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COMMISSION NOTICE

on the Enforcement of State Aid Law by National Courts

1. INTRODUCTION

1. In 2005, the Commission adopted a road map for State aid reform, the State Aid Action Plan¹ ('the SAAP'), to improve the effectiveness, transparency, credibility and predictability of the EC State aid regime. Based on the principle of 'less and better targeted State aid', the central objective of the SAAP is to encourage Member States to reduce their overall aid levels, whilst redirecting State aid resources to horizontal common interest objectives. In this context, the Commission has reaffirmed its commitment to take a strict approach towards unlawful and incompatible aid. The SAAP highlighted the need for better targeted enforcement and monitoring as regards State aid granted by Member States and stressed that private litigation before national courts could contribute to this aim by ensuring increased discipline in the field of State aid².
2. Prior to the adoption of the SAAP, the Commission had already addressed the role of national courts in the Notice on Cooperation between national courts and the Commission in the State aid field, which was published in 1995³ ('the 1995 Cooperation Notice'). The 1995 Cooperation Notice introduced mechanisms for cooperation and exchange of information between the Commission and national courts.
3. In 2006, the Commission commissioned a study on the enforcement of State aid law at national level⁴ ('the Enforcement Study'). This study was aimed at providing a detailed analysis of private State aid enforcement in the different Member States. The Enforcement Study concluded that, in the period between 1999 and 2006, State aid litigation at Member State level had increased significantly⁵.
4. However, the Enforcement Study also revealed that a large number of the legal proceedings at Member State level were not aimed at reducing the anticompetitive effect of the underlying State aid measures. This was because almost two thirds of the judgments analysed concerned actions brought by taxpayers who sought relief from the allegedly discriminatory imposition of a (tax) burden⁶ and actions brought by beneficiaries to challenge the recovery of unlawful and incompatible State aid⁷. The number of legal challenges aimed at enforcing compliance with the State aid

¹ State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 final.

² SAAP, paragraphs 55 and 56.

³ OJ C 312, 23.11.1995, p. 8.

⁴ Available at http://ec.europa.eu/comm/competition/state_aid/studies_reports/studies_reports.cfm. The study only covered EU-15.

⁵ A total increase from 116 cases to 357 cases.

⁶ 51% of all judgments.

⁷ 12% of all judgments.

rules was relatively small: actions by competitors against a Member State authority for damages, recovery and/or injunctive measures based on Article 88(3) EC accounted for only 19% of the judgments analysed, whilst actions by competitors directly against beneficiaries accounted for only 6% of the judgments.

5. In spite of the fact that, as highlighted in the Enforcement Study, genuine private enforcement before national courts has only played a relatively limited role in State aid to date, the Commission considers that private enforcement actions can offer considerable benefits for State aid policy. Proceedings before national courts give third parties the opportunity to address and resolve many State aid related concerns directly at national level. In addition, based on the jurisprudence of the European Court of Justice ('ECJ'), national courts can offer claimants very effective remedies in the event of a breach of the State aid rules. This can in turn contribute to stronger overall State aid discipline.
6. The main purpose of the present Notice is therefore to inform national courts and potential claimants about the remedies available in the event of a breach of the State aid rules and to give them guidance on the practical application of these rules. In addition, the Commission seeks to develop its cooperation with national courts by introducing more practical tools for supporting national judges in their daily work.
7. This Notice replaces the 1995 Cooperation Notice and is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Community courts. Additional information aimed at national courts will be made available on the Commission's website.

2. ROLE OF NATIONAL COURTS IN STATE AID ENFORCEMENT

2.1. General issues

2.1.1. Identifying State aid

8. The first question which national courts and potential claimants face when applying Articles 87 and 88 EC is whether the measure concerned actually constitutes State aid within the meaning of the Treaty.
9. Article 87(1) EC covers '*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States*'.
10. The ECJ has explicitly stated that, as is the case for the Commission, national courts have powers to interpret the notion of State aid⁸.

⁸ Case 78/76, *Steinike & Weinlig*, [1997] ECR 595, paragraph 14; Case C-39/94, *SFEI and Others*, [1996] ECR I-3547, paragraph 49; and Case C-368/04, *Transalpine Ölleitung in Österreich*, [2006] ECR I-9957, paragraph 39.

11. This notion is not limited to subsidies⁹. It also comprises, inter alia, tax concessions and investments from public funds made in circumstances in which a private investor would have withheld his support¹⁰. Whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid is immaterial in this respect¹¹. But, for public support to be classed as State aid, the aid needs to favour certain undertakings or the production of certain goods ('selectivity'), as opposed to general measures to which Article 87(1) EC does not apply¹². In addition, the aid must distort or threaten to distort competition and must have an effect on trade between Member States. Provided the aid strengthens the competitive position of the beneficiary as opposed to its competitors, these requirements are generally met¹³.
12. The case law of the Community courts¹⁴ and the decisions taken by the Commission have frequently addressed the question of whether certain measures qualify as State aid. In addition, the Commission has issued detailed guidance on a series of complex issues, such as the application of the private investor principle¹⁵, the circumstances under which state guarantees must be regarded as State aid¹⁶, the treatment of public land sales¹⁷, aid below the de minimis thresholds¹⁸, export credit insurance¹⁹, direct business taxation²⁰, risk capital investments²¹, and State aid for research,

⁹ Case C-308/01, *GIL Insurance and Others*, [2004] ECR I-3565, paragraph 69; Case C-387/92, *Banco Exterior de España v Ayuntamiento de Valencia*, [1994] ECR I-877, paragraph 13; and Case C-295/97, *Piaggio*, [1999] ECR I-3735, paragraph 34.

¹⁰ Cf. Advocate General Jacobs' opinion in Joined Cases C-278/92, C-279/92 and C-280/92, *Spain v Commission*, [1994] ECR I-4103, paragraph 28: 'State aid is granted whenever a Member State makes available to an undertaking funds which in the normal course of events would not be provided by a private investor applying normal commercial criteria and disregarding other considerations of a social, political or philanthropic nature'.

¹¹ Case 290/83, *Commission v France*, [1985] ECR 439, paragraph 14.

¹² A clear analysis of this distinction is to be found in Advocate General Darmon's opinion in Joined Cases C-72/91 and C-73/91, *Sloman Neptun v Bodo Ziesemer*, [1993] ECR I-887.

¹³ Joined Cases C-393/04 and C-41/05, *Air Liquide*, [2006] ECR I-5293, paragraphs 33 to 36; Case C-222/04, *Cassa di Risparmio de Firenze and Others*, [2006] ECR I-289, paragraphs 139 to 141; and Case C-310/99, *Italy v Commission*, [2002] ECR I-2289, paragraphs 84 to 86.

¹⁴ A good example is the *Altmark* case of the ECJ, Case 280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-07747.

¹⁵ **[Citation to be added].**

¹⁶ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, available at http://ec.europa.eu/comm/competition/state_aid/reform/reform.cfm.

¹⁷ Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ C 209, 10.7.1997, p. 3).

¹⁸ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5); Commission Regulation (EC) No 875/2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the fisheries sector and amending Regulation (EC) No 1860/2004 (OJ L 193, 25.7.2007, p. 6); and Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the sector of agricultural production.

¹⁹ Communication of the Commission to the Member States pursuant to Article [93(1)] of the EC Treaty applying Articles [92] and [93] of the Treaty to short-term export-credit insurance (OJ C 281, 17.9.1997, p. 4), as last amended by the Communication of the Commission to Member States amending the communication pursuant to Article [93(1)] of the EC Treaty applying Articles [92] and [93] of the Treaty to short-term export-credit insurance (OJ C 325, 22.12.2005, p. 22).

²⁰ Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

development and innovation²². Case law, Commission guidance and decision making practice can provide valuable assistance to national courts and potential claimants concerning the notion of State aid.

13. In case of doubts about the existence of State aid, national courts may ask for a Commission opinion under section 3 of the present Notice. This is without prejudice to the possibility and/or the obligation for a national court to refer the matter to the ECJ for a preliminary ruling under Article 234 EC.

2.1.2. *The standstill obligation*

14. According to Article 88(3) EC, Member States may not implement State aid measures without the prior approval of the Commission (Standstill Obligation):

*The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*²³

15. However, there are a number of circumstances in which State aid can be lawfully implemented without separate Commission approval:

- Most importantly, this is the case where the measure is covered by a Block Exemption Regulation issued under the framework of Council Regulation (EC) No 994/98²⁴ ('the Enabling Regulation'). Where a measure meets all the requirements of a Block Exemption Regulation, the Member State is relieved of its obligation to notify the planned aid measure and the Standstill Obligation does not apply. Based on the Enabling Regulation, the Commission originally adopted several Block Exemption Regulations²⁵, some of which have in the meantime been replaced by the General Block Exemption Regulation²⁶.

²¹ Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (OJ C 194, 18.8.2006, p. 2).

²² Community Framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).

²³ The Standstill Obligation is reiterated in Article 3 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [93] of the EC Treaty (OJ L 83, 27.3.1999, p. 1) ('the Procedural Regulation').

²⁴ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

²⁵ Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 10, 13.1.2001, p. 20); Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33); Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ L 337, 13.12.2002, p. 3) and Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ L 302, 1.11.2006, p. 29). The SME, training and employment Block Exemption Regulation were prolonged until 30 June 2008 by Commission Regulation (EC) No 1976/2006 of 20 December 2006 amending Regulations (EC) No 2204/2002, (EC) No 70/2001 and (EC) No 68/2001 as regards the

- Similarly, the Standstill Obligation does not apply where aid is granted under a scheme which existed before a Member State's accession to the EU (existing aid) or under a scheme previously approved by the Commission (approved aid)²⁷.
16. National court proceedings in State aid matters may sometimes concern the applicability of a Block Exemption Regulation and/or an existing or approved aid scheme. Where the applicability of a Block Exemption Regulation is at stake, the national court can only assess whether all the conditions of the Regulation are met. It cannot assess the compatibility of an aid measure where this is not the case, since this assessment is the exclusive responsibility of the Commission²⁸.
 17. If the national court needs to determine whether the measure falls under an approved aid scheme, it can only check whether all conditions of the approval decision are met. Where the issues raised at national level concern the validity of a Commission decision, the national court must in principle refer the matter to the ECJ for a preliminary ruling²⁹. Based on the principle of legal certainty as interpreted by the ECJ, even the possibility to question the validity of the underlying Commission decision by way of a preliminary ruling is no longer available where the claimant could undoubtedly have challenged the Commission decision before the Community courts under Article 230 EC, but failed to do so³⁰.
 18. This notwithstanding, the national court may ask the Commission for an opinion under section 3 of the present Notice if it has doubts concerning the applicability of a Block Exemption Regulation or an existing or approved aid scheme.

2.1.3. *Respective roles of the Commission and national courts*

19. The ECJ has repeatedly confirmed that both national courts and the Commission play essential, but distinct roles in the context of State aid enforcement³¹.

extension of the periods of application (OJ L 368, 23.12.2006, p. 85). Specific Block Exemption Regulations apply in the fisheries and agricultural sector. See Commission Regulation (EC) No 736/2008 of 22 July 2008 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of fisheries products (OJ L 201, 30.7.2008, p. 16); and Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ L 358, 16.12.2006, p.3).

²⁶ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (OJ L 214/3, 6.8.2008, p. 3).

²⁷ This does not apply where the scheme itself foresees an individual notification requirement for certain types of aid.

²⁸ See paragraph 20 below.

²⁹ Case T-330/94, *Salt Union v Commission*, [1996] ECR II-1475, paragraph 39.

³⁰ Case C-188/92, *TWD Textilwerke Deggendorf v Germany*, [1994] ECR I-833, paragraphs 17, 25 and 26; and Advocate General Kokott's opinion in Case C-333/07, *Regie Networks*, pending, paragraph 36; see also Case C-239/99, *Nachi*, [2001] ECR I-1197, paragraph 37; Joined Cases C-346/03 and C-529/03, *Atzeni and Others*, [2006] ECR I-1875, paragraph 31; and Case C-232/05, *Commission v France*, ('Scott'), [2006] ECR I-10071, paragraph 59.

³¹ Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 37; Joined Cases C-261/01 and C-262/01, *Van Calster and Cleeren*, [2003] ECR I-12249, paragraph 74; and Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 41.

20. The main role of the Commission is to examine the compatibility of proposed aid measures with the common market, based on the criteria laid down in Article 87(2) and (3) EC. This compatibility assessment is the exclusive responsibility of the Commission, subject to review by the Community courts. According to settled ECJ jurisprudence, national courts do not have the power to declare a State aid measure compatible with Article 87(2) or (3) EC³².
21. The role of the national court depends on the aid measure at stake and whether this has been duly notified and approved by the Commission:
- National courts are often asked to intervene in cases where a Member State authority³³ has granted aid without respecting the Standstill Obligation. This situation can arise either because the aid was not notified at all, or because the authority implemented it before the Commission's approval. The role of national courts in such cases is to protect the rights of individuals affected by the unlawful implementation of the aid³⁴.
 - National courts also play an important role in the enforcement of recovery decisions adopted under Article 14(1) of the Procedural Regulation, where the Commission's assessment leads it to conclude that aid granted unlawfully is incompatible with the common market and enjoins the Member State concerned to recover the incompatible aid from the beneficiary. The involvement of national courts in such cases usually arises from actions brought by beneficiaries for review of the legality of the repayment request issued by national authorities.
22. When preserving the interests of individuals, the national courts must take full account of the effectiveness and direct applicability³⁵ of Article 88(3) EC and the interests of the Community³⁶.
23. The role of national courts in the above settings is set out in more detail under sections 2.2 and 2.3 of the present Notice.

2.2. Sanctioning unlawful aid

24. One of the most important roles for national courts in State aid enforcement is the protection of individual rights of parties affected by a violation of the Standstill Obligation.

³² Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, judgment of 12 February 2008, nyr, 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 v France*, [1991] ECR I-5505, paragraph 14.

³³ This includes authorities at national, regional and local level.

³⁴ Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraphs 38 and 44; Joined Cases C-261/01 and C-262/01, *Van Calster and Cleeren*, cited above footnote 31, paragraph 75; and Case C-295/97, *Piaggio*, cited above footnote 9, paragraph 31.

³⁵ Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 32, paragraphs 11 and 12; and Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraphs 39 and 40.

³⁶ Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 48, referring to Case C-5/89, *Commission v Germany*, [1990] ECR I-3437, paragraph 19

25. The essential role played by national courts in this context stems from the fact that the Commission's own powers to protect competitors and other third parties against unlawful aid are limited. Most importantly, as the ECJ held in its 'Boussac'³⁷ and 'Tubemeuse'³⁸ judgments, the Commission is prevented from adopting a final decision ordering recovery merely because the aid was not notified in accordance with Article 88(3) EC. The Commission must therefore conduct a full compatibility assessment, regardless of whether the Standstill Obligation has been respected or not³⁹. This assessment can be time-consuming and the Commission's powers to issue preliminary recovery injunctions are subject to very strict legal requirements⁴⁰.
26. As a result, actions before national courts offer an important means of redress for competitors and other third parties affected by unlawful State aid. Remedies available before national courts include:
- preventing the payment of unlawful aid;
 - recovery of unlawful aid (regardless of compatibility);
 - recovery of illegality interest;
 - damages for competitors and other third parties; and
 - interim measures against unlawful aid.
27. Each of these remedies is set out in more detail in sections 2.2.1 to 2.2.6 of the present Notice.

2.2.1. Preventing the payment of unlawful aid

28. National courts are obliged to protect the rights of individuals affected by violations of the Standstill Obligation. National courts must therefore draw all appropriate legal consequences where an infringement of Article 88(3) EC has occurred⁴¹. However, the national courts' obligations are not limited to unlawful aid already disbursed. They also extend to cases where an unlawful payment is about to be made. As part of their duties under Article 88(3) EC, national courts must safeguard the rights of individuals against possible disregard of those rights⁴². Where unlawful aid is about

³⁷ Case C-301/87, *France v Commission*, ('Boussac'), [1990] ECR I-307.

³⁸ Case C-142/87, *Belgium v Commission*, ('Tubemeuse'), [1990] ECR I-959.

³⁹ Case C-301/87, *France v Commission*, ('Boussac'), cited above footnote 37, paragraphs 17 to 23; Case C-142/87, *Belgium v Commission*, ('Tubemeuse'), cited above footnote 38, paragraphs 15 to 19; Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 32, paragraph 14; and Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraph 38.

⁴⁰ Cf. Article 11(2) of the Procedural Regulation, which requires that there are no doubts about the aid character of the measure concerned, that there is an urgency to act and that there is a serious risk of substantial and irreparable damage to a competitor.

⁴¹ Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 32, paragraph 12; Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 40; Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 47; and Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraph 41.

⁴² See references cited in footnote 34.

to be disbursed, the national court is therefore obliged to prevent this payment from taking place.

29. The national courts' obligation to prevent the payment of unlawful aid can arise in a variety of procedural settings, depending on the different types of actions available under national law. Very often, the claimant will seek to challenge the validity of the national act granting the unlawful State aid. In such cases, preventing the unlawful payment will usually be the logical consequence of finding that the granting act is invalid as a result of the Member State's breach of Article 88(3) EC⁴³.

2.2.2. *Recovery of unlawful aid*

30. Where a national court is confronted with unlawfully granted aid, it must draw all legal consequences from this unlawfulness under national law. The national court must therefore in principle order the full recovery of unlawful State aid from the beneficiary⁴⁴. This obligation is independent of the compatibility of the aid measure with Article 87(2) or (3) EC.
31. Since national courts must order the full recovery of unlawful aid regardless of its compatibility, recovery can be swifter before a national court than through a complaint with the Commission. Indeed, unlike the Commission⁴⁵, the national court can and must limit itself to determining whether the measure constitutes State aid and whether the Standstill Obligation applies to it.
32. However, the national courts' recovery obligation is not absolute. According to the 'SFEI' jurisprudence⁴⁶, there can be exceptional circumstances in which the recovery of unlawful State aid would not be appropriate. The legal standard to be applied in this context should be similar to the one applicable under Article 14 of the Procedural Regulation⁴⁷. In other words, circumstances which would not stand in the way of a recovery order by the Commission cannot justify a national court refraining from ordering full recovery under Article 88(3) EC. The standard which the Community courts apply in this respect is very strict⁴⁸. In particular, the ECJ has

⁴³ On the invalidity of the granting act in cases where the Member State has violated Article 88(3) EC, see Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 32, paragraph 12; see also German Federal Court of Justice ('Bundesgerichtshof'), judgment of 4 April 2003, V ZR 314/02, VIZ 2003, 340, and judgment of 20 January 2004, XI ZR 53/03, NVwZ 2004, 636.

⁴⁴ Case C-71/04, *Xunta de Galicia*, [2005] ECR I-7419, paragraph 49; Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraphs 40 and 68; and Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 32, paragraph 12.

⁴⁵ Which needs to conduct a compatibility analysis before ordering recovery, see references cited in footnote 39.

⁴⁶ Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraphs 70 and 71, referring to Advocate General Jacobs' opinion in this case, paragraphs 73 to 75; see also Case 223/85, *RSV v Commission*, [1987] ECR 4617, paragraph 17; and Case C-5/89, *Commission v Germany*, cited above footnote 36, paragraph 16.

⁴⁷ See Advocate General Jacobs' opinion in Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 75.

⁴⁸ Article 14 only provides for an exemption from the Commission's recovery obligation where a recovery would contravene general principles of Community law. The only case in which a Member State can refrain from implementing a recovery decision by the Commission is where such recovery would be objectively impossible, cf. Case C-177/06, *Commission v Spain*, [2007] ECR I-7689, paragraph 46.

consistently held that a beneficiary of unlawful aid cannot plead legitimate expectations against a Commission recovery order⁴⁹. This is because a diligent businessman would have been able to verify whether the aid he received was notified or not⁵⁰.

33. To justify the national court not ordering recovery under Article 88(3) EC, a specific and concrete fact must therefore have generated legitimate expectations on the beneficiary's part⁵¹. This can be the case if the Commission itself has given precise assurances that the measure in question does not constitute State aid, or that it is not covered by the Standstill Obligation⁵².
34. In its recent 'CELF' judgment⁵³, the ECJ clarified that the national court's obligation to order full recovery of unlawful State aid ceases if, by the time the national court renders its judgment, the Commission has already decided that the aid is compatible with the common market. Since the purpose of the Standstill Obligation is to ensure that only compatible aid can be implemented, this purpose can no longer be frustrated where the Commission has already confirmed compatibility⁵⁴. Therefore, the national court's obligation to protect individual rights under Article 88(3) EC remains unaffected where the Commission has not yet taken a decision, regardless of whether a Commission procedure is pending or not⁵⁵.
35. While after a positive Commission decision, the national court is no longer under a *Community law* obligation to order full recovery, the ECJ also explicitly recognises that a recovery obligation may exist under *national law*⁵⁶. However, where such a recovery obligation exists, this is without prejudice to the Member State's right to re-implement the aid subsequently.

Also see paragraph 17 of the Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid (OJ C 272, 15.11.2007, p. 4).

⁴⁹ Case C-5/89, *Commission v Germany*, cited above footnote 36, paragraph 14; Case C-169/95, *Spain v Commission*, [1997] ECR I-135, paragraph 51; and Case C-148/04, *Unicredito Italiano*, [2005] ECR I-11137, paragraph 104.

⁵⁰ Case C-5/89, *Commission v Germany*, cited above footnote 36, paragraph 14; Case C-24/95, *Alcan*, [1997] ECR I-1591, paragraph 25; and Joined Cases C-346/03 and C-529/03, *Atzeni and Others*, cited above footnote 30, paragraph 64.

⁵¹ Cf. Advocate General Jacobs' opinion in Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 73; and Case 223/85, *RSV v Commission*, cited above footnote 46, paragraph 17.

⁵² Case C-506/03 *Germany v Commission* [2005] ECR I-0000, paragraph 58; Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 147; Case T-571/93 *Lefebvre and Others v Commission* [1995] ECR II-2379, paragraph 72; Case T-113/96 *Dubois et Fils v Council and Commission* [1998] ECR II-125, paragraph 68; and Case T-290/97 *Mehibas Dordtselaan v Commission* [2000] ECR II-15, paragraph 59.

⁵³ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraphs 45, 46 and 55.

⁵⁴ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraph 49.

⁵⁵ The judgment explicitly confirms the recovery obligation imposed by the ECJ in its previous jurisprudence, cf. Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraph 41.

⁵⁶ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraphs 53 and 55.

36. Once the national court has decided that unlawful aid has been disbursed in violation of Article 88(3) EC, it must quantify the aid in order to determine the amount to be recovered. The case law of the Community courts on the application of Article 87(1) EC and the Commission's guidance and decision making practice should assist the court in this respect. Should the national court encounter difficulties in calculating the aid amount, it may request the Commission's support, as further set out in section 3 of this Notice.

2.2.3. *Recovery of interest*

37. The economic advantage of unlawful aid is not limited to its nominal amount. In addition, the beneficiary obtains a financial advantage resulting from the premature implementation of the aid. This is due to the fact that, had the aid been notified to the Commission, payment would (if at all) have taken place later. This would have obliged the beneficiary to borrow the relevant funds on the capital markets, including interest at market rates.

38. This undue time advantage is the reason why, if recovery is ordered by the Commission, Article 14(2) of the Procedural Regulation requires not only recovery of the nominal aid amount, but also recovery of interest from the day the unlawful aid was put at the disposal of the beneficiary to the day when it is effectively recovered. The interest rate to be applied in this context is defined in the Implementing Regulation⁵⁷.

39. In its recent 'CELF' judgment, the ECJ has clarified that the need to recover the financial advantage resulting from premature implementation of the aid (hereinafter referred to as 'illegality interest') is part of the national courts' obligation under Article 88(3) EC. This is because the premature implementation of unlawful aid will at least make competitors suffer depending on the circumstances earlier than they would have to, in competition terms, from the effects of the aid. The beneficiary has therefore obtained an undue advantage⁵⁸.

40. The national court's obligation to order the recovery of illegality interest can arise in two different settings:

- As explained above, the national court must normally order full recovery of unlawful aid under Article 88(3) EC. Where this is the case, illegality interest needs to be added to the original aid amount when determining the total recovery amount.
- However, the national court must also order the recovery of illegality interest in circumstances in which, exceptionally, there is no obligation to order full

⁵⁷ Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [93] of the Treaty (OJ L 140, 30.4.2004, p. 1) ('The Implementing Regulation'). On the method for setting the reference and discount rates, see the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6) ('The Reference Rate Communication').

⁵⁸ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraphs 50 to 52 and 55.

recovery. As confirmed in 'CELF', the national court's obligation to order recovery of illegality interest therefore remains in place even after a positive Commission decision⁵⁹. This can be of central importance to potential claimants, since it offers a successful remedy also in cases where the Commission has already declared the aid compatible with the common market.

41. In order to comply with their recovery obligation as regards illegality interest, national courts need to determine the interest amount to be recovered. The following principles apply in this respect:

- The starting point is the nominal aid amount⁶⁰.
- When determining the applicable interest rate and calculation method, national courts must take account of the fact that recovery of illegality interest by a national court serves the same purpose as the Commission's interest recovery under Article 14 of the Procedural Regulation. In addition, claims for the recovery of illegality interest are Community law claims based directly on Article 88(3) EC⁶¹. The principles of equivalence and effectiveness described under section 2.4.1 of this Notice therefore apply to these claims.
- In order to ensure consistency with Article 14 of the Procedural Regulation and to comply with the effectiveness requirement, the method of interest calculation used by the national court may not be less strict than that foreseen in the Implementing Regulation⁶². Consequently, illegality interest must be calculated on a compound basis and the applicable interest rate may not be lower than the reference rate.
- Moreover, it follows from the principle of equivalence that, where the interest rate calculation under national law is stricter than that laid down in the Implementing Regulation, the national court will have to apply the stricter national rules also to claims based on Article 88(3) EC.
- The start date for the interest calculation will always be the day on which the unlawful aid was put at the disposal of the beneficiary. The end date depends on the situation at the time of the national judgment. If, as was the case in 'CELF', the Commission has already approved the aid, the end date is the date of the Commission decision. Otherwise, illegality interest accumulates for the whole period of unlawfulness until the date of actual repayment of the aid by the beneficiary.

42. In case of doubt, the national court may ask the Commission for support under section 3 of this Notice.

⁵⁹ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraphs 52 and 55.

⁶⁰ See paragraph 36 above.

⁶¹ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraphs 52 and 55.

⁶² See chapter V of the Implementing Regulation.

2.2.4. Damages claims

43. As part of their role under Article 88(3) EC, national courts may also be required to uphold claims for compensation for damage caused to competitors of the beneficiary and to other third parties by the unlawful State aid⁶³. Such damages actions are usually directed at the State aid granting authority. They can be particularly important for the claimant, since, contrary to actions aimed at mere recovery, a successful damages action provides the claimant with direct financial compensation for suffered loss.
44. The ECJ has repeatedly held that affected third parties can bring such damages actions under *national law*⁶⁴. Such challenges are obviously dependent on national legal rules. Therefore, the legal bases on which claimants have relied in the past vary significantly across the EU.
45. Irrespective of the possibility to claim damages under national law, breaches of the Standstill Obligation have direct and binding consequences under *Community law*. This is because the Standstill Obligation under Article 88(3) EC is a directly applicable rule of Community law which is binding on all Member State authorities⁶⁵. Breaches of the Standstill Obligation can therefore in principle give rise to damages claims based on the 'Francovich'⁶⁶ and 'Brasserie du Pêcheur'⁶⁷ jurisprudence of the ECJ. This jurisprudence confirms that Member States are required to compensate for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible⁶⁸. Such liability exists where: (i) the rule of law infringed 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 damage suffered by the injured parties⁶⁹.
46. The first requirement (Community law obligation aimed at protecting individual rights) is met in relation to violations of Article 88(3) EC. The ECJ has not only repeatedly confirmed the existence of individual rights under Article 88(3) EC but

⁶³ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraphs 53 and 55; Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 56; and Case C-390/98, *Banks*, [2001] ECR I-6117, paragraph 80.

⁶⁴ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraphs 53 and 55; Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 56; and Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 75.

⁶⁵ Case 6/64, *Costa v E.N.E.L.*, [1964] ECR 1141; Case 120/73, *Lorenz GmbH v Bundesrepublik Deutschland and Others*, [1973] ECR 1471, paragraph 8; and Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 32, paragraph 11.

⁶⁶ Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, [1991] ECR I-5357.

⁶⁷ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, [1996] ECR I-1029.

⁶⁸ Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, cited above footnote 66, paragraphs 31 to 37; and Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, cited above footnote 67, paragraph 31.

⁶⁹ Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, [2007] ECR I-2107, paragraph 115; Case C-224/01, *Köbler*, [2003] ECR I-10239, paragraphs 51 and 57; and Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, cited above footnote 67, paragraph 51; see also Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, cited above footnote 66, paragraph 40.

has also clarified that the protection of these individual rights is the genuine role of national courts⁷⁰.

47. The requirement of a sufficiently serious breach of Community law will also generally be met as regards Article 88(3) EC. When determining whether or not a breach of Community law is sufficiently serious, the ECJ lays strong emphasis on the amount of discretion enjoyed by the authorities concerned⁷¹. Where the authority in question has no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach⁷². However, with regard to Article 88(3) EC, Member State authorities have no discretion not to notify State aid measures. They are, in principle, under an absolute obligation to notify all such measures prior to their implementation. Although the ECJ sometimes takes the excusability of the relevant breach of Community law into account⁷³, in the presence of State aid, Member State authorities cannot normally argue that they were not aware of the Standstill Obligation. This is because there is a large body of case law and Commission guidance on the application of Articles 87(1) and 88(3) EC. In case of doubt, Member States can always notify the measure to the Commission for reasons of legal certainty⁷⁴.
48. The third requirement that the breach of Community law must have caused an actual and certain financial damage to the claimant can be met in various ways.
49. The claimant will often argue that the aid was directly responsible for a loss of profit. When confronted with such a claim, the national court should take account of the following considerations:
- By virtue of the Community law requirements of equivalence and effectiveness⁷⁵, national rules may not exclude a Member State's liability for loss of profit⁷⁶. Damage under Community law can exist regardless of whether the breach caused the claimant to lose an asset or whether it prevented the claimant from improving his asset position. Should national law contain such an exclusion, the national court would need to leave the provision unapplied as regards damages claims under Article 88(3) EC.

⁷⁰ Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 32, paragraphs 12 to 14; Joined Cases C-261/01 and C-262/01, *Van Calster and Cleeren*, cited above footnote 31, paragraph 53; and Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraph 38.

⁷¹ Case C-282/05 P, *Holcim v Commission*, [2007] ECR I-2941, paragraph 47; Case C-352/98 P, *Bergaderm and Goupil v Commission*, [2000] ECR I-5291, paragraph 43; and Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, cited above footnote 67, paragraph 55.

⁷² Case C-278/05, *Robins and Others*, [2007] ECR I-1053, paragraph 71; Case C-424/97, *Haim*, [2000] ECR I-5123, paragraph 38; and Case C-5/94, *Hedley Lomas*, [1996] ECR I-2553, paragraph 28.

⁷³ Case C-278/05, *Robins and Others*, cited above footnote 72, paragraph 77; Case C-224/01, *Köbler*, cited above footnote 69, paragraph 55; and Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, cited above footnote 67, paragraph 56.

⁷⁴ Although breaches of Article 88(3) EC must therefore generally be regarded as sufficiently serious, there can be exceptional circumstances which stand in the way of a damages claim. In such circumstances, the requirement of a sufficiently serious breach may not be met. See paragraphs 32 and 33 above.

⁷⁵ See section 2.4.1 below.

⁷⁶ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, cited above footnote 67, paragraphs 87 and 90.

- Determining the actual amount of lost profit will be easier where the unlawful aid enabled the beneficiary to win over a contract or a specific business opportunity from the claimant. 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.
- More complicated damage assessments are necessary where the aid merely lead to an overall loss of market share. One possible way for dealing with such cases would 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.
- There can be circumstances where the damage suffered by the claimant exceeds the lost profit. This could, for example, be the case where, as a consequence of the unlawful aid, the claimant is forced out of business (e.g. through insolvency).

50. The possibility to claim damages is, in principle, independent of any parallel Commission investigation concerning the same aid measure. Such an ongoing investigation does not release the national court from its obligation to safeguard individual rights under Article 88(3) EC⁷⁷. Since the claimant may be able to demonstrate that he suffered loss due to the premature implementation of the aid, and, more specifically, as a result of the beneficiary's illegal time advantage, successful damages claims are also not ruled out where the Commission has already approved the aid by the time the national court decides⁷⁸.

51. National procedural rules will sometimes allow the national court to rely on reasonable estimates for the purpose of determining the actual amount of damages to be granted to the claimant. Where that is the case, and provided the principle of effectiveness⁷⁹ is respected, the use of such estimates would also be possible in relation to damages claims arising under Article 88(3) EC. This can be a useful tool for national courts which face difficulties in relation to the calculation of damages.

52. The legal prerequisites for damages claims under Community law and issues of damages calculation can also form the basis of requests for Commission assistance under section 3 of the present Notice.

2.2.5. *Damages claims against the beneficiary*

53. As described above, potential claimants are entitled to bring damages claims against the State aid granting authority. However, there may be circumstances in which the claimant prefers to claim damages directly from the beneficiary.

54. In the 'SFEI' judgment, the ECJ explicitly addressed the question whether direct damages actions can be brought against the beneficiary under Community law. It

⁷⁷ Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 44.

⁷⁸ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraphs 53 and 55.

⁷⁹ See Section 2.4.1 below.

concluded that, because Article 88(3) EC does not impose any direct obligations on the beneficiary, there is no sufficient *Community law* basis for such claims⁸⁰.

55. However, this does not in any way prejudice the possibility of a successful damages action against the beneficiary on the basis of substantive *national law*. In this context, the ECJ specifically referred to the possibility for potential claimants to rely on national rules governing non-contractual liability⁸¹.

2.2.6. *Interim measures*

56. The duty of national courts to draw the necessary legal consequences from violations of the Standstill Obligation is not limited to their final judgments. As part of their role under Article 88(3) EC, national courts are also required to take interim measures where this is appropriate to safeguard the rights of individuals⁸² and the effectiveness of Article 88(3) EC.

57. The power of national courts to adopt interim measures can be of central importance to interested parties where fast relief is required. Because of their ability to act swiftly against unlawful aid, their proximity and the variety of measures available to them, national courts are very well placed to take conservatory measures where unlawful aid has already been paid or is about to be paid.

58. The most straightforward cases are those where unlawful aid has not yet been disbursed, but where there is a risk that such payments will be made during the course of national court proceedings. In such cases, the national court's obligation to prevent violations of Article 88(3) EC⁸³ requires it to issue an interim order preventing the illegal disbursement until the substance of the matter is resolved.

59. Where the illegal payment has already been made, the role of national courts under Article 88(3) EC usually requires them to order full recovery (including illegality interest). Because of the principle of effectiveness⁸⁴, the national court may in principle not postpone this by unduly delaying proceedings. Such delays would not only affect the individual rights which Article 88(3) EC protects, but also directly increase the competitive harm which stems from the unlawfulness of the aid.

60. However, in spite of this general obligation, there may nevertheless be circumstances in which the final judgment for the national court is delayed. In such cases, the obligation to protect the individual rights under Article 88(3) EC requires the national court to use all interim measures available to it under the applicable national procedural framework to at least terminate the anti-competitive effects of the aid on a

⁸⁰ Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraphs 72 to 74.

⁸¹ Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 75.

⁸² Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 32, paragraph 12; Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 52; and Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraphs 44 to 47.

⁸³ See section 2.2.1 above.

⁸⁴ See section 2.4.1 below.

provisional basis ('interim recovery')⁸⁵. The application of national procedural rules in this context is subject to the requirements of equivalence and effectiveness⁸⁶.

61. Where, based on the case law of the Community courts and the practice of the Commission, the national judge has reached a reasonable prima facie conviction that the measure at stake involves unlawful State aid, the most expedient remedy would, in the Commission's view, be to order the unlawful aid *and* the illegality interest to be put on a blocked account until the substance of the matter is resolved. In its final judgment, the national court would then either order the funds on the blocked account to be returned to the State aid granting authority, if the unlawfulness is confirmed, or order the funds to be released to the beneficiary.
62. Interim recovery can also be a very effective instrument in cases where national court proceedings run parallel to a Commission investigation. An ongoing Commission investigation does not release the national court from its obligation to protect individual rights under Article 88(3) EC⁸⁷. The national court may therefore not simply suspend its own proceedings until the Commission has decided and leave the rights of the claimant under Article 88(3) EC unprotected in the meantime. Where the national court wishes to await the outcome of the Commission's compatibility assessment before adopting a final and irreversible recovery order, it should therefore adopt appropriate interim measures. Here again, ordering the placement of the funds on a blocked account would seem an appropriate remedy.
- Should the Commission declare the aid incompatible, the national court would order the funds on the blocked account to be returned to the State aid granting authority (aid plus illegality interest).
 - Should the Commission declare the aid compatible, this would release the national court from its Community law obligation to order full recovery⁸⁸. The court may therefore, subject to national law⁸⁹, order the actual aid amount to be released to the beneficiary. However, as described in section 2.2.3 of the present Notice, the national court remains under a Community law obligation to order the recovery of illegality interest⁹⁰. This illegality interest will therefore have to be paid to the State aid granting authority.

2.3. Role of national courts in recovery cases

63. National courts can also face State aid issues in cases where the Commission has already ordered recovery. Although most cases will be actions for the annulment of a national recovery order, third parties can also claim damages from national authorities for failure to implement a Commission recovery decision.

⁸⁵ See also Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 52; and Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 46.

⁸⁶ See section 2.4.1 below.

⁸⁷ Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 44.

⁸⁸ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraphs 46 and 55.

⁸⁹ See paragraph 35 above.

⁹⁰ Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 32, paragraphs 52 and 55.

2.3.1. Challenging the validity of a national recovery order

64. According to Article 14(3) of the Procedural Regulation, Member States have to implement recovery decisions without delay. Recovery takes place according to the procedures available under national law, provided they allow for immediate and effective execution of the recovery decision. Where a national procedural rule prevents immediate and/or effective recovery, the national court must leave this provision unapplied⁹¹.
65. The validity of recovery orders issued by national authorities to implement a Commission recovery decision is sometimes challenged before a national court. The rules governing such actions are set out in detail in the Commission's 2007 Recovery Notice⁹², the main principles of which are summarised below.
66. In particular, national court actions cannot challenge the validity of the underlying Commission decision where the claimant could have challenged this decision directly before the Community courts⁹³. This also means that, where a challenge under Article 230 EC would have been possible, the national court may not suspend the execution of the recovery decision on grounds linked to the validity of the Commission decision⁹⁴.
67. Where it is not self-evident that the claimant could have brought an annulment action under Article 230 EC (e.g. for lack of legal standing), the national court must in principle offer legal protection. However, should the national action concern the validity and lawfulness of the Commission decision, the national judge must request a preliminary ruling under Article 234 EC⁹⁵.
68. Granting interim relief in such circumstances is subject to the very strict legal requirements defined in the 'Zuckerfabrik'⁹⁶ and 'Atlanta'⁹⁷ jurisprudence: a national court may only suspend recovery orders under the following conditions (i) the court has serious doubts as regards the validity of the Community act. If the validity of the contested act is not already in issue before the ECJ, it must itself refer the question to the ECJ; (ii) there must be urgency in the sense that the interim relief is necessary to avoid serious and irreparable damage to the party seeking relief; and (iii) the court has to take due account of the Community interest. In its assessment of all those conditions, the national court must respect any ruling by the Community courts on the lawfulness of the Commission decision or on an application for interim relief at Community level⁹⁸.

⁹¹ Case C-232/05, *Commission v France*, ('Scott'), cited above footnote 30, paragraphs 49 to 53.

⁹² Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid, cited above footnote 48, paragraphs 55 to 59.

⁹³ See references cited in footnote 30.

⁹⁴ Case C-232/05, *Commission v France*, ('Scott'), cited above footnote 30, paragraphs 49 to 53.

⁹⁵ Joined Cases C-346/03 and C-529/03, *Atzeni and Others*, cited above footnote 30, paragraphs 30 to 34.

⁹⁶ Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, [1991] ECR I-415, paragraph 33.

⁹⁷ Case C-465/93, *Atlanta Fruchthandels-gesellschaft and Others v Bundesamt für Ernährung und Forstwirtschaft*, [1995] ECR I-3761, paragraph 51.

⁹⁸ For further guidance, cf. 2007 Recovery Notice, paragraph 59.

2.3.2. Damages for failure to implement a recovery decision

69. Like violations of the Standstill Obligation, failure by the Member State authorities to comply with a Commission recovery decision under Article 14 of the Procedural Regulation can give rise to damages claims under the 'Francovich' and 'Brasserie du Pêcheur' jurisprudence⁹⁹. The treatment of such damages claims mirrors the principles set out above as regards violations of the Standstill Obligation¹⁰⁰. This is because, (i) the Member State's recovery obligation is aimed at protecting the same individual rights as the Standstill Obligation, and (ii) the Commission's recovery decisions do not leave national authorities any discretion; breaches of the recovery obligation are thus in principle to be regarded as sufficiently serious. 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 recovery¹⁰¹.

2.4. Procedural rules and legal standing before national courts

2.4.1. General principles

70. As outlined above, national courts are obliged to enforce the Standstill Obligation and protect the rights of individuals against unlawful State aid. In principle, national procedural rules apply to such proceedings¹⁰². However, based on general principles of Community law, the application of national law in these circumstances is subject to two essential conditions:

- national procedural rules applying to claims under Article 88(3) EC may not be less favourable than those governing claims under domestic law (principle of equivalence)¹⁰³; and
- national procedural rules may not render excessively difficult or practically impossible the exercise of the rights conferred by Community law (principle of effectiveness)¹⁰⁴.

71. Given the supremacy of Community law, national courts must leave national procedural rules unapplied if doing otherwise would violate the above principles¹⁰⁵.

⁹⁹ See references cited in footnote 69.

¹⁰⁰ See section 2.2.4 above.

¹⁰¹ See paragraphs 48 to 51 above.

¹⁰² Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 45; and Case C-526/04, *Laboratoires Boiron*, [2006] ECR I-7529, paragraph 51.

¹⁰³ Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 45; Joined Cases C-392/04 and C-422/04, *i-21*, [2006] ECR I-8559, paragraph 57; and Case 33/76, *Rewe*, [1976] ECR 1989, paragraph 5.

¹⁰⁴ Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 45; Case C-174/02, *Streekgewest*, [2005] ECR I-85, paragraph 18; and Case 33/76, *Rewe*, cited above footnote 103, paragraph 5.

¹⁰⁵ Case 106/77, *Amministrazione delle finanze dello Stato v Simmenthal*, [1978] ECR 629, paragraphs 21 and 24; and Case C-232/05, *Commission v France*, ('Scott'), cited above footnote 30, paragraphs 49 to 53.

2.4.2. *Legal standing*

72. The principle of effectiveness has a direct impact on the standing of possible claimants before national courts under Article 88(3) EC. In this respect, Community law requires that national rules on legal standing do not undermine the right to effective judicial protection¹⁰⁶. National rules cannot therefore limit legal standing only to the competitors of the beneficiary¹⁰⁷. Third parties who are not affected by the distortion of competition resulting from the aid measure can also have a sufficient legal interest in bringing proceedings before a national court¹⁰⁸.

2.4.3. *Standing issues in tax cases*

73. The jurisprudence cited above is particularly relevant for State aid granted in the form of exemptions from taxes and other financial liabilities. In such cases, it is not uncommon for persons who do not benefit from the same exemption to challenge their own tax burden based on Article 88(3) EC¹⁰⁹.

74. However, third party tax payers may only rely on the Standstill Obligation where their own tax payment forms an integral part of the unlawful State aid measure¹¹⁰. This is the case where, under the relevant national rules, the tax revenue is reserved exclusively for funding the unlawful State aid and has a direct impact on the amount of State aid granted in violation of Article 88(3) EC¹¹¹.

75. If exemptions have been granted from general taxes, the above criteria are usually not met. An undertaking liable to pay such taxes therefore cannot generally claim that someone else's tax exemption is unlawful under Article 88(3) EC¹¹². It also results from settled case law that extending an illegal tax exemption to the claimant is no appropriate remedy for breaches of Article 88(3) EC. Such a measure would not eliminate the anticompetitive effects of unlawful aid, but on the contrary, strengthen them¹¹³.

2.4.4. *Gathering evidence*

76. The principle of effectiveness can also influence the process of gathering evidence. For example, where the burden of proof as regards a particular claim makes it impossible or excessively difficult for a claimant to substantiate its claim (e.g. because the necessary documentary evidence is not in its possession), the national court is required to use all means available under national procedural law to give the

¹⁰⁶ Case C-174/02, *Streekgewest*, cited above footnote 104, paragraph 18; Joined Cases C-87/90 to C-89/90, *Verholen and Others v Sociale Verzekeringsbank Amsterdam*, [1991] ECR I-3757, paragraph 24; and Case C-13/01, *Safalero*, [2003] ECR I-8679, paragraph 50.

¹⁰⁷ Case C-174/02, *Streekgewest*, cited above footnote 104, paragraphs 14 to 21.

¹⁰⁸ Case C-174/02, *Streekgewest*, cited above footnote 104, paragraph 19.

¹⁰⁹ See statistics in paragraph 3 above.

¹¹⁰ Case C-174/02, *Streekgewest*, cited above footnote 104, paragraph 19.

¹¹¹ Joined Cases C-393/04 and C-41/05, *Air Liquide*, cited above footnote 13, paragraph 46; Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, *Casino France and Others*, [2005] ECR I-9481, paragraph 40; and Case C-174/02, *Streekgewest*, cited above footnote 104, paragraph 26.

¹¹² Joined Cases C-393/04 and C-41/05, *Air Liquide*, cited above footnote 13, paragraph 48; and Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, *Casino France and Others*, cited above footnote 111, paragraphs 43 and 44.

¹¹³ Joined Cases C-393/04 and C-41/05, *Air Liquide*, cited above footnote 13, paragraph 45.

claimant access to this evidence. 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 claimant¹¹⁴.

3. COMMISSION SUPPORT FOR NATIONAL COURTS

77. According to Article 10 EC, the European institutions and Member States have a mutual duty of loyal cooperation with a view to attaining the objectives of the EC Treaty. Article 10 EC thus implies that the Commission must assist national courts when they apply Community law¹¹⁵. Conversely, national courts may be obliged to assist the Commission in the fulfilment of its tasks¹¹⁶.
78. Given the key role which national courts play in the enforcement of the State aid rules, the Commission is committed to helping national courts where the latter find such assistance necessary for their decision on a pending case. Whilst the 1995 Cooperation Notice already offered national courts the possibility to ask the Commission for assistance, this possibility has not been used regularly by national courts. The Commission therefore wishes to make a fresh attempt at establishing closer cooperation with national courts by providing more practical and user-friendly support mechanisms. In doing so, it draws inspiration from the Antitrust Cooperation Notice¹¹⁷.
79. Commission support to national courts can take two different forms:
- The national court may ask the Commission to transmit to it relevant information in its possession (see section 3.1 of the present Notice).
 - The national court may ask the Commission for an opinion concerning the application of the State aid rules (see section 3.2 of the present Notice).
80. When supporting national courts, the Commission must respect its duty of professional secrecy and safeguard its own functioning and independence¹¹⁸. In fulfilling its duty under Article 10 EC towards national courts, the Commission is therefore committed to remaining neutral and objective. Since the Commission's assistance to national courts is part of its duty to defend the public interest, the Commission has no intention to serve the private interests of the parties involved in the case pending before the national court. The Commission will therefore not hear any of the parties involved in the national proceedings about its assistance to the national court.

¹¹⁴ Case C-526/04, *Laboratoires Boiron*, cited above footnote 102, paragraphs 55 and 57.

¹¹⁵ Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 50; Order of 13 July 1990 in Case C-2/88 Imm., *Zwartveld and Others*, [1990] ECR I-3365, paragraphs 16 to 22; and Case C-234/89, *Delimitis v Henninger Bräu*, [1991] ECR I-935, paragraph 53.

¹¹⁶ Case C-94/00, *Roquette Frères*, [2002] ECR I-9011, paragraph 31.

¹¹⁷ Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101, 27.4.2004, p. 54), paragraphs 15 to 30.

¹¹⁸ Order of 6 December 1990 in Case C-2/88 Imm., *Zwartveld and Others*, [1990] ECR I-4405, paragraphs 10 and 11; and Case T-353/94, *Postbank v Commission*, [1996] ECR II-921, paragraph 93.

81. The support offered to national courts under this Notice is also without prejudice to the possibility or obligation for the national court to ask the ECJ for a preliminary ruling regarding the interpretation or the validity of Community law in accordance with Article 234 EC.

3.1. Transmission of information to national courts

82. The Commission's duty to assist national courts in the application of State aid rules comprises the obligation to transmit relevant information in its possession to national courts¹¹⁹.

83. A national court may, *inter alia*, ask the Commission for the following types of information:

- Information concerning a pending Commission procedure; this can, *inter alia*, include information on whether a procedure regarding a particular aid measure is pending before the Commission, whether a certain aid measure has been duly notified in accordance with Article 88(3) EC, whether the Commission has initiated a formal investigation, and whether the Commission has already taken a decision. In the absence of a decision, the national court may ask the Commission to clarify when this is likely to be adopted.
- In addition, national courts may ask the Commission to transmit documents in its possession. This can include copies of existing Commission decisions to the extent that these decisions are not already published on the Commission's website, factual data, statistics, market studies and economic analysis.

84. In order to ensure efficiency in its cooperation with national courts, the Commission will endeavour to provide the national court with the requested information within one month from the date of the request. Where the Commission needs to ask the national court for further clarifications, this one-month period starts to run from the moment when the clarification is received. Where the Commission has to consult third parties who are directly affected by the transmission of the information, the one-month period starts from the conclusion of this consultation. This could, for example, be the case for certain types of information submitted by a private person¹²⁰, or where information submitted by one Member State is being requested by a court in a different Member State.

85. In transmitting information to national courts, the Commission needs to uphold the guarantees given to natural and legal persons under Article 287 EC¹²¹. Article 287 EC prevents members, officials and other servants of the Commission from disclosing information which is covered by the obligation of professional secrecy. This can include confidential information and business secrets.

¹¹⁹ Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 50; Order of 13 July 1990 in Case C-2/88 *Imm., Zwartveld and Others*, cited above footnote 115, paragraphs 17 to 22; Case C-234/89, *Delimitis v Henninger Bräu*, cited above footnote 115, paragraph 53; and Case T-353/94, *Postbank v Commission*, cited above footnote 118, paragraphs 64 and 65.

¹²⁰ Case T-353/94, *Postbank v Commission*, cited above footnote 118, paragraph 91.

¹²¹ Case C-234/89, *Delimitis v Henninger Bräu*, cited above footnote 115, paragraph 53; and Case T-353/94, *Postbank v Commission*, cited above footnote 118, paragraph 90.

86. Articles 10 and 287 EC do not lead to an absolute prohibition for the Commission to transmit to national courts information covered by professional secrecy. As confirmed by the Community courts, the duty of loyal cooperation requires the Commission to provide the national court with whatever information the latter may seek¹²². This also includes information covered by the obligation of professional secrecy.
87. Where it intends to provide information covered by professional secrecy to a national court, the Commission will therefore remind the court of its obligations under Article 287 EC. It will ask the national court whether it can and will guarantee the protection of such confidential information and business secrets. Where the national court cannot offer such a guarantee, the Commission will not transmit the information concerned¹²³. Where, on the other hand, the national court has offered such a guarantee, the Commission will transmit the information requested.
88. There are further scenarios in which the Commission may be prevented from disclosing information to a national court. In particular, the Commission may refuse to transmit information to a national court where such transmission would interfere with the functioning and independence of the Communities. This would be the case where disclosure would jeopardise the accomplishment of the tasks entrusted to the Commission¹²⁴ (e.g. information concerning the Commission's internal decision making process).

3.2. Opinions on questions concerning the application of the State aid rules

89. When called upon to apply the State aid rules to a case pending before it, a national court must respect any relevant Community rules in the area of State aid and the existing case law of the Community courts. In addition, a national court may seek guidance in the Commission's decision making practice and in the notices and guidelines concerning the application of the State aid rules issued by the Commission. However, there may be circumstances in which the above tools do not offer the national court sufficient guidance on the issues at stake. In the light of its obligations under Article 10 EC and given the important and complex role which national courts play in State aid enforcement, the Commission therefore gives national courts the opportunity to request the Commission's opinion on relevant issues concerning the application of the State aid rules¹²⁵.
90. Such Commission opinions may, in principle, cover all economic, factual or legal matters which arise in the context of the national proceedings¹²⁶, although opinions on legal matters are without prejudice to the right or obligation for the national court to ask the ECJ for a preliminary ruling.

¹²² Case T-353/94, *Postbank v Commission*, cited above footnote 118, paragraph 64; and Order of 13 July 1990 in Case C-2/88 Imm., *Zwartveld and Others*, cited above footnote 115, paragraphs 16 to 22.

¹²³ Case T-353/94, *Postbank v Commission*, cited above footnote 118, paragraph 93; and Order of 6 December 1990 in Case C-2/88 Imm., *Zwartveld and Others*, cited above footnote 118, paragraphs 10 and 11.

¹²⁴ Order of 6 December 1990 in Case C-2/88 Imm., *Zwartveld and Others*, cited above footnote 118, paragraph 11; Case C-275/00, *First and Franex*, [2002] ECR I-10943, paragraph 49; and Case T-353/94, *Postbank v Commission*, cited above footnote 118, paragraph 93.

¹²⁵ See Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 50.

¹²⁶ However, please note paragraph 92 below.

91. Possible subject matters for Commission opinions include, *inter alia*:
- Whether a certain measure qualifies as State aid within the meaning of Article 87 EC and, if so, how the exact aid amount is to be calculated. Such opinions can relate to each of the criteria under Article 87 EC (i.e. existence of an advantage, granted by a Member State or through State resources, possible distortion of competition and effect on trade between Member States).
 - Whether a certain aid measure meets a certain requirement of a Block Exemption Regulation so that no individual notification is necessary and the standstill obligation under Article 88(3) EC does not apply.
 - Whether a certain aid measure falls under a specific aid scheme which has been notified and approved by the Commission or otherwise qualifies as existing aid. Also in such cases, the standstill obligation under Article 88(3) EC does not apply.
 - Whether exceptional circumstances (as referred to in the 'SFEI' judgment of the ECJ¹²⁷) exist which would prevent the national court from ordering full recovery under Community law.
 - Where the national court is required to order the recovery of interest, it can ask the Commission for assistance as regards the interest calculation and the interest rate to be applied.
 - The legal prerequisites for damages claims under Community law and issues concerning the calculation of the damage incurred.
92. As stated in paragraph 20 above, the assessment of the compatibility of an aid measure with the common market pursuant to Article 87(2) and 87(3) EC falls within the exclusive competence of the Commission. National courts are not competent to assess the compatibility of an aid measure. Whilst the Commission cannot therefore provide opinions on compatibility, this does not prevent the national court from requesting procedural information as to whether the Commission is already assessing the compatibility of a certain aid measure (or intends to do so) and, if so, when its decision is likely to be adopted¹²⁸.
93. When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification sought, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.
94. In the interest of making its cooperation with national courts as effective as possible, the Commission will endeavour to provide the national court with the requested opinion within four months from the date of the request. Where the Commission

¹²⁷ See references cited in footnote 46.

¹²⁸ See paragraph 83 above.

needs to ask the national court for further clarifications concerning its request, this four-month period starts to run from the moment when the clarification is received.

95. In this context, it should be noted, however, that the general obligation of national courts to protect individual rights under Article 88(3) EC also applies during the period in which the Commission prepares the requested opinion. This is because, as set out in paragraph 62 above, the national court's obligation to protect individual rights under Article 88(3) EC applies irrespective of whether a statement from the Commission is still awaited or not¹²⁹.
96. As already indicated in paragraph 80 of this Notice, the Commission will not hear the parties before providing its opinion to the national court. The introduction of the Commission's opinion to the national proceeding is subject to the relevant national procedural rules, which have to respect the general principles of Community law.

3.3. Practical issues

97. In order to further contribute to effective cooperation with national courts, the Commission has decided to establish a single contact point, to which national courts can address all requests for Commission support under sections 3.1 and 3.2 of the present Notice, and any other written or oral questions about State aid policy that may arise in their daily work.

European Commission

Directorate General for Competition

[Dedicated Contact Person]

B-1049 Brussels

Belgium

Telephone *[Dedicated Phone Number]*

Fax *[Dedicated Fax Number]*

Email *[Dedicated Functional Mailbox]*

98. The Commission will publish a summary concerning its cooperation with national courts pursuant to this Notice in its annual Report on Competition Policy. It may also make its opinions and observations available on its website.

4. FINAL PROVISIONS

99. This Notice is issued in order to assist national courts in the application of the State aid rules. National courts and third parties are only bound by the content of this Notice to the extent to which it is based on existing legislation and/or other binding rules and principles of Community law as defined by the Community courts.

¹²⁹ This can include interim measures as outlined in section 2.2.6 above.

100. This Notice replaces the 1995 Cooperation Notice.