1. Introduction

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1. FROM THE TREATY OF ROME TO STATE AID MODERNIZATION: THE RULES ARE THE SAME BUT EVERYTHING ELSE HAS CHANGED

Since the Treaty of Rome, Art. 107 TFEU has regulated how the Member States can grant aid either to private or State-owned undertakings. Aid measures incompatible with Art. 107(1) may only be authorized by the European Commission if they fulfill one of the conditions mentioned in Art. 107(2) and 107(3) TFEU.

Although the wording of the Treaty has not changed significantly over the past 60 years,¹ the goals of State aid policy have progressively shifted. Similar to other free trade agreements, the EU founding fathers included State aid rules in the Treaty of Rome in order to avoid a subsidies war among the Member States—a war that could have distorted free competition within the internal market.² State aid rules were thus initially conceived as a complementary instrument to the free movement rules. In addition, State aid law was also complementary to competition policy, since the provisions concerning both policies were included in the same chapter of the Treaty,³ and were enforced by the same institution—that is, DG Competition of the European Commission.⁴

¹ Save for the obligatory numbering of the relevant provisions (Article 92 originally, Article 87 since 2002, and Article 107 since the coming into force of the TFEU) and the switch from testing the compatibility of aid with the internal market as opposed to the common market with the TFEU.

² C.D. Ehlermann, “State Aid Control in the European Union. Success or Failure” 18(4) *Fordham International Law Journal* (1994): 1212–29.

³ Title VII of the Treaty on the Functioning of the European Union, “Common Rules on Competition, Taxation and Approximation of Laws.” Both the competition and State aid rules are mentioned in Chapter 1 of Title VII.

⁴ <http://ec.europa.eu/competition/> accessed July 9, 2019.

During the past decades, the goals of State aid policy have progressively “broadened,” including additional goals such as financial stability and the coordination of national fiscal policies. In the context of the 2008 financial crisis, for instance, the Commission relied on State aid policy to supervise the guarantees, recapitalization, and impaired assets relief schemes put in place by the majority of the Member States to save their financial institutions.⁵ Such measures fell within the definition of aid under Art. 107(1): due to their size they could distort free competition in the financial markets, by having a negative system effect on the stability of financial markets.⁶

The types of State aid likely to be authorized by the Commission have also changed. The 2005 State Aid Action Plan (SAAP) indicated that the Commission would facilitate the granting of State aid by Member States when the selected projects supported EU-wide industrial policy goals.⁷ Projects favoring innovation, investment in human capital, and better provision of services of general economic interest were seen as priorities.⁸ Moreover, applications for State aid have become more formal, for example requiring that the State explain the market failure that the aid would address, what benefits are expected, how the measure is necessary to generate such benefits, and that the aid is the minimum necessary to achieve the expected gains.⁹

A broadening of the Commission’s enforcement priorities is visible in the field of taxation. Tax law is a competence reserved to the Member States; the requirement of unanimity voting within the Council has traditionally curbed the degree of EU harmonization in this area.¹⁰ In particular, attempts to harmonize national corporate taxation in order to avoid forum shopping by mul-

⁵ In relation to the enforcement of State aid rules by the Commission during the financial crisis, see M. Botta, “Competition Policy—Safeguarding the Commission’s Competences in State Aid Control” 38(3) *Journal of European Integration* (2016): 265–78.

⁶ J. Philippe, “Euro 4.6 Trillion” 1 *European State Aid Law Quarterly* (2011): 3–4.

⁷ Commission Communication, State aid action plan—Less and better targeted State aid: a roadmap for state aid reform 2005–2009. Published in Brussels on 7.6.2005, COM/2005/0107 final.

⁸ On this policy shift see M. Blauburger, “Of ‘Good’ and ‘Bad’ Subsidies: European State Aid Control through Soft and Hard Law” 32(4) *West European Politics* (2009): 719.

⁹ See e.g. Communication from the Commission, Framework for State aid for research and development and innovation. OJ C198/1, 27.6.2014. Paras 35–36.

¹⁰ Under Art. 113 TFEU, “The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.”

tinational corporations have failed to achieve the required political consensus within the Council.¹¹ In recent years, however, the Commission has investigated a number of high-profile State aid cases, requiring some Member States to recover the aid in the form of preferential tax treatment previously granted to multinational corporations to establish their legal seat in that country.¹² The 2016 Commission decision requiring Ireland to recover €13 billion from Apple is the best known example of an ongoing trend in this regard.¹³ The focus of State aid rules has thus shifted from avoiding Member States subsidizing their national champions to preventing Member States from granting a preferential tax treatment to foreign corporations.¹⁴

Besides an enlargement of its goals, State aid policy has also evolved in relation to its patterns of enforcement. Under Art. 108(3) TFEU, Member States cannot implement any aid measure before having received the Commission's clearance. Similar to competition policy, the EU founding fathers thus granted to the Commission the exclusive competence of enforcing State aid rules: the EU executive branch was selected as the independent referee, in charge of reviewing national aid measures without the influence of any national industrial policy consideration. Similar to competition law, during the past decade the enforcement of State aid policy has been decentralized. On the one hand, national courts play a role both in "public enforcement" (that is, enforcing the Commission's recovery decisions) and in "private enforcement" of State aid

¹¹ A good example of the difficulties faced in achieving a political consensus to harmonize corporate taxation is represented by the current debate concerning the crossborder taxation of firms operating in the digital economy. In March 2018, the European Commission proposed a Directive "laying down rules relating to the corporate taxation of a significant digital presence." In March 2019, the proposal failed to achieve the necessary consensus within the Council due to the opposition by Ireland, Sweden, and Denmark. European Commission, Proposal for a Council Directive laying down rules relating to corporate taxation of a significant digital presence. Published in Brussels on 21.3.2018, COM(2018) 147 final. See J. Valero, "The EU's Digital Tax Is Dead, Long Live the OECD's Plans," published on Euroactiv on 8.3.2019. www.euractiv.com/section/economy-jobs/news/the-eus-digital-tax-is-dead-long-live-the-oecd-plans/ accessed July 9, 2019.

¹² A list of the State aid cases involving tax rulings decided by the Commission since 2013 is available at http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html accessed July 9, 2019.

¹³ Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple. OJ L-187/1, 19.7.2017.

¹⁴ On the interaction between harmonization of corporate taxation and the recent State aid enforcement *vis-à-vis* tax rulings see T. Jaeger, "Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law?" 8(4) *Journal of European Competition Law and Practice* (2017): 221–32.

rules (that is, hearing complaints by competitors of the aid beneficiary requesting either the recovery of the unlawful aid in breach of the standstill obligation or compensation for the damage suffered). On the other hand, after the State Aid Modernization project (SAM), the number of aid measures notified to the Commission has dropped.¹⁵ In particular, following the 2014 revision of the General Block Exemption Regulation (GBER),¹⁶ a larger number of aid measures fall within the scope of GBER and thus they do not need to be notified to Brussels before being put in place by the Member States.¹⁷ As a consequence of the GBER reform, central and regional authorities in the Member States are increasingly involved in State aid policy, planning aid schemes that fulfill the GBER requirements in order to escape the duty of notification to the Commission. In addition, a number of Member States have established monitoring authorities in charge of *ex ante* assessment of the planned aid schemes with the GBER and the *De Minimis* Regulation.¹⁸ Unlike in the case of competition policy, there is no harmonization of the structure and competences of these State aid monitoring authorities.¹⁹ However, the Court of Justice recently

¹⁵ SAM refers to the process of revision of State aid procedural rules and guidelines started by the Commission via the publication of its 2012 Communication. The Communication indicates the intention of the Commission to focus its enforcement activities on the “cases with the biggest impact on internal market” (para. 19) via “a revision and possible extension of the General Block Exemption Regulation” (para. 20.c). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU State Aid Modernisation (SAM). Published in Brussels on 08.05.2012. COM/2012/0209 final. The list of legislation and guidelines amended after the 2012 Communication is available at: http://ec.europa.eu/competition/state_aid/modernisation/index_en.html accessed July 9, 2019.

For a comment on the effect of the SAM, see P. Nicolaides, “State Aid Modernization: Institutions for Enforcement of State Aid Rules” 3(35) *World Competition* (2012): 457–70.

¹⁶ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. OJ L 187/1, 26.6.2014.

¹⁷ After the entry into force of the 2014 GBER, 96 percent of the aid measures granted by the Member States fall within the scope of GBER and thus do not require notification to the Commission. Before the new GBER, only 68 percent of the aid measures were exempted from the duty of notification. http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html accessed July 9, 2019.

¹⁸ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid. OJ L 352/1, 24.12.2013.

¹⁹ For instance, in Cyprus the Commissioner for State Aid Control has to assess the compatibility of draft aid measures with GBER conditions. Similarly to other countries in Central and Eastern Europe that joined the EU during the past decade, the Commissioner Office was originally established during the pre-EU accession phase and

recognized in *Eesti Pagar* that, similarly to national courts, national administrative authorities have the duty to order the recovery of aid when the granting authority breaches the standstill obligation.²⁰ *Eesti Pagar* thus indirectly recognizes the legality of an *ex ante* system of State aid monitoring at the national level. The Commission has supported the process of State aid decentralization brought by SAM, in order to decrease its workload and focus its resources on the most controversial aid measures that require a deeper analysis.²¹

To sum up, although the core State aid rules have not changed since the Treaty of Rome, the goals and the pattern of enforcement of this EU policy have changed radically over the past 60 years. On the one hand, State aid policy, initially conceived as complementary to free movement and competition rules, has broadened its goals. On the other, although the Commission still has exclusive jurisdiction to assess the compatibility of notified aid measures under Art. 107(3) TFEU, the number of aid notifications has substantially decreased after SAM. Finally, national courts support the Commission in the enforcement of State aid rules by executing the Commission recovery decisions and by remedying the lack of aid notification to the Commission.

2. THE PRESENT VOLUME

The nine contributions included in the present volume contribute to the existing literature by focusing on emerging trends in State aid policy at both the national and the EU levels.²² The volume follows an interdisciplinary perspective, including contributions from both legal and economic scholars. For instance, while the chapter by Merola and Caliento analyzes the CJEU case law in relation to the definition of aid under Art. 107(1) TFEU, Heimler takes an economist's perspective to analyze the lack of an effect-based analysis in the definition of aid. Similarly, Bruzzone and Boccaccio as well as Parcu and Rossi discuss emerging trends in the enforcement of State aid rules in relation to State support schemes for transport and broadband infrastructures respec-

has State aid monitoring authority. After Cyprus joined the EU, the Commission has transferred the power to conduct a compatibility assessment to the Commission, while retaining competence over *ex ante* control of planned aid schemes with the conditions of the block exemption regulations. www.publicaid.gov.cy/publicaid/publicaid.nsf/csac03_en/csac03_en?OpenDocument accessed July 9, 2019.

²⁰ Case C-349/17, *Eesti Pagar AS v. Ettevõtlike Arendamise Sihtasutus* (2019) ECLI:EU:C:2019:172, paras 89–90.

²¹ *Supra*, 2012 Commission Communication on SAM, para. 20.c.

²² In relation to existing volumes regarding trends in State aid law see: H. Hofmann and C. Micheau (eds), *State Aid Law of the European Union* (Oxford University Press, 2016); A. Biondi, P. Eeckhout, and J. Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press, 2004).

tively, comparing the recent EU *acquis* in these industries and the economic rationale of such rules.

The second part of the volume is dedicated to the analysis of trends in State aid enforcement at the national level. In particular, Merchante and Monti discuss the remedies that national courts can adopt in cases involving private enforcement of State aid rules. The role played by national courts in State aid enforcement can sometimes lead to conflicts with the exclusive jurisdiction exercised by the Commission in State aid policy. In his contribution, Justice Scott analyzes an example of such conflict in the recent *Micula* judgment, a case that involves a conflict between national, EU, and public international law in relation to investor protection under bilateral investment treaties (BITs). By contrast, Donzelli and Willemot-Nieuwenhuys discuss the origins and use of the State aid cooperation tools: requests for information/opinion and *amicus curiae* briefs are the main instruments of coordination between national tribunals and the Commission in case of parallel State aid proceedings at the national and EU level. The book concludes with two case studies by Weinzierl and Piernas. They analyze how German and Spanish courts respectively have dealt with their task of enforcing State aid rules, as well as possible conflicts with Commission decisions.

3. EMERGING TRENDS IN STATE AID ENFORCEMENT

The nine contributions included in the present volume have identified a number of trends in State aid policy, both at the national and the EU level.

3.1 Evolving Nature of the Definition of Aid

The concept of aid has evolved constantly and the CJEU faces incessant calls to refine the meaning of State aid as new types of measures come under scrutiny. In their chapter, Merola and Caliento challenge the traditional view that the CJEU has constantly broadened the definition of aid in its case law.²³ By comparing the jurisprudence of the General Court (GC) and that of the European Court of Justice (ECJ), the authors conclude that the definition of aid has sometimes been stretched and sometimes shrunk by the EU Courts,

²³ See, for instance, P. Nicolaidis, “A Critical Review of the Commission Notice on the Notion of State Aid” 23(4) *Maastricht Journal of European and Comparative Law* (2016): 842; P. Nebbia, “Il concetto di aiuto di Stato.” In L.F. Pace (ed), *Dizionario sistematico del diritto della concorrenza* (Jovene, 2013) 497.

moving between these two extremes like a pendulum. The authors identify a number of reasons to explain this trend:

- (1) Member States constantly develop new forms of aid to escape the Commission's compatibility assessment. The Court of Justice is thus constantly required to review the definition of aid in relation to very specific measures, thus undermining the overall consistency of the concept of aid in its case law.
- (2) Claimants can challenge a Commission decision only in relation to the concept of aid, since the Commission enjoys a broad margin of discretion in the compatibility assessment under Art. 107(3) TFEU.
- (3) The GC has tried to develop new formulas in relation to the notion of aid, in order to adapt it to the new forms of aid measures put in place by the Member States. Nevertheless, the ECJ has usually rejected such an approach, rather stretching existing legal concepts. In view of the EU Courts' divergent views on the definition of aid, the General Court has often been overruled on appeal, creating legal uncertainty regarding the notion of aid. According to the authors, such legal certainty is visible in relation to the Notice on the Definition of Aid.²⁴ This soft law document was published in 2016 by the Commission in order to systematize existing CJEU case law concerning Art. 107(1) TFEU. However, the document rapidly became outdated due to the constant evolution of the CJEU case law on the definition of aid.

In his contribution, Heimler criticizes the lack of effects-based analysis in relation to the definition of aid. In its case law on Art. 107(1) TFEU, the CJEU has focused on the concepts of State resources, advantage, and selectivity, while introducing a low burden of proof in relation to the intracommunity trade condition as well as presuming a distortion of competition when the other conditions under Art. 107(1) TFEU are also fulfilled. According to the author, after the 2005 SAAP,²⁵ the Commission introduced an effect-based analysis in

²⁴ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946. OJ C 262/1, 19.7.2016.

²⁵ In the 2005 SAAP, the Commission mentioned for the first time the need to introduce a "refined economic approach" in State aid analysis. The meaning of "refined economic approach" is given in a Staff Working Paper published in 2009 by the Commission. *Supra*, State Aid Action Plan. Commission Staff Working Document, Common Principles for an Economic Assessment of the Compatibility of State Aid under Article 87.3. The document is available at http://ec.europa.eu/competition/consultations/2009_common_principles/index_en.html accessed July 9, 2019. The list of Commission notices and guidelines amended after the SAAP in order to introduce

all its guidelines, in order to balance the distortive effects and the efficiencies generated by an aid measure. However, such balancing takes place only at the final phase of the Commission review process rather than at the initial phase of the analysis – i.e., when deciding what measures represent an aid under Art. 107(1) TFEU. According to the author, due to the lack of effects-based analysis in CJEU case law on Art. 107(1), a large number of State measures have to be notified to the Commission, although they do not actually have any distortive effect on the competition in the market.

3.2 State Aid as an Instrument of EU Industrial Policy

According to Merola and Caliento, the EU founding fathers designed State aid policy as a “negative” instrument of integration, where Member States enjoyed a large margin of discretion in designing the aid measure. In other words, the Commission could only check if a notified aid fell within one of the justifications mentioned under Art. 107(3) TFEU, as codified in its soft law documents. On the other hand, the Commission could not advise the Member States where to invest their resources.

However, in recent years State aid policy has become an instrument of positive integration. The 2014 GBER in fact provides a long and detailed list of aid measures that are presumed to be compatible with the internal market.²⁶ This long list of horizontal aids steers State funding toward certain public objectives predetermined at the EU level. As noted by Bruzzone and Broccaccio in their contribution, SAM has thus *de facto* led to the development of an EU industrial policy, which coexists with national industrial policies.

Industrial policy, even when coordinated at the EU level, can sometimes distort free competition in the market. This is well explained by Parcu and Rossi in their chapter on the enforcement of State aid policy in the broadband sector. In line with the goal to foster the deployment of broadband networks in Europe announced in the 2012 Digital Agenda for Europe (DAE),²⁷ the 2013 State Aid Broadband Guidelines follow a rather lenient approach in relation to States’ financing of broadband infrastructures.²⁸ According to the authors,

a balancing test in State aid assessment is available at http://ec.europa.eu/competition/state_aid/reform/archive.html accessed July 9, 2019.

²⁶ *Supra*, Art. 1(1) GBER.

²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “The Digital Agenda for Europe—Driving European Growth Digitally,” [2012] COM(2012) 784 final.

²⁸ Communication from the Commission, EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks. OJ C 25/1, 26.1.2013.

such form of EU industrial policy might actually deincestivize private investments by market operators. The latter, in fact, may be encouraged to delay investment in new broadband infrastructures, waiting to receive public funding and aware of lenient State aid control in this regard. On the other hand, State support can sometimes lead to positive effects, such as the construction of new broadband infrastructures in underpopulated areas, where the operators will never find a sufficient number of users to finance the deployment of the new broadband services.

To sum up, SAM has increased the coordination of national industrial policies, establishing the basis for an EU industrial policy. However, like every industrial policy, even the EU industrial policy might go beyond what is needed to solve market failures, by thus distorting competition and discouraging innovation by market operators.

3.3 Private Enforcement of State Aid Law: The Glass Half Empty and Half Full

In their chapter, Merchante and Monti discuss the role played by national courts in private enforcement of State aid law. The authors broadly distinguish two main functions exercised by national courts in this regard: a prophylactic function (i.e., the court orders the granting authority either to stop the implementation of the measure or to recover the unlawful aid) and a restorative function (i.e., the court awards compensation to the harmed competitor of the aid beneficiary, negatively affected by the lack of aid notification to the Commission). Such functions derive from the direct effect of the standstill obligation under Art. 108(3) TFEU. According to the CJEU case law, such Treaty provision is clear, unconditional, and grants rights to individuals, and therefore it can be relied upon in national court proceedings.²⁹ As noted by the authors, the provision is couched in objective terms, in the sense that it defines the procedural obligations that fall upon Member States without making any explicit reference to the rights of third parties. Yet, this is precisely the provision that fuels private enforcement of State aid law before national courts. Unlike the general prohibition of State aid laid down by Article 107(1) TFEU, in fact, the CJEU has recognized that the standstill clause under Article 108(3) TFEU is a source of subjective rights for third parties.³⁰ To be more precise, the provision confers upon third parties (for example, competitors of the aid

²⁹ Case C-39/94, *Syndicat français de l'Express international (SFEI) and others v. La Poste and others* [1996] ECLI:EU:C:1996:285. Para. 39.

³⁰ Case 120/73, *Gebrüder Lorenz GmbH v Germany* [1973] ECLI:EU:C:1973:152. Para 8.

beneficiary) the right not to put up State aid measures unless and until when they are authorized by the Commission.

The actual number of private enforcement cases in national courts has long been disputed; in the absence of a database of national court rulings in State aid law, it was unclear how and to what extent the remedies provided by CJEU case law were actually applied by national courts. A recent study carried out on behalf of DG Competition has shed light on this question.³¹ The study identified 766 State aid judgments ruled by the national courts of the 28 EU Member States in the period 2007–17.³² In particular, the study has identified 172 rulings that concern public enforcement (i.e., enforcement of recovery decisions by national courts) and 594 private enforcement cases (i.e., cases concerning an alleged breach of the standstill obligation under Art. 108 TFEU).³³ Despite the increase in court litigation, there are very few instances in which national courts have concluded that unlawful aid was granted and hence remedies were awarded: in 66 per cent of the private enforcement cases identified by the study, the national court rejected the claim.³⁴ This trend is particularly evident in relation to damages claims: only in five rulings identified in the study did national courts award compensation due to the harm caused by a breach of the standstill obligation by a Member State (that is, less than 2 per cent of the private enforcement cases identified in the study).³⁵ The study revealed a number of reasons which may explain why national courts rarely award remedies in private enforcement cases.³⁶ Besides the lack of familiarity of State aid rules by national courts, the claimants usually do not put forward well-structured arguments to support their claims. In addition, it appears that national courts face difficulties in verifying the conditions concerning the notion of aid under Article 107(1) TFEU (for example, the application of the Market Economy Operator Principle, MEOP and whether the conditions of the GBER are met, as well as in applying the *Altmark* case

³¹ The study was carried out on behalf of DG Competition by a consortium including Spark Legal Network, European University Institute, Ecorys, and Caselex. The editors of the present volume were members of the EUI team in charge of analyzing the data collected by Spark via its network of national experts and writing the comparative findings of the study. European Commission, Study on the Enforcement of State Aid Rules and Decisions by National Courts. COMP/2018/001, published on 30 July 2019. The text of the study is available at http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html accessed July 30, 2019.

³² *Ibid*, Executive Summary.

³³ *Ibid*, Executive Summary.

³⁴ *Ibid*, section 2.4.

³⁵ *Ibid*, section 2.2.2.

³⁶ *Ibid*, section 2.4.

law to services of general economic interest.³⁷ Third, State aid claims often require national courts to assess the legality of the measure under different areas of law (for example, tax, administrative, contract law): the interaction of different legal regimes makes the evaluation of the aid measure more complex for the national judge. Fourth, national courts are often reluctant to order the recovery of the unlawful aid while the case is pending for compatibility assessment at the Commission. Finally, a State aid claim generally implies a rather high burden of proof for the claimant, especially in damages claims. In the latter category of cases, the plaintiff must prove that the challenged measure represents an unlawful aid not previously notified to the Commission and that the aid measure caused damage to the claimant. The breach of the standstill obligation may cause either a loss of profits and/or a loss of market share for the competitors of the aid beneficiary. In both cases, it can be quite challenging for the claimant to estimate the damage suffered during a long period when the unlawful aid was granted. In fact, exogenous factors may also have an impact on the profits and market share of the claimant.

To conclude, while the CJEU case law on the prophylactic and restorative functions of national courts in State aid law is quite well established and the number of private enforcement actions has increased in recent years, most of the claims are still rejected by national courts. Following the publication of the recent study, the Commission might consider whether any intervention (for example, revision of the 2009 Enforcement Notice)³⁸ might be needed to increase the number of successful private enforcement claims.

3.4 Parallel State Aid Proceedings: How to Handle Conflicts between the Commission and National Courts

The development of private enforcement of State aid law has opened the door to possible conflicts between the Commission and national courts. While the Commission has exclusive jurisdiction in carrying out the compatibility assessment under Art. 107(3) TFEU, the Commission shares with national courts the task of applying the cumulative conditions under Art. 107(1) TFEU. In cases of alleged unlawful aids, in fact, national courts have to verify if the challenged measure indeed fulfills the cumulative conditions under Art. 107(1), and thus if the measure breached the standstill obligation under Art. 108(3) TFEU. The conflict between the Commission and national courts may

³⁷ Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht* (2003) ECLI:EU:C:2003:415.

³⁸ Commission notice on the enforcement of State aid law by national courts, 2009/C 85/01, April 2009.

arise in case of parallel State aid proceedings: for instance, in the case a competitor brings a case to a national court asking for the recovery of the unlawful aid, while the Commission opens investigations concerning the same measure. Both the Commission and the national courts have thus to decide in parallel whether the measure indeed represents an unlawful aid. Taking into consideration the evolving definition of aid under Art. 107(1) discussed in the previous pages, a divergent assessment by the national court and the Commission in this regard is not a remote scenario.

In his contribution, Justice Scott discusses a specific example of such multilevel conflict by looking at the *Micula* case. As mentioned in the previous pages, the case represents an interesting conflict between national law, EU State aid rules, and the award by an arbitral tribunal established under the International Centre for Settlement of Investment Disputes (ICSID) convention (i.e., public international law).³⁹ In particular, the basic question discussed in the case is whether the award decided by the arbitral tribunal represented an aid that favored Micula (the harmed investor compensated by the ICSID arbitral tribunal).⁴⁰ The claimant sought to enforce the arbitral award before the Bucharest Tribunal in Romania, the High Court of England & Wales in the United Kingdom and a District Court in New York in the United States.⁴¹ Each of these States has ratified the ICSID Convention, which provides for the enforcement of the awards of arbitral tribunals established under that convention.

Nevertheless, in 2015 the Commission adopted a decision against Romania, considering the execution of the arbitral award as an unlawful aid.⁴² The decision was recently annulled by the General Court on procedural grounds,⁴³ and thus the case remains pending at the moment of writing. While the facts of the case are rather specific, since in *Micula* the unlawful aid was represented

³⁹ Convention establishing the International Centre for Settlement of Investments Disputes (ICSID), signed in Washington D.C. on October 14, 1966. Art. 54(1). The text of the ICSID convention is available at: <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx> accessed July 9, 2019.

⁴⁰ Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20. Final award decided on December 11, 2013. The text of the 2013 final award is available at www.italaw.com/cases/697 accessed July 9, 2019.

⁴¹ The main documents concerning the *Micula* legal saga in these jurisdictions are available at www.italaw.com/cases/697 accessed July 9, 2019.

⁴² Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania—Arbitral award *Micula v. Romania* of 11 December 2013. OJ L-232/43, 4.9.2015.

⁴³ Case T-624/15, *European Food SA and Others v. Commission* (2019) ECLI:EU:T:2019:423.

by ICSID arbitral award rather than by an aid measure directly adopted by the State institutions, *Micula* is an example of a more general trend in terms of possible conflicts between national courts and the Commission in case of parallel State aid proceedings.

In *Micula*, the Commission intervened via *amicus curiae* briefs in a number of national courts in Romania and the UK where the plaintiff asked for the recognition and execution of the arbitral award.⁴⁴ As noted by Donzelli and Willemot-Nieuwenhuys in their contribution, the Commission has rarely relied on *amicus curiae* briefs, for a number of reasons. First of all, the Commission's resources are limited, and thus it intervenes in court proceedings as *amicus curiae* only in important national cases. Second, the instrument is rather new: while the Commission has been empowered to act as *amicus curiae* in competition law since Reg. 1/2003,⁴⁵ in State aid law this tool has been introduced only by the 2015 Procedural Regulation.⁴⁶ Third, an *amicus curiae* brief is not binding and the national court can always ask for a (binding) ECJ preliminary ruling after hearing the Commission's views.

Similarly, in spite of the increasing number of private enforcement cases and parallel State aid proceedings, national courts rarely ask for information and opinions from the Commission.⁴⁷ According to a 2016 study commissioned by DG Competition, the number of judges who may potentially have to deal with State aid law is approximately 16,000 in the first instance, 5,000 for the intermediate instance (if applicable), and about 1,200 in the last instance.⁴⁸ Unlike competition law, the potential number of users of the State aid cooperation tool is thus very large. According to the findings of the abovementioned study on the enforcement of State aid law by national courts, most national judges that might be involved in State aid proceedings are still unaware of the existence

⁴⁴ http://ec.europa.eu/competition/court/amicus_curiae.html accessed July 9, 2019.

⁴⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Art. 15(3). OJ L 1/1, 4.1.2003.

⁴⁶ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union. Art. 29(2). OJ L 248/9, 24.9.2015.

⁴⁷ http://ec.europa.eu/competition/court/requests_information.html accessed July 9, 2019.

⁴⁸ J. Coughlan, W. Heusel, E. Szyszczak, V. Patrini, and A. Pauer, *Study on Judges' Training Needs in the Field of European Competition Law* (European Commission, 2016), <http://ec.europa.eu/competition/publications/reports/kd0416407enn.pdf> accessed July 9, 2019.

of the State aid cooperation tools; these tools should get more visibility among national judiciaries.⁴⁹

In their contribution, Donzelli and Willemot-Nieuwenhuys note that the 2015 Procedural Regulation does not include any provision similar to Art. 16 Reg. 1/2003, whereby national courts are required not to rule in a way that runs counter to a Commission decision. Nevertheless, the CJEU recognized in *Lübeck*,⁵⁰ as well as in *Lufthansa*,⁵¹ that “national courts must refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional.”⁵² In other words, the assessment of the aid definition by the Commission in a specific case is “binding” for national courts in case of parallel State aid proceedings, even if the Commission concluded that the measure did not represent an aid during the preliminary phase of investigation, by thus closing the case. In case of doubt, however, the national court can always ask for a preliminary ruling from the CJEU.⁵³

As mentioned above, the application of the definition of aid is a “shared competence” between the Commission and national courts, which are both subject to the (evolving) jurisprudence of the Court of Justice on Art. 107(1). In *Lufthansa* and *Lübeck*, the CJEU recognized the *de facto* primacy of the Commission assessment of the aid definition in case of parallel State aid proceedings. In his contribution, Weinzerl discusses how German courts have reacted to such case law. He notes that in the followup national judgment after *Lübeck*, the *Bundesgerichtshof* (German Federal Court of Justice, BGH) ruled that “it would presumably be contrary to the judicial independence of the national judge to hold that the judge is bound by a preliminary decision by an administrative authority like the European Commission.”⁵⁴ In other words, according to the BGH, the Commission’s assessment of the definition of aid would be binding for national courts only if expressed in a final decision (i.e., adopted after the second phase of investigations), not as a result of a preliminary interim decision adopted by the Commission after the first phase of the investigations. A similar view has been expressed by the *Bundesverwaltungsgericht* (German Supreme Administrative Court, BVerwG) in *Kletterhallen*.⁵⁵ According to the BVerwG, the Commission decisions adopted under Art. 4(3) Procedural Regulation are only based on

⁴⁹ *Supra*, 2019 study on the enforcement of State aid law by national courts. Executive summary.

⁵⁰ Case C-27/13, *Flughafen Lübeck* [2014] ECLI:EU:C:2014:240.

⁵¹ Case C-284/12, *Lufthansa* [2013] ECLI:EU:C:2013:755.

⁵² *Ibid*, para. 42.

⁵³ *Ibid*, para. 43.

⁵⁴ BGH, *Flughafen Lübeck*, MDR 2017, 844. Para. 38, 41.

⁵⁵ BVerwG, EuZW 2017, 355.

a preliminary assessment and the defendant does not have the possibility to challenge the Commission's assessment in court.⁵⁶ Therefore, similarly to the BGH, the BVerwG concluded that the Commission's assessment of the definition of aid is binding for national courts only when expressed in a final decision, at the end of the second phase of the Commission proceedings. In his contribution to the present volume, Weinzerl criticizes the rulings by the BGH and the BVerwG, which undermine *Lufthansa* and *Lübeck* case law and the principle of primacy of EU law. In particular, the author criticizes the fact that neither the BGH nor the BVerwG requested a preliminary ruling from the CJEU to verify whether their interpretation was correct, though under Art. 263 TFEU last instance courts "shall" ask the ECJ for a preliminary ruling in case an issue concerning the interpretation of EU law arises during the proceedings.

It is interesting to compare the approach followed by German higher courts in relation to the "binding" Commission assessment of the definition of aid with the approach followed by the Spanish Supreme Court, as discussed by Piernas in his chapter. In the legal saga involving the aid to the deployment of digital terrestrial television, the Spanish Supreme Court ruled that in case of parallel State aid proceedings, the national court might wish to wait for the final decision by the Commission.⁵⁷ While the Commission investigations are open, the national court can adopt interim measures to block the distortive effect of the unlawful aid. In particular, by referring to the list of remedies mentioned in the 2009 Enforcement Notice,⁵⁸ the Supreme Court concluded that the lower court could adopt an interim relief, ordering to freeze the funds in a blocked account until the adoption of the final Commission decision.

The growing number of private enforcement cases increases the chances of parallel State aid proceedings, and thus of possible conflicts between the Commission and national courts in relation to the definition of aid. In their contributions, Weinzerl and Piernas compare German and Spanish higher courts' suggestions in such a scenario: while the BGH and the BVerwG advised German courts to reassess the aid nature of a measure under Art. 107(1), independently of the interim Commission decision in the case, the Spanish Supreme Court suggested that the lower court stayed proceedings, waiting for the Commission's final decision in the case and granting interim relief in the meantime. The diverging approaches by German and Spanish courts in this regard show the lack of consensus among national courts on how

⁵⁶ *Ibid.*

⁵⁷ Spanish Supreme Court, Judgements of 16 July 2012 (6539/2011), 23 November 2012 (818/2012), 30 January 2014 (RC 1962/2012), and 17 July 2014 (2815/2013).

⁵⁸ *Supra*, 2009 Enforcement Notice.

to deal with parallel State aid proceedings, and they call for further guidance by the Commission and the CJEU in this regard.

3.5 National Recovery Legislation

In his chapter, Piernas analyses the 2015 legislation adopted in Spain to recover fiscal State aid.⁵⁹ According to the author, the legislation was adopted due to the previous backlog of Commission recovery decisions that the Spanish authorities had failed to enforce. In order to speed up the recovery process, the legislation considered the Commission recovery decision as directly enforceable by the Spanish tax authority. In addition, the legislation pointed out that the recovery should take place even if the challenged tax measure had not acquired the status of *res judicata*,⁶⁰ and the aid beneficiary could not ask for the deferral or payment in installments of tax debts resulting from the enforcement of the recovery decisions so as not to delay the full recovery of the aid.⁶¹ According to Piernas, the legislation was also adopted to comply with the case law of the Spanish Supreme Court, requiring the granting authorities to comply with due process principles during the recovery proceedings, such as safeguarding the right to be heard of the aid beneficiary and, in line with the 2015 Procedural Regulation, introducing a ten-year limitation period to order the recovery.⁶²

The scope of the Spanish legislation is limited to the recovery of fiscal aid. However, it represents an interesting example of an ongoing trend in different Member States. The recent study on the enforcement of State aid law by national courts has pointed out that a number of Member States either have adopted recovery legislation (Netherlands, Finland) or are in the process of adopting such law (Estonia).⁶³ Although this legislation broadly differs in terms of scope of application, administrative authorities involved, and procedural steps in the recovery process, it represents an emerging trend in relation to the enforcement of State aid rules at the national level. The adoption of a specific legal framework may increase legal certainty and reduce court litigation, thus ensuring the effective enforcement of the Commission recovery decisions.

⁵⁹ Law 34/2015 of 21 September 2015, partially amending General Taxation Law 58/2003, of December 17, 2003 ('LGT').

⁶⁰ *Ibid*, Art. 263 LGT.

⁶¹ *Ibid*, Art. 65 LGT.

⁶² *Supra*, Procedural Regulation 2015/1589, Art. 17(1).

⁶³ *Supra*, 2019 study on the enforcement of State aid law by national courts. Section 3.3.

To conclude, the chapters included in the present volume have identified a number of emerging trends in the enforcement of State aid policy, both at the national and at the EU level. Such trends clearly show the evolution of State aid policy, which has progressively changed its goals and enforcement pattern since the Treaty of Rome. The concept of aid and the role of State aid policy as an instrument of EU industrial policy are likely to lead to further CJEU case law and Commission decisions in the years to come. Similarly, the growing number of private enforcement cases and parallel State aid proceedings, and the adoption of national recovery legislation, are likely to attract further debate in the near future. Therefore, the present volume does not represent the final word on this matter: the trends observed in the present volume are likely to further develop in the years to come.