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# The role of national courts in the enforcement of State aid rules and decisions

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*The views expressed in this presentation are those of the speaker only and can in no way be taken to reflect the official position of the European Commission.*

# Overview

- The role of the Commission and national courts
- The standstill obligation
- Enforcement of Commission decisions

# The role of the Commission and national courts

# The role of the Commission

- Assesses whether the measure constitutes State aid
- Examines whether the measure is compatible with the internal market (exclusive competence of the Commission)
  - preliminary examination
  - official investigation
- The Commission may, at its discretion, apply interim measures pending the completion of the compatibility assessment
- Decides on the recovery of aid

# The role of national courts

- Assess whether the measure constitutes State aid
  - In the event of doubt as to the elements of State aid, national courts may ask the Commission for an opinion
  - Have the possibility or the obligation to refer a question to the Court of Justice for a preliminary ruling
- Determine whether the measure is subject to a standstill obligation
- Ensure effective legal protection for third parties
- Implement negative Commission decisions on state aid recovery

# Standstill obligation

Part 3 of Article 108 TFEU

# Standstill obligation

## Article 108 (3) of the Treaty on the Functioning of the European Union

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 internal market having regard to Article 107, 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.

# Standstill obligation

## The notification requirement does not apply to:

- De *minimis* aid (Regulation No 1407/2013, threshold EUR 200,000 over three financial years)
- Aid covered by the **General Block Exemption Regulation** (Regulation No 651/2014)
- **Existing aid** granted before the entry into force of the TFEU in the Member States concerned or under an aid scheme previously approved by the Commission
- The aid was granted **under another Commission Regulation** which exempts **certain categories** of aid from the notification requirement



# Remedies

# Prohibition of payment of unlawful aid

- The implementation of an unlawful measure may be suspended by the annulment of the act by which it was granted
- National courts may declare a contract under which aid was granted as void
- National courts may annul or suspend the decision to grant aid
- Where aid is granted in instalments, national courts should order the suspension of future payments

# Unlawful aid recovery

- It is for the national courts to take the necessary measures to remedy the unlawfulness of the implementation of the aid so that it is not freely available to the recipient during the period before the Commission takes a decision (*CELFA*, C-199/06)
- National courts have an obligation to order the recovery of unlawful aid in the absence of a Commission decision declaring the aid compatible (*SFEI*, C - 39/94)
- The obligation of national courts to adopt a recovery decision is not absolute
  - Legitimate expectations
- National courts must order the recovery of the principal sum of the aid and interest on the unlawfulness

# Illegality interests recovery

- Economic advantage of State aid
- Illegality interest (*CELF*, C-199/06)
  - The national court's obligation to recover illegality interest remains even when the Commission decides that the aid is compatible
- Illegality interest calculation
  - The method of calculation may not be less stringent than that laid down in the Procedural Regulation
  - The starting date for the calculation of interest will always be the day on which the unlawful aid was put at the disposal of the beneficiary

# Damage compensation

- Breach of standstill obligation may be the basis for damages claims
- Conditions (*Francovich*, C-6/90 and C-9/90; and *Brasserie du Pêcheur*, C-46/93 and C-48/93):
  - The rule of law infringed is intended to confer rights on natural persons
  - The infringement is sufficiently serious, and
  - There is a direct causal link between the breach of a Member State's obligation and the damage suffered by the victims
- Damage compensation does not depend on a simultaneously performed Commission investigation into the same aid measure

# Interim measures

- National courts must grant interim measures if:
  - There is no doubt as to the existence of State aid
  - The aid will be or is being implemented, and
  - No exceptional circumstances have been identified which would make the recovery of the aid inappropriate
- The courts may order the recovery of the aid with illegality interest or the temporary transfer of the amount of aid, including interest for the period between the implementation of the aid and its transfer, to a blocked account.

# Deutsche Lufthansa, C-284/12

- 2006 - a claim for repayment of the sums paid to Ryanair between 2002 and 2005 as “marketing aid” and to cease all aid to Ryanair
- 2008 - Commission decision to initiate the formal investigation procedure
- Request for an opinion from the Commission
- 2012 - Request for a preliminary ruling

Question: *“Should a national court hearing a claim for the recovery and cancellation of all future payments take account of the legal opinion set out in the Commission’s decision to initiate the procedure as regards the question whether the contested measure may be classified as aid?”*

# Deutsche Lufthansa, C-284/12

- The fact that the Commission initiated the formal investigation procedure under Article 108 (2) TFEU does not release national courts from the obligation to protect the rights of individuals in the event of an infringement of Article 108 (3) TFEU.
- The scope of that obligation may vary according to whether the Commission has initiated the formal investigation procedure in respect of the measure which is the subject of the dispute before the national court.
- **National courts must avoid decisions that run counter to the Commission's decisions, even if they are of a temporary nature**
- Two scenarios:
  - The Commission has not opened a formal investigation - national courts assess whether a measure constitutes State aid
  - The Commission has opened a formal investigation:
    - Non-state aid - the court does not order the repayment of the aid granted
    - State aid - a decision to suspend the implementation of a measure and to order the repayment of amounts already transferred



# Eesti Pagar, C-349/17

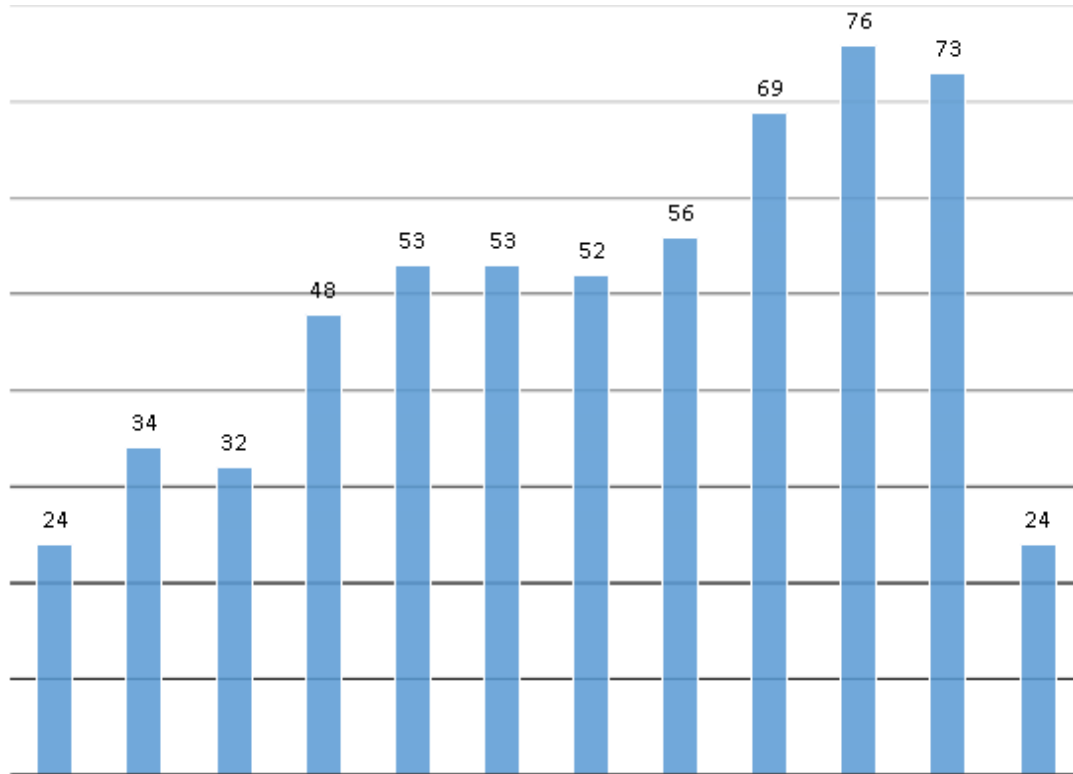
- In 2008, Eesti Pagar received EUR 526 000 in state aid to improve its production line
- In 2013, the granting authority informed Eesti Pagar that the aid violated the terms of the GBER;
- The decision to repay the aid with interest has been appealed to court;
- Request for a preliminary ruling
- Questions:
  - Can the Estonian authorities decide to recover the aid without a Commission decision?
  - Can recovery be avoided on the basis of the principle of protection of the legitimate expectations of the beneficiary?

# Eesti Pagar, C-349/17

- Before granting aid under the GBER, the national authorities must verify that the conditions laid down in this Regulation are complied with
- The national authority must, on its own initiative, recover the aid which it has granted under the GBER if it subsequently finds that the conditions laid down in that regulation have not been met.
- A national authority cannot create a legitimate expectation as to the legality of the aid to the recipient if it grants the aid by misapplying the GBER

# Standstill obligation - case law

## Number of cases in national courts in 2007-2018, EU 28

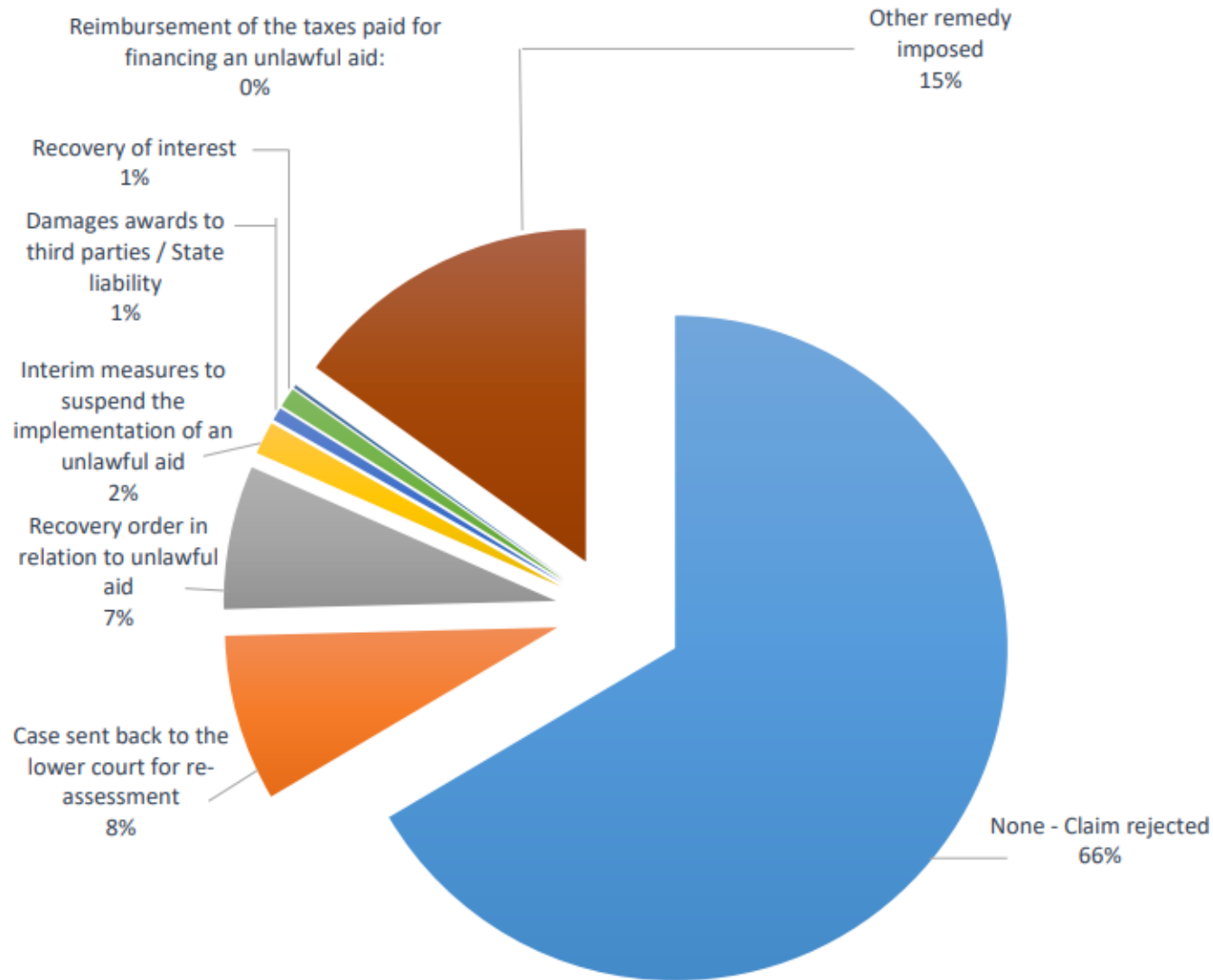


Source: Study on how national courts enforce state aid rules and decisions, European Commission, 2019.

## Claimant

- Beneficiary's competitor (36%)
- National authorities (18%)
- Beneficiary (14%)
- Consumer Association (2%)
- Third parties (9%)
- Others (21%)

# Application of remedies



Source: Study on how national courts enforce state aid rules and decisions, European Commission, 2019.

# Enforcement of Commission decisions

Order for recovery

# Contesting the order for recovery

- The main categories of recovery litigation are:
  - Claims brought by a recovery authority in order to obtain the recovery of aid from a Beneficiary which does not wish to return aid
  - Claims brought by beneficiaries to challenge a recovery order
- National recovery order
  - The validity of the underlying Commission decision cannot be challenged by means of a national court when the applicant has been able to challenge that decision before the Court of Justice

# Interim measures

- According to the case law of the ECJ (*Zuckerfabrik*, Cases C-143/88 and C-92/89; and *Atlanta*, C-465/93), a national court may grant interim measures if all of the following conditions are met:
  - Serious doubts as to the validity of the Commission's decision (if the ECJ no longer hears the case, the national court must itself refer the case to the ECJ)
  - Urgency (seeking to avoid serious and irreparable damage)
  - The national court takes due account of the interest of the European Union
  - The national court shall take into account any judgement of the ECJ concerning the legality of an act of the European Union

# Useful links

- Commission Notice on the enforcement of State aid law by national courts (2009/C [85/01](#))
- Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union
- Commission Notice on the recovery of unlawful and incompatible State aid (2019/C [247/01](#))
- Study on how national courts enforce state aid rules and decisions, European Commission, [2019](#)



# Thank you for your attention!



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