loss of profits and delay in recovery of the aid are very onerous[40].

1. Compensation for losses and damage sustained by competing undertakings.

The European Commission explains that loss of profit constitutes the core of the damage for which action for compensation can be brought. To that effect, the Commission gives several examples of specific contracts and business opportunities open to the recipients of aid that can be detrimental to their competitors, such as the loss of market share and even bankruptcy proceedings.

Therefore, in the cases where aid is a factor in a competing undertakings' loss of a contract or a specific business opportunity, the European Commission accepts that it will be easier to determine the actual loss of profits, since the national court "can then calculate the revenue which the claimant was likely to generate under this contract. In cases where the contract has already been fulfilled by the beneficiary, the national court would also take account of the actual profit generated" (paragraph 49.b) of *Commission Notice 2009*).

In the event of loss of market share, the European Commission accepts that damage assessments will be more complex and explains: "One possible way for dealing with such cases could be to compare the claimant's actual income situation (based on the profit and loss account) with the hypothetical income situation had the unlawful aid not been granted" (paragraph 49.c) of *Commission Notice 2009*).

Finally, when as a consequence of the unlawful aid, the claimant is forced out of business (through insolvency for example), the damage sustained by the claimant may exceed the lost profit (paragraph 49.d) of *Commission Notice 2009*).

On the other hand, delays in compliance with the Commission's recovery decision may give rise to damages. Consequently, the success of a damages claim for non-implementation of a Commission recovery decision will again depend on whether the claimant can demonstrate that he suffered loss directly as a result of the delayed recovery (paragraph 69 of *Commission Notice* 2009)

In such cases, the Commission offers national courts assistance in damage calculation issues (paragraph 52 of *Commission Notice 2009*). In fact, the Commission is in an idea position to assist national courts, not the parties, to resolve particularly complex economic issues. The Commission offers to provide national courts opinions on: "The legal prerequisites for damages claims under Community law and issues concerning the calculation of the damage incurred" (paragraph 91.f) of *Commission Notice 2009*).

[40] The same situation is expressed by Andreas Knaul and Francisco Pérez Flores, in Jonathan Faull and Ali Nikpay (ed.), *The EC Law of Competition*, *ob. cit.*, pp. 1784 and 1785.

2. Compensation for losses and damage sustained by recipient undertakings

However, even when recipient undertakings are able to claim damages on the basis of national law alone, the Court of Justice establishes a limit that coincides with the limit imposed on the national courts' powers of annulment.

In effect, in the aforementioned Transalpine Ölleitung in Österreich judgement of 5 October 2006, the Court of Justice warned that national courts must ensure the remedies they grant are such as in fact to negate the effects of the aid unlawful aid granted. Therefore, in this case, "the national courts should not merely extend the aid to a further class of beneficiaries" (paragraph 50). Further on, the Court of Justice insists: "In [giving an opinion on an application for compensation for the damage caused], the national court must strive to preserve the interests of individuals whilst taking the Community interest fully into consideration" (paragraph 57). Undoubtedly, it is in the Community interest to prevent State aid from causing distortions in the interior market and free competition.

More specifically, in the aforementioned judgement of 20 May 2010, Scott v Ville d'Orléans, the Court of Justice sustains that European law is not contrary to the annulment of liquidations issued to recover State aid, providing it will correct any formal errors. Paying said amounts to the recipient of unlawful and incompatible aid again, even as an interim measure, would be contrary to EU law.

V. CONCLUSION

The implementation of the State aid regime by national courts or, to use the parallelism of antitrust law or private enforcement of the State aid regime is relatively new[41]. However, it has been promoted by the European Commission, which bases it on the Court of Justice's case law, in an attempt to overcome the weaknesses inherent in a direct relationship between the European Commission and the national authorities in the control of the public authorities' power to grant subsidies.

However, the enforcement of the European competition regime has implied a high degree of legal uncertainty for recipient undertakings and even for the national authorities that grant the aid. On the one hand, the Council and the Commission have drawn up a particularly complex legislative and administrative regime. Moreover, the review procedure has proved to be a heavy administrative load that everyone tries to avoid. Certainly, when there is an obvious breach of the prior notification procedure or the European Commission finds that the unlawful aid granted is incompatible, the national courts must prevent the enforcement of the unlawful aid and make every effort to recover the incompatible aid, as the Court of Justice has repeatedly emphasised.

The consequential annulment of unlawful aid is obvious and readily verified by the national courts once the European Commission or the Court of Justice have helped to decide that it is State aid. It is also easy to see that the national courts help to compel

[41] In the aforementioned handbook edited by Martin Heidenhain, *European State Aid Law*, *ob. cit.*, only 16 pages out of 816 are dedicated to what the author, Hans-Jörg Niemeyer, calls 'Proceedings before the National Courts', pp. 767-783.

national authorities or recipient undertakings to recover or repay unlawful and incompatible aid. The degree of difficulty competing undertakings experience in obtaining compensation for losses and damage is increasing, owing to the difficulty of providing evidence of them.

Nonetheless, the (voluntary) cooperation offered to national courts by the European Commission and, of course, collaboration with the Court of Justice through reference for a preliminary ruling can mitigate the difficulties of a regime that is simple in its form and goals. It is a pillar of EU competition law and seeks to prevent the intervention of national authorities who grant aid that distorts free competition.

The European Commission's promotion of an *amicus curiae*, who could represent the national competition authorities in national law, would serve to strengthen the role of national courts in the enforcement of the European State aid regime. It could also be an indispensable complement to the European competition regime.

It is only the only way to stifle the widespread idea among national authorities, and recipient undertakings and their competitors, that what matters it to obtain subsidies at any price and that later it will be very difficult to go back on them.