



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

Final Study

Prepared by



Competition

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

Final study

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## **Abstract**

This Final Study is the result of the 'Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)' (the 'Study'), carried out for DG Competition of the European Commission by Spark Legal Network, the European University Institute, Ecorys and Caselex, with the support of a network of national legal experts. The Study offers a comprehensive overview of the enforcement of State aid rules by national courts of the 28 Member States, identifying emerging trends and challenges and presenting best practices. It also provides insights on the use of cooperation tools by the Commission and national courts. In order to meet the objectives of the Study, the following tasks were carried out: Task 1 – Identify, classify and summarise the most relevant rulings rendered by national courts on State aid matters; Task 2 – Summary of the main findings at EU level; Task 3 – Identification of best practices; and Task 4 – Use of the cooperation tools by the Commission and the national courts. The Study includes 145 case summaries and 28 country reports in its annexes which are publicly available on a dedicated project website, including a user-friendly Case Database.

## **Executive Summary**

### **Introduction**

This document comprises the Final Study for the ‘Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)’ (the ‘Study’), carried out for DG Competition of the European Commission (the ‘Commission’) by Spark Legal Network (the ‘Data Collection Team’), the European University Institute (the ‘State Aid Team’); Spark Legal Network and the European University Institute are together referred to as: the ‘Study Team’), Ecorys (the ‘Cooperation Tools Team’) and Caselex (the ‘Editorial Team’) (together: the ‘Consortium’). The Consortium was supported by a network of national legal experts who were responsible for legal data collection and analysis on the enforcement of State aid rules at national level, producing case summaries and country reports.

The Study comprises four chapters. Chapter 1 includes the legal context, the objectives and the methodology of the Study. Chapter 2 presents a summary and analysis of State aid enforcement by national courts across the European Union (‘EU’), including the main trends with regard to the enforcement of EU State aid rules by national courts. Chapter 3 provides best practices in State aid enforcement by national courts across the EU. Chapter 4 focuses on the findings with regard to the use of cooperation tools by the Commission and national courts in relation to State aid cases. The Study includes four annexes that contain the details of the methodology and the results of the data collection.

### **Legal context**

Under Article 107(1) of the Treaty on the Functioning of the European Union (‘TFEU’), State aid granted by Member States of the European Union (‘Member States’) is prohibited. Under Article 108(3) TFEU, Member States must notify to the Commission any plan to grant new aid which fulfils the conditions under Article 107(1) TFEU. In addition, Member States are subject to a standstill obligation, whereby they cannot implement the aid measure before the Commission has completed the compatibility assessment of the notified aid. The Commission has the exclusive competence to assess whether an aid prohibited under Article 107(1) TFEU is or may be considered compatible with the internal market.

Under Article 263(1) TFEU, the Court of Justice of the European Union (‘CJEU’) has exclusive jurisdiction to review the legality of Commission decisions. Therefore, national courts of the Member States cannot review Commission State aid decisions. However, national courts are involved in the enforcement of State aid rules in relation to two types of legal proceedings<sup>1</sup>:

- Implementation of recovery decisions (i.e. public enforcement of State aid rules): once the Commission adopts a recovery decision (ordering a Member State to recover an incompatible aid previously implemented in breach of the standstill obligation), the national courts will be involved in the recovery proceedings.
- Enforcement of Article 108(3) TFEU (i.e. private enforcement of State aid rules): interested third parties can start an action in a national court in view of the direct effect of the standstill obligation under Article 108(3) TFEU. In particular, competitors can ask for the recovery of the aid implemented in breach of the

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<sup>1</sup> In the context of the present Study, a more detailed definition of ‘public’ and ‘private’ enforcement of State aid rules is provided in Section 1.4.3.

standstill obligation (i.e. unlawful aid), independently of the compatibility assessment carried out by the Commission. Finally, competitors can also start damages actions. In the context of private enforcement, national courts rule on whether the challenged measure fulfils the conditions to be considered State aid under Article 107(1) TFEU, thus representing unlawful aid, since it has not been notified to the Commission.

## **Objectives and methodology**

The objective of the Study was to provide the state of play of State aid enforcement by national courts in the EU. It therefore offers a comprehensive overview of the enforcement of State aid rules by national courts of the 28 Member States, identifying emerging trends and challenges, and presenting best practices. The Study looks at national enforcement cases, which were decided between 1 January 2007 and 31 December 2017, and includes important cases decided in 2018 (also referred to as: the 'Study Period'). It also provides insights on the use of cooperation tools by the Commission and national courts. In order to meet the objectives of the Study, the following tasks were carried out:

- Task 1 – Identify, classify and summarise the most relevant rulings rendered by national courts on State aid matters
- Task 2 – Summary of the main findings at EU level
- Task 3 – Identification of best practices
- Task 4 – Use of the cooperation tools by the Commission and the national courts

In Task 1, the Study Team, in cooperation with the national legal experts, identified and compiled a list of relevant rulings<sup>2</sup> adopted by national courts in the Member States in the Study Period (the full list of relevant rulings can be found in Annex 2). Such rulings have been identified in all but one Member State, i.e. Luxembourg. From the list of relevant rulings, the Study Team and the national legal experts selected a sample of rulings on the basis of their legal relevance<sup>3</sup> and novelty within the respective Member States and at EU level ('selected rulings').<sup>4</sup> Subsequently, the national legal experts drafted case summaries of the selected rulings, on the basis of a template created by the Study Team. They also created country reports for each Member State, again following a template, providing general conclusions on the state of play of State aid rules at national level (the country reports, including the selected rulings and the case summaries can be found in Annex 3). Additionally, during Task 1, the Editorial Team developed a project website and a Case Database. The project website is publicly available and contains the results presented in the Final Study, as well as a Case Database, and will be kept accessible for at least two years after publication of the Study. The Case Database comprises the 145 case summaries produced under this Study and offers visitors a broad range of search options to find and read the case summaries in a user-friendly way.

The execution of Task 1 formed the basis of Tasks 2 and 3 which were both undertaken by the State Aid Team (supported by the Data Collection Team). Task 2 consisted of

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<sup>2</sup> Relevant rulings are defined in the Tender Specifications of this Study (available at: <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=3191>, last accessed on 18.6.2019) as: "those rulings which bring about a significant development of State aid rules and enforcement of those rules either in the Member State or at Union level."

<sup>3</sup> 'Legal relevance' is described in the Tender Specifications of this Study (available at: <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=3191>, last accessed on 18.6.2019) as: "those rulings which decide on main legal issues of State aid enforcement, mere repetition of settled case-law is to be excluded."

<sup>4</sup> A total amount of 145 rulings was selected for the sample.

analysing and summarising the main findings with regard to the enforcement of EU State aid rules by national courts across the EU, in particular on the basis of the list of 766 relevant rulings, the 145 case summaries and 28 country reports produced under Task 1. The analysis covered both public and private enforcement of State aid rules and consisted of the elaboration of a number of statistics, as well as the identification of a number of qualitative trends, and a comparison with earlier relevant research. The objective of Task 3 was to identify a number of best practices in relation to the enforcement of State aid by the national courts of the Member States. In order to identify best practices, the State Aid Team developed a set of indicators to assess how a given jurisdiction performs: a) the speed with which cases are likely to be resolved as a result of the practice; b) the quality of coordination with parallel Commission procedures; c) the degree to which the remedies provide for adequate compensation; and d) the tools used for judicial dialogue. In the assessment, the State Aid Team looked not only at the practice, but also at the context in which it takes place (i.e. the relevant national judicial framework).

The objective of Task 4, carried out by the Cooperation Tools Team, was to undertake research, gathering knowledge of the use of and views on the cooperation tools provided for in Article 29 of the State aid Procedural Regulation.<sup>5</sup> In order to fulfil the research objectives for Task 4, various data collection methods were employed: desk research (using data available within the Commission), interviews with Commission staff, an online questionnaire addressed to judges at relevant courts (105 respondents, of which 78 were relevant to the Study), and interviews with several judges across the EU (27 interviews).

## **State aid enforcement by national courts**

In Chapter 2, the Consortium identifies a number of trends concerning public and private enforcement of State aid rules by national courts of the Member States. While public enforcement refers to disputes in national courts concerning recovery orders, private enforcement refers to court disputes arising from breaches of the standstill obligation under Article 108(3) TFEU.

The first trend identified in Chapter 2 concerns the overall increase in the number of judgments handed down by national courts during the period covered by the Study. A second trend concerns the increase in private enforcement cases, which have exceeded the number of public enforcement rulings. The Consortium has identified 172 cases of public enforcement of State aid rules and 594 private enforcement cases, thus making the number of private enforcement cases more than triple the number of public enforcement cases. The increase in the number and size of State aid measures put in place by Member States in the aftermath of the 2008 financial crisis may have contributed to the substantial increase in the number of private enforcement cases in the first half of the 2010s.

Despite the increase of court litigation, national courts have rarely concluded that unlawful aid has been granted and hence rarely awarded remedies. In 32% of the identified cases of public enforcement and in 66% of the identified cases of private enforcement, the national court rejected the claim. In public enforcement, this can be considered as a positive trend: it shows that national recovery orders are rarely successfully challenged in national courts. In particular, it is worth noting that only in five cases did the national courts adopt interim measures to suspend the enforcement of the recovery order (i.e. 2% of the public enforcement cases identified in the Study).

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<sup>5</sup> Council Regulation (EU) No 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, OJ L 248, 24.9.2015.

Consequently, it appears that Commission decisions are enforced by national authorities without facing the risk of lengthy national litigation, which might delay the effective aid recovery.

On the other hand, the low number of remedies awarded by national courts in the identified private enforcement cases calls for further reflection. National courts rarely either order the recovery of the unlawful aid or adopt interim measures to suspend the implementation of the aid measure. This trend is particularly evident in relation to damages claims: only in six of the identified relevant rulings did national courts award compensation due to the harm caused by a breach of the standstill obligation by a Member State (i.e. less than 1% of the private enforcement cases identified in the Study). The country reports reveal a number of reasons which may explain why national courts rarely award remedies in private enforcement cases. Firstly, besides the lack of familiarity with State aid rules among national courts, a number of national legal experts report that the claimants do not usually put forward well-structured arguments to support their claims. Secondly, it appears that national courts face difficulties in verifying the conditions concerning the notion of aid under Article 107(1) TFEU, under the GBER, as well as applying the CJEU case law in relation to *Altmark* and Market Economic Operator Principle (MEOP). Thirdly, a number of national reports stress that State aid claims often require national courts to assess the legality of the measure under different areas of law (e.g. tax, administrative, contract law); the interaction of different legal regimes makes the evaluation of the measure under State aid rules more complex. Fourthly, a number of national reports point out that national courts are often reluctant to order the recovery of the unlawful aid while the case is awaiting a compatibility assessment by 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 the entire period that the unlawful aid was in operation. In fact, exogenous factors may have an impact on the profits and market share of the claimant.

The increased familiarity of national judges with State aid rules may improve *via* the organisation of training programmes and advocacy activities organised by the Commission and national authorities. On the other hand, the number of successful damages claims might increase if national courts were to receive 'further guidance' in relation to the economic techniques concerning damages estimation in State aid cases. In this regard, it is worth noting that in 2013 the Commission published a Practical Guide, summarising the economic techniques concerning damages estimation in cases of private enforcement of EU competition rules.<sup>6</sup> This Practical Guide is a non-binding document, which specifically targets national courts and explains to national judges the steps followed by economists to quantify damages in a EU competition law cases in simple and accessible language. National judges increasingly rely on the Practical Guide, which is considered a useful framework to assess the reliability of the damage estimation put forward by the experts hired by the parties. The Consortium considers that such guidance can be seen as a positive example. It might even be contended that, if applied to State aid enforcement, it might increase the number of successful damages claims in national courts, thus supporting a growth in the number of cases of private enforcement of State aid rules.

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<sup>6</sup> Commission Staff Working Document, Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. Published in Strasbourg 11.6.2013, SWD (2013) 205.

## Best Practices in State aid enforcement

The trends identified in Chapter 2 suggest that State aid enforcement at national level is becoming more effective in most Member States. The best practices presented in Chapter 3 reveal that certain Member States are aware that amending national procedures may be vital to making State aid enforcement more effective. Many of these practices are designed to embed a 'culture' of enforcement of State aid rules among the national stakeholders (i.e. granting authorities, beneficiaries and third parties).

The Consortium has based its indicators for best practices on the information gathered from the country reports and case summaries identified in this Study. The best practices that the Consortium has subsequently discerned mainly concern national procedural rules and judicial practices which can contribute to reducing the length of the aid recovery proceedings after a Commission decision. In particular, the Consortium has identified seven best practices, divided in three categories:

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

In recent years, a number of Member States have adopted specific legal frameworks governing aid recovery. Although these laws broadly differ in terms of scope of application, administrative authorities involved and procedural steps in the recovery process, they represent a best practice 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 recovery decisions. Further best practices identified in relation to aid recovery are the inclusion of instructions about possible recovery proceedings in the administrative act granting the aid, as well as the adoption of internal penalties to sanction the national authorities if they do not enforce the Commission decision in a proper and timely manner. The latter best practice complements the financial penalties that the CJEU could impose on a Member State in the context of infringement proceedings, due to the lack of enforcement of a recovery decision.

Additionally, the Consortium considers the screening mechanisms introduced in a number of Member States as a best practice. Such mechanisms could work either *ex-ante* (i.e. a national authority provides a non-binding compatibility assessment to the granting authority, thus anticipating the likely Commission assessment of the aid measure before its notification) or *ex-post* (i.e. a national authority monitors the compatibility of aid measures already implemented with GBER,<sup>7</sup> *de minimis* Regulation<sup>8</sup> and the concept of aid, and it can eventually order the recovery of the unlawful aid without a Commission decision). The legality of the *ex-post* system of control has been

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<sup>7</sup> 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 156/1, 20.6.2017.

<sup>8</sup> 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.

recently confirmed by the CJEU in *Eesti Pagar*,<sup>9</sup> And is in line with the increased relevance of the GBER since State Aid Modernisation.<sup>10</sup> Finally, it is worth pointing out that the *ex-ante* mechanisms are based on non-binding opinions delivered by national authorities to the granting institution concerning the likely compatibility of the planned aid measure with State aid rules; such non-binding opinions do not replace the Commission's exclusive competence in carrying out the compatibility assessment under Article 107(2) and 107(3) TFEU and under the provisions adopted pursuant to Articles 93, 106(2), 108(2) and 108(4) TFEU.

At the institutional level, the Study points out as best practices the rules clarifying the jurisdiction of the courts in State aid disputes, as well as the principle of investigation in court proceedings. While the former best practice makes national judges more familiar with State aid rules, the latter aims at supporting the plaintiff in developing a claim in line with the remedies available under State aid rules, thus increasing the number of successful claims in national courts.

While the abovementioned best practices may provide helpful lessons, the principle of national procedural autonomy militates against some of them becoming more generally widespread. On the other hand, a number of the best practices simply create working practices that make State aid monitoring and enforcement smoother, and thus can easily be replicated in different Member States. In other words, the best practices identified in the present Study mostly concern judicial practices that could be easily applied by national courts, rather than requiring legislative intervention. Since the beginning of State Aid Modernisation, the Commission has set up a number of working groups bringing together representatives from both the Member States and the Commission, in order to discuss issues related to State aid enforcement.<sup>11</sup> The Commission could thus establish a working group to facilitate the exchange of best practices among the Member States' representatives. Within such a working group, the Member States could assist each other, in order to either refine existing policies (i.e. for the Member States that already apply one of the best practices) or in considering how far these practices could improve State aid enforcement in their country (i.e. for Member States that do not have such practices).

## **Use of the cooperation tools by the Commission and the national courts**

Based on the data gathered and the analysis presented in Chapter 4, the Consortium provides a number of key observations, and conclusions on the use of and views on the cooperation tools provided for in Article 29 of the State aid Procedural Regulation. The tools included in Article 29 are the request for information; the request for opinion; and *amicus curiae* observations.

National courts seem to rely on the cooperation tools on a moderate scale. In the Study Period, the Commission received at least seven requests for information. In that same period, the Commission provided at least 20 *amicus curiae* observations. Information on the requests for opinion is available since 2009. The Commission provided at least 21 opinions at the request of national courts since that year.

The Consortium has identified two main reasons for the limited use of cooperation tools. First of all, seeking guidance from the Commission regarding State aid-related questions does not seem to be the most likely approach for judges to take. The vast majority of

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<sup>9</sup> Case C-349/17, *Eesti Pagar AS v. Ettevõtjate Arendamise Sihtasutus* (2019) ECLI:EU:C:2019:172.

<sup>10</sup> [http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html) (last accessed on 18.6.2019).

<sup>11</sup> European Commission, Code of Best Practice for the conduct of State aid control procedures. OJ C 253/14, 19.7.2018, para. 89.

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

A second reason for the limited use of cooperation tools seems to relate to a lack of awareness of the existence of the cooperation tools among judges. Around 40% of judges participating in the online questionnaire indicated that they had not heard of any of the cooperation tools before participating in the Study. The judges interviewed confirmed this finding. Several of them also indicated that their fellow judges were not familiar with the tools' existence. Even judges who are aware of some of the tools, are often not familiar with all of them. This lack of awareness among judges on the existence of cooperation tools may be addressed by initiatives to raise awareness among judges.

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

The main potential endeavours that the Commission could undertake to support the use of cooperation tools include:

- Improving (the accessibility of) practical guidance on the cooperation tools procedures. Potential places where this information would be made available could be, in addition to the website of the Commission (DG Competition), locations that judges typically use for finding legal information, such as the EUR-Lex-website.
- The dissemination of information on and promotion of both State aid rules in general and the cooperation tools in particular, with the aim of increasing overall awareness among national judges. To achieve this, the Commission could introduce an online platform, which offers the opportunity for a judge to look up the required information as well as to ask a question online on a protected platform only accessible by judges.



# 1. Context and objectives of the Study

## 1.1. Introduction

This document constitutes the Final Study for the ‘Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)’ (also referred to as: the ‘Study’), carried out for DG Competition of the European Commission (also referred to as: the ‘Commission’) by Spark Legal Network (also referred to as: the ‘Data Collection Team’), the European University Institute (also referred to as: the ‘State Aid Team’; Spark Legal Network and the European University Institute are together also referred to as: the ‘Study Team’), Ecorys (also referred to as: the ‘Cooperation Tools Team’) and Caselex (also referred to as: the ‘Editorial Team’) (together also referred to as: the ‘Consortium’). The Consortium was supported by a network of national legal experts who were responsible for legal data collection and analysis on the enforcement of State aid rules at national level, producing case summaries and country reports.

This Final Study starts with an introductory chapter (the current Chapter 1) which includes the legal context, the objectives and a summary of the methodology applied throughout the Study. Chapter 2 presents a summary and analysis of State aid enforcement by national courts across the European Union (also referred to as: the ‘EU’), comprising the main trends with regard to the enforcement of EU State aid rules by national courts across the EU. Chapter 3 provides best practices in State aid enforcement by national courts across the EU. Chapter 4 focuses on the findings with regard to the use of cooperation tools by Commission and national courts in relation to State aid rules.

The following annexes are attached to this Study:

- **Annex 1: Technical details:**  
Detailed methodology and supporting materials.
- **Annex 2: List of relevant rulings on State aid matters<sup>12</sup>:**  
Covering 27 Member States<sup>13</sup>, contained in a spreadsheet.
- **Annex 3: Country reports:**  
Each of the 28 country reports contains general conclusions on the state of play of State aid rules at national level, a list of the relevant rulings rendered by the Member State's courts, and summaries of a selected sample of rulings (also referred to as: ‘selected rulings’).<sup>14</sup>
- **Annex 4: Methods and evidence of data collection for Task 4**  
(on the use of cooperation tools by the Commission and national courts).

### 1.2.1. Introduction to EU State aid rules

Under Article 107(1) of the Treaty on the Functioning of the European Union (also referred to as: the ‘TFEU’), State aid granted by Member States of the European Union (also referred to as: ‘Member States’) is prohibited. However, aid is or may be

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<sup>12</sup> Relevant rulings are defined in the Tender Specifications of this Study (available at: <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=3191>, last accessed on 18.6.2019) as: “those rulings which bring about a significant development of State aid rules and enforcement of those rules either in the Member State or at Union level.”

<sup>13</sup> No relevant rulings as defined under this Study were identified in Luxembourg.

<sup>14</sup> As no relevant rulings as defined under this Study were identified in Luxembourg, no list of relevant rulings or case summaries are included in the country report for this country.

considered compatible with the internal market under Article 107(2) and (3), and under the provisions adopted pursuant to Articles 93, 106(2), 108(2) and 108(4) TFEU.

Under Article 107(1) TFEU, a State measure is considered 'State aid' when the following cumulative conditions are met:<sup>15</sup>

- The aid is granted to either one or a group of 'undertakings' - i.e. any public support granted to individuals is outside the scope of State aid control. An undertaking is broadly defined by the case law of the Court of Justice of the European Union (also referred to as: the 'CJEU') as "any entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed".<sup>16</sup>
- The aid is granted "by a Member State or through State resources".<sup>17</sup> The aid, therefore, can be granted by central, regional or local State authorities, as well as by State-owned undertakings.
- The aid is 'selective' – i.e. the aid is discriminatory, and thus only a single/limited number of products and/or undertakings within the internal market benefit from the aid.
- The aid creates an 'advantage' for the beneficiary undertaking. The aid can take 'any form' – i.e. a grant, tax rebate, loan/State guarantee at an interest rate more favourable than under market conditions. When the existence of an advantage is not self-evident, like in the case of a loan or State guarantee, the advantage will be assessed on the basis of the 'Market Economic Operator Principle' (MEOP). The test follows this logic: would a market operator grant a loan/State guarantee to the beneficiary undertaking at the same conditions as the Member State? If the answer is positive, there is no State aid, since the State in such case acts like a market economic operator.
- The aid "affects trade between Member States".<sup>18</sup> The condition has been broadly interpreted by CJEU case law to include any aid that could potentially/indirectly affect trade between Member States.
- The aid "distorts or threatens to distort competition" in the internal market. This condition is usually presumed to be satisfied when the previous cumulative conditions are fulfilled.

Under Article 108(3) TFEU, Member States must notify to the Commission any plan to grant new aid that fulfils the conditions under Article 107(1) TFEU. In addition, Member States are subject to a standstill obligation, whereby they cannot implement the aid measure before the Commission has completed the compatibility assessment of the notified aid. The Commission, in fact, has the exclusive competence to assess whether aid prohibited under Article 107(1) TFEU is or may be considered compatible with the internal market under Article 107(2) and (3) and under the provisions adopted pursuant to Articles 93, 106(2), 108(2) and 108(4) TFEU.

Under Article 263(1) TFEU, the CJEU has exclusive jurisdiction to review the legality of Commission decisions. Therefore, national courts of the Member States cannot review the Commission State aid decisions. However, according to the 2009 Commission Notice on the enforcement of State aid rules by national courts (also referred to as: the '2009

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<sup>15</sup> Further details about the notion of State aid under Article 107(1) TFEU, as interpreted by CJEU case law, is provided in the 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. OJ C 262/1, 19.7.2016.

<sup>16</sup> Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH* (1991) ECLI:EU:C:1991:161, para. 21.

<sup>17</sup> Article 107(1) TFEU.

<sup>18</sup> Article 107(1) TFEU.

Enforcement Notice'), national courts are involved in the enforcement of State aid rules in relation to two types of legal proceedings:<sup>19</sup>

- Implementation of recovery decisions (i.e. public enforcement of State aid rules): once the Commission adopts a recovery decision (ordering a Member State to recover incompatible aid previously implemented in breach of the standstill obligation), the national courts will be involved in the recovery proceedings.
- Enforcement of Article 108(3) TFEU (i.e. private enforcement of State aid rules): interested third parties can start an action in a national court in view of the direct effect of the standstill obligation under Article 108(3) TFEU. In particular, competitors can ask for the recovery of the aid implemented in breach of the standstill obligation (i.e. unlawful aid), independently of the compatibility assessment carried out by the Commission. Finally, competitors can also start damages actions. In the context of private enforcement, national courts rule on whether the challenged measure fulfils the conditions to be considered State aid under Article 107(1) TFEU and thus it represents unlawful aid, having not been notified to the Commission.

The present Study covers both public and private enforcement of State aid rules by national courts of the Member States.<sup>20</sup>

### 1.2.2. Public enforcement of State aid rules

When the Commission adopts a recovery decision, the Member State concerned "...shall take all the necessary measures to recover the aid from the beneficiary."<sup>21</sup> The aid beneficiary may try to avoid the implementation of the recovery decision by challenging the recovery order or any other implementing act adopted by the national authorities, before a national court. In particular, national courts fulfil a number of functions in the context of the implementation of the recovery decision:

- Quantification of the State aid to be recovered: The Commission is not required to quantify the exact amount of the aid to be recovered in its decision. The latter is a task usually left to national authorities. Recovery shall cover the time from the date when the aid was put at the disposal of the beneficiary until the moment of the effective recovery. The amount to be recovered shall bear interest until the moment of the effective recovery.<sup>22</sup> Courts may be called upon to adjudicate on any resulting dispute between the beneficiaries and the State in relation to same.
- Identification of the aid beneficiary: National authorities may have to identify the aid beneficiary.<sup>23</sup> This might be a complex task in case the beneficiary had been either acquired by another firm or split into different firms. Similarly, the national authorities need to identify both the direct and indirect aid beneficiaries from

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<sup>19</sup> Commission Notice on the enforcement of State aid Law by national courts. OJ C 85/1, 09.04.2009. Section 2.2 and 2.3.

<sup>20</sup> In the context of the present Study, a more detailed definition of 'public' and 'private' enforcement of State aid rules is provided in Section 1.4.3.

<sup>21</sup> Council Regulation (EU) No 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. OJ L 248/9, 24.9.2015. Article 16(1).

<sup>22</sup> *Ibid*, Article 16(2).

<sup>23</sup> *Ibid*.

whom the aid should be recovered.<sup>24</sup> Here too, litigation in a national court is possible if there is a dispute as to the identification of the beneficiary.

- Suspension of the recovery procedure: National courts do not have jurisdiction to review the legality of the Commission decision.<sup>25</sup> In addition, challenging the decision before the General Court of the European Union (also referred to as the 'GC') and the CJEU does not have a suspensory effect under Article 278 TFEU. Nevertheless, in *Atlanta*<sup>26</sup> and *Zuckerfabrik*,<sup>27</sup> the CJEU ruled that a national court can order the suspension of the recovery decision in exceptional circumstances. In particular, in these rulings the CJEU identified four cumulative conditions to justify the suspension by a national court of the implementation of the recovery decision:<sup>28</sup>
  - a) The national court has "serious doubts" about the validity of the Commission decision. The national court should refer a request for a preliminary ruling to the CJEU, unless the Commission decision has already been challenged before the CJEU.
  - b) "There is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief."
  - c) The national court takes "due account of the interest of the EU".
  - d) The national court must "respect the CJEU case law".
- Indirect challenges against a Commission decision: Member States can directly challenge the legality of the Commission decisions as 'privileged actors' under Article 263(4) TFEU.<sup>29</sup> In accordance with the *Plaumann* test, the aid beneficiary can challenge the Commission decision under Article 263(4) second limb if they are individually concerned by a decision "by reason of certain attributes which are peculiar to them or by reason of circumstance in which they are differentiated from all other persons".<sup>30</sup> By contrast, competitors rarely fulfil the conditions under Article 263(4) second limb to have legal standing in accordance with the *Plaumann* test.<sup>31</sup> The CJEU has recently 'softened' the conditions of legal standing of the competitors of the aid beneficiary in *Montessori*.<sup>32</sup> In the judgment, the CJEU interpreted the meaning of Article 263(4) third limb in the field of State aid rules. The provision, introduced by the Lisbon Treaty, grants to natural and legal persons the *locus standi* to challenge at the GC "...a regulatory

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<sup>24</sup> In relation to the concept of indirect aid beneficiary, see T-424/05, *Italy v. Commission* (2009), ECLI:EU:T:2009:49.

<sup>25</sup> Case C-188/92, *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* (1994) ECLI:EU:C:1994:90, para. 17.

<sup>26</sup> Case C-465/93, *Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft* (1991) ECLI:EU:C:1995:369.

<sup>27</sup> Case C-143/88, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* (1991) ECLI:EU:C:1991:65.

<sup>28</sup> *Supra*, Case C-465/93, para. 51. C-143/88, para. 33.

<sup>29</sup> With regard to State aid rules, the recovery decision is addressed to the Member State granting the aid. Therefore, the aid beneficiary and its competitors can challenge the decision only if they are direct and individually concerned in accordance with the *Plaumann* test.

<sup>30</sup> Case C-25/62, *Plaumann & Co. v. Commission* (1963) ECLI:EU:C:1963:17.

<sup>31</sup> For instance, in *Bupa* the GC recognised *Bupa locus standi* to challenge the Commission decision not to raise objections on the Irish Risk Equalisation Scheme (RES); the RES scheme was considered by the Commission a Service of General Economic Interest (SGEI) that did not involve State aid under Article 107(1) TFEU. *Bupa* was the only competitor of VHI, the main beneficiary of RES. According to the GC, *Bupa* was directly and individually concerned by the Commission decision in accordance with the *Plaumann* test, since *Bupa* was the only VHI competitor in the market of Private Medical Insurances (PMIs). *Bupa* is a good example of the high burden of proof that competitors of the aid beneficiary have to satisfy in order to have *locus standi* to challenge a Commission decision under Article 263(4) second limb.

Case T-289/03, *Bupa and others v. Commission* (2008) ECLI:EU:T:2008:29, para. 63-84.

<sup>32</sup> C-622/16 P, *Scuola Elementare Montessori v. Commission* (2018) ECLI:EU:C:2018:873.

act which is of direct concern to them and does not entail implementing measures". In *Montessori*, the CJEU recognised that Commission State aid decisions are, subject to certain conditions, 'regulatory acts'<sup>33</sup> Therefore, competitors will be able in the future to rely on this recent case law to challenge Commission decisions.

In addition, in view of the traditional restrictive wording of the *Plaumann* test and in order to guarantee judicial redress to the aid beneficiary, in *Atzeni* the CJEU recognised that in case the plaintiff does not fulfil the conditions of *locus standi* under Article 263(4) second limb TFEU, it could indirectly challenge the legality of the Commission decision before a national court.<sup>34</sup> In line with *Atlanta* and *Zuckerfabrik* case law,<sup>35</sup> in such case the national court would refer a request for a preliminary ruling to the CJEU in relation to the legality of the recovery decision. However, in view of the recent *Montessori* ruling, *Atzeni* case law may become less relevant: competitors may rely on the *Montessori* ruling to claim legal standing at the GC.

- Aid recovery in the context of insolvency proceedings: An alternative to full recovery of the unlawful/incompatible aid is the liquidation of the beneficiary.<sup>36</sup> Insolvency procedures are carried out in accordance with national law. However, the CJEU has elaborated a number of general principles that should guide national courts in insolvency procedures involving the recovery of incompatible/unlawful aid:
  - a) The beneficiary's assets should be sold in an open and transparent manner.<sup>37</sup>
  - b) The insolvency procedure must lead to the cessation of business activities of the aid beneficiary.<sup>38</sup>
  - c) In the context of the insolvency procedures, the State aid claim should be registered on the basis of the appropriate ranking.<sup>39</sup>
  - d) National courts must ensure that there is no economic continuity with the successor company. The successor company is liable to pay back the aid only if there is economic continuity with the aid recipient. Unless the original beneficiary paid back the full amount of the aid, in fact, that amount should be registered in the schedule of liabilities and recovered in the context of the insolvency procedures.<sup>40</sup>
  
- Assessing the impossibility to recover the aid: As mentioned above, the insolvency of the aid beneficiary is not a justification to avoid the implementation of the recovery decision. According to the CJEU case law, recovery can be avoided only when it is "absolutely impossible".<sup>41</sup> Nevertheless, "political and legal difficulties" faced by Member States in the context of the recovery procedure do not represent a valid justification to avoid the implementation of the Commission decision.<sup>42</sup>

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<sup>33</sup> *Ibid*, para. 35.

<sup>34</sup> Case C-346/03, *Giuseppe Atzeni and Others, Marco Scalas and Renato Lilliu v. Regione autonoma della Sardegna* (2006) ECLI:EU:C:2006:130, Para. 30-34.

<sup>35</sup> *Supra*, Case C-465/93, para. 51. C-143/88, para. 33.

<sup>36</sup> Case C-42/93, *Spain v. Commission* (1994) ECLI:EU:C:1994:32.

<sup>37</sup> Case C-277/00, *Germany v. Commission* (2004) ECLI:EU:C:2004:238.

<sup>38</sup> *Supra*, 2009 Enforcement Notice, para. 66.

<sup>39</sup> Case C-142/87, *Belgium v. Commission* (1990) ECLI:EU:C:1990:125.

<sup>40</sup> *Supra*, 2009 Enforcement Notice, para. 67.

<sup>41</sup> Case 94/87, *Commission v. Germany* (1989) ECLI:EU:C:1989:46, para. 7.

<sup>42</sup> *Ibid*, para. 10.

- Assessing the recovery time limit: in view of the principle of legal certainty, the State aid Procedural Regulation defines a time limit of 10 years for the recovery of unlawful aid.<sup>43</sup> Such time limit is counted from the moment the unlawful aid is granted to the beneficiary; the time limit is interrupted if the Commission opens investigations concerning the unlawful aid.<sup>44</sup> Therefore, national courts might be called on to assess claims concerning the impossibility of aid recovery put forward by the beneficiary concerning the expiry of the 10 years' time limit.

In terms of the applicable EU *acquis*, the national courts will primarily be guided by the recovery decision concerning the individual unlawful/incompatible aid which they must enforce at the national level. Secondly, national courts will be guided by CJEU case law, defining their tasks in relation to public enforcement of State aid rules. Finally, the national courts may also refer to the Commission Recovery Notice.<sup>45</sup>

From a procedural point of view, on the other hand, recovery takes place "... in accordance with the procedures under the national law of the Member State concerned" (i.e. principle of procedural autonomy).<sup>46</sup> In particular, the courts that have jurisdiction to hear disputes concerning recovery orders implementing a Commission decision can vary from country to country. However, on the basis of the principles of equivalence and effectiveness, national procedural rules cannot undermine the effective enforcement of the recovery decision.<sup>47</sup>

### 1.2.3. Private enforcement of State aid rules

Under Article 108(3) TFEU, Member States cannot implement an aid measure before its final approval by the Commission (i.e. standstill obligation). In *SFEI*, the CJEU recognised the horizontal direct effect of Article 108(3) – i.e. any affected party can request before a national court the recovery of the aid disbursed in breach of the standstill obligation (i.e. unlawful aid).<sup>48</sup>

As mentioned above, national courts cannot assess the compatibility of the aid.<sup>49</sup> Nevertheless, national courts must assess whether a State measure qualifies as 'State aid', and thus determine if it was implemented unlawfully. In particular, national courts check if the aid fulfils:

- The cumulative conditions under Article 107(1) TFEU: In this regard, the national court will have to take into consideration the CJEU case law on Article 107(1) TFEU, as codified by the 2016 Commission Notice on the Notion of State aid.<sup>50</sup>

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<sup>43</sup> *Supra*, 2015 State aid Procedural Regulation, Article 17(1).

<sup>44</sup> *Supra*, 2015 State aid Procedural Regulation, Article 17(2).

<sup>45</sup> Notice from the Commission, Towards an Effective Implementation of Commission Decisions Ordering Member States to Recover Unlawful and Incompatible State Aid. OJ C 272/4, 15.11.2007.

At the timing of writing the Study, the 2007 Recovery Notice is subject to a public consultation in order to be reviewed.

[http://ec.europa.eu/competition/consultations/2019\\_recovery\\_notice/index\\_en.html](http://ec.europa.eu/competition/consultations/2019_recovery_notice/index_en.html) (last accessed on 5.3.2019).

<sup>46</sup> *Supra*, 2015 State aid Procedural Regulation, Article 16(3).

<sup>47</sup> Case C-368/04, *Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others* (2006) ECLI:EU:C:2006:644, para. 45.

<sup>48</sup> "The involvement of national courts in State aid proceedings is the result of direct effect of the standstill obligation under Article 108(3) TFEU."

*Supra*, Case C-39/94, para. 39.

<sup>49</sup> *Supra*, Case C-188/92, para. 17.

<sup>50</sup> *Supra*, Commission Notice on the notion of State aid.

- The General Block Exemption Regulation (GBER): Aid schemes that fulfil the GBER conditions are presumed to be compatible, and thus they do not need to be notified to the Commission.<sup>51</sup> National courts are empowered to assess the compliance of State aid measures with the GBER.
- The State aid *de minimis* Regulation: Under the *de minimis* Regulation, aid measures below EUR 200,000 granted during a period of three fiscal years are considered to be “too small” to have a distortive impact on the competition in the internal market under Article 107(1) TFEU, and thus they do not need to be notified to the Commission.<sup>52</sup> Such threshold is increased to EUR 500,000 in relation to *de minimis* aid granted in the context of Services of General Economic Interest (SGEI).<sup>53</sup>
- ‘Existing aid’: State aid measures granted by a Member State before joining the EU or previously approved by the Commission are considered existing aid.<sup>54</sup> Under Article 108(1) TFEU, the Commission, in cooperation with the Member States, constantly monitors existing aid. In particular, the Commission can ask for the modification of the aid measure if the conditions in the market have changed, and thus the measure is not needed anymore.<sup>55</sup> On the other hand, existing aid measures are not unlawful and thus they cannot be subject to private enforcement claims in national courts. National courts, therefore, may verify if a measure qualifies as ‘existing aid’, but the Commission has exclusive competence to ask for modifications/abolition of the aid measure in view of new developments in the market.

Besides ordering the recovery of the unlawful aid, national courts can adopt interim measures to suspend the implementation of unlawful aid (e.g. ordering the granting authority to suspend the implementation of unlawful aid).<sup>56</sup> The objective of the interim injunction is to protect the rights of the claimant during the court proceedings.<sup>57</sup>

In order to guarantee the effective recovery of the unlawful aid, the national court should also order the recovery of the interest earned by the beneficiary.<sup>58</sup> In other words, the recovery should not be limited to the nominal value of the aid, but it should also cover the financial advantage that the beneficiary gained from the aid. The recovery of interest aims at forfeiting the time advantage enjoyed by the aid beneficiary. The ‘advantage’ is equivalent to the difference between what the aid beneficiary could have obtained in the market and the cost of its financing under the aid measure concerned.<sup>59</sup> The interest accrues from the moment the aid was at the disposal of the beneficiary until the effective recovery of the aid.<sup>60</sup> National courts will rely on national rules on the calculation of the applicable interest rate.<sup>61</sup> However, due to the principles of equivalence and effectiveness, the application of national rules should not lead to the

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<sup>51</sup> 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 156/1, 20.6.2017.

<sup>52</sup> 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.

<sup>53</sup> Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest Text with EEA relevance. OJ L 114/8, 26.4.2012.

<sup>54</sup> *Supra*, 2015 State aid Procedural Regulation, Article 21.

<sup>55</sup> *Supra*, 2015 State aid Procedural Regulation, Article 22-23.

<sup>56</sup> 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. 52.

<sup>57</sup> *Supra*, Case C-368/04, para. 46.

<sup>58</sup> *Supra*, 2009 Enforcement Notice, para. 37.

<sup>59</sup> *Supra*, 2009 Enforcement Notice, para. 38.

<sup>60</sup> *Supra*, 2009 Enforcement Notice, para. 41.

<sup>61</sup> *Supra*, 2009 Enforcement Notice, para. 61.

calculation of a lower interest rate in comparison to the rate calculated by the Commission in similar circumstances.<sup>62</sup> Finally, as ruled by the CJEU in *CELF*, the recovery of the interest is independent from the compatibility assessment; recovery of the interest should always take place even if the unlawful aid has been declared compatible by the Commission.<sup>63</sup>

Besides the recovery of the interest, in *SFEI* the CJEU recognised that the competitors of the beneficiary can be entitled to receive compensation due to the damage caused by the unlawful aid.<sup>64</sup> Such compensation should be paid by the granting institution, rather than by the beneficiary, since the latter is not liable for the lack of compliance with the notification obligation.<sup>65</sup> The notification to the Commission is, in fact, an obligation that falls entirely on the national authorities. Therefore, the conditions for obtain damages for a breach of State aid rules are the equivalent to State liability for breach of Union law. In *Francoovich*,<sup>66</sup> the CJEU recognised for the first time that Member States may be liable to pay compensation to individuals due to the damage caused by the lack of implementation of an EU Directive. In *Brasserie du Pêcheur*,<sup>67</sup> the CJEU introduced general criteria to assess Member State liability for breach of Union law: the breached Union law should confer rights on individuals; there is “serious breach” of Union law; there is a “causal link” between the breach and the damage suffered by the plaintiff. With regard to State aid rules, the standstill obligation under Article 108(3) TFEU grants rights to individuals and lack of compliance by a Member State is considered a “serious breach” of Union law. The major challenge faced by the plaintiff is represented by the damage quantification and by showing the existence of a causal link between the damage suffered and the lack of compliance with the standstill obligation. Finally, competitors might receive compensation from the aid beneficiary if this type of action is allowed under national law.<sup>68</sup>

The last type of remedy involving private enforcement of State aid rules concerns tax measures imposed by Member States to finance an unlawful State aid measure. In *Streekgewest*,<sup>69</sup> the CJEU recognised that a third party can challenge its tax burden when the tax payment “forms an integral part of the unlawful State aid measure”.<sup>70</sup> In particular, the claimant can challenge the unlawful aid even if it is not a competitor of the aid beneficiary, and thus even if it is not directly affected by the unlawful aid. On the contrary, a third party cannot obtain from a national court an exemption from the payment of a tax which is equivalent to the unlawful aid. Such exemption, in fact, would broaden the number of beneficiaries of the unlawful aid, rather than reduce it.<sup>71</sup> Such exemption could be granted under national non-discrimination and unfair competition law.

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<sup>62</sup> In its recovery decision, the Commission calculates the applicable interest rate concerning an unlawful/incompatible aid on the basis of the formula provided by Article 9 of the Regulation No 794/2004; 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 EC Treaty. OJ L 140/1, 30.4.2004.

<sup>63</sup> Case C-199/06, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)* (2008) ECLI:EU:C:2008:79, para. 52 and 55.

<sup>64</sup> *Supra*, Case C-39/94, para. 72.

<sup>65</sup> *Supra*, Case C-39/94, para. 74.

<sup>66</sup> Case C-6/90, *Andrea Francoovich and Danila Bonifaci and others v Italian Republic* (1991) ECLI:EU:C:1991:428.

<sup>67</sup> Case C-46/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (1996) ECLI:EU:C:1996:79.

<sup>68</sup> *Supra*, 2009 Enforcement Notice, Section 2.2.5.

<sup>69</sup> Case C-174/02, *Streekgewest Westelijk Noord-Brabant v. Staatssecretaris van Financiën* (2005) ECLI:EU:C:2005:10.

<sup>70</sup> *Ibid*, para. 21.

<sup>71</sup> *Supra*, Case C-368/04, para. 49.



The EU *acquis* does not harmonise the national procedural rules followed by national courts. In accordance with the principle of procedural autonomy, in fact, national rules define which courts have jurisdiction in recovery proceedings and damages claims, as well as the procedural rules which are applicable.<sup>72</sup> However, in view of the principle of equivalence and effectiveness, national courts could set aside certain national procedural rules that make the enforcement of State aid rules *de facto* impossible.<sup>73</sup> The following table summarises the relevant EU *acquis* and types of remedies available in relation to the two types of enforcement proceedings.

**Table 1: EU State aid *acquis* and types of remedies available**

Type of proceedings	Remedies	Relevant EU <i>acquis</i>
Public enforcement – recovery of unlawful/incompatible aid	Recovery order of the unlawful/incompatible aid. Issues to be assessed by national courts: <ul style="list-style-type: none"> <li>▪ Quantification of the aid to be recovered and applicable interest;</li> <li>▪ Identification of the aid beneficiary;</li> <li>▪ Requests of aid recovery suspension;</li> <li>▪ Indirect challenges against a Commission decision;</li> <li>▪ Aid recovery in the context of insolvency proceedings;</li> <li>▪ Assessing the impossibility of aid recovery.</li> </ul>	<ul style="list-style-type: none"> <li>▪ CJEU case law;</li> <li>▪ Recovery decision;</li> <li>▪ Commission Recovery Notice.</li> </ul>
Private enforcement - enforcement standstill obligation	<ul style="list-style-type: none"> <li>▪ Recovery order in relation to unlawful aid;</li> <li>▪ Interim measures;</li> <li>▪ Recovery of the interest;</li> <li>▪ Damages to third parties;</li> <li>▪ Reimbursement of the taxes paid for financing unlawful aid.</li> </ul>	<ul style="list-style-type: none"> <li>▪ CJEU case law</li> <li>▪ General Block Exemption Regulation (GBER);</li> <li>▪ <i>de minimis</i> Regulations;</li> <li>▪ Commission Enforcement Notice;</li> <li>▪ Commission Notice on the Notion of State Aid;</li> </ul>

### 1.3. Objectives of the Study

The aim of this Study is to provide the state of play of State aid enforcement by national courts in the EU. It therefore offers a comprehensive overview of the enforcement of State aid rules by national courts of the 28 Member States, identifying emerging trends and challenges, and presenting best practices. The Study looks at national enforcement cases which were decided between 1 January 2007 and 31 December 2017. However, the Study also includes 33 important rulings that were decided in 2018. The temporal coverage of the Study is hereinafter also referred to as: the ‘Study Period’. It also provides insights on the use of cooperation tools by the Commission and national courts.

<sup>72</sup> *Supra*, Case C-368/04, para. 45.

<sup>73</sup> Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (1978) ECLI:EU:C:1978:49.

More specifically, the Study focusses on:

- Enforcement of the standstill obligation by national courts  
On the basis of country statistics, the Study analyses trends in private enforcement of State aid rules at national level.
- Enforcement of the recovery decisions by national courts  
The case summaries and country reports include information on how recovery decisions have been implemented by national authorities. In particular, the Study identifies possible correlations between the average time of aid recovery in the different Member States and the applicable procedural framework, in order to elaborate best practices that could be extended to the other Member States.
- Interim measures  
The Study discusses the role of interim injunctions in private enforcement of State aid rules.
- Difficulties faced by national courts in the enforcement of State aid rules.  
An analysis of national case law has allowed the Study to set out the difficulties faced by national judges in the enforcement of State aid rules.
- Identification of the best practices in State aid enforcement  
On the basis of the information gathered, the Study elaborates a number of best practices regarding State aid enforcement.
- Cooperation tools between national courts and the Commission  
The Study provides insight into the actual use of and views on the cooperation tools by national courts.

In order to meet the objectives as set out above, the Consortium carried out the following tasks:

- Task 1 – Identify, classify and summarise the most relevant rulings rendered by national courts on State aid matters;
- Task 2 – Summary of the main findings at EU level;
- Task 3 – Identification of best practices;
- Task 4 – Use of the cooperation tools by the Commission and the national courts.

In the section below, a description is provided of the methodological approach that the Consortium has applied in order to fulfil Tasks 1 - 4. A more detailed description as well as the supporting materials that the Consortium relied upon and produced while carrying out the Study can be found in Annex 1.

## **1.4. Overview of methodological approach and completed tasks**

### **1.4.1. Introduction**

In order to fulfil the objectives of the Study, the Consortium has carried out four main tasks. During Task 1 ('Identify, classify and summarise the most relevant rulings rendered by national courts on State aid matters'), the Study Team in cooperation with the national legal experts, worked on the identification and compilation of a list of

relevant rulings<sup>74</sup> adopted by national courts in the Member States since 2007. Subsequently, the Study Team and the national legal experts selected a sample of rulings from the list of relevant rulings, on the basis of their legal relevance and novelty within each Member State and at EU level.<sup>75</sup> Lastly, the national legal experts drafted case summaries of the selected sample of rulings and created country reports for each Member State. Additionally, during this task, the Editorial Team developed a Case Database, to capture the case summaries produced under this Study with the objective of being made publicly available upon completion of the Study. The execution of Task 1 formed the bases of Task 2 ('Summary of the main findings at EU level') and Task 3 ('Identification of best practices'), which consisted of analysing and summarising the main findings with regard to the enforcement of EU State aid rules by national courts across the EU and identifying best practices respectively. These tasks were undertaken by the State Aid Team (supported by the Data Collection Team). The objective of Task 4 ('Use of the cooperation tools by the Commission and the national courts'), carried out by the Cooperation Tools Team, was to undertake research, gathering knowledge of the use of and views on the cooperation tools provided for in Article 29 of the State aid Procedural Regulation.

What follows below is an overview of the methodological approach applied by the Consortium in executing their respective tasks. A detailed description and supporting materials can be found in Annex 1.

#### **1.4.2. Task 1 - Identify, classify and summarise the most relevant rulings rendered by national courts on State aid matters**

##### **Task 1A: Identifying and assembling the list of rulings adopted by national courts in the 28 Member States since 2007**

The Study Team firstly prepared a detailed Guidance Document for the national legal experts, in order to fulfil their tasks under this project. At the same time, the Editorial Team started to develop the reporting infrastructure for the case summaries, to be collected in a dedicated Case Database.

After the distribution of the Guidance Document to the national legal experts, they started the first part of their desk research: the identification and accumulation of a list of relevant national rulings in their Member State in a dedicated spreadsheet. The relevant rulings to be identified by the national legal experts were "rulings from 1 January 2007 to 31 December 2017 (but not excluding relevant rulings from 2018), from the last two instance competent courts of the Member State in which a party to the proceedings raised an argument based on State aid, this argument was (to some extent) expanded upon by the national court, and the rulings can be categorised as falling under public or private enforcement of State aid as defined for the purposes of this Study."<sup>76</sup> The national legal experts were instructed to include any ruling from lower courts concerning State aid rules that were considered of particular relevance, but may not have been appealed (in which case they would probably already be included), in the spreadsheet.

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<sup>74</sup> Relevant rulings are defined in the Tender Specifications of this Study (available at: <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=3191>, last accessed on 18.6.2019) as: "those rulings which bring about a significant development of State aid rules and enforcement of those rules either in the Member State or at Union level."

<sup>75</sup> 'Legal relevance' is described in the Tender Specifications of this Study (available at: <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=3191>, last accessed on 18.6.2019) as: "those rulings which decide on main legal issues of State aid enforcement, mere repetition of settled case-law is to be excluded."

<sup>76</sup> See Section 1.4.3. for the definition of public and private enforcement under this Study.

The full list of relevant rulings can be found under Annex 2, and the lists for each Member State can be found in the country reports under Annex 3.<sup>77</sup>

### **Task 1B: Selecting the sample of judgments and drafting case summaries and country reports**

#### *Selecting a sample of judgments*

After the Study Team had approved the lists of relevant rulings, the national legal experts commenced their task of selecting the sample of rulings from the lists of relevant rulings, on the basis of their legal relevance and novelty within each Member State and at EU level. In identifying the selected rulings, the national legal experts were asked to identify at least the following minimum number of rulings, as required by the Tender Specifications of this Study:

- France, Germany, Italy, Spain and United Kingdom: 10 rulings;
- Belgium, the Netherlands and Poland: 7 rulings;
- Austria, Czech Republic, Denmark, Finland, Greece, Portugal, Sweden: 5 rulings;
- Bulgaria, Croatia, Cyprus, Estonia, Hungary, Ireland, Luxembourg, Lithuania, Latvia, Malta, Romania, Slovenia and Slovakia: 3 rulings.

According to the instructions provided, the national legal experts took into account the following considerations in selecting these rulings:

- The rulings selected contained an important consideration regarding State aid enforcement and State aid was one of the main aspects of the proceedings, rather than an ancillary argument put forward by the parties;
- The rulings were not mere repetition of settled case law;
- Rulings in which the court referred only to an administrative matter or issue could not be considered to constitute a selected ruling;
- For cases on which there had been multiple rulings, only the most relevant ruling (i.e. the most representative case of the legal saga) was selected.

#### *Required numbers of selected rulings*

For three Member States, the Study Team established that, despite broadening the search and applying additional verification checks, the required minimum number of relevant rulings could not be identified. For two Member States, namely Malta and Croatia, only one relevant ruling was identified, while in one Member State (Luxembourg) no relevant ruling could be found. In order to ensure that the total minimum number of 145 rulings to be included in the Case Database was reached, and analysed under Task 2, it was agreed between the Commission and the Consortium that additional rulings would be added, under the condition that they covered topics that were not already dealt with by other rulings in the representative sample. On the basis of the above, additional rulings were added for Austria, Belgium, France, Germany, Italy, the Netherlands and Spain to the selection of rulings.

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<sup>77</sup> As mentioned under Section 1.1, no relevant rulings as defined under this Study were identified in Luxembourg which means that no rulings could be selected for the sample of rulings and no case summaries were produced for this country.

### *Testing the appropriateness of the sample in six Member States*

The Study Team reviewed the selection of the sample of judgments, carrying out an assessment of the appropriateness of the sample of judgments through a preliminary analysis of three rulings in six Member States.

### *Preparing case summaries*

The next step in this task was the preparation of a case summary by the national legal experts for each of the selected rulings, in accordance with a template designed and provided by the Study Team (please refer to Annex 1, Part A for a more detailed description and the templates used in the Study).<sup>78</sup>

In addition to the case summaries, the national legal experts provided PDF files containing the full text of the selected rulings to be uploaded to the Case Database. In doing so, the national legal experts checked whether the rulings collected and saved in PDF were not subject to any pre-existing intellectual property rights. In most Member States, the rulings were free of such rights. However, in some Member States rulings are only accessible *via* private databases; in such cases, the rulings could not be uploaded to the Case Database.

### *Drafting 28 country reports*

For each Member State, the national legal experts also prepared a country report, again following a structured template containing general questions regarding the relevant courts and procedures, as well questions to be answered based on the case summaries and, to some extent, on the broader research including on the list of relevant rulings, carried out by the national legal expert.

The case summaries and country reports can be found in Annex 3. In addition, the case summaries can be found in a Case Database, which is accessible *via* the project website.

### *Developing the project website*

The Editorial Team created a publicly accessible project website for this Study, which will be kept accessible for at least two years after publication of the Study.<sup>79</sup> A link to this project website is made available as part of the Final Study and is included on the relevant webpage of the Commission website. In terms of content and lay-out, the project website will contain a home page with general information on the project; a Final Study page where users can navigate the results of the analysis carried out; and a Case Database where the case summaries are hosted.

In Annex 1, Part A, more detailed information on the content and design of the project website can be found.

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<sup>78</sup> For the purposes of the analysis under Task 2 and 3, the case summaries have been given titles consisting of the country acronym followed by the number of the case summary. The titled case summaries can be found in Annex 3.

<sup>79</sup> <https://www.caselex.eu/> (last accessed on 18.6.2019).

### 1.4.3. Task 2 – Summary of the main findings at EU level

#### Introduction

The State Aid Team, with the support of the Data Collection Team, subsequently proceeded to analyse the findings in order to identify a number of trends in State aid enforcement. Chapter 2 of the present Study presents the identified trends.

The State Aid Team relied on the data collected under Task 1, in particular the lists of 766 relevant rulings, the 145 case summaries and 28 country reports included in Annex 2 and 3 of the present Study. In particular, while the country reports aimed at identifying trends in each Member State, the analysis carried out under Task 2 aimed at aggregating the findings at EU level. The analysis under Task 2 covered the Study Period, and it covered both public and private enforcement of State aid rules. The Study Team relied on the data collected under Task 1 for Task 2 both to elaborate a number of statistics (i.e. quantitative trends), as well as to point out a number of qualitative trends from the case summaries and country reports, and finally to draw a comparison with the trends identified by the 2006 Study on the enforcement of State aid rules by national courts (also referred to as: the '2006 State Aid Study').<sup>80</sup>

The distinction between public and private enforcement of State aid rules relies on the legal context presented in Section 1.2. In the current Study, the expression 'public enforcement' refers to relevant national rulings that flow from a recovery decision, where the Commission found an unlawful aid incompatible with the internal market under Article 107 TFEU. Two main categories of recovery-related litigation can be distinguished in national courts: (i) actions brought by the recovering authority seeking a court order to force an unwilling beneficiary to pay back the aid and (ii) actions brought by beneficiaries contesting the recovery order, including individual measures to ensure recovery. Further, a number of cases identified in the present Study relate to disputes concerning aid recovery directly ordered by national administration authorities, without any direct involvement of the Commission.<sup>81</sup> As the CJEU recently recognised in *Eesti Pagar*,<sup>82</sup> national administrative authorities have to order the aid recovery when the granting authority breaches the standstill obligation, by implementing the aid measure without the previous aid notification to the Commission. For instance, a national authority has to order the recovery of an aid previously granted, if the aid measure breaches the GBER conditions.<sup>83</sup> In the context of the present Study, national rulings concerning disputes related to recovery orders without a Commission decision have also been included in the category of 'public enforcement', since they concern disputes before national courts challenging an aid recovery order.<sup>84</sup>

On the other hand, the expression 'private enforcement' refers to litigation before a national court triggered by an alleged breach of the standstill obligation under Article

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<sup>80</sup> T. Ottervanger, T. Jestaedt, T. Derenne (2006), *Study on the enforcement of State aid law at national level*. Study carried out on behalf of the Commission (DG Competition). <https://publications.europa.eu/en/publication-detail/-/publication/801bf70b-c64b-4fa8-bef6-2ec17204b1f1> (last accessed on 22.5.2019).

<sup>81</sup> See, for instance, 417/2018 (Case summary RO2), ECLINL RVS 20151152 (Case summary NL8), Ro 2015/03/0014 (Case summary AT6), 2005/AR/2457 (Case summary BE7), ECLI:EE:TLRK:2014:3.13.1497.19903 (Case summary EE2).

<sup>82</sup> Case C-349/17, *Eesti Pagar AS v. Ettevõtlike Arendamise Sihtasutus* (2019) ECLI:EU:C:2019:172, para. 89-90.

See ECLI:EE:RK:2016:3.3.1.8.16.10899 (Case summary EE1).

<sup>83</sup> *Ibid.*

<sup>84</sup> See, for instance, 417/2018 (Case summary RO2), ECLINL RVS 20151152 (Case summary NL8), Ro 2015/03/0014 (Case summary AT6), 2005/AR/2457 (Case summary BE7), ECLI:EE:TLRK:2014:3.13.1497.19903 (Case summary EE2).

108(3) TFEU, where no aid recovery has previously been ordered either by national authorities or by the Commission. As discussed in Section 1.2, a national court may adopt a number of remedies in a private enforcement case, such as interim measures, ordering the recovery of the unlawful aid and the relevant interest, awarding damages, as well as ordering the reimbursement of the taxes paid for financing an unlawful aid. Finally, in a number of cases identified in the context of the present Study, the national courts awarded 'additional' remedies in comparison to those mentioned in the 2009 Enforcement Notice and discussed in Section 1.2. For instance, in some cases the plaintiff requested the national Constitutional Court to declare national legislation unconstitutional, since it represented an unlawful aid in breach of EU State aid rules.<sup>85</sup> Therefore, in the context of the present Study, the category of 'private enforcement' includes all national rulings concerning a breach of the standstill obligation, where no recovery was previously ordered either by the Commission or by national administrative authorities, independently of the type of remedy awarded by the national court.

#### **1.4.4. Task 3 – Identification of best practices**

##### **Structure of the best practices**

The first step to identify examples of best practices is to define what is meant by 'best practices'. In the context of the present Study, 'best practices' are those practices that ensure an effective resolution of the issue at hand and which get closest achieving the aims of public enforcement of State aid rules (i.e. recovering unlawful aid, thus removing the distortion of competition caused by the aid) and private enforcement (i.e. safeguarding the rights of the claimant while also contributing to the removal of unlawful aid, thus removing the distortion of competition caused by the aid).

An initial and important point is that good practices emerge from a combination of judicial wisdom and procedural structure. Accordingly, the Study identifies best practices in both the legal framework and the judgments.

In Chapter 3, the Study identifies a set of indicators to assess how a given jurisdiction performs:

- The speed with which cases are likely to be resolved as a result of the practice;
- The quality of coordination with parallel Commission procedures;
- The degree to which the remedies provide for adequate compensation (private enforcement) / restoration of the *status quo ante* (public enforcement);
- The tools used for judicial dialogue.

#### **1.4.5. Task 4 - Use of the cooperation tools by the Commission and the national courts**

The objective of Task 4 was to undertake research amongst national courts to gather knowledge on the use of and views on the cooperation tools used by national courts and the Commission regarding State aid rules provided for in Article 29 of the State aid Procedural Regulation. In order to collect the relevant information to assess the actual use of and views on the cooperation tools, the Cooperation Tools Team used several data collection methods. More specifically, the Cooperation Tools Team undertook the following steps: (i) desk research, mainly using data available within the Commission, (ii) interviews with Commission staff, (iii) an online questionnaire aimed at national courts (national judges) and (iv) interviews with national judges.

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<sup>85</sup> See, for instance, 2014-36-01 (Case summary LV1), ECLI:CZ:US:2012:PI.US.17.11.2 (Case summary CZ 4).

## **Desk research**

The aim of the desk research was twofold. Firstly, the Cooperation Tools Team used the desk research to obtain an overview of how often each of the three cooperation tools was used. Secondly, the Cooperation Tools Team used the desk research to gain insights into the geographical distribution of courts using the tools.

## **Interviews with Commission staff**

The aims of these interviews were (1) to collect factual information (i.e. how often the cooperation tools are used; which courts are involved; possibility to use available contact details for the survey) and (2) to obtain a better understanding of how Commission staff perceives the use of the cooperation tools. The Cooperation Tools Team shared a topic list for the interviews.

## **Online questionnaire**

The questionnaire aimed to collect information from judges, who might have encountered one or more of the cooperation tools cited in Article 29 of the State aid Procedural Regulation. Relevant questions asked to the judges related to their familiarity with the cooperation tools, the number of times they considered using a tool, the reasons for (not) using the tool, and their experiences so far. In addition, the Cooperation Tools Team asked the judges whether specific bottlenecks are currently hampering the use of the cooperation tools and what could be done to tackle these bottlenecks.

The Cooperation Tools Team distributed the questionnaire *via* several channels. Firstly, judges who participated in training courses organised by the European University Institute in the context of ENTraNCE for Judges were directly invited to participate in the questionnaire. Secondly, the Association of European Competition Law Judges (AECLJ) shared the link to the questionnaire among the judges who are member of the association. Thirdly, the Academy of European Law (ERA) agreed to share the online questionnaire with judges who participated in their training courses. As the response rate remained rather limited, the Cooperation Tools Team decided to identify and contact national judicial associations and to ask them whether some of their members would be willing to participate in the Study.

## **Interviews among selected courts**

The aim of the interviews was to obtain an in-depth understanding of the views on the cooperation tools. The Cooperation Tools Team identified two types of responses; courts with (some) experience in using the cooperation tools and courts without experience in using the tools. Firstly, for the (limited number of) courts that have experience with one of the cooperation tools, the focus of the interview was on how the decision to use the tools had been, or is, taken and how the judges involved had experienced this process. Secondly, the Cooperation Tools Team conducted several interviews with courts who have experience with State aid rules, but who have not used any of the cooperation tools. The focus of these interviews was on the identification of potential barriers for the use of the tools.

The Cooperation Tools Team undertook several routes for contacting the judges. First, the Cooperation Tools Team contacted the courts who are familiar with one of the tools. The Commission shared with the Cooperation Tools Team a list of cases in which one of the tools has been used. Secondly, the Cooperation Tools Team invited a selection of judges on the European University Institute-list for an interview. In addition to the



judges included on the European University Institute-list, the Cooperation Tools Team also invited judges who are members of the AECLJ to participate in an interview. Another route the Cooperation Tools Team followed was the online questionnaire. Judges could indicate whether they would like to participate in a follow-up interview. Additionally, the Cooperation Tools Team approached the national associations and asked them whether members would be willing to participate.

## 2. State aid enforcement by national courts

### 2.1. Introduction

Chapter 2 analyses the main trends in the enforcement of State aid rules by the national courts of the Member States during the Study Period. The chapter highlights a number of quantitative trends based on statistics extracted from the lists of relevant rulings, country reports and case summaries (to be found in Annexes 2 and 3, respectively), and qualitative trends based on national judgments and national procedural rules relevant in State aid enforcement. In Section 2.2, the main trends are discussed in relation to public enforcement (Section 2.2.1) and private enforcement of State aid rules (Section 2.2.2). Finally, Section 2.3 concludes the analysis of the trends, by comparing the main findings identified in Section 2.2 with the conclusions reached by the 2006 State Aid Study.<sup>86</sup>

### 2.2. Main findings of the Study - main trends in the Study Period

#### 2.2.1. Public enforcement by national courts

##### Aggregated statistics at EU level

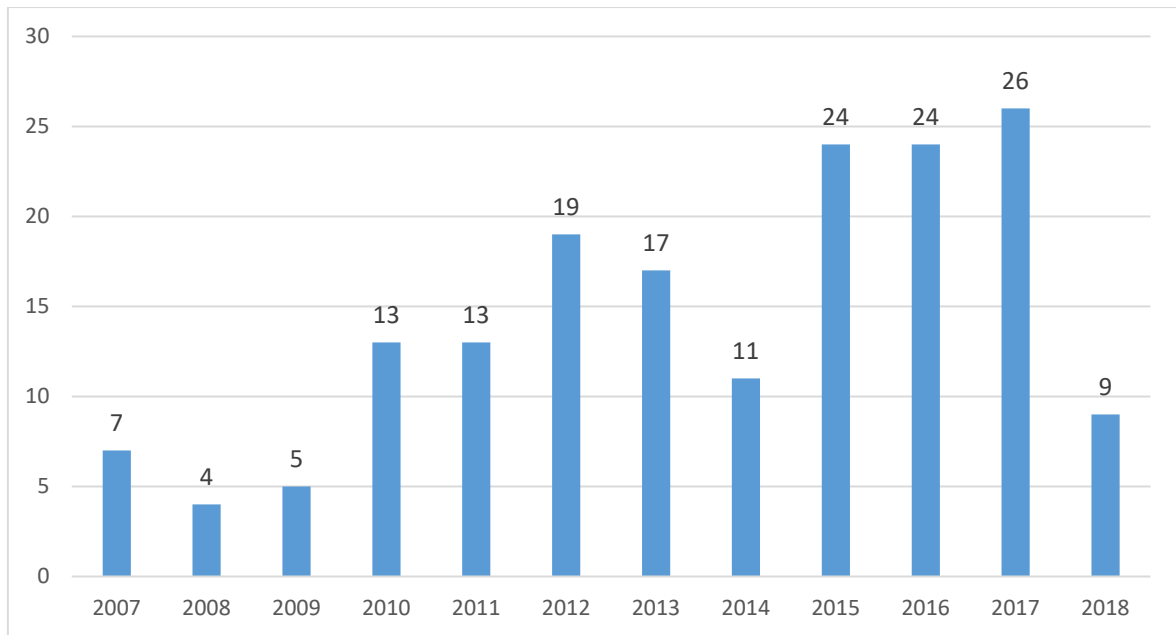
###### *Limited number of public enforcement cases*

As can be seen in the lists of relevant rulings in Annex 2, the first overall trend during the Study Period is that the number of reported cases on public enforcement is lower than the number of private enforcement cases: in the period covered by the Study, the Consortium has identified 172 cases that fall within the definition of public enforcement provided in Section 1.4.3, and 594 cases of private enforcement of State aid rules. The number of private enforcement cases is thus more than triple the number of public enforcement cases listed in Annex 2. Nevertheless, as shown by Figure 1, the number of public enforcement cases has grown steadily, with a large number of cases reported in the year 2017.

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<sup>86</sup> In the Consortium's view, the latter document is currently the most comprehensive Study on the enforcement of State aid rules by national courts, and thus it is suitable as benchmark for a comparison of the findings of the current chapter. The comparison against the 2006 State Aid Study was not requested by the Commission in the Tender Specifications for this Study (available at: <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=3191>, last accessed on 18.6.2019).

**Figure 1 - Number of cases of public enforcement of State aid rules at EU level, 2007-2018 data extracted from the lists of relevant rulings in Annex 2**



This trend is also confirmed by the number of public enforcement cases per year per Member State (see Table 2).

Table 2 - Number of cases of public enforcement of State aid rules per Member State, 2007-2018 (data extracted from the lists of relevant rulings in Annex 2)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	TOTAL
<b>Austria</b>			1							2	1		4
<b>Belgium</b>				1	1	1			3	1			7
<b>Bulgaria</b>					1		1		1		1		4
<b>Croatia</b>									1				1
<b>Cyprus (*publication date)</b>	1									1			2
<b>Czech Republic</b>										2			2
<b>Denmark</b>													0
<b>Estonia</b>								1		1	1		3
<b>Finland</b>									1				1
<b>France</b>	1	1		1	1	5	5	1	6	2	5	4	32
<b>Germany</b>	2	1	1	1	1	1	2						9
<b>Greece (*publication date)</b>	1									2			3
<b>Hungary</b>													0
<b>Ireland</b>													0
<b>Italy</b>	1			8	2	8	4	5	4	6	8		46
<b>Latvia</b>													0
<b>Lithuania</b>													0
<b>Luxembourg</b>													0
<b>Malta</b>													0

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

<b>Netherlands</b>	1				1				1	1			4
<b>Poland</b>							1	1					2
<b>Portugal</b>					3	1			2	2	1		9
<b>Romania</b>		1	1	2		1				3	1	1	10
<b>Slovakia</b>			1		1	1			2		1		6
<b>Slovenia</b>							1		1				2
<b>Spain</b>		1	1		2	1	3	3	2	1	6	3	23
<b>Sweden</b>													0
<b>UK</b>											1	1	2
<b>EU</b>	<b>7</b>	<b>4</b>	<b>5</b>	<b>13</b>	<b>13</b>	<b>19</b>	<b>17</b>	<b>11</b>	<b>24</b>	<b>24</b>	<b>26</b>	<b>9</b>	<b>172</b>

While the Study covers the judgments ruled by national courts from 2007 to 2017, a limited number of judgments handed down in 2018 have also been included in the lists of relevant rulings in Annex 2. This factor explains the decrease in the number of public enforcement cases in the year 2018 shown by Figure 1 and Table 2.

From the data shown in Table 2, the Consortium notes that in 10 Member States no cases on public enforcement have been identified for the period covered by the Study. This may be explained not only by the fact that national follow-up litigation did not have to be invoked in order to secure recovery, but also by the fact that the Commission did not adopt any recovery decisions in relation to these Member States during the Study Period. In particular, the Commission has not adopted any recovery decisions in the relevant period in relation to Croatia, Latvia and Lithuania.<sup>87</sup> This finding explains why no case of public enforcement of State aid rules has been identified in relation to these two Member States.

Secondly, from Table 2, the Consortium also observes a higher number of court rulings in cases of public enforcement of State aid rules in some 'larger' Member States (Italy, Spain and France) in comparison to some 'smaller' Member States.<sup>88</sup> It is noteworthy that the annual number of public enforcement cases in the 'larger' Member States is not only high, but remains relatively constant across the reporting period, as confirmed by Table 2.

As mentioned above, the Study shows a higher number of private enforcement (594) than public enforcement (172) cases. A number of reasons can be put forward to explain the lower number of public enforcement cases compared to private enforcement cases, as discussed below:

- Direct applicability of the recovery decisions: aid recovery from the beneficiaries may well be accomplished without any further national court involvement. Many national courts, in fact, increasingly recognise the direct applicability of Commission decisions in their national legal order. This is apparent from the case summaries in Annex 3. For example, since the UK courts have formally recognised that a Commission decision is directly applicable in its legal order, it is no longer required for public authorities to bring a (civil action) of unjustified enrichment against the beneficiary to recover the aid received by way of an (unlawful) tax exemption (see *Gunn – British Aggregates*).<sup>89</sup> Similarly, with the exception of fiscal aid, Spanish courts have also recognised the direct effect of Commission decisions.<sup>90</sup>
- Specific legal framework governing recovery: as it is evident from the national reports, a number of Member States (e.g. Belgium, Spain, the Netherlands, Finland, Slovakia) have adopted legislation allowing specific or *ad hoc* recovery procedures to deal with recovery problems or simplifying existing enforcement procedures. In addition, Estonia is considering the adoption of such legislation.<sup>91</sup> This may also reduce litigation and thus the involvement of national courts, as the potential for a variety of procedural challenges to a national recovery order should diminish.

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<sup>87</sup> See DG Competition database of decisions at:

[http://ec.europa.eu/competition/elojade/iseef/index.cfm?policy\\_area\\_id=0](http://ec.europa.eu/competition/elojade/iseef/index.cfm?policy_area_id=0) (last accessed on 8.4.2019).

<sup>88</sup> The distinction between 'larger' and 'smaller' Member States is not based on exact numbers but influenced by a number of criteria, such as the overall GDP of the country and the size of the population. On the other hand, the definition does not take into consideration the amount of public expenditure on State aid measures.

<sup>89</sup> 2018CSOH 39 (Case summary UK10).

<sup>90</sup> Country Report, Spain.

<sup>91</sup> See the country report for Estonia in Annex 3.

As confirmed by the country reports, given that the adoption of the relevant national legislation is quite recent in most jurisdictions, the data presented in Annex 2 does not yet fully reflect the impact of specific or *ad hoc* State aid recovery legislation on the evolution of national court proceedings. The adoption of national recovery legislation is a recent trend that explains the limited number of public enforcement cases in the Study Period. In addition, as further discussed in Chapter 3, it could also be considered a best practice which facilitates the speedy implementation of recovery decisions.

It is worth noting that the peculiarities of fiscal aid may lead to the introduction of specific/tailored recovery procedures. The Spanish authorities, for example, rely directly on the enforceable character of the recovery decisions, save for fiscal aid. In the case of fiscal aid, an *ad hoc* recovery procedure has been introduced by Law 34/2015.<sup>92</sup> The Law, which entered into force on 12 October 2015, regulates the procedures to be followed for the enforcement of decisions to recover State aid. This legislation has been developed by Royal Decree 1070/2017, of 29 December 2017. An *ad hoc* law to allow recovery of tax aid has also been adopted in Belgium.<sup>93</sup> This trend is not uniform, however - the recently adopted Dutch law on aid recovery explicitly excludes tax measures from its scope.<sup>94</sup>

#### *Categories of courts hearing public enforcement cases*

A second trend observed in the reporting period covered by the Study is that the number of disputes reaching courts of last instance is relatively high (65 administrative; 38 civil/commercial). The highest percentage of cases are dealt with by administrative courts (38% last instance and 23% second to last instance courts).

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<sup>92</sup> And by the corresponding acts adopted by the two Spanish regions with a high degree of fiscal autonomy, namely Navarre and the Basque Country.

<sup>93</sup> See the country report concerning Belgium in Annex 3.

<sup>94</sup> See country report concerning the Netherlands in Annex 3.

**Figure 2 - Categories of courts hearing cases of public enforcement of State aid rules - percentage at EU level (data extracted from the lists of relevant rulings in Annex 2)**

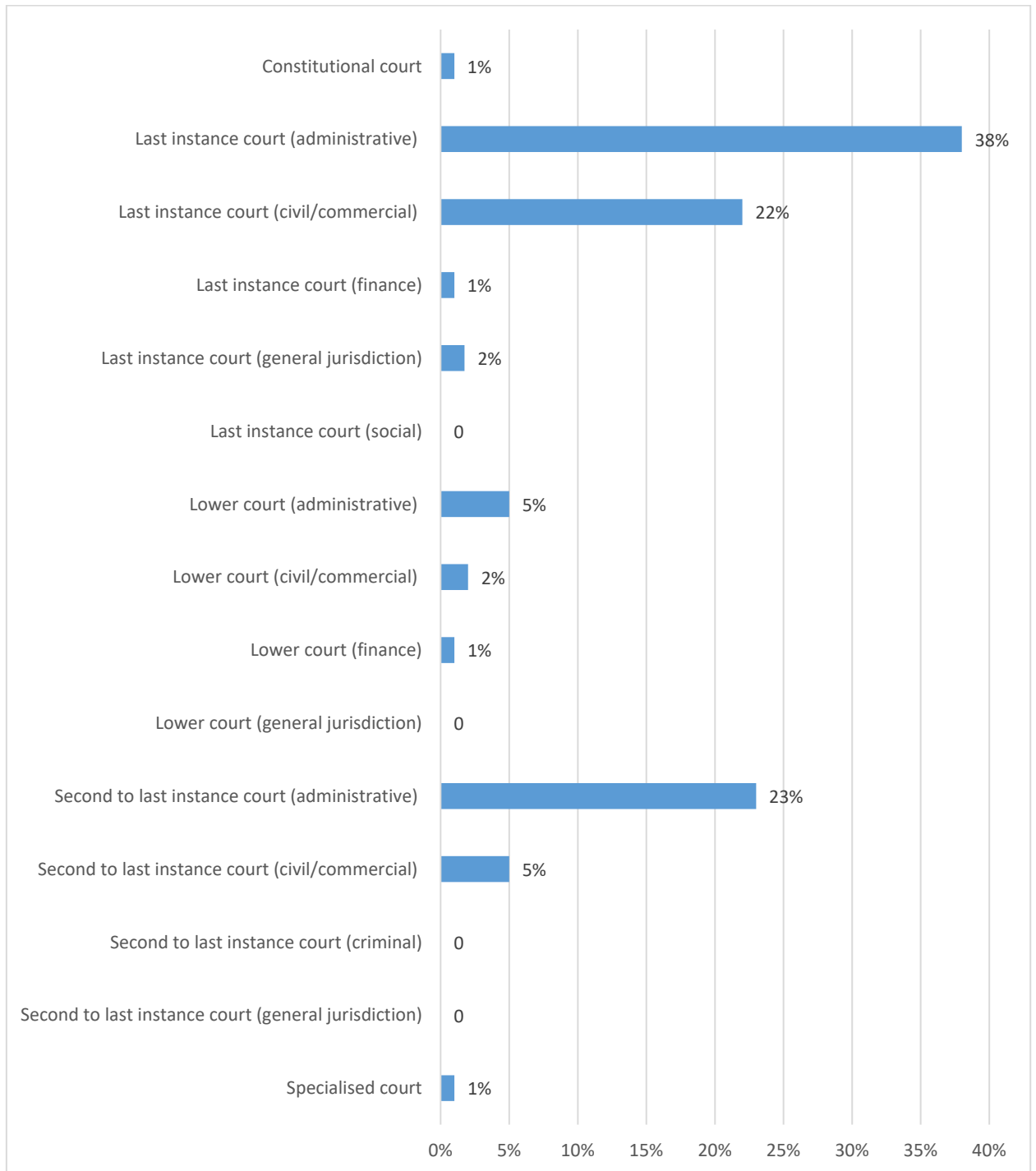
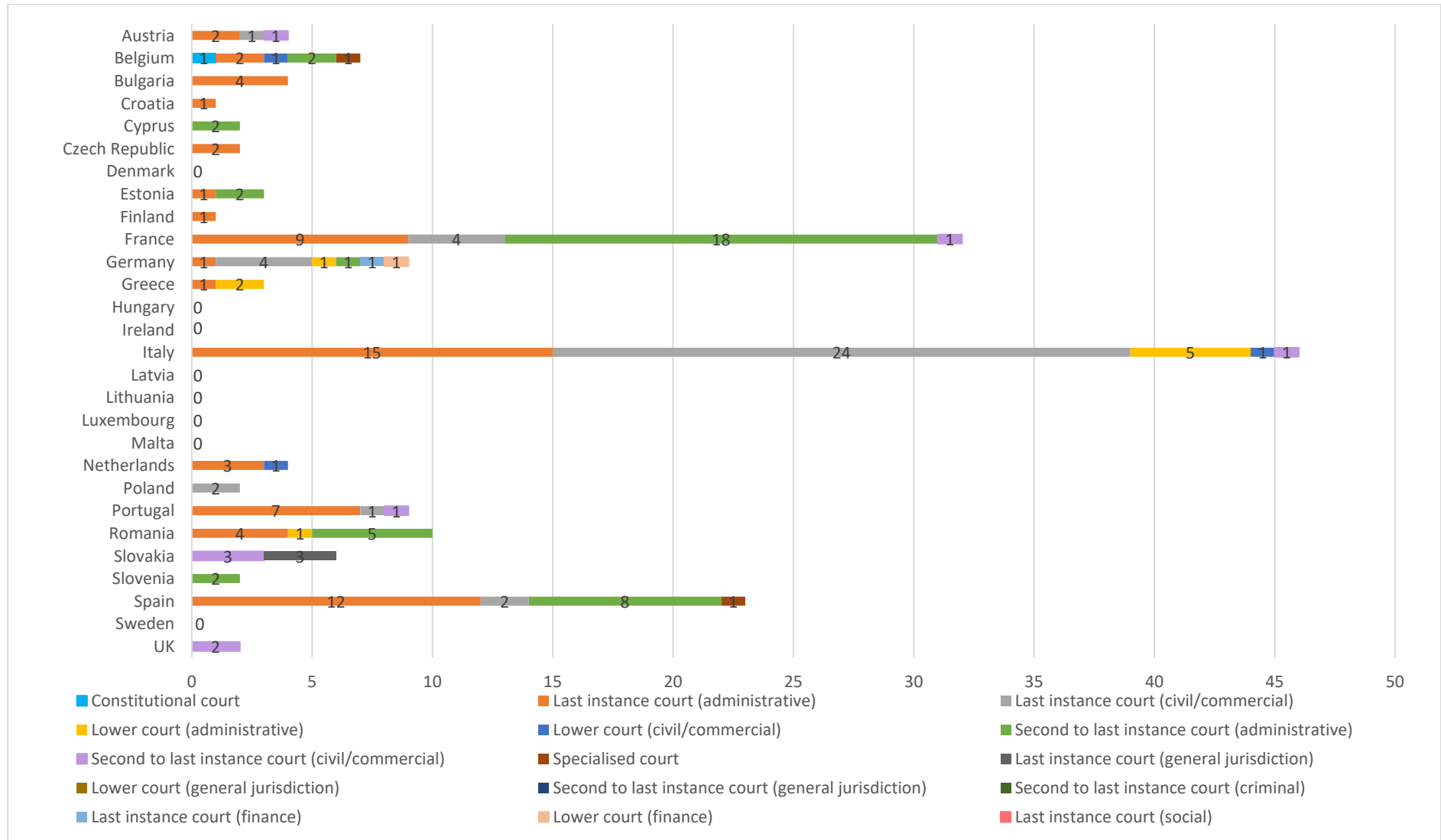




Figure 3 - Categories of courts hearing cases of public enforcement of State aid rules (data extracted from the lists of relevant rulings in Annex 2)

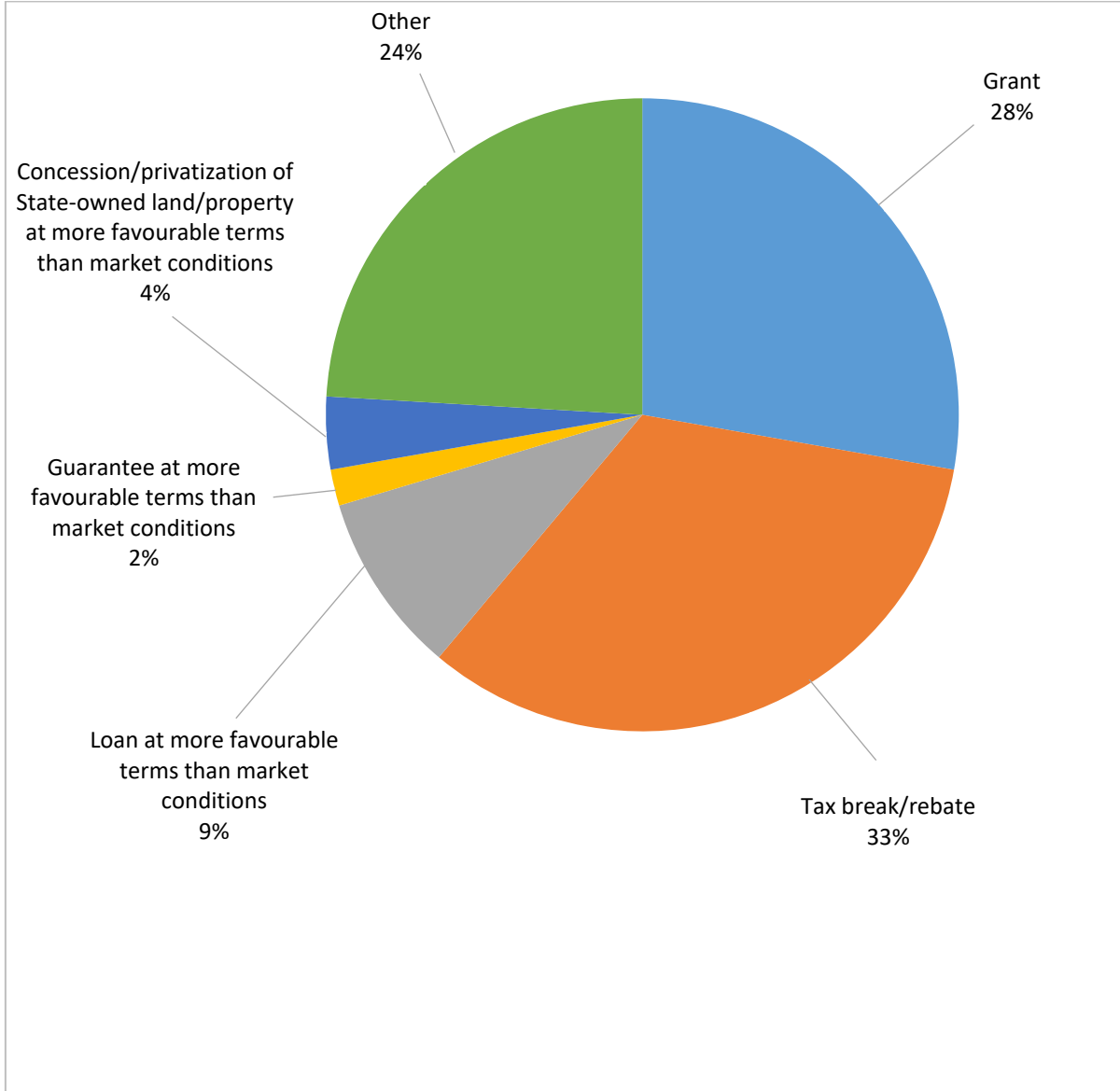


Figures 2 and 3 show that administrative procedures are predominantly relied upon for the public enforcement of State aid rules in all Member States. Civil or commercial courts may become involved if the beneficiary is the subject of insolvency proceedings, or if the recovery procedure relates to the annulment of a contract or agreement between the public authority and the beneficiary (e.g. a sale of land or other assets).

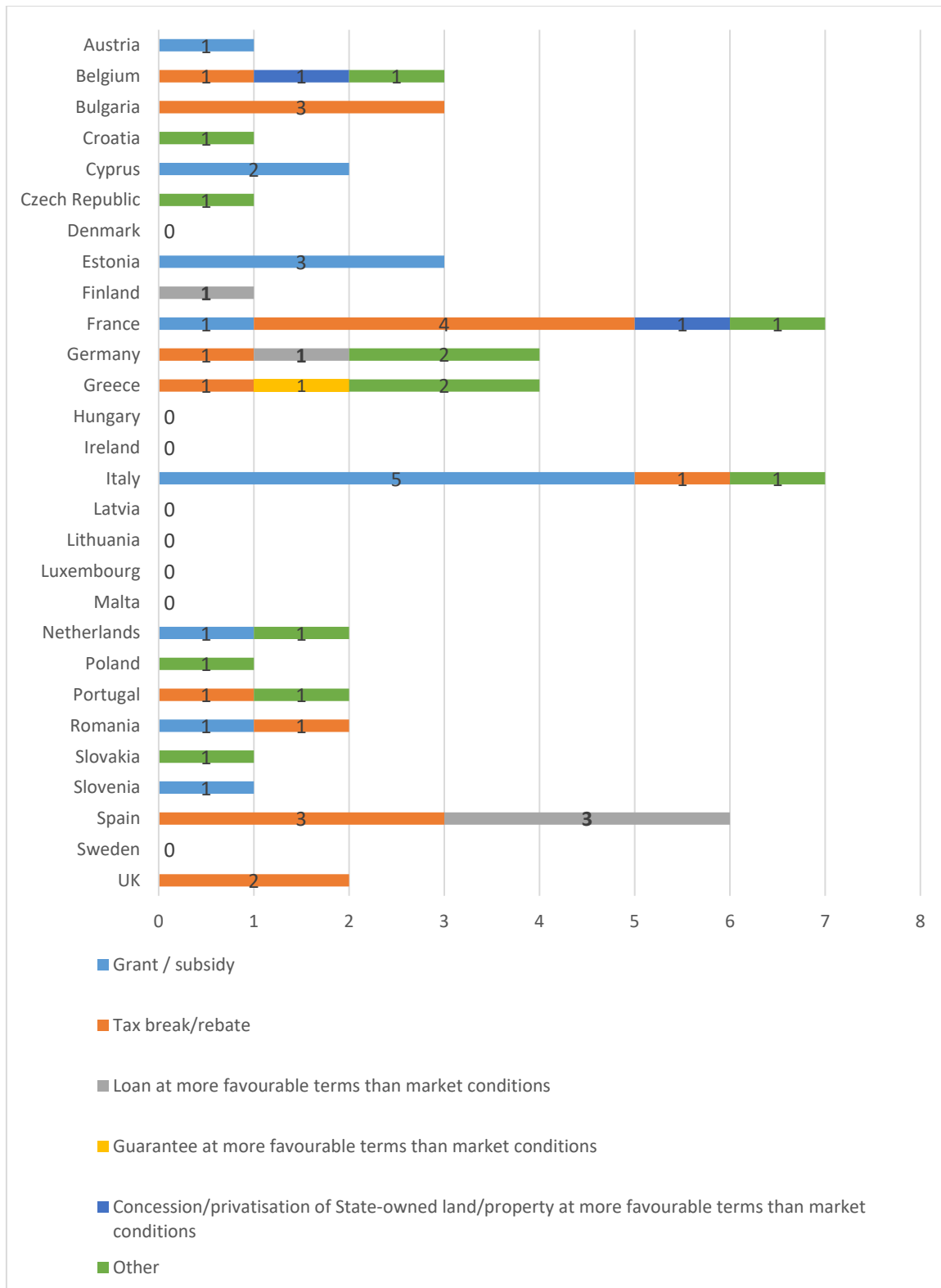
Finally, as further discussed in Chapter 3, with the exception of the Irish High Court, no specialised courts or panels have been set up in the Member States to deal with public enforcement cases.

Categories of aid measures challenged in public enforcement cases

Figure 4 - Categories of aid measures challenged in cases of public enforcement of State aid rules - EU average (data extracted from the case summaries in Annex 3)



**Figure 5 - Categories of aid measures challenged in cases of public enforcement of State aid rules (data extracted from the case summaries in Annex 3)**



Figures 4 and 5 analyse the categories of aid measures challenged in public enforcement cases. The graphs suggest that the majority of cases result from tax rebates (18), grants

(15) and loans (5), whereas private law measures such as concessions (2) or guarantees (1) account for only three cases. This finding explains why civil or commercial court proceedings are far less frequent (see Figures 2 and 3), especially in those Member States in which only public grants, tax breaks or more favourable loans than market conditions are at issue.

*Economic sectors involved in public enforcement procedures*

**Figure 6 - Economic sectors in cases of public enforcement of State aid rules (data extracted from the case summaries in Annex 3)**

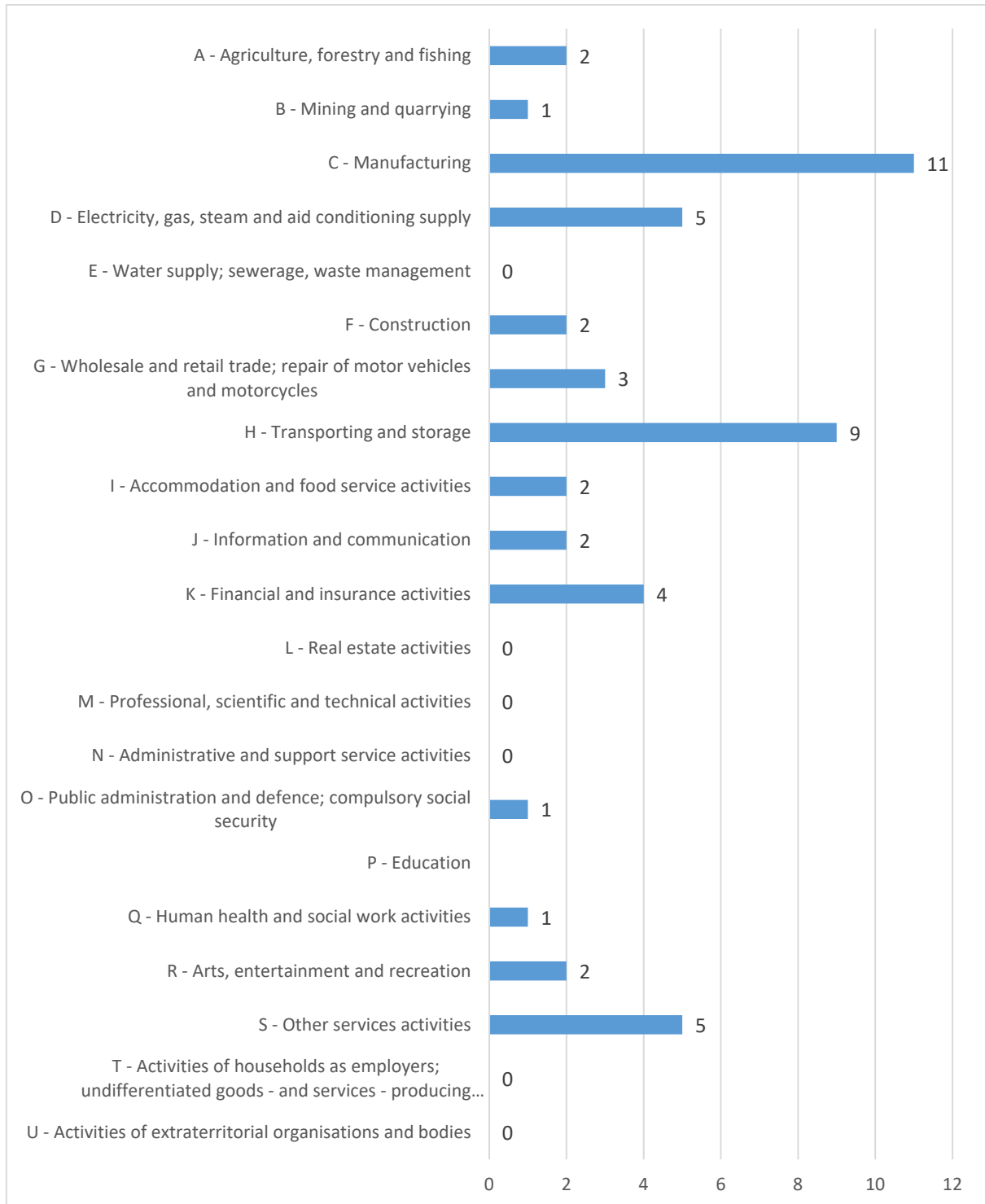


Figure 6 reflects a predominance of disputes involving aid measures in a number of sectors, such as manufacturing (11 cases), transport (9) and energy (5), with financial and insurance (4) as a notable category during the financial crisis. However, the range of sectors in which up to two cases have been noted is rather diverse.

### Evolution of the degree of enforcement of the EU State aid *acquis* by national courts

#### *Primacy of EU State aid rules recognised by national Supreme Courts*

A trend that emerges from the case summaries (included in Annex 3) is that the higher courts of the Member States seem more likely to recognise the primacy of Union law and order aid recovery, overturning the lower instances.

The case *Venezia/Chioggia* provides a good representation of the consequences of the principle of primacy of EU State aid rules in national proceedings.<sup>95</sup>

#### *Venezia / Chioggia*

The Italian Council of State, overturning the lower instance court, held that the disputed recovery measures were sufficiently justified and lawful. Therefore, the first instance should not have annulled the recovery order. In particular, the Council of State held that:

- In line with settled CJEU, Supreme Court and Constitutional Court case law, national courts must enforce recovery decisions, because the Commission has exclusive competence in assessing the compatibility of State aid measures;
- As the principle of effectiveness of Union law overrides the principle of *res iudicata*, the Member States' recovery obligations cannot be impeded by conflicting national judgments.
- Beneficiaries of State aid cannot rely on legitimate expectations after the Commission has declared the measure incompatible with Article 107 TFEU;
- The investigations carried out by national authorities in order to verify if the activity carried out by the beneficiaries could lead to a distortion of competition do not have a discretionary nature but are a mere execution of the Commission decision.

The majority of Supreme Courts of the Member States have no difficulty disapplying national limitation periods, as is shown in Italy by the *TNT* ruling.<sup>96</sup>

#### *TNT*

Firstly, the Italian Supreme Court, partially following the lower instance court, held that the limitation period for the recovery of unlawful State aid measures is ten years, as provided by generally applicable rules (i.e. Article 2946 of Italian Civil Code). The period starts from the notification of the recovery decision to the Italian authorities.

Secondly, the Court established that, in the case of aid schemes, beneficiaries bear the burden of proving compliance with (i) aid granting requirements set out by the Commission, or (ii) the applicability of the *de minimis* exemption. In the case at stake,

<sup>95</sup> 2401/2015 (Case summary IT9).

<sup>96</sup> 60712012 (Case summary IT11).

the beneficiary did not fulfil the burden of proof, and thus the recovery order was upheld.

A similar pattern emerges from the case summaries reported in Spain and France – countries that have reported a consistently high number of public enforcement cases over the period of this Study (see Table 2). The willingness of these courts to set aside national procedural barriers may reflect the depth of experience with State aid enforcement procedures in these Member States.

In the UK, the principle of loyal co-operation under Article 4(3) TEU was invoked in proceedings relating, albeit indirectly, to recovery procedures addressed to another Member State (i.e. Romania in the *Micula* case).<sup>97</sup>

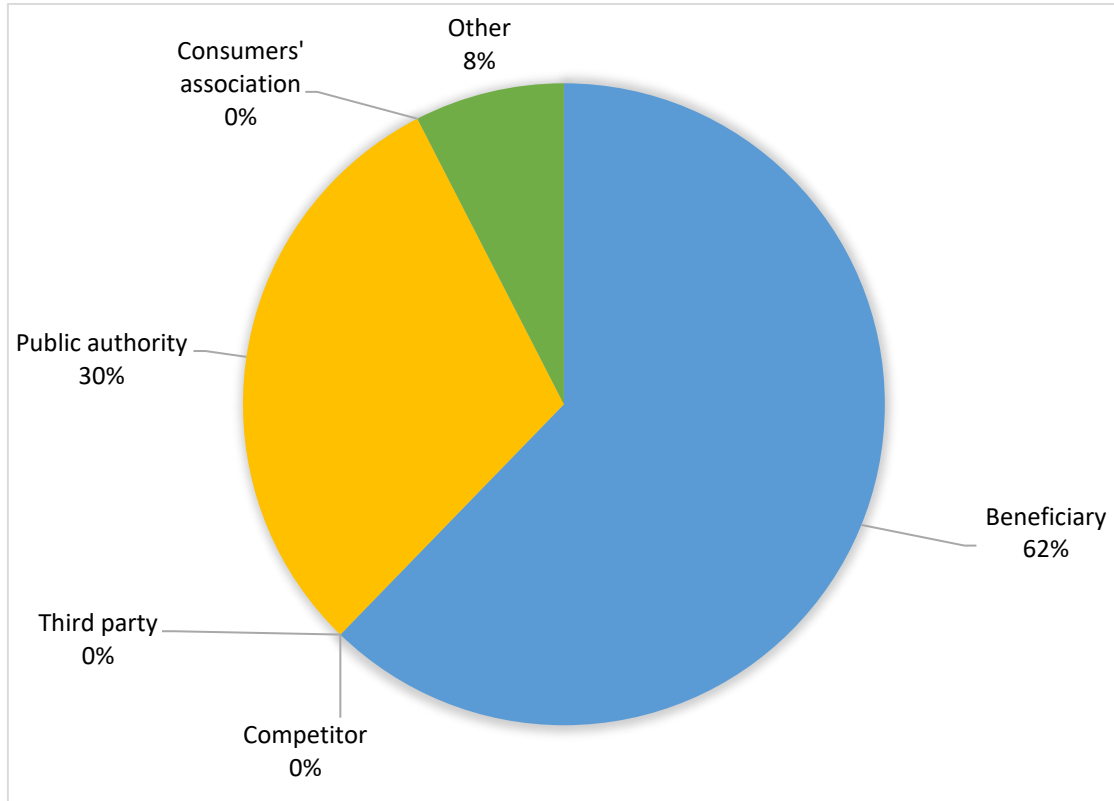
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<sup>97</sup> 2018CSOH39 (Case summary UK10).

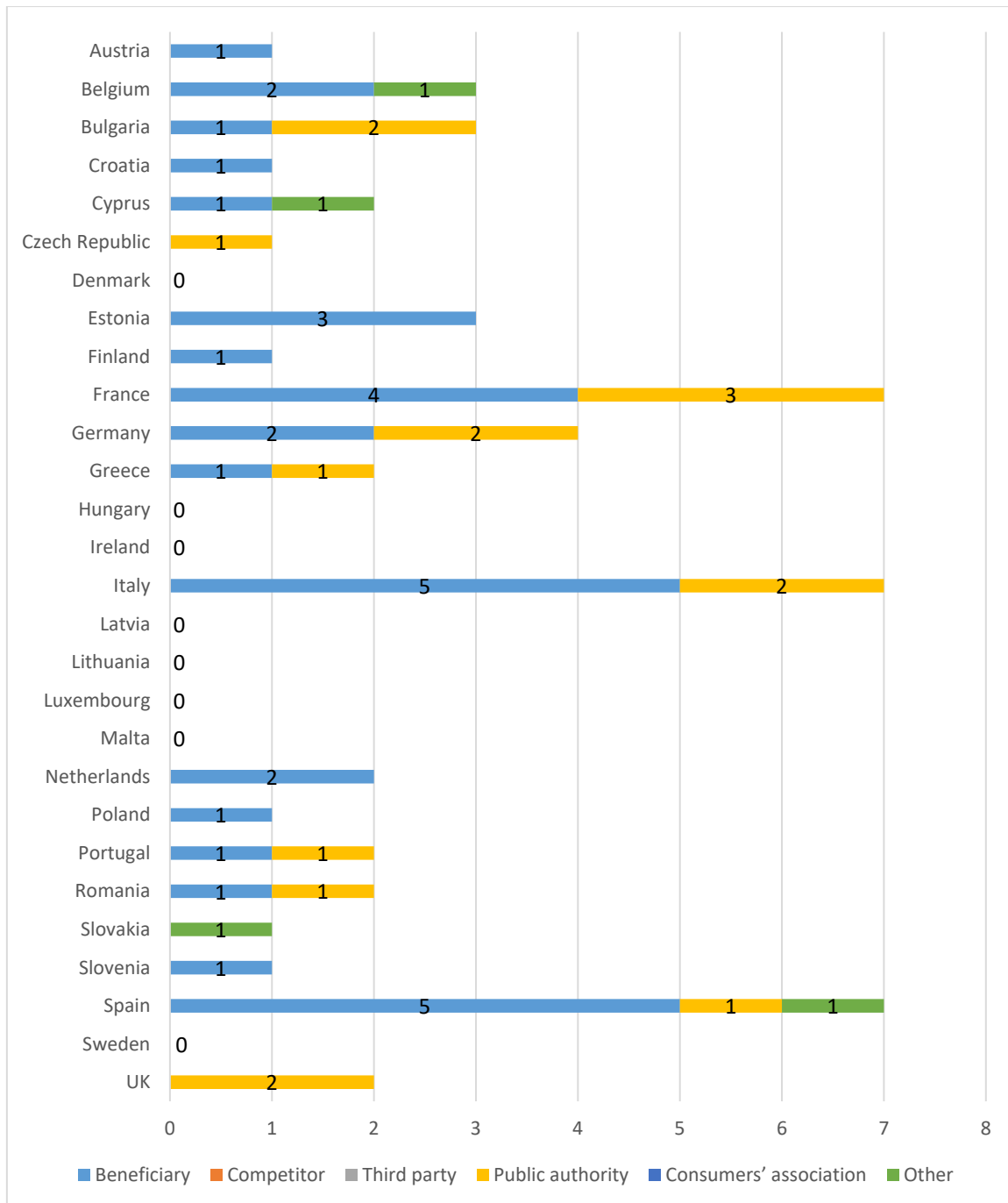


*Categories of plaintiffs in public enforcement procedures*

**Figure 7 - Categories of plaintiffs in cases of public enforcement of State aid rules, percentage at the EU level (data extracted from the case summaries in Annex 3)**



**Figure 8 - Categories of plaintiffs in cases of public enforcement of State aid rules (data extracted from the case summaries in Annex 3)**



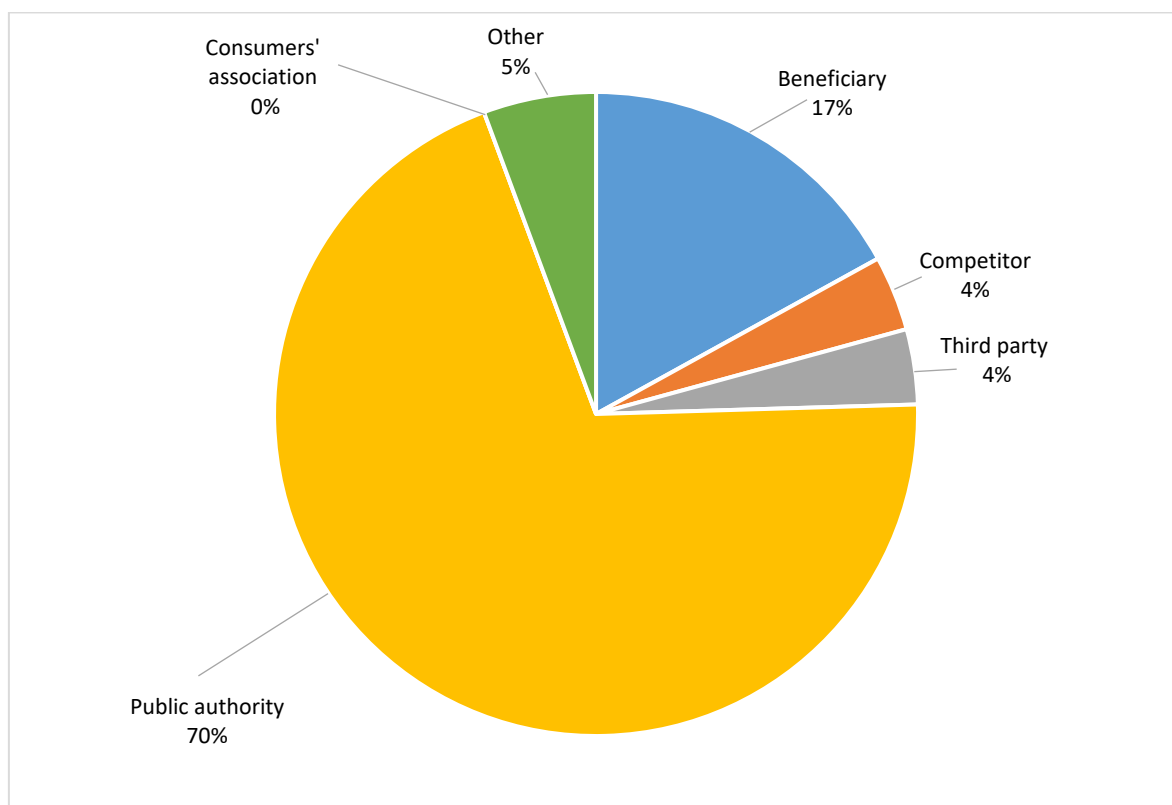
As shown by Figure 7, 62% of the plaintiffs in cases of public enforcement of State aid rules are aid beneficiaries and 30% are public authorities. From the case summaries, no case emerges in which a competitor is listed as a plaintiff; in one case the plaintiff was a political party (in Slovakia – although the case concerned a challenge to legislation on recovery methods as opposed to a recovery order as such).<sup>98</sup>

<sup>98</sup> PL. ÚS 115/2011 (Case summary SK3).

A significant number of cases reported in Spain deal with fiscal measures. In most of the case summaries included in Annex 3, the claimants are the beneficiaries of the aid, challenging the national recovery order.<sup>99</sup> Alternatively, plaintiffs also include regional authorities that have requested the annulment or suspension of fiscal measures adopted by other public authorities granting State aid.<sup>100</sup>

*Categories of defendants in public enforcement procedures*

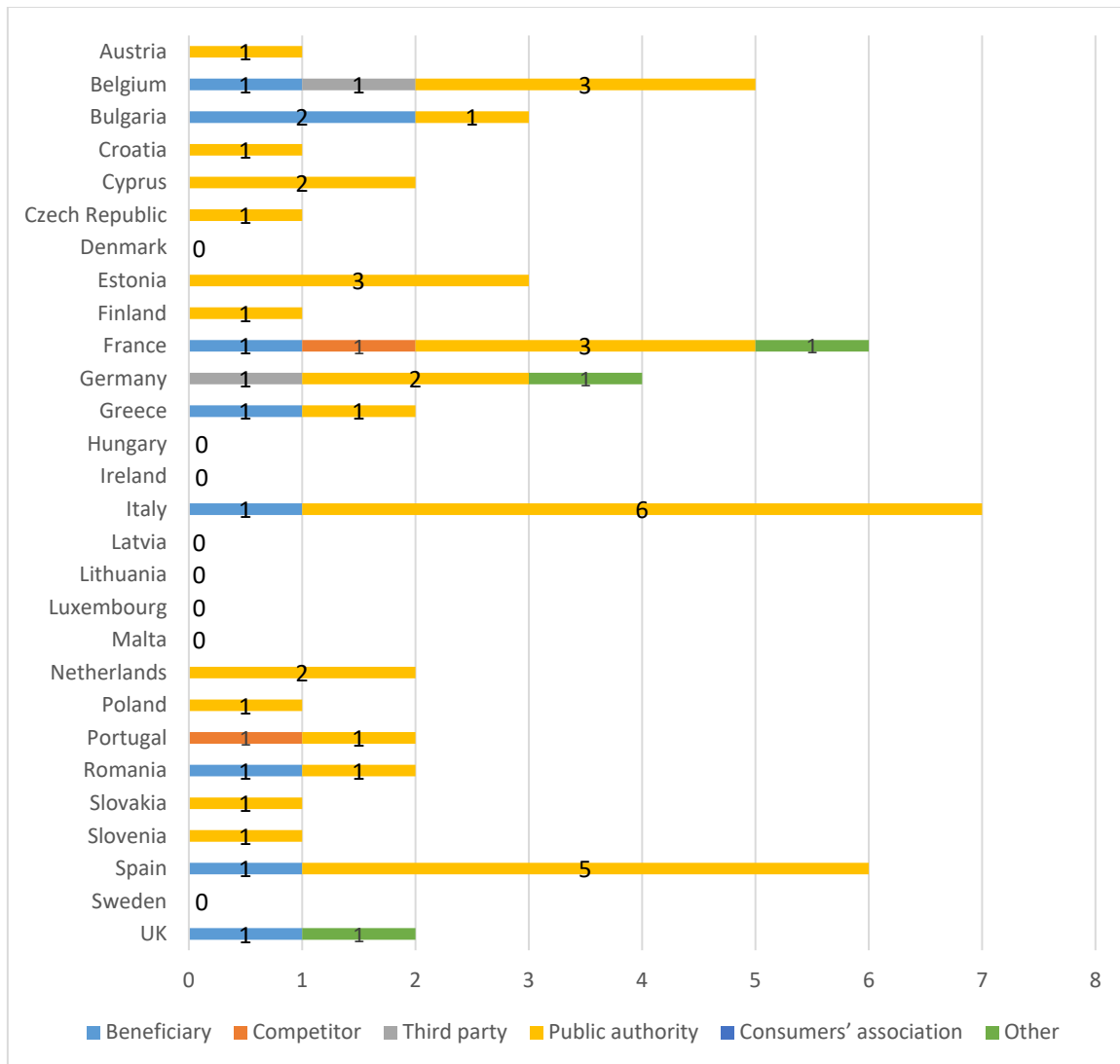
**Figure 9 - Categories of defendants in cases of public enforcement of State aid rules, percentage at EU level (data extracted from the case summaries in Annex 3)**



<sup>99</sup> See, for instance, 476/17 (Case summary ES6), ECLI:ES:AN:2011:5805 (Case summary ES7), ECLI:ES:TS:2013:3083 (Case summary ES8), ECLI:ES:TS:2018:3097 (Case summary ES9).

<sup>100</sup> ECLI:ES:TJCV:2018:485 (Case summary ES10).

**Figure 10 - Categories of defendants in cases of public enforcement of State aid rules (data extracted from the case summaries in Annex 3)**



As shown by Figure 9, the majority of the defendants in the case summaries included in Annex 3 are public authorities (70%), whereas only 17% are beneficiaries. The number of competitors listed as defendants is obviously low (i.e. 4% of the total number of cases).

#### *Locus standi issues*

No issue concerning a denial of *locus standi* in public enforcement cases have been reported in the case summaries. This may be due to the relatively liberal rules on legal standing, as pointed out, for example, by the country report on France:

“A party will be able to bring an action concerning the enforcement of a recovery decision before the court if it has an interest in taking legal action. This means that any party directly or indirectly affected by the measure (i.e. addressee of the measure, competitor, public authority), and groups representing the interests of those who have been directly or indirectly affected by the measure (i.e. consumer’s association, trade

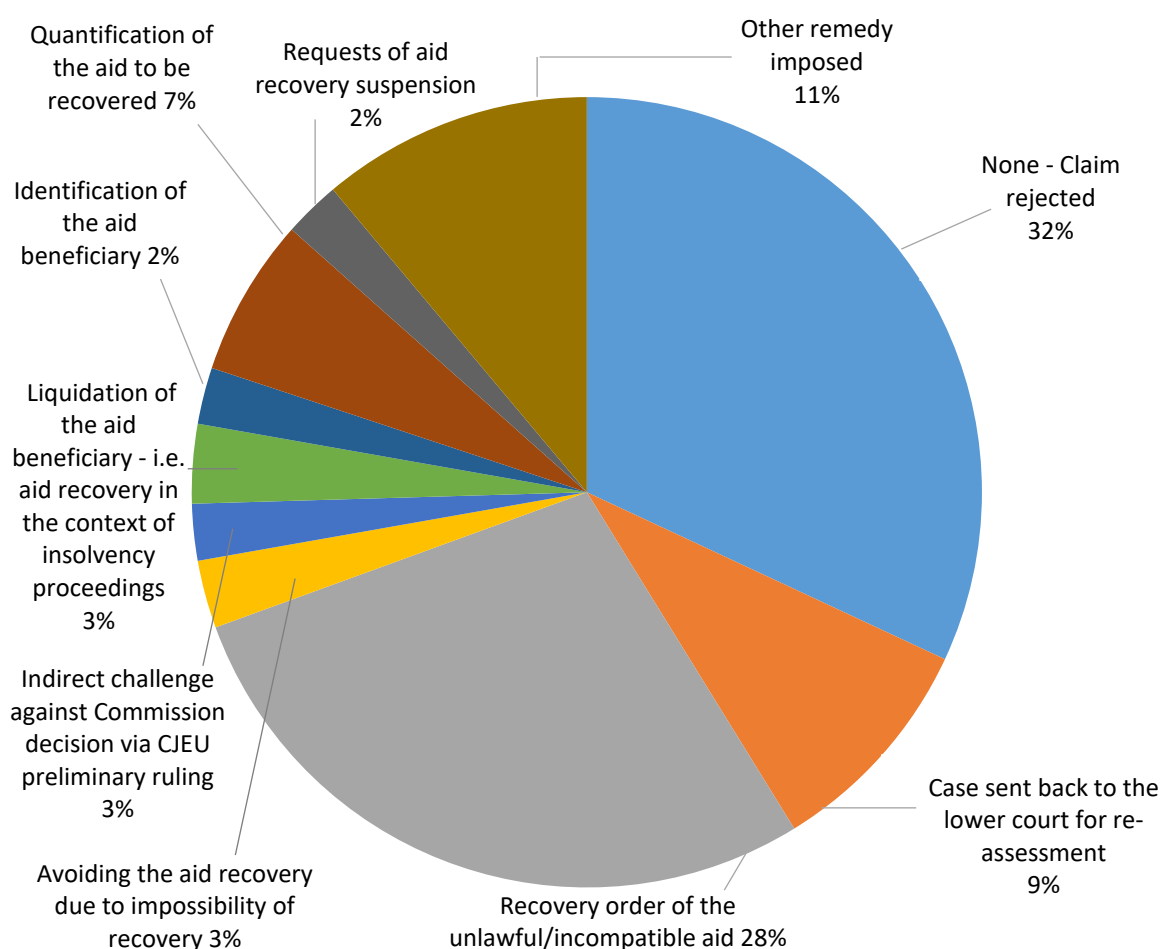
union, etc.) can bring an action before the national courts concerning the public enforcement of State aid rules.”

As explained by Figures 7 and 9, a large majority of defendants and plaintiffs in public enforcement cases are either public authorities responsible for the aid recovery or the aid beneficiaries. It is therefore highly likely that their interest in taking legal action will be recognised in court proceedings.

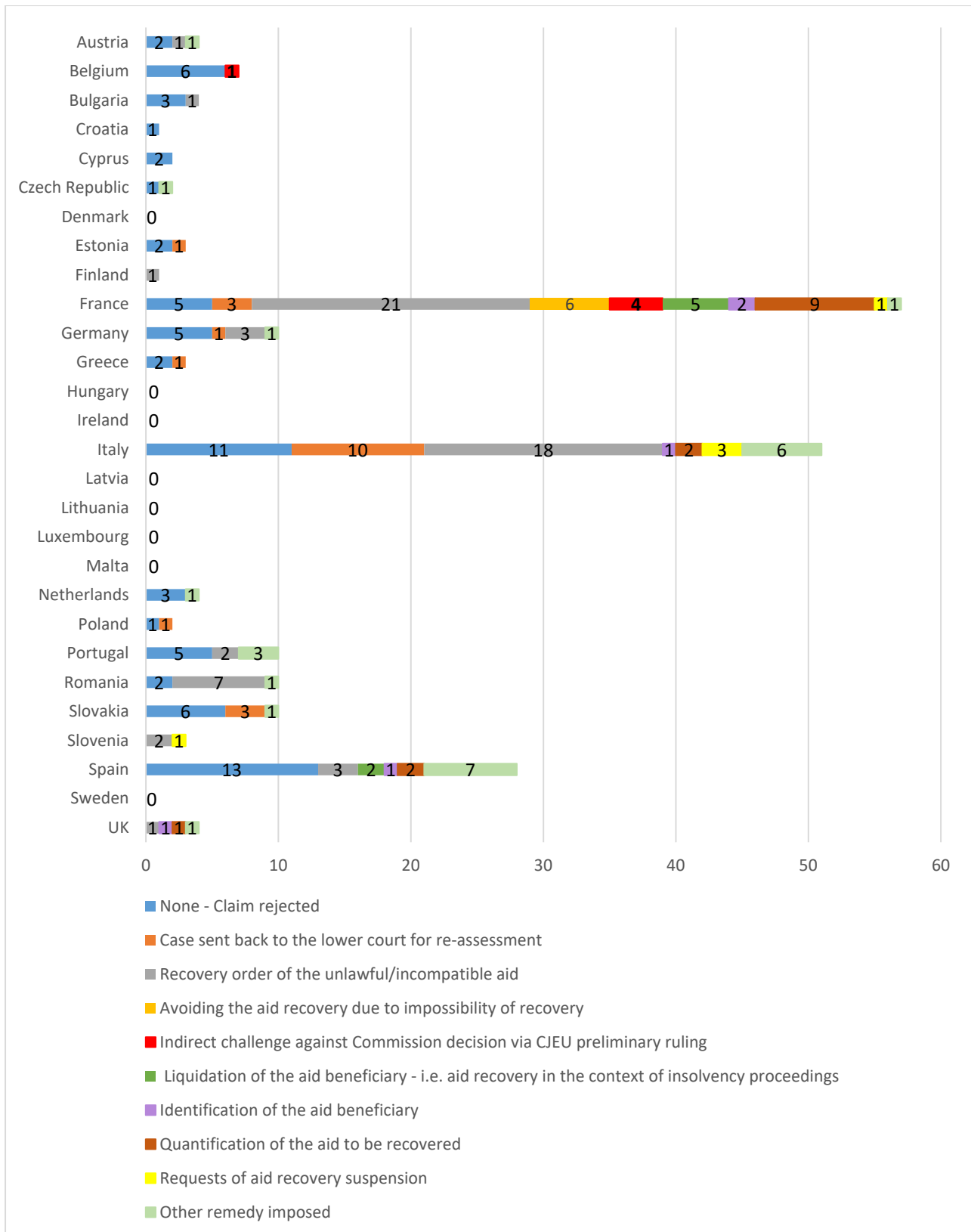
### Interim measures and recovery orders enforced by national courts

#### Interim measures

Figure 11 - Remedies awarded by national courts in cases of public enforcement of State aid rules - percentage at EU level (data extracted from the lists of relevant rulings in Annex 2)



**Figure 12 - Remedies awarded by courts in cases of public enforcement of State aid rules (data extracted from the lists of relevant rulings in Annex 2)**



The granting of interim measures to suspend a recovery order at national level is relatively rare, as shown from the list of relevant rulings in Annex 2 and illustrated in Figure 11. Only in five cases – that is 2% of the total number of cases reported – national courts have awarded a suspension.<sup>101</sup>

The case summaries indicate that higher courts will be more reluctant to grant a request for suspension, as this would be contrary to the principle of primacy of Union law. For example, in *Ryanair*,<sup>102</sup> the beneficiary's request for suspension pending the outcome of national appeals procedures was denied, as the French court confirmed that Union law takes precedence over national procedural rights. Similarly, in the *Greek export tax* case, the constitutional objections to recovery and rights to request suspension were overruled by the highest court in Greece.<sup>103</sup>

As the case summaries in Annex 3 explain, where requests for interim measures or suspension of a recovery order are at issue in national cases, this may reflect the complexities of litigation at EU level, especially where the Commission, the GC and subsequently the Court of Justice have taken different positions on the case.<sup>104</sup> For instance, in the *Valencian football* case the Spanish High Court ruled that the lower instance court should not have decided on the adoption of the interim measure requested until the GC had ruled on the legality of such measure.<sup>105</sup>

Nevertheless, there are some noteworthy exceptions where the national court has been concerned by alleged economic hardship and granted interim relief. In the case involving the *Municipality of Milan*,<sup>106</sup> for example, the Italian court granted the interim relief, by suspending the recovery decision.<sup>107</sup> Although the remedy represented a clear breach of Union law, the Italian court assessed the claim under generally applicable procedural rules, which require the presence of two conditions: (i) *periculum in mora*, and (ii) *fumus boni juris*. Accordingly, the court held that (i) the recovery could have jeopardised the financial stability of the Municipality of Milan, which would have had to reimburse a large amount of money within a short period. In addition, if the Municipality then claimed the amount from SEA (i.e. the beneficiary), the recovery could have led the beneficiary to

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<sup>101</sup> National courts adopted interim measures to suspend the enforcement of the recovery order in the following relevant rulings included in Annex 2:

- Münster Fiscal Court, 1/8/2011, 9V357/11KG (Case summary DE9).
- Lombardia Administrative Tribunal, 22/5/2013, 553/2013 (Case summary IT7).
- Administrative Court of the Republic of Slovenia, 20/3/2015, ECLI:SI:UPRS:2015:III.U.64.2015.
- Italian Council of State (3<sup>rd</sup> chamber), 16/6/2015, 3036/2015.
- Bordeaux Court of Appeal, 10/12/2015, 15BX01807 (Case summary FR8).

<sup>102</sup> 15BX01807 (Case summary FR8).

<sup>103</sup> EZT E31572007 (Case summary EL5).

<sup>104</sup> See for example the Spanish *financial goodwill* cases, discussed in further detail in the Spanish national report.

<sup>105</sup> ECLI:ES:TSJCV:2018:485 (Case summary ES10).

The High Court revoked the interim measure (suspension of the national measure that ordered Hercules C.F. to repay the aid) adopted by the lower instance court. The High Court considered that the lower instance court should not have decided on the adoption of the interim measure requested until the GC had decided on the legality of such measure, given that the GC had already suspended the Commission decision at stake by an order. Consequently, the national court should not have reassessed whether the interim measure requested (suspension of the national measure) had to be granted, in particular due to the risks for legal certainty that would arise if the national court and the GC reached different decisions. Therefore, the Regional High Court annulled the lower instance court ruling.

<sup>106</sup> 553/2013 (Case summary IT7).

The Municipality of Milan claimed the suspension of the aid recovery order as the beneficiary of the measure was *SEA Handling* and not the Municipality – which was a shareholder in SEA.

The first instance court judgment was then set aside by the upper court (judgment of the Council of State no. 3756 of 24 September 2013).

<sup>107</sup> Commission Decision (EU) 2015/1225 of 19 December 2012 regarding injections of capital by SEA SpA into SEA Handling SpA. OJ L 201/1, 30.7.2015.

bankruptcy. (ii) The claim was credible, as the recovery order was not addressed to the same entity defined as the beneficiary by the Commission decision. Nevertheless, it is worth noting that the ruling was later quashed on appeal.

Similarly, in the German *Sanierungsklausel* a request for an interim suspension pending further litigation before the CJEU was accepted by the lower tax court, as the taxpayer had established undue hardship.<sup>108</sup>

#### *Recovery and national rules on interest*

With respect to the imposition of interest on the sums to be recovered, some lower courts have been reluctant to disapply national law, relying on procedural issues such as national limitation periods and rules on the imposition of simple as opposed to compound interest on appeal. On the other hand, as noted above, the higher courts of the Member States have usually recognised the primacy of Union law (e.g. Spain<sup>109</sup>, Italy<sup>110</sup>) and thus required 'full' recovery, including compound interest. Reference is frequently made to the 2009 Enforcement Notice in this respect.

For example, the Spanish country report observes that the Spanish courts have confirmed the primacy of Union law over national law. In particular, the national legal expert mentions in the country report that Spanish courts have relied on primacy of Union law and *Simmenthal*<sup>111</sup> case law in order to disapply the Spanish Civil Code. The latter, in fact, was often in conflict with the recovery decisions, either in relation to the limitation periods for recovery or in relation to the ranking of the credit to be recovered under national insolvency law.

Similarly, in the *fiscal aid* case, the Portuguese court adjusted the amount of interest due, as the delay in the collection of correct tax rate was held not to be the fault of the plaintiff.<sup>112</sup>

#### *Some notable departures with respect to the 2009 Enforcement Notice*

As argued above in relation to interim measures and recovery of the interest, the national courts of the Member States have generally afforded remedies in line with the 2009 Enforcement Notice. However, the data collected as part of the current Study also show some notable departures from the 2009 Enforcement Notice:

- **Failure to notify:** although most courts did not accept a claim of failure on the part of the public authorities to notify the planned measure to the Commission as a defence, in a number of cases damages for failure to notify an aid scheme to the Commission have been addressed and have been held to be potentially warranted. Relevant examples to this regard are the *Sardinia hotels* case in Italy,<sup>113</sup> and the *Brandenburg* case in Germany.<sup>114</sup>

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<sup>108</sup> 9V357/11KG (Case summary DE9).

Appeal to the Federal Tax Court was granted but did not occur as plaintiff went bankrupt.

<sup>109</sup> ECLI:ES:AN:2011:5805 (Case summary ES7); ECLI:ES:TS:2018:3097 (Case summary ES8); ECLI:ES:TSJPV:2012:3337 (Case summary ES10).

<sup>110</sup> 243/2017 (Case summary IT5); 60712012 (Case summary IT11).

<sup>111</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (1978) ECLI:EU:C:1978:49.

<sup>112</sup> 069/11 (Case summary PT4).

<sup>113</sup> 517/2017 (Case summary IT6).

<sup>114</sup> IIIZR279/07 (Case summary DE10).

In the case, the defendant had failed to ascertain whether the public authority had complied with its obligation to notify the Commission. This is of minor importance, as the main circumstances leading to the claim of restitution were not within the responsibility or sphere of influence of the defendant. The predominant cause



- Right to a fair hearing as a defence: in *Álava*,<sup>115</sup> the Spanish Supreme Court annulled the relevant administrative order implementing the recovery decision as the right to a fair hearing had been denied to the defendant. Similarly, in most recent cases, the Spanish courts annulled the recovery orders due to a breach of the principle of legitimate expectations.<sup>116</sup>

As discussed in the Spanish country report in Annex 3, the Spanish Supreme Court has established that the recovery procedure must meet the basic procedural guarantees of hearing, motivation, determination of the amount, and indication of the appeals that may be lodged. Therefore, on the basis of this judicial precedent, the requests for reimbursement that are sent to the beneficiaries of the aid should provide for a period of ten days within which to make representations, specify the amount and interest to be paid, and indicate the appeals that can be made against them. The Spanish tax recovery legislation adopted in 2015 and amended in 2017 now provides for a number of specific procedural guarantees for the beneficiary. The failure to observe procedural rights may not, however, be fatal for recovery.

In France,<sup>117</sup> although the recovery measures in question were annulled for failure to allow the beneficiary a fair hearing, the court recognised that such procedural defects can also be subsequently remedied by the adoption of a new recovery order, once the beneficiary has been heard by the public authority in charge of the recovery.

- Breach of legitimate expectations: in *Sardinia hotels*,<sup>118</sup> Cagliari Court of Appeal, overturned the lower instance court. The Court of Appeal, departing from the principle of legitimate expectations under Union law, annulled the recovery order because the granting authority had breached the principle of legitimate expectations of the beneficiary with regard to the lawfulness of the State aid received. The aid to be recovered was lowered, as full recovery interest was no longer due. Instead, interest was due from the date of service of the recovery order (i.e. and not from the date when the aid was unlawfully granted), on the basis of national legal principles.

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giving rise to the dispute was the grave fault of the public authority, which failed to notify the Commission and waited for its response. SMEs and their guarantors can expect to generally be able to rely on the lawfulness of acts and procedures undertaken by specialised public authorities.

<sup>115</sup> ECLI:ES:TS:2013:3083 (Case summary ES8).

The plaintiff argued that the contested judgment violated national law and was contrary to the CJEU case law due to the fact that the resolution ordering the recovery of fiscal aid did not give the aid beneficiary the opportunity to be heard by making representations. The Spanish Supreme Court ruled that the adoption of a resolution ordering the recovery of fiscal State aid without giving the aid beneficiary the right to be heard, was contrary to national and Union law. Therefore, the Supreme Court decided to annul the administrative acts at stake and to roll back the administrative procedure.

<sup>116</sup> ECLI:ES:TSJPV:2012:3337 (Case summary ES 10).

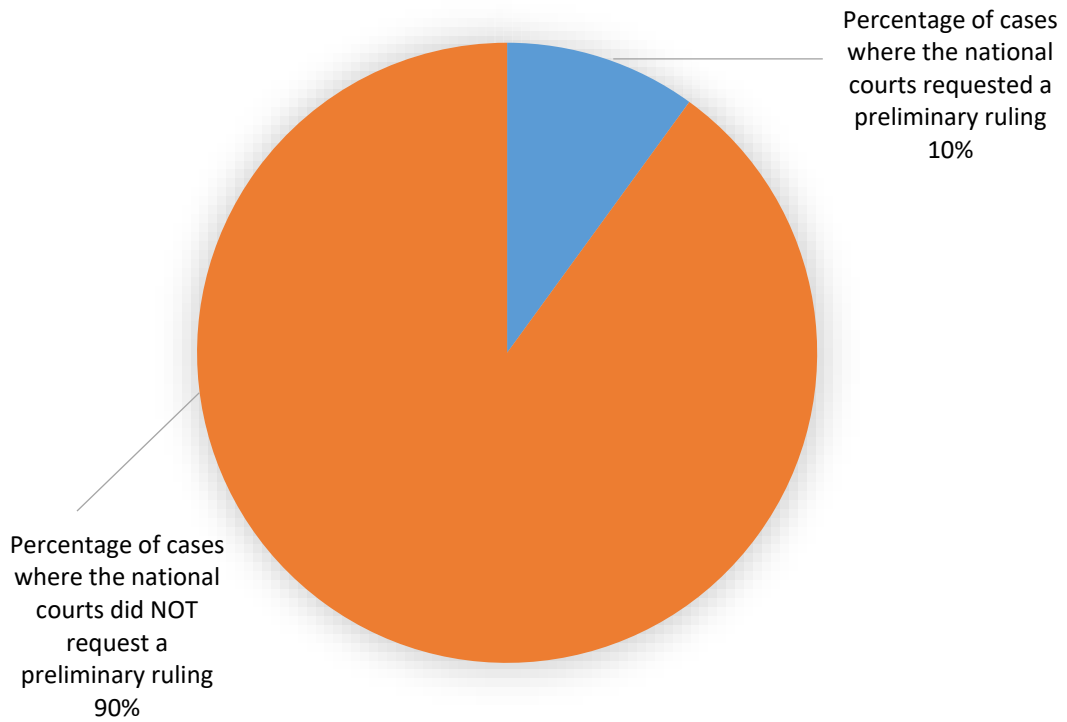
A regional measure (*Norma Foral Alavesa 5/1996*) granted an exemption from corporation tax for certain newly established firms. By decision of 20 December 2001, the Commission qualified the measure as incompatible State aid and ordered the Spanish authorities to recover the aid. The plaintiff challenged the Agreement of the Economic Administrative Court that dismissed the appeal against the resolution which ordered the recovery of the aid. The Court held that national courts are not competent to review or annul Commission's decisions and that public authorities may not invoke the alleged legitimate expectations of the beneficiaries in order to avoid State aid recovery. The Court also rejected any State liability.

<sup>117</sup> 16NT02839 (Case summary FR9).

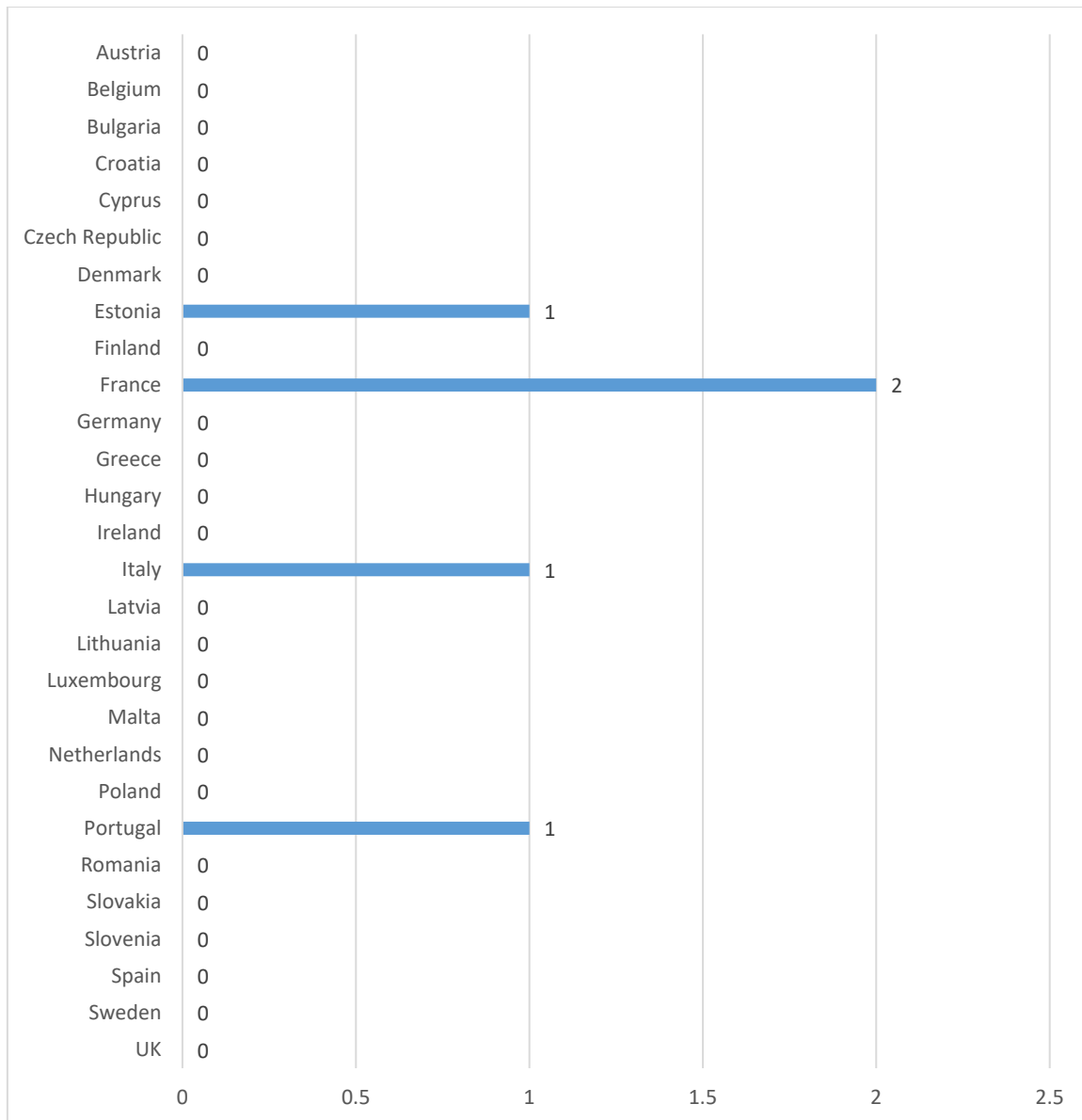
<sup>118</sup> 517/2017 (Case summary IT6).

### The role of CJEU preliminary rulings in public enforcement cases

Figure 13 - Requests of CJEU preliminary rulings in cases of public enforcement of State aid rules, percentage at EU level (data extracted from the case summaries in Annex 3)



**Figure 14 - Requests of CJEU preliminary ruling in cases of public enforcement of State aid rules (data extracted from the case summaries in Annex 3)**



In general, the courts of appeal and the courts of last instance have made extensive reference to CJEU jurisprudence. However, referrals to the CJEU were very rare during the Study Period. For instance, during the period covered by the present Study, the Spanish courts did not refer any request for preliminary ruling to the CJEU concerning public enforcement of State aid rules. Nevertheless, the Spanish courts have extensively referred in their rulings to CJEU jurisprudence. For instance, in *Álava* the High Court of the Basque Country rejected the claimant's request to annul the administrative order enforcing the recovery decision in the case.<sup>119</sup> By referring to the previous CJEU ruling in the case,<sup>120</sup> the national court ruled that public authorities could not invoke the alleged legitimate expectations by the beneficiary to avoid the aid recovery. As noted in Figure 14, out of the total 49 cases analysed in Annex 3, only 5 involved references for preliminary ruling to the CJEU.

<sup>119</sup> ECLI:ES:TSJPV:2012:3337 (Case summary ES11).

<sup>120</sup> Case C-474/09 P, *Territorio Histórico de Vizcaya - Diputación Foral de Vizcaya* (2011) ECLI:EU:C:2011:522.

*Mediaset* represents an important example of the importance of the preliminary ruling procedure in the context of the recovery process. Following the CJEU preliminary ruling in the case,<sup>121</sup> the first instance court annulled the recovery order and recalculated the aid amount, which was found to be equal to zero.<sup>122</sup> Subsequently, the appeal court ordered national authorities to repay the amount of the aid already recovered. In particular, the appeal court argued that, in the light of the economic analysis of the independent expert appointed, *Mediaset* obtained no advantage from the aid, because the additional profit in terms of new costumers resulting from the subsidisation of the purchase of decoders was found to be equal to zero. As pointed out in the Italian country report, the CJEU preliminary ruling in the case was relied upon not only by the referring court to find that no recovery was required in the case, but it has been frequently referred to in subsequent national rulings.

Similarly, the French Council of State's two requests for rulings in the long-running *CELF* litigation have created major precedents in France.<sup>123</sup> In particular, following the first CJEU preliminary ruling in the case, the Council of State ruled that the French authorities had to recover the aid received by *CELF* and the corresponding interest for the entire period in which the unlawful aid had remained in force,<sup>124</sup> in spite of the three previous Commission decisions considering the aid compatible with the internal market, later quashed on appeal by the GC. In addition, in its second preliminary ruling in *CELF*, the CJEU further clarified that the previous Commission decisions could not be considered as exceptional circumstances that justified the lack of aid recovery.<sup>125</sup>

The recent CJEU preliminary ruling in *Eesti Pagar* represents another important legal development, which will have an impact on the enforcement of State aid rules at the national level in years to come.<sup>126</sup> In the dispute, *Eesti Pagar* (i.e. the aid beneficiary) challenged the recovery order adopted by Enterprise Estonia (i.e. the granting authority), which ordered recovery of the investment grant (with interest) that it had previously paid out to the beneficiary due to the lack of incentive effect of the aid measure, and thus its breach of GBER conditions.<sup>127</sup> As discussed above, the case falls within the definition of public enforcement in the context of the present Study: although the Commission did not adopt any decision in the case, the case concerns a dispute before national courts challenging an aid recovery order. In 2016, the Estonian Supreme Court sent the case back for re-assessment to the court of appeal, but at the same time referred a request for a preliminary ruling to the CJEU.<sup>128</sup> As noted in the Estonian country report, following the recognition by the CJEU of the obligation for "all the authorities of the Member States" (i.e. administrative authorities, not only national courts) to recover unlawful aid in breach of GBER,<sup>129</sup> Estonia will probably amend the Estonian Competition Act to introduce a general obligation for granting authorities to recover any unlawful aid.<sup>130</sup> The relevance of the CJEU preliminary ruling thus goes beyond the dispute at stake in the national proceedings.

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<sup>121</sup> Case C-69/13, *Mediaset SpA v. Ministero dello Sviluppo economico* (2014) ECLI:EU:C:2014:71.

<sup>122</sup> 2897/2016 (Case summary IT10).

<sup>123</sup> 274923 (Case summary FR10).

<sup>124</sup> *Supra*, Case C-199/06.

<sup>125</sup> Case C-1/09, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)* (2010). ECLI:EU:C:2010:136.

<sup>126</sup> *Supra*, Case C-349/17, *Eesti Pagar AS*.

<sup>127</sup> ECLI:EE:RK:2016:3.3.1.8.16.10899 (Case summary EE1).

<sup>128</sup> *Ibid.*

<sup>129</sup> *Supra*, Case C-349/17, *Eesti Pagar AS*, para. 90.

<sup>130</sup> Estonia country report.

Finally, mention should be made of the request by the Supreme Administrative Court of Portugal for further guidance on a public service compensation calculation (*PSO/transport*).<sup>131</sup> In line with the CJEU preliminary ruling in the case,<sup>132</sup> the Supreme Administrative Court pointed out the importance of introducing a system of accounting separation in the companies providing a SGEI, in order to differentiate the activities where the firm could benefit from an aid, in order to perform a SGEI, from the other activities carried out in a competitive market.

The low percentage of preliminary ruling requests could, in part, be explained by the availability of the co-operation tools - further discussed in Chapter 4. In particular, on the basis of the cases discussed in Annex 3, the Consortium notes that a Commission opinion was solicited by national courts in a number of cases: *Hellenic Shipyards*<sup>133</sup> in Greece and *Sheep*<sup>134</sup> in the Netherlands. Finally, Commission *amicus curiae* observations were relied upon in *Micula* in UK,<sup>135</sup> in *Hellenic Shipyards*<sup>136</sup> in Greece and in *Ryanair* in France.<sup>137</sup> It is worth noting that in these cases there were no further requests for preliminary rulings from the CJEU.

### **Main difficulties faced by national courts in public enforcement cases - examples drawn from collected data**

The case summaries and country reports included in Annex 3 have revealed a number of difficulties faced by national courts in cases of public enforcement of State aid rules.

#### *Difficulties in calculating the recovery interest*

Difficulties in respect of calculation of the recovery interest, as established in Commission Regulation (EC) No 794/2004<sup>138</sup> and amended by Commission Regulation (EC) No 271/2008,<sup>139</sup> have led a number of Member States to include specific provisions concerning the recovery interest in the legislation on aid recovery. As discussed in the country reports in Annex 3, the recovery legislation adopted in the Netherlands and Slovakia includes specific provisions on the calculation of the recovery interest. Similarly, Spain included similar provisions in the recovery legislation after the Supreme Court criticised the absence of a specific national procedure to recover fiscal State aid.<sup>140</sup>

#### *Complications for recovery in cases where the beneficiary is insolvent*

National legislation may affect the position of the State as creditor or impose time limitations on lodging a claim in bankruptcy proceedings and prevent full recovery (e.g. *SCM* case in France),<sup>141</sup> or restrictions on the type of claim that can be lodged. In *SKL-*

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<sup>131</sup> 01050/03 (Case summary PT5).

<sup>132</sup> Case C-504/07, *Associação Nacional de Transportadores Rodoviários de Pesados de Passageiros (Antrop) and Others v Conselho de Ministros, Companhia Carris de Ferro de Lisboa SA (Carris) and Sociedade de Transportes Colectivos do Porto SA (STCP)* (2009) ECLI:EU:C:2009:290.

<sup>133</sup> 2734/2016 (Case summary EL4).

<sup>134</sup> ECLI:NL:CBB:2016:210 (Case summary NL8).

<sup>135</sup> 2017 EWHC 31 (Comm) (Case summary UK9).

<sup>136</sup> 2734/2016 (Case summary EL4).

<sup>137</sup> 15BX01807 (Case summary FR8).

<sup>138</sup> 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 EC Treaty. OJ L 140/1, 30.4.2004.

<sup>139</sup> Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty. OJ L 82/1, 25.03.2008.

<sup>140</sup> Spanish country report.

<sup>141</sup> ECLI:FR:CCASS:2012:C00012535 (Case summary FR11).

The SCM had benefitted from a tax exemption later declared incompatible with the internal market by the

M, although the German court denied full recovery as the public authority had followed the wrong procedures to file a claim against the insolvent aid beneficiary, the court ruled that the claim could be re-submitted to the insolvency trustee.<sup>142</sup> Finally, it is worth noting that not all Member States have recognised national procedural insolvency rules as a barrier to full recovery (see for example, the *Valencian football* cases).<sup>143</sup>

#### *Identification of beneficiary after insolvency*

The identification of the beneficiary after insolvency may prove time-consuming and result in lengthy proceedings, as the *Plastini Operations* case in Belgium well shows.<sup>144</sup> In this case, the court conducted in-depth analysis and ordered an expert report to ensure that the price paid by company acquiring shares of a past aid beneficiary had paid the market price, and therefore no aid had to be recovered from the buyer.

In Finland,<sup>145</sup> the Supreme Court rejected in full the plaintiff's arguments that requirements of a compulsory restructuring programme, following insolvency and the creation of a successor company, could be a legitimate obstacle to recovery. The Court held that Union law prevailed over national measures.

In *Venezia/Chiogga*, the Italian Council of State rejected a claim that the relevant public authority should have carried out additional research in addition to the Commission decision to establish the beneficiaries from whom State aid should have been recovered.<sup>146</sup>

In Germany (*SKL-M*),<sup>147</sup> the recovery was partly denied, as appropriate procedures governing insolvency had not been followed, although the court also ruled that the public authority could re-submit the claim after having followed the correct procedures.

#### *Alleged lack of clarity of the recovery decision and the recovery order*

In their rulings, national courts may be requested "to clarify" a number of alleged unclear aspects in the Commission decision and the national recovery order:

- 'Quantum' of the aid to be recovered: in France (*tax*), a national recovery order was annulled, as the beneficiary was not in the position to calculate the amount due. In the ruling, the court held that the public administration could correct the defect and issue a new administrative decision.<sup>148</sup>
- Interest (simple v. compound): although some courts have rejected recovery of interest based on compound interest calculation (France),<sup>149</sup> in Spain (*interest*

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Commission. The administration issued a recovery order while the SCM was already under a liquidation procedure. SCM's liquidator refused to reimburse the State aid, claiming that the deadline to report a debt had expired under French law on insolvency. The Court raises that French law does not provide any exception to allow the recovering of a debt from an insolvent undertaking once the one-year limitation period provided for in French law on insolvency procedure has elapsed.

<sup>142</sup> SKLM IXR22105 (Case summary DE11).

<sup>143</sup> 47617 (Case summary ES 6).

<sup>144</sup> 2003/AB/43888 (Case summary BE6).

<sup>145</sup> KHO/2015/7 (Case summary FI5).

<sup>146</sup> 2401/2015 (Case summary IT9).

<sup>147</sup> SKLM IXR22105 (Case summary DE 11).

<sup>148</sup> ECLI:FR:CECHR:4420/70224 (Case summary FR 11).

<sup>149</sup> NT00572 (Case summary FR07).

In the case the Commission had issued two recovery orders, requesting payment of the amount of the State aid and interest. The aid beneficiaries claimed that only simple interest should be recovered by the administration. The Nantes Administrative Court of Appeal upheld the action and annulled the recovery orders.

free loan) <sup>150</sup> the Supreme Court ruled that compound interest had to be recovered and set aside relevant provisions of Spanish civil and administrative law.

- Identification of the time period for the aid recovery: in *Alcoa*,<sup>151</sup> the Regional Administrative Tribunal found that the recovery order issued by the Italian Electricity Industry Equalisation Fund against Alcoa (i.e. granting authority) was partially unlawful for the period from 19 January 2007 to 19 November 2009. The national court noted that the Commission decision only explicitly referred to the incompatibility of the aid from 1 January 2006 to 18 January 2007. Consequently, the national court partially annulled the recovery order, since the order extended the recovery obligation beyond the period mentioned in the Commission decision.

#### *Lack of clarity on recovery while actions for annulment are pending against a recovery decision*

One of the main challenges faced by national courts concern the enforcement of a recovery decision while the latter is pending annulment at the CJEU. In most of the cases summarised in Annex 3, the national court has rightly enforced the Commission decision, in spite of the pending proceedings at the CJEU. For instance, in *CELF*,<sup>152</sup> the French Council of State did not suspend the recovery procedure in spite of the complexity of the proceedings (i.e. three Commission decisions were annulled on appeal by the GC). The Council of State dealt with the issue by referring two requests for preliminary rulings to the CJEU.<sup>153</sup>

In a limited number of cases reported in Annex 3, however, the national courts suspended the enforcement of the Commission decision while actions for annulment were pending. In *Sanierungsklausel*,<sup>154</sup> for instance, Finance Court Münster temporarily suspended the Commission decision until the final ruling of the CJEU, since it had “serious doubts” as to the application of the selectivity criterion in the Commission decision and since the recovery would have caused irreparable damage to the aid beneficiary. Therefore, in view of the *Atlanta*<sup>155</sup> and *Zuckerfabrik* cases, the national court temporarily suspended the enforcement of the Commission decision, waiting for the final ruling by the CJEU in the case. However, it is worth noting that this type of case represents a minority among the cases summarised in Annex 3 and, although the ruling of the lower court was appealed, that appeal was withdrawn following the bankruptcy of the beneficiary.

#### *Suspension of national recovery order during the appeal proceedings*

Under Article 25 of the Polish Act on State Aid Procedure,<sup>156</sup> the enforcement of the recovery order enforcing a Commission decision can be suspended while the appeal is

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However, the Court did not order the administration to reimburse the whole amounts paid by the plaintiffs but only the difference between compound and simple interest. The Court also orders the administration to issue rectified recovery orders.

<sup>150</sup> ECLI:ES:AN:2011:5805 (Case summary ES7).

<sup>151</sup> 2297/2014 (Case summary IT8).

<sup>152</sup> 274923 (Case summary FR10)

<sup>153</sup> *Supra*, Case C-199/06 and Case C-1/09.

<sup>154</sup> 9V357/11KG (Case summary DE9).

<sup>155</sup> See Section 1.2.

<sup>156</sup> See Polish country report.

*Ustawa z dnia 30 kwietnia 2004 r. o postępowaniu w sprawach dotyczących pomocy publicznej, Dz.U. 2004 nr 123 poz. 1291 ze zm.*

pending before the national courts. Similarly, Article 12 of the General Administrative Procedure Act in Croatia provides that an appeal against an administrative act (e.g. recovery order) has suspensory effect in relation to its execution.<sup>157</sup> Under Article 278 TFEU, “actions brought before the CJEU shall not have suspensory effect”. Therefore, the enforcement of the Commission decisions cannot be suspended while appeals are pending before the GC/CJEU. However, the Croatian and Polish procedural rules refer to an appeal against a recovery order enforcing a Commission decision. The concerned Member States could argue that in view of the principle of procedural autonomy, such procedural rules are compatible with Union law as they aim at safeguarding the legitimate expectations of the aid beneficiary during the court proceedings. However, it could be contended that such rules represent an obstacle to the timely enforcement of recovery decisions – i.e. they should be disapplied by national courts since they hamper the effective enforcement of Union law. The fact that the suspension refers only to the national recovery order does not alter this notion, since it has the effect of jeopardising the enforcement of the Commission decision.

#### *Recovery ordered by national authorities without Commission intervention*

A number of selected rulings concern the recovery of State aid ordered by national authorities without Commission intervention.

These rulings concern, for example, recovery proceedings that do not follow a recovery decision, but rather a recovery order adopted by a national authority. One such case has been identified in Romania, where the aid recovery was treated as a sanction/penalty for misuse of EU structural funds.<sup>158</sup>

Similarly, in the *Sheeps* case,<sup>159</sup> the beneficiary challenged the administrative decision of the Dutch State Secretary to modify the aid scheme previously approved, by reducing its overall size to comply with the *de minimis* Regulation.<sup>160</sup> The State Secretary based its decisions on possible concerns that the Commission would not have approved the aid scheme if the latter had been notified.

Finally, in the *Broadcasting television* case,<sup>161</sup> the Austrian Communication Office ordered ORF (i.e. Austrian public broadcaster) to recover the unlawful aid received. The Communication Office justified the recovery order on the basis of domestic law. In addition, it argued that the order was compatible with a previous Commission decision in a similar case.<sup>162</sup> In these three cases, therefore, the recovery took place because of the autonomous initiative of national authorities, while the aid was not notified to the Commission.

The interesting aspect of these cases is that the public authority has justified the recovery order to avoid a possible recovery decision – i.e. it is an example of de-centralisation of State aid enforcement. The cases may be seen to anticipate the recent *Eesti Pagar* ruling by the CJEU.<sup>163</sup> In the judgment, the CJEU stressed that national authorities have to take “...all appropriate action, in accordance with their national law, to address the consequences of an infringement of the last sentence of Article 108(3)

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<http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20041231291> (last accessed on 11.3.2019).

<sup>157</sup> See Croatian country report.

<sup>158</sup> 417/2018 (Case summary RO2).

<sup>159</sup> ECLINL RVS 20151152 (Case summary NL8).

<sup>160</sup> *Supra*, *de minimis* Regulation.

<sup>161</sup> Ro 2015/03/0014 (Case summary AT6).

<sup>162</sup> Commission decision of 28 October 2009 on the State aid C 14/08 (ex NN 1/08) implemented by the United Kingdom for Northern Rock. OJ L 112/38, 5.5.2010.

<sup>163</sup> *Supra*, Case C-349/17, *Eesti Pagar AS*.



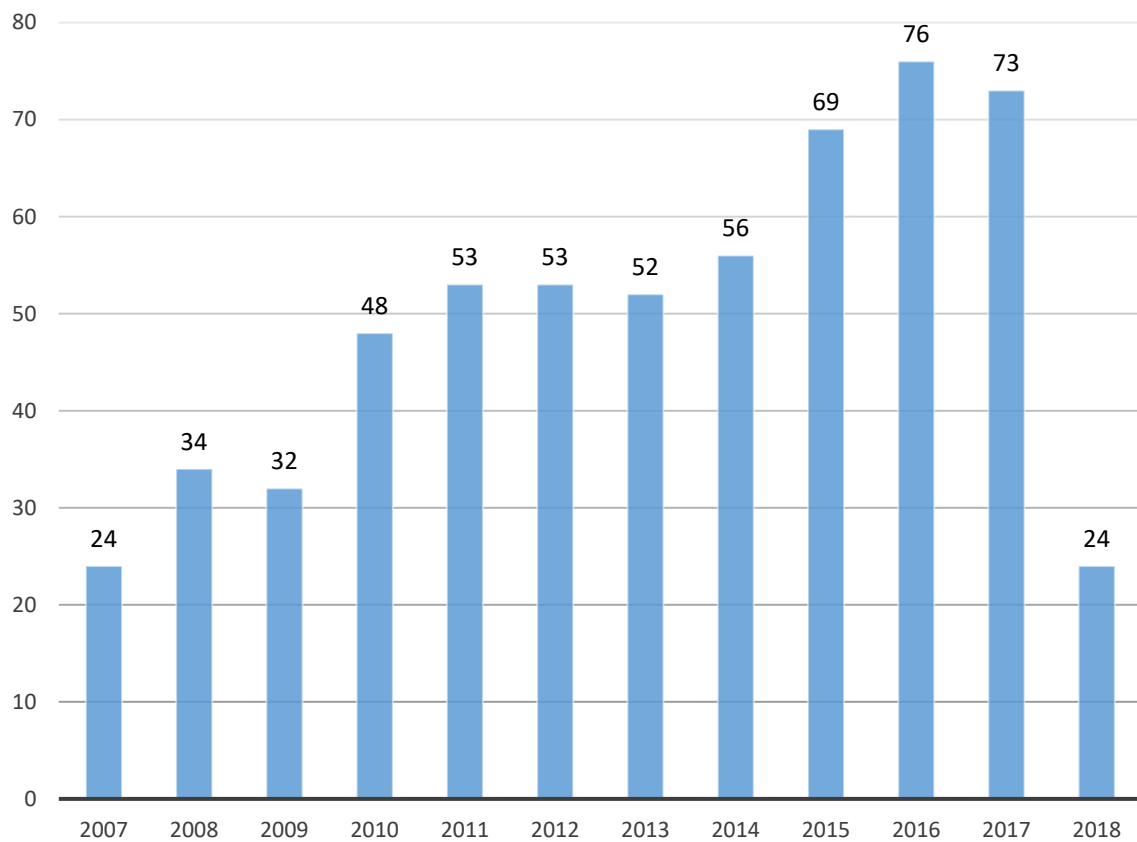
TFEU” (i.e. breach of the standstill obligation).<sup>164</sup> In particular, such duty falls on “all the authorities of the Member States” - i.e. not only national courts, but also administrative authorities.<sup>165</sup> In *Eesti Pagar*, the CJEU thus recognised the duty of national administrative authorities to order the recovery of an unlawful aid even in the absence of a previous Commission decision.

### 2.2.2. Private enforcement by national courts

#### Aggregated statistics at EU level

##### *Growth of the number of private enforcement cases*

Figure 15 - Number of cases of private enforcement of State aid rules at EU level, 2007-2018 (data extracted from the lists of relevant rulings in Annex 2)



<sup>164</sup> *Supra*, Case C-349/17, *Eesti Pagar AS*, para. 89.

<sup>165</sup> *Supra*, Case C-349/17, *Eesti Pagar AS*, para. 90.

Table 3 - Number of cases of private enforcement of State aid rules per Member State, 2007-2018 (data extracted from the lists of relevant rulings in Annex 2)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	TOTAL
<b>Austria</b>	8	5	1	2	2	3		2	3	2	3	1	32
<b>Belgium</b>	1	3	5	2	1	1	3	3	4	1	2		26
<b>Bulgaria</b>													0
<b>Croatia</b>													0
<b>Cyprus (*publication date)</b>			1		1								2
<b>Czech Republic</b>		1		1		1		1	1	1	3		9
<b>Denmark</b>							3	1		4			8
<b>Estonia</b>							1	1	3	1		1	7
<b>Finland</b>			1	2	3	4	3	3	5	1	1	3	26
<b>France</b>	4	5	1	5	9	7	10	8	15	22	12	6	104
<b>Germany</b>	1	1	4	3	5	8	6	5	6	9	13	2	63
<b>Greece (*publication date)</b>		1				2	2	3	1	1	2		12
<b>Hungary</b>							1	1	1	2			5
<b>Ireland</b>					1		1		1		1		4
<b>Italy</b>	1	2	2	8	2	3	2	6	3	6	5	1	41
<b>Latvia</b>				1	1			1	2			2	7
<b>Lithuania</b>			1	5	3	2	3	5	4	3	1		27
<b>Luxembourg</b>													0
<b>Malta</b>										1			1
<b>Netherlands</b>	7	8	7	11	17	8	8	4	2	7	8	2	89
<b>Poland</b>		1	3	3	4	4	2	5	6	6	10	1	45

<b>Portugal</b>		1					2		2	1	1		7
<b>Romania</b>								1		1			2
<b>Slovakia</b>									1		1	1	3
<b>Slovenia</b>		1				1			2	2			6
<b>Spain</b>		3	4		2	5		3	3	4	9	4	37
<b>Sweden</b>	2	1	2	3	1	3	2	1	1	1			17
<b>UK</b>		1		2	1	1	3	2	3		1		14
<b>EU</b>	<b>24</b>	<b>34</b>	<b>32</b>	<b>48</b>	<b>53</b>	<b>53</b>	<b>52</b>	<b>56</b>	<b>69</b>	<b>76</b>	<b>73</b>	<b>24</b>	<b>594</b>

As mentioned in the previous section, the Study covers judgments handed down by national courts from 2007 to 2017. However, a number of judgments handed down in 2018 are also included in the Study where these cases were of particular relevance. This factor explains the decrease in the number of private enforcement cases in the year 2018 shown by Figure 15 and Table 3.

Figure 15 and Table 3 show the growth of the number of private enforcement cases in the period 2007-2017. In particular, between 2007 and 2017, the number of private enforcement cases has tripled. Such growth took place both in absolute terms and in comparison with public enforcement cases.<sup>166</sup> Finally, Table 3 shows that this trend is generally uniform across all Member States.<sup>167</sup>

Possible explanations for the growth of the number of private enforcement cases include the following:

- Country-specific factors: as mentioned by the country reports in Annex 3, in Finland and Sweden, citizens can challenge the acts of municipalities leading to an advantage for an undertaking, as the granting of unlawful aid is, in substance, considered a form of maladministration. An active level of participation in the public administration thus fuels private enforcement actions. In addition, in the UK and in the Netherlands, the low number of recovery decisions limited litigation in the field of State aid rules to private enforcement cases.<sup>168</sup>
- Factors specific to public enforcement and recovery proceedings: Under Article 263(1) TFEU, Commission decisions can only be challenged before Union courts, with national courts being able to grant interim measures in exceptional circumstances: as discussed in Section 1.2, national courts can suspend the aid recovery only if the conditions mentioned in the *Atlanta* and *Zuckerfabrik* cases are fulfilled.<sup>169</sup> This case law results in a limitation in the possible grounds on which a public enforcement action can rely, which in turn means there is less interest in bringing public enforcement litigation. The pay-offs of a private action case, by contrast, can be significant. Nevertheless, a number of country reports in Annex 3 have stressed that parties often prefer to submit a complaint to the Commission rather than starting court proceedings, since the outcome of private actions can be very uncertain and costly.<sup>170</sup>
- Cultural factors specific to private enforcement: companies and their advisors are more and more aware about State aid potentially being used as a 'sword' or as a 'shield' in a competition-related litigation. In this connection, the country reports in Annex 3 show that in the large majority of Member States, national courts extensively refer to EU *acquis* in their rulings.<sup>171</sup> Given that judgments

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<sup>166</sup> See Austria, Belgium, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, Netherlands, Sweden, UK. In Spain, there is the same number of cases of public and private enforcement. In Italy, public enforcement outweighs private enforcement cases; this could be due to country specific factors, such as the relatively high number of recovery decisions adopted by the Commission against Italy.

<sup>167</sup> In the Netherlands, there was a surge of cases in 2011, maybe in connection with the aftermath of the financial crisis. Yet, private enforcement claims brought before Dutch courts in 2011 had different backgrounds, concerning various types of aid and economic sectors. Since then, the number of cases has followed a steady trend.

<sup>168</sup> See the country reports concerning UK and the Netherlands in Annex 3, as well as Table 2.

<sup>169</sup> *Supra*, C-465/93, para. 51 and C-143/88, para. 33.

<sup>170</sup> See, for instance, country reports from Czech Republic, Slovakia.

<sup>171</sup> See, for example, Germany, Latvia, Netherlands, Slovakia, Spain. One exception to this regard is represented by the UK country report, which argues that national courts generally did not refer to CJEU rulings.

tend to reflect the arguments brought by the parties, this finding buttresses the point about increased awareness of State aid rules among practising lawyers.

- Impact of the 2008 financial crisis: as noted in Figure 20, most of the cases of private enforcement discussed in the case summaries in Annex 3 concern the financial and insurance sectors. Therefore, it is plausible to infer a correlation between the increase in the number of private enforcement cases pointed out in Figure 15 and Table 3, and increased litigation in national courts in the post-2008 financial crisis. In the aftermath of the financial crisis, in fact, the majority of Member States put in place a number of aid measures to safeguard banks and financial institutions. Therefore, the increase in the number and size of State aid measures may have contributed to the substantial increase of private enforcement cases in the first half of 2010s. A number of case summaries in Annex 3, in fact, concern private enforcement claims challenging aid schemes granted by Member States after the 2008 financial crisis.<sup>172</sup>
- Relevant procedural rules: In a number of Member States, lodging a claim before a national court in State aid matters is not a parallel track to other types of remedies. In particular, when competitors of the beneficiary choose to file a complaint with the Commission, or with the national administrative body, they usually do not institute judicial actions before the courts.<sup>173</sup>

#### *Categories of courts hearing private enforcement cases*

In all Member States, private enforcement of State aid rules follows generally applicable national procedural rules. In particular, in the absence of specific rules, cases are distributed among civil and administrative courts according to general legal principles. In most of the Member States, administrative courts are competent when the claimant challenges an act of the public authority, while civil/commercial courts are competent when the claimant is seeking damages.<sup>174</sup>

In certain States, criminal courts could also hear State aid cases, when the grant constitutes fraud (e.g. Germany). In other instances, aid granted through statutory laws can be challenged before Constitutional Courts (e.g. Belgium and Italy).<sup>175</sup>

Italy is the only country having *ad hoc* rules for determining the competent court to hear State aid cases. In particular, administrative courts have now exclusive jurisdiction to hear cases of public and private enforcement of State aid rules.<sup>176</sup> However, the case law of the Italian Supreme Court has carved out an exception for follow-on damages cases, and it cannot be excluded that stand-alone cases might also be assigned to civil courts.

In Spain, national law provides for an *ad hoc* recovery administrative procedure applicable to the recovery of State aid granted in the form of grants, rather than fiscal measures.<sup>177</sup> The competent authority for the recovery is the granting authority, which

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<sup>172</sup> See, for instance: [2011] IESC 4 (Case summary IE1); [2017] IEHC 520 (Case summary IE3); ECLI:SI:USRS:2016:U.I.295.13 (Case summary SI2).

<sup>173</sup> See, for instance, country reports from Spain and the Netherlands.

<sup>174</sup> For example, in Belgium, Croatia Estonia, Italy or Luxembourg. Instead, in France, administrative courts are competent when a public authority is involved.

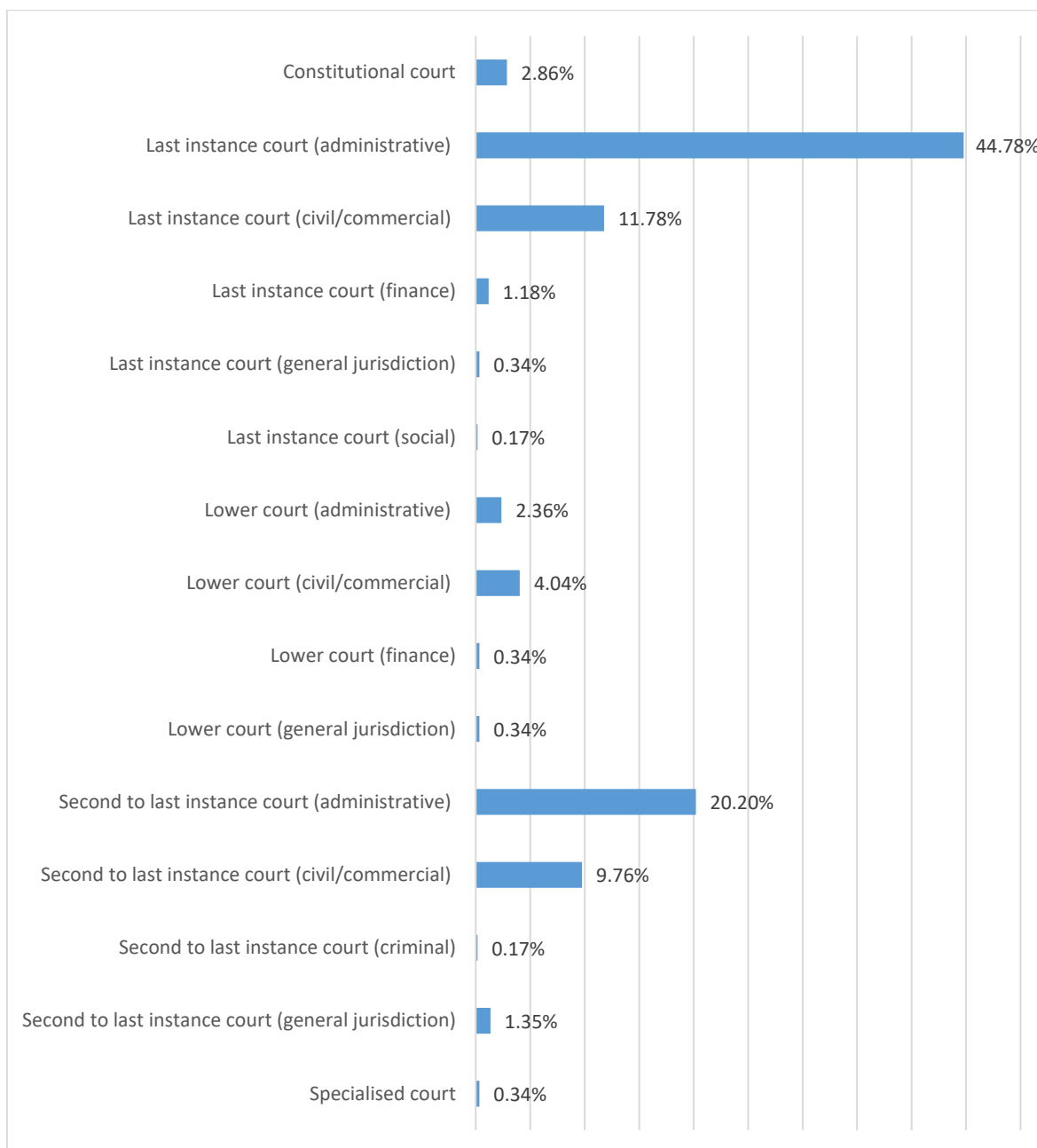
<sup>175</sup> In Italy, the central government can challenge before the Constitutional court a regional law for breach of the standstill obligation.

<sup>176</sup> Following the introduction of Article 49, par. 2, of Law no. 234 of 24 December 2012.

<sup>177</sup> Law 38/2003, the General Law on Subsidies, and Royal Decree 887/2006 of 21 July 2006.

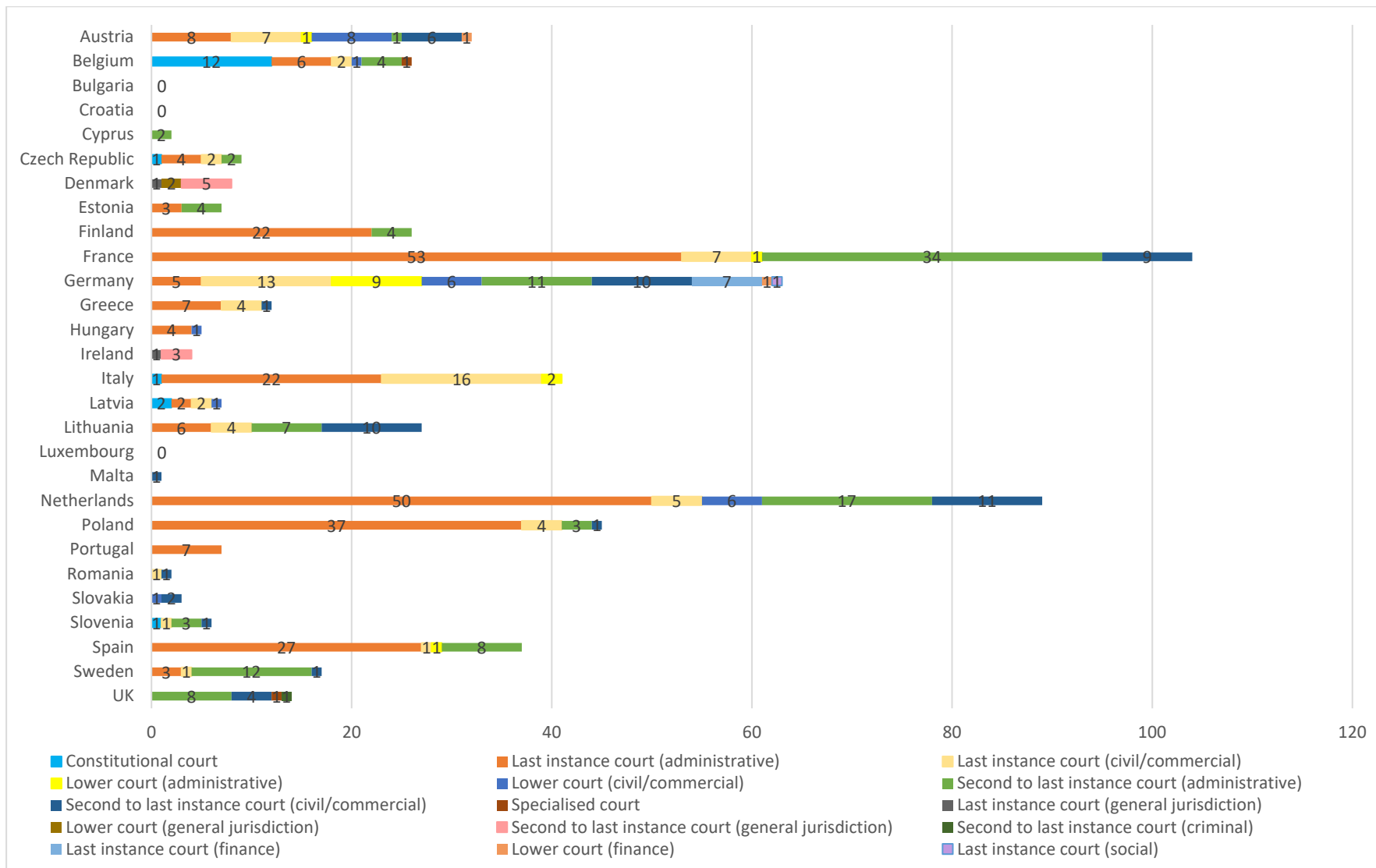
could start the procedure *ex officio* or at the request of other authorities or of a complaint. Interested parties have the right to be heard during the procedure. The refusal of the administration to set in motion this process can be appealed before administrative courts.

**Figure 16 - Categories of courts hearing cases of private enforcement of State aid rules - percentage at EU level (data extracted from the lists of relevant rulings in Annex 2)**



See also the Law 34/2015, of September 21, 2015, partially amending General Taxation Law 58/2003, of December 17, 2003 ("LGT").

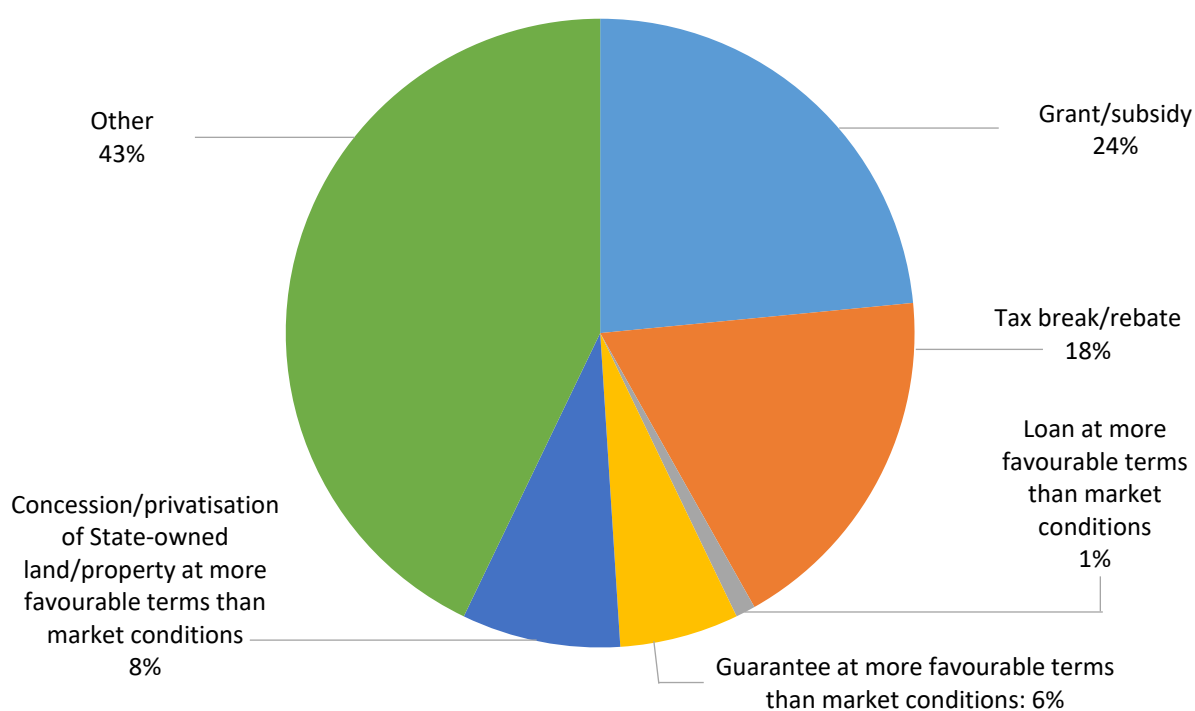
Figure 17 - Categories of courts hearing cases of private enforcement of State aid law (data extracted from the lists of relevant rulings in Annex 2)



Last instance administrative courts hear most of the private enforcement cases. In particular, Figures 16 and 17 show that in certain countries,<sup>178</sup> private enforcement cases have been ruled on exclusively by administrative courts. The prevalence of administrative high courts over civil courts is consistent with the trend in the remedies awarded: there are more recovery actions, falling generally within the competence of administrative courts, than damages claims. This trend is further discussed in the next section.

*Categories of aid measures challenged in private enforcement cases*

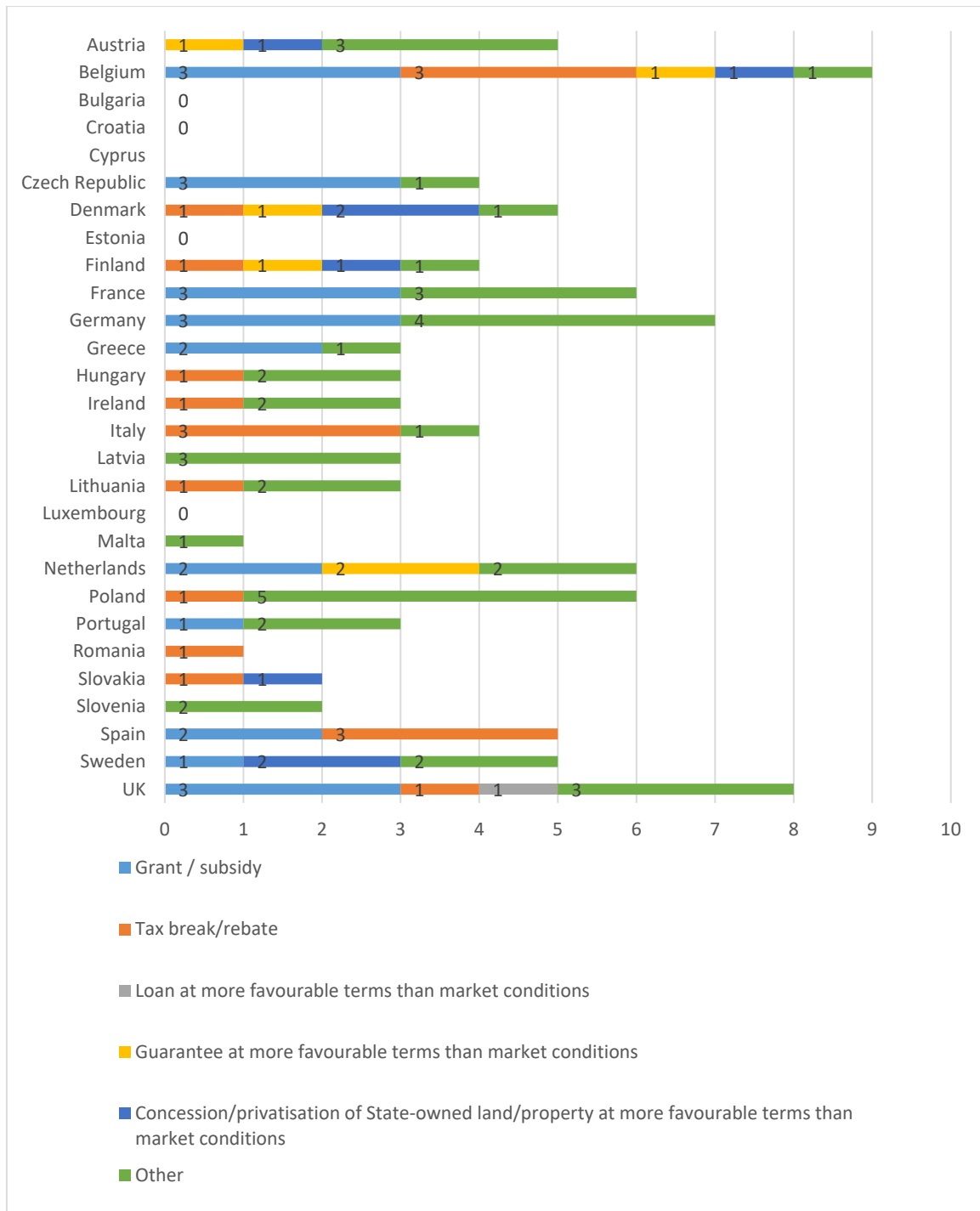
**Figure 18 - Categories of aid measures challenged in cases of private enforcement of State aid rules - percentage at EU level (data extracted from the case summaries in Annex 3)**



<sup>178</sup> For example, Sweden, Spain, Portugal, Finland, Estonia, Cyprus, Bulgaria.



**Figure 19 - Categories of aid measures challenged in cases of private enforcement of State aid rules (data extracted from the case summaries in Annex 3)**



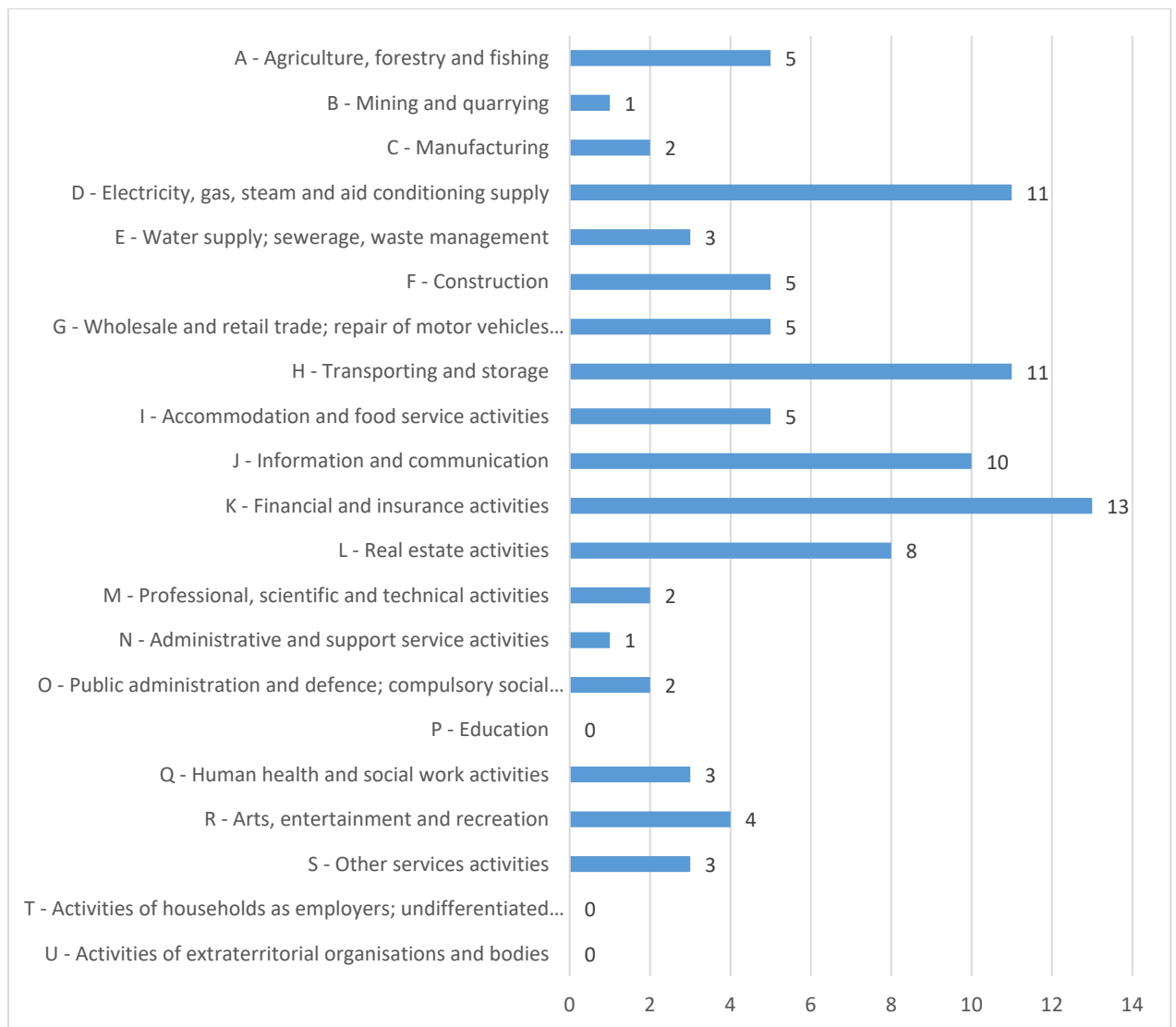
Figures 18 and 19 show that, contrary to the public enforcement cases,<sup>179</sup> grants and tax rebates do not represent the main aid measures challenged in the private enforcement cases summarised in Annex 3. It is worth noting that most of the aid measures discussed in the case summaries could not easily be classified by the national

<sup>179</sup> See Figures 4 and 4.

legal experts and thus fell within the category 'others' (i.e. 43% of the cases).<sup>180</sup> This finding is not a surprise: in the context of the Study, private enforcement cases refer to claims concerning the breach of the standstill obligation under Article 108(3) TFEU. Private enforcement cases, therefore, are likely to concern specific measures where the fulfilment of the cumulative conditions under Article 107(1) TFEU is not self-evident, and thus in the context of court proceedings, it can be debated whether the measure indeed represents a new aid that should have been notified to the Commission.

*Economic sectors involved in private enforcement procedures*

**Figure 20 - Economic sectors in cases of private enforcement of State aid rules (data extracted from the case summaries in Annex 3)**



<sup>180</sup> See, for instance, 2015/15/0001 (Case summary AT1), where the plaintiff challenged the decision of the fiscal authority declaring that the depreciation of goodwill had to be extended to holdings in companies' resident in another Member State. On the other hand, in ECLI:AT:OGH0002:2014:00400B00209.13H.0325.000 (Case summary AT4) concerned the sales of banks' shares at a price more favorable than market conditions.

As regards the economic sectors involved in cases of private enforcement, Figure 20 shows that some sectors appear to be more prone to litigation than others, with financial and insurance activities, transport and storage, and energy having a similar high score.

Possible explanations for this trend include:

- Legacy: for all three sectors (i.e. financial and insurance activities, transport and storage and energy), the State has traditionally played a leading role, either because these industries have been gradually liberalised or because of public policy reasons (e.g. protection of depositors in the banking sector).
- Financial crisis: as discussed above, the increase in the number of aid measures granted by the Member States to save or stabilise financial institutions after the 2008 financial crisis might explain why the majority of private enforcement cases took place in the financial sector.<sup>181</sup>
- Green technologies: during the last few years, the majority of the Member States have granted aid measures to support the development of green technologies in the energy and transport sectors, in order to comply with environmental objectives agreed at EU level. A number of case summaries in Annex 3 deal with claims by competitors challenging this type of aid measures.<sup>182</sup> This trend might explain the relevance of energy and transport sectors in private enforcement cases of State aid rules.
- Services of General Economic Interest (SGEI): besides the support of green technologies, the large number of private enforcement cases in the transport and energy sectors might also be explained by the aid granted by a number of Member States to support SGEI. In a number of case summaries in Annex 3, in fact, the claimant challenged the aid measures granted by a Member State to compensate the provider of a SGEI.<sup>183</sup>

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<sup>181</sup> See, for instance: [2011] IESC 4 (Case summary IE1); [2017] IEHC 520 (Case summary IE3); ECLI:SI:USRS:2016:U.I.295.13 (Case summary SI2).

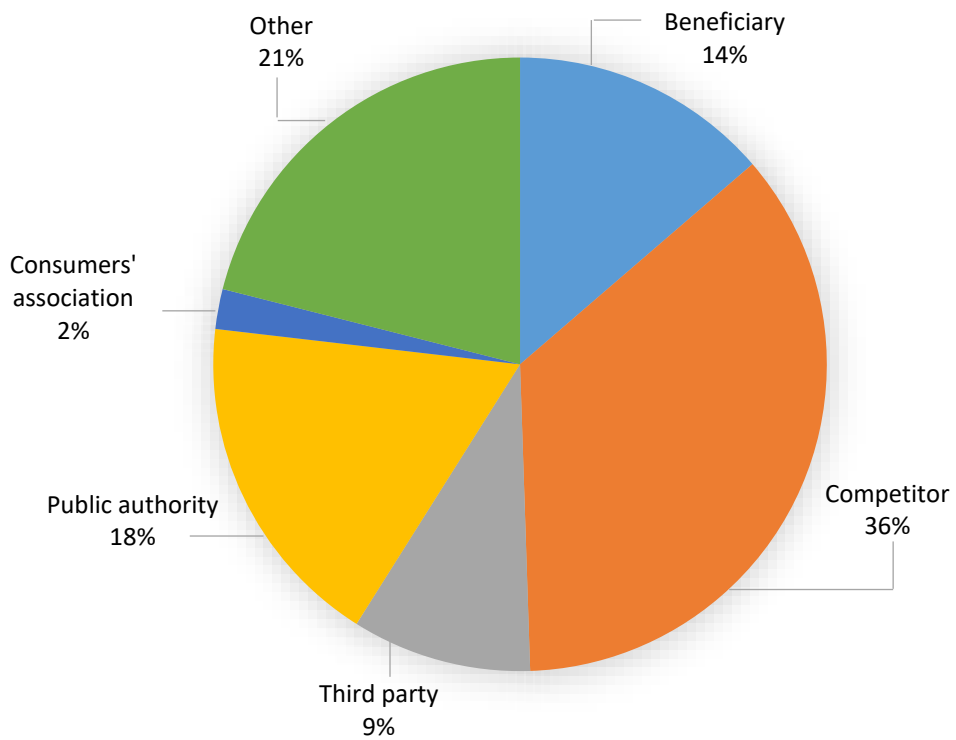
<sup>182</sup> See, for instance: ECLI:FR:CESSR:2016:393721.20160415 (Case summary FR4).

<sup>183</sup> See, for instance: 13PA03172 (Case summary FR1); DE:BGH:2017:090217UIZR91.15.0 (Case summary DE2); I ZR 136/09 (Case summary DE6); CLI:NL:CBB:2011:BP7546 (Case summary NL1); 998 / 2017 (Case summary EL2).

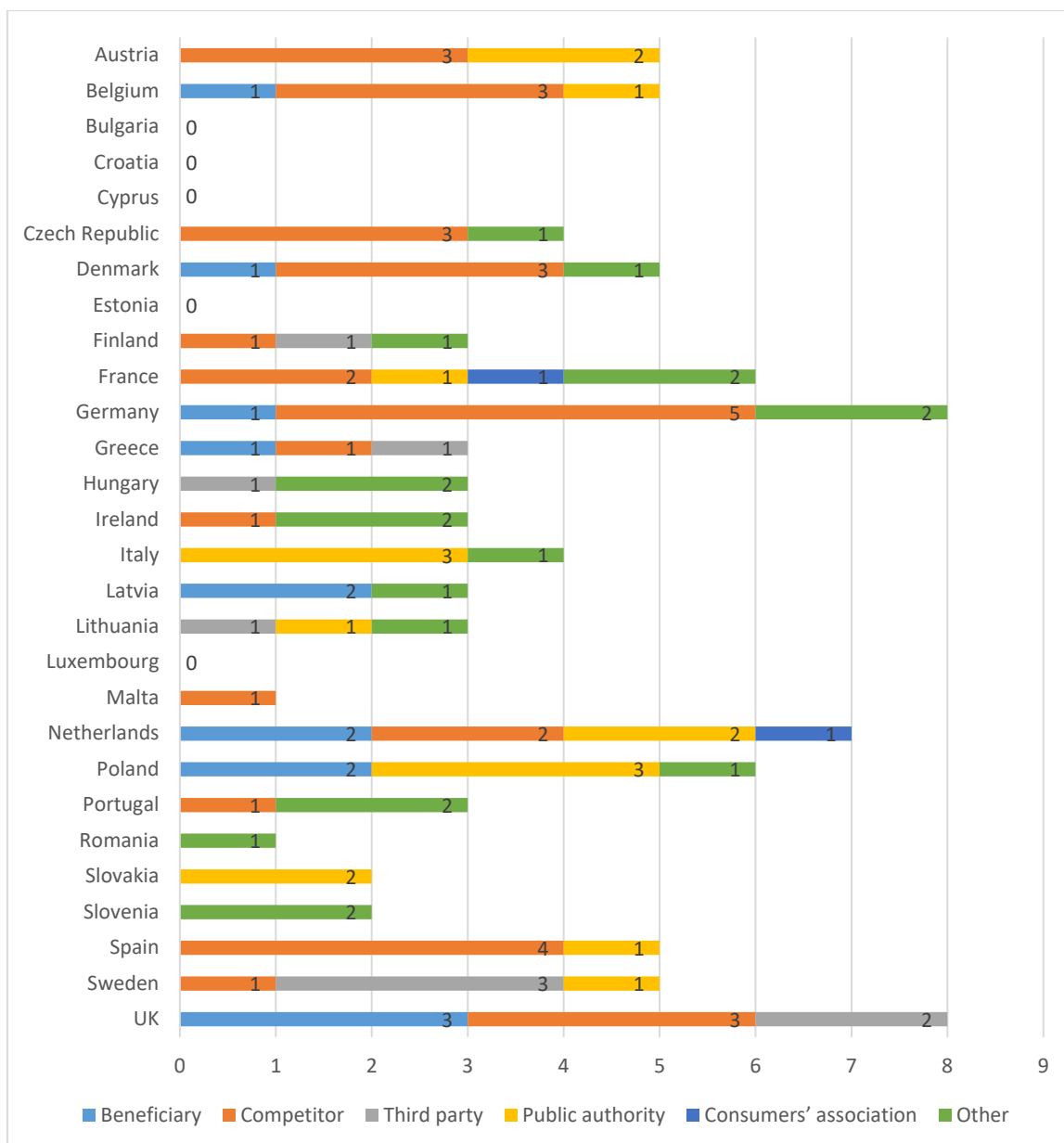
## Evolution of the degree of enforcement the EU State aid *acquis* by national courts

### *Categories of plaintiffs in private enforcement procedures*

**Figure 21 - Categories of plaintiffs in cases of private enforcement of State aid rules - percentage at the EU level (data extracted from the case summaries in Annex 3)**



**Figure 22 - Categories of plaintiffs in cases of private enforcement of State aid rules (data extracted from the case summaries in Annex 3)**



As regards the categories of plaintiffs, the enforcement of State aid rules was triggered by competitors of the beneficiaries in 36% of the cases, as shown by Figure 21. For the other actions, the data shows that in 14% of the case summaries, the plaintiff was the aid beneficiary; in 18%, public authorities acted as plaintiffs. Finally, there is also a significant percentage of cases in which the relationship between the plaintiff and the aid is unclear or cannot be attributed to one of the standard categories (i.e. beneficiary/competitor/public authority).

As shown by Figure 22, the distribution of cases according to categories of plaintiffs is not uniform throughout different jurisdictions: in a number of countries (e.g. Italy, Slovenia, Bulgaria, Hungary, Lithuania and Poland), none of the claimant in the case summaries included in Annex 3 were competitors. By contrast, in Germany, Spain,

Belgium and Austria, the majority of private enforcement claims were brought by competitors.

The data on plaintiffs indicate that:

- Recovery actions triggered by competitors represent approximately one third of the total actions sampled: one possible explanation for the scarcity of competitors' actions is that many private enforcement cases may be at the borderline between public and private enforcement (this also has consequences regarding the nature and award of remedies, as further discussed in the following section).
- Tax cases (fiscal exemptions, or other forms of tax measures and benefits) are significant: in these cases, the tax authority (or other public entity) starts an action for recovery of unlawful aid on the premise that the tax benefit was granted in breach of the standstill obligation.
- Beneficiaries of aid ask for damages: in a number of cases summarised in Annex 3, the beneficiary, rather than a competitor, claimed damages from the State granting the aid. This was the case, for instance, in *Sardinia hotel*, a case that was pending on appeal at the Italian Supreme Court at the time of writing the Study.<sup>184</sup> In this type of case, the beneficiary usually puts forward arguments concerning the breach of its legitimate expectations to justify the damages. In other words, the beneficiary claims compensation when the State authorities initially grant aid and later order the aid recovery, since the measure breaches State aid rules. In its recent ruling in *Eesti Pagar*, however, the CJEU has pointed out that the recovery of unlawful aid by State authorities does not breach the legitimate expectations of the beneficiary; an unlawful aid measure does not generate any legitimate expectation for the beneficiary, which has the duty to check in advance that the aid measure complies with the standstill obligation under Article 108(3) TFEU.<sup>185</sup> In view of the recent CJEU ruling in *Eesti Pagar*, it is doubtful that damages claims started by the aid beneficiary due to the breach of the principle of legitimate expectations will be successful in the future.

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<sup>184</sup> 517/2017 (Case summary IT6).

<sup>185</sup> *Supra*, Case C-349/17, para. 98-104.

*Categories of defendants in private enforcement procedures*

**Figure 23 - Categories of defendants in cases of private enforcement of State aid rules - percentage at the EU level (data extracted from the case summaries in Annex 3)**

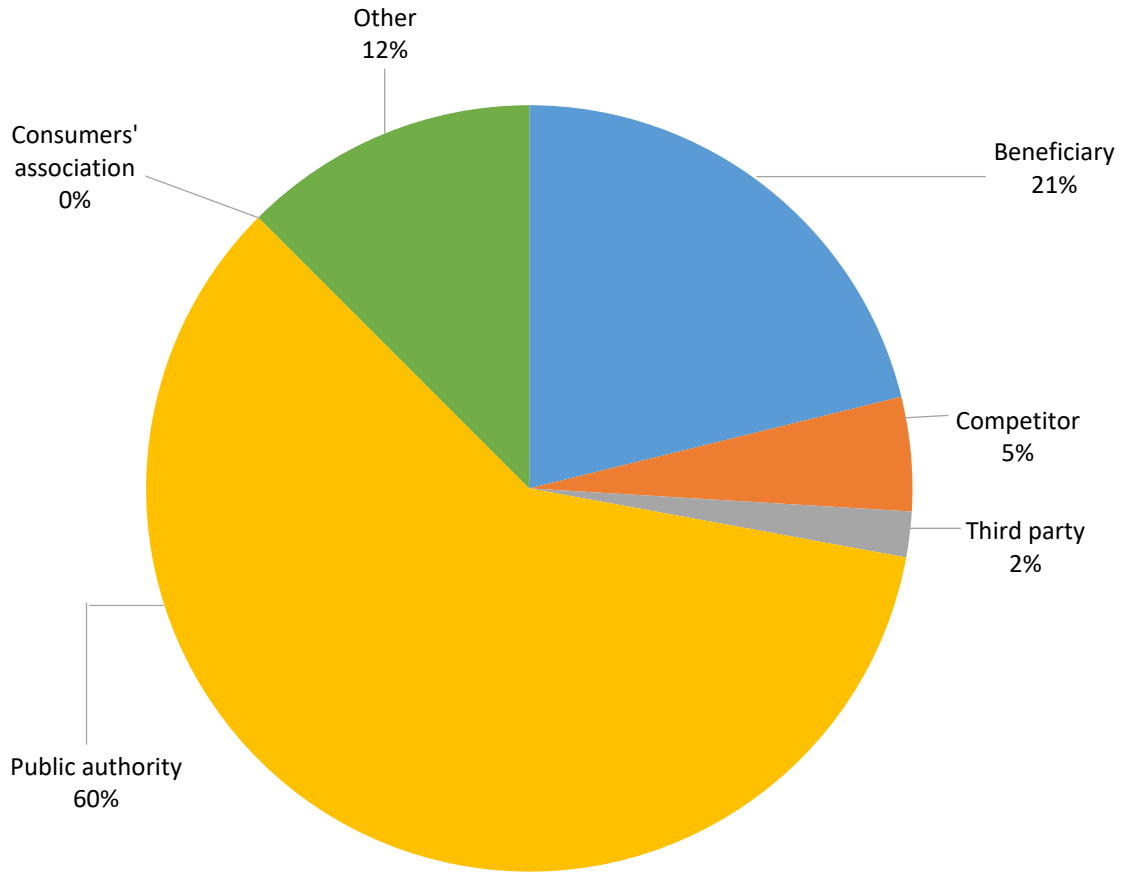
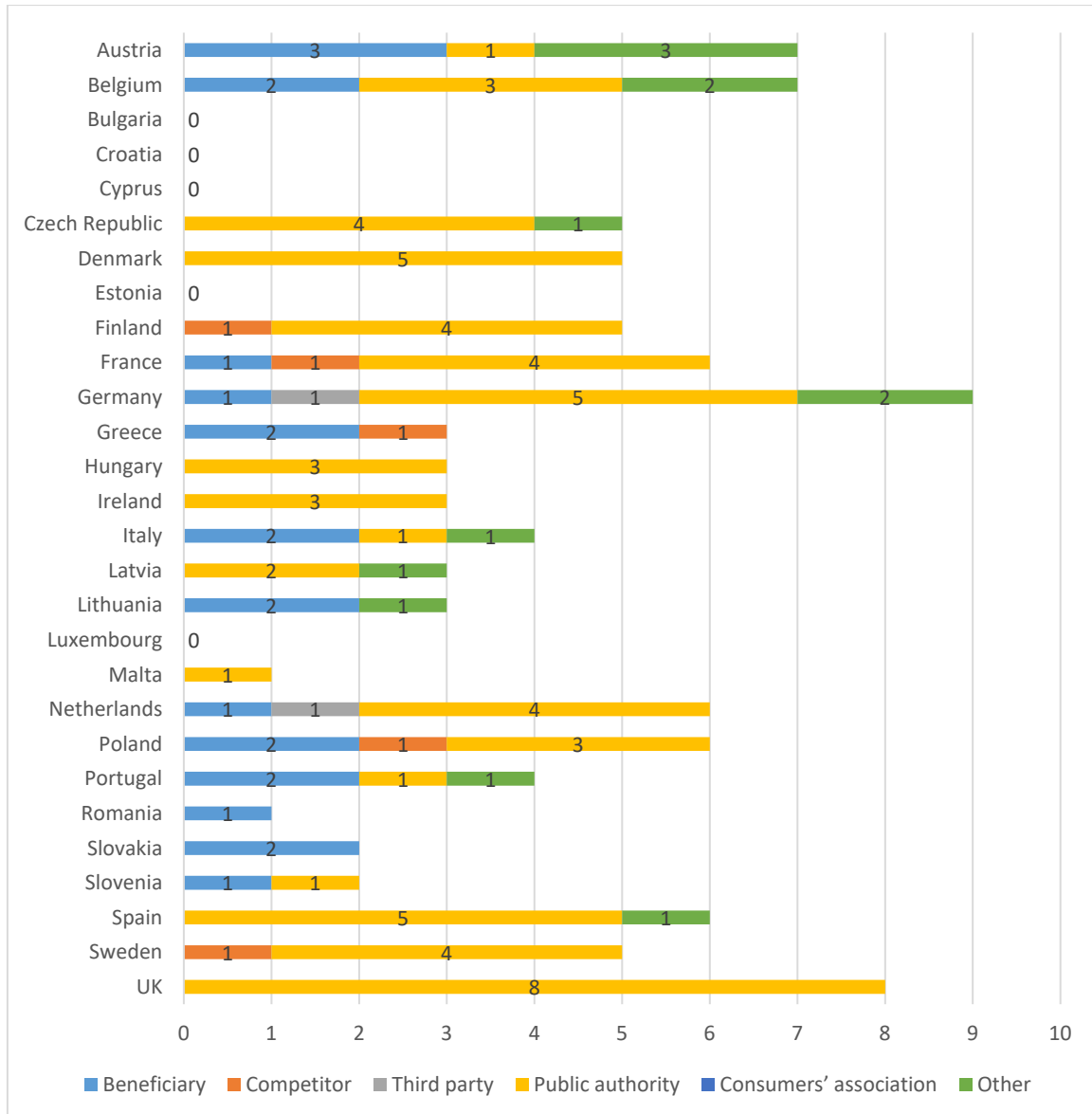


Figure 24 - Categories of defendants in cases of private enforcement of State aid rules



As regards the categories of defendants in private enforcement cases, unsurprisingly, the vast majority actions are brought against public authorities. In particular, in 60% of the cases, the defendant is a public authority, as shown by Figure 23. In 21% of the cases, the defendant was the beneficiary.

Figure 24 shows that in most countries the defendant was a public authority in the majority of cases.<sup>186</sup> Exceptions include countries where public authorities were defendants in all the selected rulings,<sup>187</sup> and countries where, in the majority of cases, the defendants were the beneficiaries.<sup>188</sup>

<sup>186</sup> For example, Poland, Netherlands, Latvia, Germany, Denmark, Austria and Belgium.

<sup>187</sup> For example, Croatia, Finland, Hungary, Ireland, Malta, Spain and the UK.

<sup>188</sup> For example, Bulgaria, Estonia, Italy, Lithuania Romania, Portugal and Slovakia.



### *Co-existence between private enforcement and complaints to the Commission*

A number of country reports pointed out that lodging a claim before a national court in State aid matters is not a parallel track to other types of remedies. In particular, when competitors of the beneficiary choose to file a complaint with the Commission, or with the national administrative body, they usually do not institute judicial actions before national courts.<sup>189</sup> Finally, as further discussed in the next section, since remedies are rarely awarded in private enforcement cases, parties might prefer submitting a complaint to the Commission in relation to an unlawful aid, rather than starting a legal action in a national court.<sup>190</sup>

### *Stand-alone v. follow-on actions*

Most of the cases of private enforcement are stand-alone actions, but some cases of follow-on actions have also been reported in the case summaries in Annex 3. These claims are brought by competitors of the beneficiary after the Commission issued a recovery decision.

For instance, in the context of the French *CELF* saga, competitors of the beneficiary brought damages claims. One of the cases is still pending; the court has requested more information from public authorities and from the Commission, in order to investigate the causal link with the damages alleged by the claimant.<sup>191</sup>

Similarly, after the Commission's recovery decision in *SEA Handling*,<sup>192</sup> one of the competitors of the beneficiary sought compensation before a national administrative court. The Italian Supreme Court rejected the claim on procedural grounds, since the follow-on damages action should have been lodged with a civil court.<sup>193</sup>

In Slovakia, a number of follow-on actions took place linked to *Frucona* case.<sup>194</sup> In particular, a number of public authorities which were obliged to write-off their claims during insolvency proceedings challenged the write-off as constituting State aid. These cases mostly concerned the issue of whether accepting such a restructuring plan was compliant with the private creditor test.

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<sup>189</sup> See, for instance, the country reports from Spain and the Netherlands.

<sup>190</sup> See the country reports from Czech Republic and Slovakia.

<sup>191</sup> 17PA00397 (Case summary FR2).

<sup>192</sup> *Supra*, Commission Decision 2015/1225.

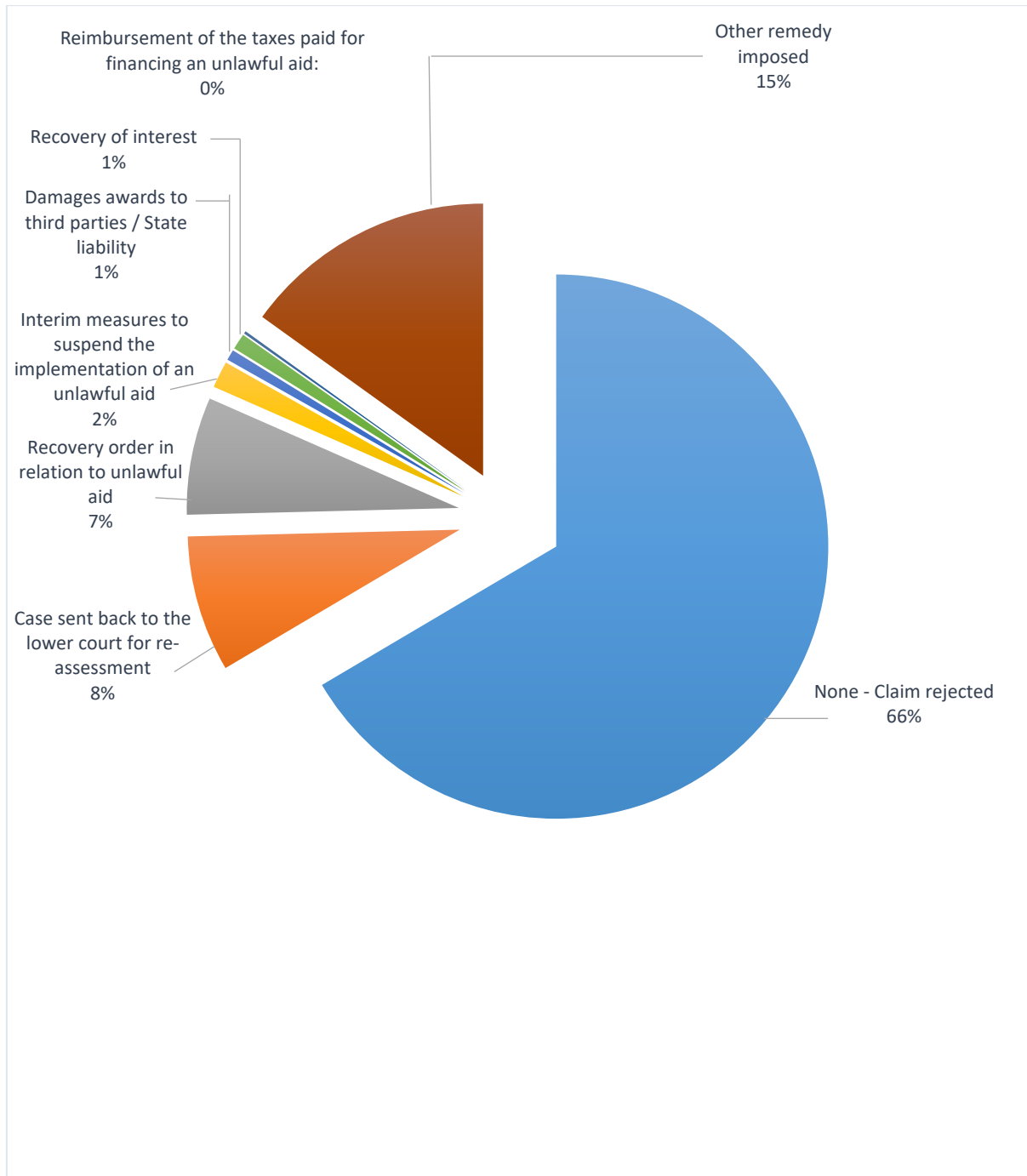
<sup>193</sup> *Cass. Sez. Un.* 25516/2016. Case not reported in Annex 3 but discussed in the country report for Italy.

<sup>194</sup> Case C-300/16, *European Commission v. Frucona Košice a.s.* (2017) ECLI:EU:C:2017:706.

## Remedies awarded by national courts - comparison with the 2009 Enforcement Notice

*Low number of remedies awarded*

**Figure 25 - Remedies awarded by national courts in cases of private enforcement of State aid rules - percentage at EU level (data extracted from the list of relevant rulings in Annex 2)**



**Figure 26 - Remedies awarded by national courts in cases of private enforcement of State aid rules (data extracted from the lists of relevant rulings in Annex 2)**

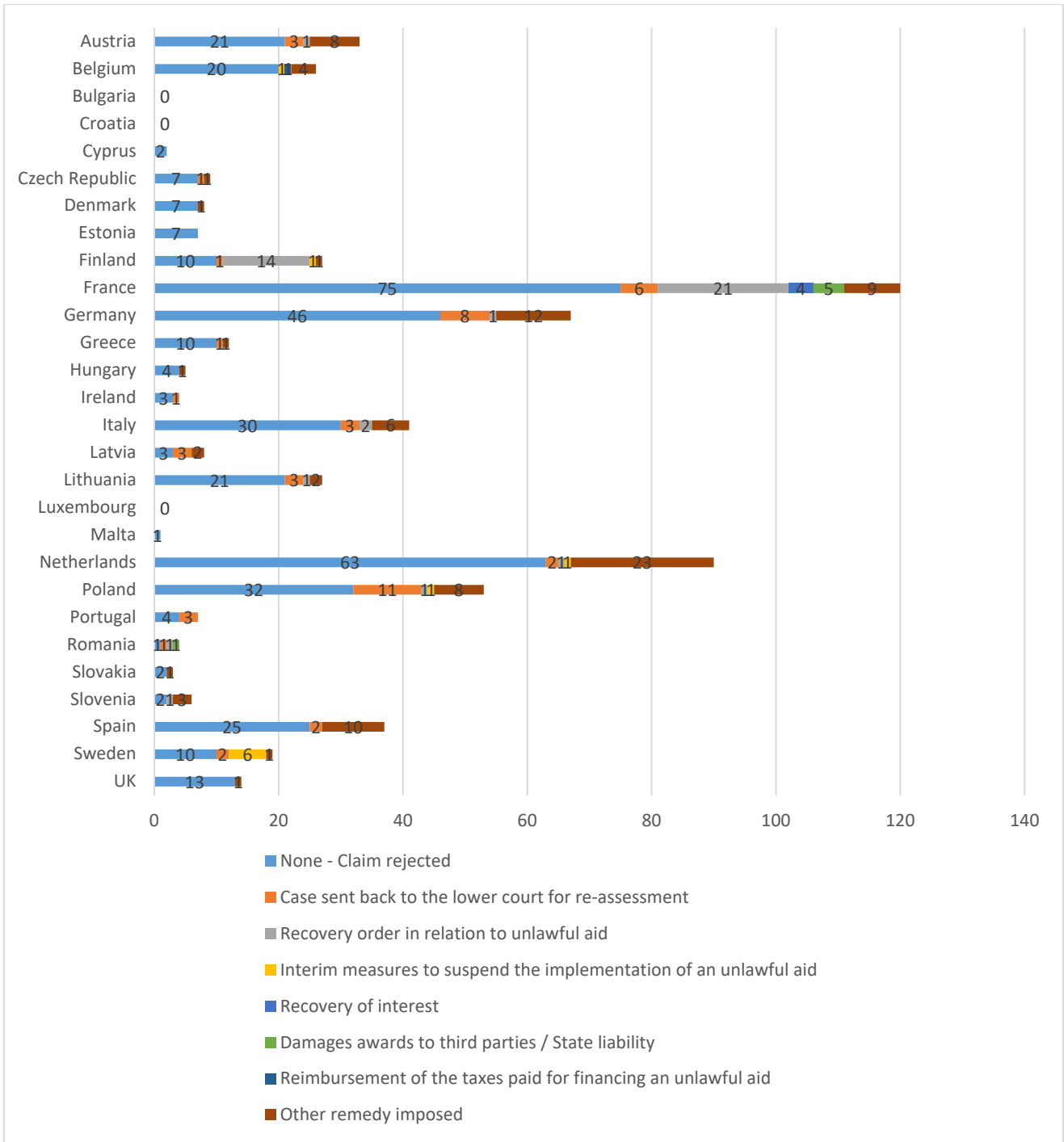


Figure 25 and 26 show that national courts rarely award remedies in cases of private enforcement of State aid rules. This trend is consistent across all jurisdictions, indicating that country-specific factors do not tend to play a role.

Explanatory factors for the widespread failure to obtain remedies include exogenous factors. For instance, in several cases the country reports indicated that the court

rejected the claim because it was not well-founded.<sup>195</sup> One interpretation of this finding is that the case simply did not involve the grant of aid. Another possible explanation is that either the court misinterpreted the law and/or the plaintiff did not construct the case well. However, the data also shows that courts (at least last instance courts) apply the law correctly. Equally, the case summaries in Annex 3 show that, with some variance between countries, knowledge of State aid rules among lawyers is adequate. As a consequence, in terms of exogenous factors, the better interpretation to explain the lack of remedies awarded by the national courts is that the measures brought to them did not constitute State aid.

In addition, a number of factors endogenous to the cases summarised in Annex 3 may also explain the low number of remedies awarded by national courts:

- Nature of the claim: first, as mentioned above, in the majority of the selected judgments, the plaintiff was not the competitor of the beneficiary. In particular, when the plaintiff was a beneficiary, the remedy was often the payment or concession or transfer of goods by public authority. In other cases, the plaintiff was the public authority arguing the presence of unlawful aid in order to obtain the restitution of the amount already paid. Sometimes, public authorities are forced to make a payment to the beneficiary by lower courts, and then have to challenge this decision before upper courts, based on State aid grounds.<sup>196</sup> Therefore, one of the reasons for the large number of cases in which private enforcement was dismissed is that the plaintiff brought an action which actually sought to extend the aid. Alternatively, the case involved a tax measure and the lack of remedies was due to specific reasons linked to tax law.
- Burden of proof: for recovery actions brought by competitors, or in other cases where the existence of State aid is directly related to the award of a remedy, the low number of remedies may depend on the complexity of the notion of State aid, made up of a number of constituent – cumulative – elements. For each of them, the plaintiff in a private action case bears the burden of proof.<sup>197</sup> In turn, the level of difficulty of meeting the burden of proof may be linked to the type of measure. For instance, showing ‘advantage’ for a capital increase in a company where the sole or majority shareholder is a State entity may not be straightforward, involving a rather broad test. Similarly, some cases the advantage may stem from obligations imposed on all undertakings in a given sector. However, depending on the structure of the obligation, the measure may or may not involve State resources.<sup>198</sup>

This explanation would be consistent with the type of measure being challenged. As Figure 18 shows, grants and subsidies, which are in theory the ‘easiest’ type

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<sup>195</sup> See the country reports from Austria, Estonia, France, Germany, Spain.

<sup>196</sup> B-1704-14 (Case summary DK4).

The case is illustrative of this trend. In that case, a municipality decided to charge premiums for the guarantees to heating plants, which were beforehand provided for free. The heating plants (i.e. the beneficiaries) challenged the decision of the municipality before national court. The first instance court found that the demand for premiums was unlawful, as in contrast with national law. The municipality appealed the judgment before the upper court arguing that the premium free guarantees were in breach of TFEU Article 107(1), and that the municipality was obliged to correct the unlawfulness. The Court found that the free guarantee constituted State aid, and thus the municipality’s decision to charge premiums for the guarantees granted was legitimate.

<sup>197</sup> The burden of proof is even higher in damage claims, where the *onus probandi* of showing existence of aid is compounded by the need to show the causal link between the aid and the damage. However, for damage cases, there may be also a “cultural” element, because it was reported that courts may be reluctant for a number of reasons to make a finding of liability against the State (see the country report on France).

<sup>198</sup> See, for instance, the recent *ENEA* case (Judgment of the CJEU of 13 September 2017, in Case C-329/15, ECLI:EU:C:2017:671), where the national court doubted (with reason) the existence of State resources.

of measure in terms of burden of proof as to the aid nature, only account for 24% of types of aid challenged in private enforcement cases.

Overall, the explanation for the low number of remedies identified in the present Study may result from a combination of both exogenous and endogenous factors. In particular, it is plausible that some cases might have been genuine cases of non-aid, for example, due to the lack of State resources – i.e. exogenous factors. On the other hand, in terms of endogenous factors, it is worth mentioning that proving the State aid nature of a given measure involves a high burden of proof, which many plaintiffs have so far found too challenging to discharge.

#### *Interim measures*

There are a few cases in which the plaintiff succeeded in the request for an interim measure to suspend the implementation of an aid measure. For instance, in the Spanish case regarding the payment of the tax on large retail establishments, the Supreme Court found errors in the reasoning of the lower courts that rejected the claim for interim measures.<sup>199</sup> The Supreme Court found that the presence of aid and that all requirements to grant the interim measure were met, including the "appearance of a *prima facie* case". The Court thus annulled the order of the lower court and granted the suspension of the payment of the tax, subject to the lodging of security.

The reasons underlying this trend stem from the legal standard for awarding interim measures, which is somewhat similar across all Member States: first, the plaintiff needs to show a *prima facie* case, as well as the presence of urgency and irreparable damage.<sup>200</sup> Given that showing the aid nature of a measure is difficult in a procedure on the merits, the burden of proof becomes an almost insurmountable obstacle in summary proceedings.

Another strong factor militating against granting of an interim measure is the weight given to public interest in the balancing test. State measures are almost by definition linked to a public interest, which systematically trumps the interest of a single undertaking.

Finland seems an exception in relation to this trend, since the country report mentions that obtaining interim measures is "not rare". However, this might also be due to the fact that challenging an aid measure might be considered a tool of ensuring a good public administration, as discussed above.

#### *Prevalence of recovery over damage actions*

In the vast majority of the case summaries included in Annex 3, when the courts awarded a remedy, it was in the form of recovery of the unlawful aid.

In most Member States, the recovery of unlawful aid is the consequence of the act enshrining the aid being invalid, for breach of Article 108(3) TFEU.<sup>201</sup> Therefore, the actions are structured as annulment actions against the act granting the aid; in such context, the recovery of the unlawful aid from the beneficiary thus follows from the annulment.

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<sup>199</sup> ECLI:ES:TS:2009:2061 (Case summary ES1).

<sup>200</sup> See the country report on Germany.

<sup>201</sup> See, for instance, in Austria, Italy, France or Luxembourg.

Only in six relevant rulings listed in Annex 2 were damages successfully awarded by national courts.<sup>202</sup> All these cases involved French courts. A good example of the challenges faced by national courts in awarding damages due to a breach of the standstill obligation is represented by the *Corsica Ferries* case.

### *Corsica Ferries*

In February 2017, Bastia Administrative Court awarded damages in the case started by Corsica Ferries against the regional administration of Corsica in France.<sup>203</sup> During the period 2007-2013, Corsica granted aid to SNCM, in order guarantee the regularity of ferry connections on the routes Toulon-Ajaccio and Toulon-Bastia (i.e. compensation for a service of general economic interest). The Commission decided that the aid was unlawful and incompatible with the internal market, and thus ordered its recovery. Corsica Ferries (i.e. main competitor of SNCM) sought to claim damages before the Bastia Administrative Court, due the lost market shares caused by the State aid granted to SNCM. Relying on the Commission decision on the incompatibility of the aid granted to SNCM, the court accepted the claim. In particular, the court upheld the damages estimation submitted by the economic expert hired by Corsica Ferries.

*Corsica Ferries* shows that follow-on damage actions are more likely to be successful in national courts, since the claimant can rely on a previous recovery decision to show the incompatibility of the aid measure. However, *Corsica Ferries* leaves open the question of the quantification of damages and the establishment of the causal link in cases of private enforcement of State aid rules. On appeal, in fact, Marseille Administrative Court partially quashed the previous ruling by Bastia Administrative Court in relation to the estimation of the damages.<sup>204</sup> The establishment of a causal relationship between the incompatible aid and the loss of market shares/profits represent a high burden of proof for any claimant.

### *Presence/absence of parallel Commission investigations.*

National courts are more open to awarding remedies when the Commission opens a formal investigation or even makes an informal communication. For instance, in the context of a relevant case in Spain concerning the transition to digital television, the competitor of the beneficiary obtained from the court an interim measure while an investigation was pending before the Commission.<sup>205</sup>

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<sup>202</sup> According to the lists of relevant rulings included in Annex 2, damages were awarded in six cases ruled by French courts (although one of these cases constituted an appeal, as can be seen below):

- Marseille Administrative Court of Appeal, 12/2/2018 (an appeal to ruling 1500375 of the Bastia Administrative Tribunal).
- Paris Administrative Court of Appeal (4th Chamber), 9/10/2018.
- Versailles Court of Appeal, 10/4/2018.
- Bastia Administrative Tribunal, 23/2/2017, 1500375. Case summary FR6.
- Council of State (10th / 9th sub-sections combined), 13/1/2017
- Council of State (9th / 10th Sub-sections combine, 15/4/2016. See case summary FR4.

<sup>203</sup> *Tribunal administratif de Bastia* No. 1500375 (Case summary FR6), follow-up claim of Commission decision of 2 May 2013 on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of Société Nationale Maritime Corse-Méditerranée. OJ L 220/20, 17.8.2013.

<sup>204</sup> Marseille Administrative Court of Appeal, 12/2/2018 (an appeal to ruling 1500375 of the Bastia Administrative Tribunal).

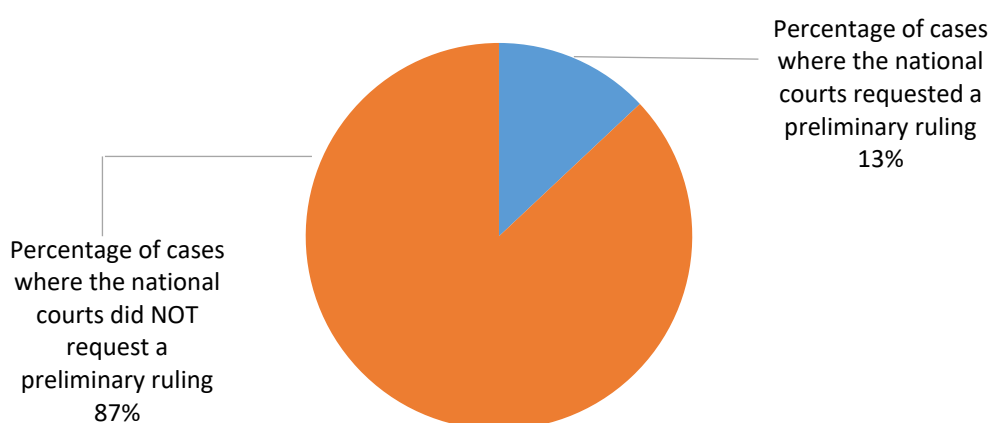
<sup>205</sup> ECLI:ES:TS:2012:4955 (Case summary ES2).

Finally, Austria and Germany display two special features: if the aid is enshrined in a contract, the contract becomes null and void in case of breach of Article 108(3) TFEU.<sup>206</sup> In addition, it is in theory possible (although there are no reported cases in Annex 3) for a judge to find that the aid beneficiary was liable for damages in a private enforcement case if the beneficiary was also responsible for the lack of notification to the Commission. In particular, beneficiary undertakings could be considered liable - according to general tort law principles – when their behavior has an impact on national authority's choice not to notify the aid, thus contributing to the breach of State aid rules.

In the Netherlands, the Supreme Court found that a guarantee has to be considered null and void if (i) it constitutes unlawful State aid, (ii) its annulment can restore the competitive situation which existed before the guarantee was granted and (iii) if there are no less onerous procedural measures to restore competition.<sup>207</sup>

### The role of CJEU preliminary rulings in private enforcement cases

Figure 27 - Requests of CJEU preliminary rulings in cases of private enforcement of State aid rules, percentage at the EU level (data extracted from the case summaries in Annex 3)



<sup>206</sup> Similarly, in Spain, when the aid is granted through a private law instrument, the purpose of the contract or agreement becomes unlawful.

<sup>207</sup> ECLI:NL:HR:2013:BY0539 (Case summary NL5).

**Figure 28 - Requests of CJEU preliminary rulings in cases of private enforcement of State aid rules (data extracted from the case summaries in Annex 3)**

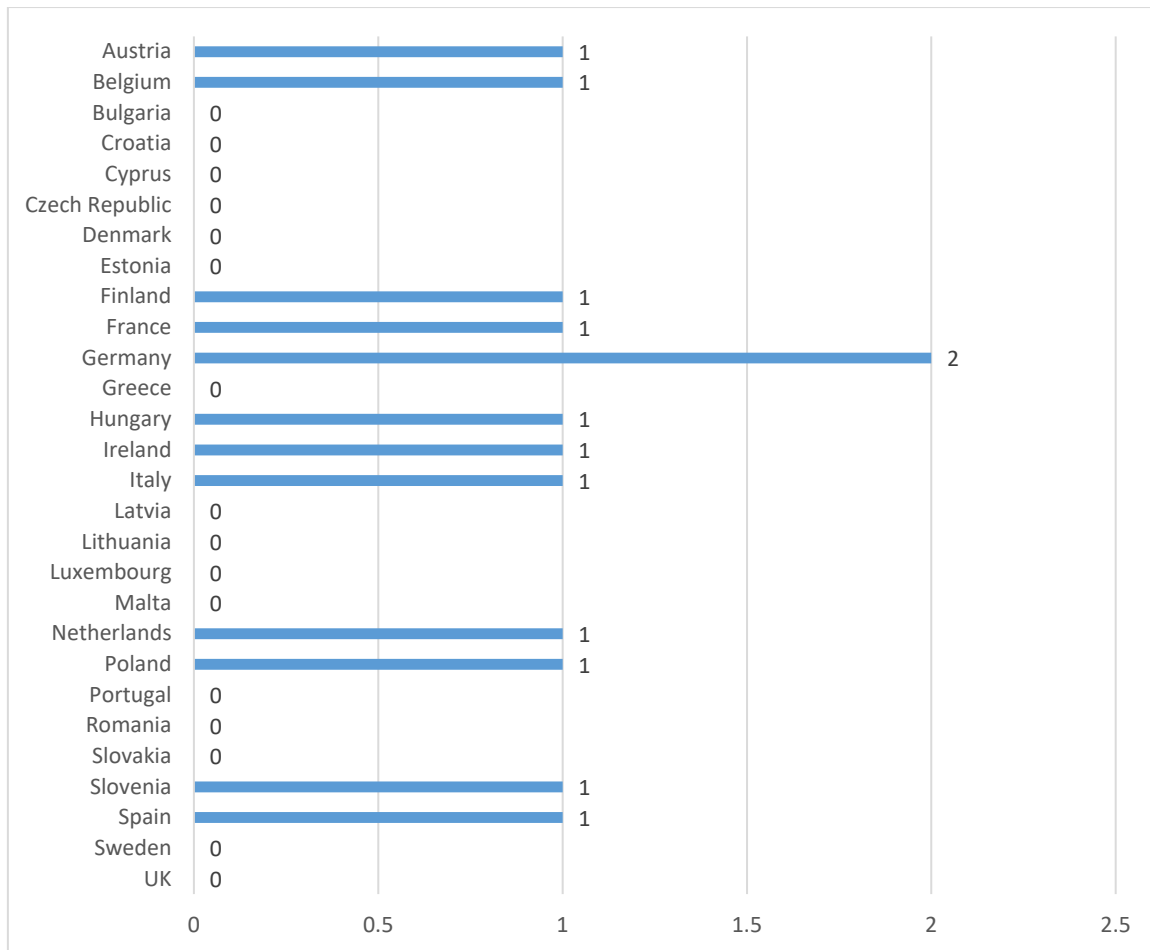


Figure 27 shows that in 13% of the case summaries the national court referred a request for a preliminary ruling to the CJEU. However, on the basis of the information gathered at national level, it can be said that the situation is not uniform across the Member States:

- In Belgium, France and Italy, courts seem particularly active in referring requests for preliminary rulings. A possible explanation is that these countries have a tradition of direct State intervention in the economy.
- Based on the information in the country reports, national courts in Portugal and Ireland do not seem to be particularly keen to refer requests for preliminary rulings. This finding may explain the low number of CJEU preliminary rulings concerning private enforcement State aid cases identified in Annex 3.
- In Poland and Germany, the number of preliminary rulings in cases of private enforcement of State aid is relatively low, but it has been steadily increasing.
- In the Netherlands, despite the relatively high overall number of preliminary rulings to the CJEU, few preliminary rulings regarding private enforcement have been reported. To a certain extent, this could potentially be explained by the use of the Commission cooperation tools by Dutch courts. According to the findings in this Study on the basis of the case summaries, in a few rulings it seems that



judges preferred to ask for a Commission's opinion under Article 29(1) of the State aid Procedural Regulation, rather than referring a request for a preliminary ruling to the CJEU.<sup>208</sup>

- In Spain<sup>209</sup> and Austria,<sup>210</sup> the preliminary rulings requested by national courts seem to have primarily concerned the interpretation of the notions of advantage and selectivity with regard to fiscal measures.
- In Sweden, it seems that national courts are sometimes reluctant to refer requests for preliminary rulings in order to avoid delays of the court proceedings.<sup>211</sup>
- In the UK, case law suggests that courts do not feel the need to refer requests for preliminary rulings, as the EU *acquis* seems to be sufficiently developed to assess whether a measure constitutes aid or not.<sup>212</sup>

Finally, on the frequency of citations/references to the EU *acquis* in the national rulings, national judges generally tend to quote/refer extensively to the EU State aid *acquis*. However, a few exceptions have been identified in the case summaries in Annex 3:

- According to the country reports in Annex 3, national judges in Poland and Portugal seem reluctant to quote soft law, such as Commission Guidelines and Communications. This can be due to formal reasons, as soft laws have no equivalence in the national hierarchy of norms.
- In Finland, the Local Government Act obliges municipalities to take into account State aid rules, especially in the sale and lease of real estate and in the imposition of SGEI obligations. As a consequence, the judgments often refer to compliance with the Local Government Act rather than Union law. However, this trend seems to apply to lower courts, as the Supreme Administrative Court applies State aid rules extensively.
- In Sweden, the majority of cases are started by natural persons against municipalities. The prevalence of individuals without the help of specialised lawyers as plaintiffs has consequences on the content of the arguments, which in turn shapes the judgments: the rulings tend to be rather concise, because plaintiffs rarely present elaborate arguments with references to the relevant EU State aid *acquis*.<sup>213</sup>

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<sup>208</sup> ECLI:NL:CBB:2012:BX6991 (Case summary NL2); ECLI:NL:RVS:2015:1152 (Case summary NL7).

<sup>209</sup> See ECLI:ES:TS:2018:3358 (Case summary ES4), follow-up of the CJEU preliminary ruling in Case C-233/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v. Generalitat de Catalunya* (2018) ECLI:EU:C:2018:280.

<sup>210</sup> See 2015/15/0001 (Case summary AT1), follow-up of the CJEU preliminary ruling in Case C-66/14, *Finanzamt Linz v Bundesfinanzgericht, Außenstelle Linz* (2015) ECLI:EU:C:2015:661.

<sup>211</sup> See country report concerning Sweden.

<sup>212</sup> See country report concerning UK.

<sup>213</sup> See country reports concerning Sweden.

## Main difficulties faced by national courts in private enforcement cases - examples drawn from the collected data

### Definition of 'aid'

Even if national courts are generally aware of the EU *acquis*, some country reports stress that national courts face a number of difficulties in applying the legal notion of 'aid' to the case.<sup>214</sup>

Examples of cases where national courts face difficulties in applying the different aspects of the concept of State aid under Article 107(1) TFEU:

- Concept of 'undertaking': in a Lithuanian case originated in the context of insolvency proceedings, the plaintiff claimed that the inclusion of the defendant's debt in the higher ranking of creditors amounted to State aid. The Court of Appeals of Lithuania rejected this claim, since the defendant was a State-owned company which provided obligatory insurance of all deposits held in banks registered in Lithuania. As such, it could not be considered an 'undertaking' under Union law.<sup>215</sup>

Similarly, in an action for damages brought by the competitor of the beneficiary in Denmark, the plaintiff claimed that a national agency had received unlawful State aid from the Danish State regarding the public financing for the composition, updating and supply of digital maps. The activities of the agency were carried out under the Danish law implementing EU legislation. The national court concluded that the activities of the Agency constituted the exercise of public authority tasks and not an economic activity. Therefore, there was no aid and the claim was rejected.<sup>216</sup>

- Interpretation of GBER or *de minimis* Regulation: a German court dealing with the question of the existence of aid regarding the reduction of the rent paid by a German gym which was below the market price found that GBER could not be applied retroactively. The aid could fall within Article 55 GBER concerning aid granted to sports infrastructures. However, as the measure was introduced before the adoption of the GBER, it should have been notified to the Commission. The Court thus rejected the claim of the beneficiary.<sup>217</sup>
- Application of the Market Economy Operator Principle (MEOP): other cases show the difficulties faced by national courts either in dealing with the MEOP test or in determining the market value in cases of sale/leasing of real estate. For instance, in a case in Slovakia, the Social Insurance Agency requested the national court to set aside the restructuring plan of an insolvent debtor, because it imposed a write-off of previous debts which constituted unlawful State aid. The Court upheld the claim, finding that the Social Insurance Agency may have obtained a higher ranking in the insolvency proceedings. Thus, the write-off of the debt was not MEOP compliant.<sup>218</sup> Similarly, in a German dispute, the plaintiff and the defendant disagreed on the correct method to evaluate the market price of agricultural land. The court emphasises that the concept of market value under

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<sup>214</sup> See, for instance, Estonia, Latvia and the Netherlands.

<sup>215</sup> 2-2205/2014 (Case summary LT3).

<sup>216</sup> B-2750/13 (Case summary DK5).

<sup>217</sup> ECLI:DE:OVGBEBB:2017:1218.6B3.17.00 (Case summary DE3).

<sup>218</sup> ECLI:SK:KSTT:2016:2114222717.1 (Case summary SK2).

State aid rules represents any "achievable" price, namely the price that a private investor acting under market conditions could have fixed.<sup>219</sup>

- Application of the *Altmark* criteria: a number of national courts experienced difficulties with the notion of advantage in cases involving Services of General Economic Interest (SGEI), as well as with the application of *Altmark* jurisprudence.<sup>220</sup> For example, in a Finnish case, a competitor claimed that the compensation paid to the rescue departments constituted unlawful State aid. The first instance Administrative Court found that emergency medical services had to be considered SGEI and thus assessed through *Altmark* criteria. In contrast with the view of the court of first instance, the Supreme Administrative Court concluded that emergency medical services were not SGEI, due to special legislative obligations imposed on the rescue departments regarding the provision of emergency medical services. Therefore, such operators were not comparable with other service providers offering similar services on the market. On the other hand, the measure was found not to be selective in the meaning of Article 107(1) TFEU and the rescue departments were not considered to be undertakings. As a result, the claim to suspend the implementation of aid was rejected.<sup>221</sup>

### 2.3. Evolution of the findings

This section aims at comparing the trends identified in Section 2.2 with the main findings of the 2006 State Aid Study by a consortium of law firms on behalf of DG Competition.<sup>222</sup> In particular, while Section 2.3.1 provides a short summary of the scope and the main findings of the 2006 State Aid Study, Section 2.3.2 draws a comparison between the main findings of the 2006 State Aid Study with the trends identified in Chapter 2.

The Consortium regards the 2006 State Aid Study as the most comprehensive overview (i.e. until the present Study) of the enforcement of State aid rules by the national courts of the Member States. Therefore, the Consortium has relied on the 2006 State Aid Study as a benchmark to assess the findings of the present Study.<sup>223</sup> In this section, the Consortium has briefly summarised the main findings of the 2006 State Aid Study and drawn a comparison with the main quantitative and qualitative trends identified in the present Study.

#### 2.3.1. The 2006 State Aid Study

In 1999, the *Association des Avocats Européens* carried out the first study on the enforcement of State aid rules by national courts on behalf of the Commission.<sup>224</sup> In March 2006, a consortium of law firms including Jones Day, Lovells and Allen & Overy published on behalf of DG Competition a more comprehensive Study on the enforcement of State aid rules by national courts.<sup>225</sup> The 2006 State Aid Study covered the 15

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<sup>219</sup> ECLI:DE:LGBE:2011:0314.900107.08.0A (Case summary DE5).

<sup>220</sup> Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* (2003) ECLI:EU:C:2003:415.

<sup>221</sup> ECLI:FI:KHO:2018:28 (Case summary F11).

<sup>222</sup> *Supra*, 2006 State Aid Study.

<sup>223</sup> The comparison against the 2006 State Aid Study was not requested by the Commission in the Tender Specifications for the present Study (available at: <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=3191>, last accessed on 18.6.2019).

<sup>224</sup> Association des Avocats Européens (1999), Application of EC State Aid Law by Member State Courts (available at: [ec.europa.eu/competition/state\\_aid/studies\\_reports/application\\_ms/section1.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/application_ms/section1.pdf), last accessed on 6.3.2019).

<sup>225</sup> *Supra*, 2006 State Aid Study.

Member States that had joined the EU before 2004. Secondly, it covered both public and private enforcement of State aid rules. In particular, in relation to public enforcement, the Study focused on the analysis of national procedural rules and court rulings in five Member States (i.e. Germany, France, Italy, Spain and Belgium). From a temporal point of view, the Study covered the period 1999-2005.

The 2006 State Aid Study was completed by an 'update' in 2009, which covered the national judgments issued in the period 2006-2009.<sup>226</sup> In addition, the 2009 Study expanded the geographic scope of the previous research to 27 Member States. In particular, the research covered the 'new' Member States that had joined the EU in 2004 and 2007 in relation to the decisions adopted by the State Aid Monitoring Authorities established in these countries during the EU pre-accession period.

The 2006 State Aid Study, as updated in 2009, identified the following main findings in the enforcement of State aid rules by national courts:

- Increase in the number of State aid rulings: The Study highlighted an increase in the number of national rulings dealing with State aid rules: from 116 cases recorded in 1999 to 357 rulings identified in 2005. In addition, the 2009 Update identified additional 305 cases in the period 2006-2009.
- Prevalence of cases of public enforcement of State aid rules: The Study mostly identified cases dealing with the implementation of recovery decisions, while cases concerning private enforcement of State aid rules were extremely rare.
- Concentration in a few Member States: From a statistical point of view, the 2006 State Aid Study noted that the cases of public enforcement of State aid rules were mostly concentrated in France, Germany and Italy. By contrast, in the majority of the other Member States, especially those who joined the EU in 2004 and 2007, no State aid rulings were identified.
- Competent courts: The 2006 State Aid Study noted that both civil and administrative courts were competent in State aid proceedings, on the basis of the type of remedy requested. In addition, the Study noted that State aid claims were often appealed up to the last instance court of the Member State. On the other hand, the Study did not assess how often the national courts referred requests for preliminary rulings to the CJEU, or the relevance of CJEU case law in national judgments.
- Prevalence of claims challenging discriminatory taxation: The Study pointed out that 50% of the cases of private enforcement concerned claims challenging the discriminatory imposition of a tax burden. A competitor usually brought to court the public authority granting a tax regime more advantageous than the one offered to the competitor. Nevertheless, in the majority of cases the plaintiff asked for the extension of the beneficial tax regime, rather than for the recovery of the unlawful aid.
- Interim measures rarely awarded: The 2006 State Aid Study pointed out that national courts rarely awarded remedies in State aid cases. In particular, both in public and private enforcement cases, interim injunctions were either unavailable under national procedural rules or they were rarely granted by national

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<sup>226</sup> Derenne and others (2009), *2009 update of the 2006 Study on the enforcement of State aid rules at national level* (available at: [http://ec.europa.eu/competition/State\\_aid/studies\\_reports/studies\\_reports.html](http://ec.europa.eu/competition/State_aid/studies_reports/studies_reports.html), last accessed on 29.1.2019).

courts. In particular, the pending compatibility assessment by the Commission usually discouraged national courts from adopting an interim measure blocking the implementation of the unlawful aid. Similarly, the court proceedings that usually followed up the implementation of a recovery decision discouraged national courts from adopting an interim injunction.

- Damages rarely awarded: The 2006 State Aid Study also pointed out that damages were rarely requested in cases of private enforcement of State aid rules, and courts were reluctant to award such a remedy. In particular, challenges related to the quantification of the harm suffered by the plaintiff and the identification of the causal link between the harm and the unlawful aid were indicated as main obstacles to the adoption of this type of remedy.
- Lack of *ad hoc* procedural framework for the implementation of the recovery decisions: the 2006 State Aid Study stressed that no Member State had adopted an *ad hoc* procedural framework to enforce recovery decisions. Consequently, the Study pointed out a number of difficulties in enforcing the recovery of incompatible/unlawful aid; difficulties related to the identification of the public authority in charge of the recovery and the procedural steps to follow. Such legal uncertainty extended the duration of the recovery proceedings and increased the chances that the Commission decision was further challenged in national court proceedings.

### 2.3.2. Comparison between the main findings of the two studies

According to the Consortium, the 2006 State Aid Study represents the most comprehensive research conducted so far on the enforcement of State aid rules by the national courts of the Member States. Therefore, it represents a useful benchmark for the present Study. In particular, the trends identified in Section 2.2. could be compared to the main findings of the 2006 State Aid Study, as summarised in Section 2.3.1:

- Further increase in the number of State aid rulings: the present Study confirms the upwards trend in the number of State aid rulings in national courts. In particular, the present Study has identified 766 relevant rulings listed in Annex 2. Figures 1 and 15 show this upward trend during the Study Period.
- Prevalence of private enforcement of State aid rules: one of the major differences in comparison to the 2006 State Aid Study is the prevalence of the cases of private enforcement over public enforcement of State aid rules. While the 2006 State Aid Study concluded that private enforcement was “still in its infancy”, the situation seems to have drastically changed during the past decade. In particular, with the exception of Bulgaria, Croatia and Luxembourg, relevant rulings concerning private enforcement of State aid rules have been identified in all Member States. By contrast, in eight Member States no relevant ruling related to public enforcement of State aid rules was identified in the period covered by the present Study. As discussed in Section 2.2.1, the low number of cases of public enforcement might be due either to the fact that the Commission has not adopted any recovery decisions in relation to a number of Member States, or to the adoption of *ad hoc* recovery rules that decreased the number of court proceedings.
- State aid proceedings in the majority of the Member States: while the 2006 State Aid Study mainly identified cases in a small number of ‘large’ Member States, the present Study identified relevant rulings in the large majority of Member States: with the exception of Luxembourg, relevant rulings (i.e. with the

prevalence of private enforcement cases) have been identified in all the Member States during the reference period of the Study. In particular, while the 2009 Update stressed that State aid rulings were extremely rare in the ‘new’ Member States in Central and Eastern Europe, the present Study identified relevant rulings in all Member States that joined the EU in 2004 and 2007. The case of Croatia, which joined the EU only in 2013 and recorded a rather limited number of rulings in comparison to other countries in Central and Eastern Europe, suggests that the number of State aid rulings might increase with time, once the market players, practicing lawyers and national judges become more familiar with State aid rules. However, the number of public and private enforcement rulings is also influenced by other factors, especially the number of aid measures granted by different Member States.

- Competent courts: the present Study confirms the findings of the 2006 State Aid Study in relation to the “fragmentation” of competent courts in State aid proceedings: in the majority of the Member States, both civil and administrative courts are competent in State aid proceedings. Unlike EU competition law, the distinction between public and private enforcement does not determine the court jurisdiction in the enforcement of State aid rules. In particular, administrative courts have jurisdiction when the plaintiff aims at challenging an administrative act; the latter can be the order implementing the recovery decision or the act awarding an aid in the form of a preferential tax treatment or State concession. Alternatively, issues related to recovery of the aid in the context of insolvency proceedings or the award of damages are usually dealt by civil courts. With the exception of Ireland, where the High Court has exclusive jurisdiction in State aid proceedings (i.e. case further discussed in Chapter 3), no Member State has modified its courts system and assigned exclusive jurisdiction to a single court in State aid disputes.

Finally, similarly to 2006 State Aid Study, State aid cases are often appealed up to the last instance court. As mentioned in Section 2.2, both in public and in private enforcement cases, last instance administrative courts ruled on the majority of the relevant rulings identified in the present Study.

- Prevalence of claims requesting the recovery of aid: while the 2006 State Aid Study identified a large number of cases where the plaintiff asked for the extension of the beneficial tax regime, this type of remedy has been requested by the plaintiff only in a limited number of the cases summarised in Annex 3.<sup>227</sup> This finding shows that stakeholders involved in State aid enforcement at the national level (i.e. practicing lawyers and firms) have understood that a claim for extending a beneficial tax regime is not an appropriate remedy under State aid rules.
- Interim measures rarely awarded: while the overall number of State aid cases has increased in comparison to the 2006 State Aid Study, the number of remedies awarded remains low. In particular, the present Study confirms the findings of the 2006 State Aid Study in relation to the low number of interim injunctions awarded by national courts, both in public and in private enforcement cases. While the present Study did not identify any procedural obstacle to the award of interim injunctions, this type of remedy is rarely awarded by national courts due to the high burden of proof and concerns about the consequences of ordering the recovery of unlawful aid while the proceedings are pending before of the Commission.

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<sup>227</sup> See, for instance, 1408/2006 (Case summary CY1).

- Damages rarely awarded: in relation to the low number of remedies awarded by national courts, it is worth noticing that in 65% of the cases of private enforcement of State aid rules the claim was rejected by the national court. In particular, according to the list of relevant rulings in Annex 2, damages were awarded only in 6 cases, all in France (i.e. 1% of the cases of private enforcement of State aid rules identified in the present Study).<sup>228</sup> As discussed in Section 2.2 and in the country reports in Annex 3, a number of reasons might explain this trend: complexities related to the quantification of the harm and the causal link between the harm and the lack of State aid notification; lack of familiarity of the market players with this type of remedy; reluctance by national courts to award damages for unlawful aid while the Commission is reviewing the aid compatibility in the context of parallel proceedings. From this point of view, the present Study confirms the findings of the 2006 State Aid Study: damages for violation of State aid rules remain a rather theoretical possibility.
- Specific framework governing aid recovery: the 2006 State Aid Study stressed the fragmentation of the national procedural rules, especially in relation to the implementation of recovery decisions. By contrast, the present Study notes that during the past decade a number of Member States have adopted *ad hoc* recovery legislation, specifying the public authority in charge of the recovery proceedings and the procedural steps to be followed. As discussed in Section 2.2, a number of Member States (e.g. Spain, the Netherlands, Slovakia, Belgium and Finland) have recently adopted a law to implement aid recovery. Although these legislations are rather different and they have not been harmonised at the EU level, the latter certainly represents a new trend and a major difference with the findings of the 2006 State Aid Study. This recent development is further discussed in Chapter 3.

## 2.4. Conclusions

In Chapter 2, the Consortium has identified a number of trends concerning public and private enforcement of State aid rules by national courts of the Member States. The first trend concerns an overall increase in the number of judgments ruled on by national courts during the Study period. As discussed in Section 2.3.2, such an increase confirms the upwards trend already identified in the 2006 State Aid Study. In particular, unlike the 2006 State Aid Study, relevant State aid rulings have been identified in all but one Member State, i.e. Luxembourg. This trend shows the increasing relevance of national courts in State aid enforcement. Such courts are involved both in the enforcement of Commission decisions/recovery orders in public enforcement of State aid rules, as well as in the enforcement of the standstill obligation under Article 108(3) TFEU.

A second trend identified in this Study concerns an increase of private enforcement cases, which have exceeded the number of public enforcement rulings. In the period covered by the Study, the Consortium has identified 172 rulings that fall within the

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<sup>228</sup> According to the lists of relevant rulings included in Annex 2, damages were awarded in six cases ruled by French courts (although one of these cases constituted an appeal, as can be seen below):

- Marseille Administrative Court of Appeal, 12/2/2018 (an appeal to ruling 1500375 of the Bastia Administrative Tribunal).
- Paris Administrative Court of Appeal (4th Chamber), 9/10/2018.
- Versailles Court of Appeal, 10/4/2018.
- Bastia Administrative Tribunal, 23/2/2017, 1500375. Case summary FR6.
- Council of State (10th / 9th sub-sections combined), 13/1/2017.
- Council of State (9th / 10th Sub-sections combine, 15/4/2016. See case summary FR4.

definition of public enforcement and 594 rulings that fall under the definition of private enforcement of State aid rules.<sup>229</sup> The number of private enforcement cases is thus more than triple the number of public enforcement cases discovered during this Study.

A number of reasons have been discussed to explain this trend, such as the impact of the 2008 financial crisis on the number of private enforcement cases. As Figure 20 shows, since most of the private enforcement cases identified in the Study concern the financial and insurance sector, it seems plausible that the 2008 financial crisis has contributed to the rise of court litigation.

In spite of the increase of State aid litigation, research undertaken in this Study on the basis of the list of relevant rulings, has shown that national courts have rarely concluded that unlawful aid was granted and hence rarely awarded remedies. As shown by Figures 11 and 25, in 32% of the cases of public enforcement and in 66% of the cases of private enforcement of State aid rules, the national court rejected the claim. In public enforcement, this trend can be considered as rather positive: it shows that national recovery orders are rarely successfully challenged in national courts. Consequently, it appears that Commission decisions may be enforced by national authorities without facing the risk of lengthy national litigation, which might delay the effective aid recovery. In particular, interim measures ordering the suspension of the recovery order have been reported only in five of the identified cases in the list of relevant rulings (i.e. 2% of the public enforcement cases identified in the Study).<sup>230</sup>

Two main reasons may explain the lack of remedies awarded by national courts in cases of public enforcement of State aid rules. First of all, a growing number of courts have recognised the direct applicability of Commission decisions.<sup>231</sup> The lack of a national recovery order enforcing the Commission decision, in fact, reduces the possibilities for the beneficiary to challenge the aid measure. Secondly, as further discussed in Chapter 3, a number of Member States have recently adopted a specific legal framework governing the procedure of aid recovery.<sup>232</sup> Although these laws broadly differ in terms of scope of application, administrative authorities involved and procedural steps in the recovery process, they represent an important trend in relation to the enforcement of State aid rules at national level. The adoption of a specific legal framework may increase legal certainty, reduce litigation and thus reduce the involvement of national courts in the process of aid recovery.

While the low number of remedies awarded in public enforcement cases can be seen as a positive sign for the enforcement of State aid rules, the low number of remedies awarded by national courts in private enforcement cases calls for further reflection. National courts only exceptionally either order the recovery of the unlawful aid or adopt interim measures to suspend the implementation of the aid measure. This trend is particularly evident in relation to damages claims: only in six cases among the relevant rulings identified in this Study national courts have awarded compensation due to the

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<sup>229</sup> Please see Section 1.4.3 for the definition of public and private enforcement of State aid rules as referred to under this Study.

<sup>230</sup> National courts adopted interim measures to suspend the enforcement of the recovery order in 5 cases reported in Annex 2.

- Münster Fiscal Court, 1/8/2011, 9V357/11KG (Case summary DE9).
- Lombardia Administrative Tribunal, 22/5/2013, 553/2013 (Case summary IT7).
- Administrative Court of the Republic of Slovenia, 20/3/2015, ECLI:SI:UPRS:2015:III.U.64.2015.
- Italian Council of State (3<sup>rd</sup> chamber), 16/6/2015, 3036/2015.
- Bordeaux Court of Appeal, 10/12/2015, 15BX01807 (Case summary FR8).

<sup>231</sup> See, for instance, 2018CSOH 39 (Case summary UK10).

<sup>232</sup> See the country reports concerning Belgium, Spain, Finland, the Netherlands, Slovakia. According to the country report, Estonia is also in the process of adopting such legislation.



harm caused by a breach of the standstill obligation – i.e. less than 1% of the identified private enforcement cases.<sup>233</sup>

The country reports reveal a number of reasons which may explain why national courts rarely award remedies in private enforcement cases: besides the lack of familiarity of State aid rules by national courts,<sup>234</sup> a number of national legal experts report in their country reports that the claimants usually do not put forward well-structured arguments to support their claims.<sup>235</sup> In addition, it appears that national courts face difficulties in verifying the conditions concerning the notion of aid under Article 107(1) TFEU,<sup>236</sup> under the GBER, as well as applying the CJEU case law in relation to *Altmark* and MEOP.<sup>237</sup> Thirdly, a number of national reports stress that State aid claims often require national courts to assess the legality of the measure under different areas of law (e.g. tax, administrative, contract law); the interaction of different legal regimes makes the evaluation of the measure under State aid rules more complex.<sup>238</sup> Fourthly, a number of national reports point out that national courts are reluctant to order the recovery of the unlawful aid while the case is pending for compatibility assessment at the Commission.<sup>239</sup> National courts, in fact, seem generally concerned about the irreparable consequences that the recovery could potentially have for the aid beneficiary. Finally, and more importantly, a State aid claim generally implies a rather high burden of proof for the claimant.<sup>240</sup> This problem is particularly evident in the case of damages claims: as shown by *Corsica Ferries* legal saga,<sup>241</sup> while follow-on damages actions generally require a lower burden for the claimant, since the claimant can rely on the previous Commission decision to prove the incompatibility of the aid measure, the damage quantification and the establishment of the causal link remain major obstacles for the claimant. The breach of the standstill obligation, in fact, may cause either a loss of profits and/or a loss of market share to the competitors of the aid beneficiary. In both cases, it may be quite challenging for the claimant to estimate the damages suffered during the entire period that the unlawful aid was in effect. In fact, exogenous factors (e.g. competitive structure of the market; fluctuations in terms of supply and demand) may also have an impact on the profits and market share of the claimant. In other words, it may be rather difficult for the claimant to prove a direct and univocal correlation between the breach of the standstill obligation and the harm suffered.

The familiarity of national judges with State aid rules may improve *via* the organisation of training programmes and advocacy activities organised by the Commission and national authorities. On the other hand, the number of successful damages claims might increase if national courts received 'further guidance' in relation to the economic techniques concerning damages estimation in State aid cases. From this point of view,

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<sup>233</sup> According to the lists of relevant rulings included in Annex 2, damages were awarded in six cases ruled by French courts (although one of these cases constituted an appeal, as can be seen below):

- Marseille Administrative Court of Appeal, 12/2/2018 (an appeal to ruling 1500375 of the Bastia Administrative Tribunal).
- Paris Administrative Court of Appeal (4th Chamber), 9/10/2018.
- Versailles Court of Appeal, 10/4/2018.
- Bastia Administrative Tribunal, 23/2/2017, 1500375. Case summary FR6.
- Council of State (10th / 9th sub-sections combined), 13/1/2017
- Council of State (9th / 10th Sub-sections combine, 15/4/2016. See case summary FR4.

<sup>234</sup> See country reports by Croatia, Cyprus, Czech Rep., Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia.

<sup>235</sup> See country reports by Croatia, France, Hungary, Italy, the Netherlands, Sweden.

<sup>236</sup> See country reports concerning Belgium, Spain,

<sup>237</sup> See country reports concerning Finland, Italy,

<sup>238</sup> See country reports concerning Bulgaria,

<sup>239</sup> See country reports concerning France,

<sup>240</sup> See country reports concerning Belgium, Germany,

<sup>241</sup> Marseille Administrative Court of Appeal, 12/2/2018 (an appeal to ruling 1500375 of the Bastia Administrative Tribunal).

it is worth noting that in 2013 the Commission published a Practical Guide, summarising the economic techniques concerning damages estimation in cases of private enforcement of EU competition rules.<sup>242</sup> The Practical Guide is a non-binding document, which specifically targets national courts. The soft law document explains to national judges the steps followed by economists to quantify the damage in an EU competition law case in simple and accessible language. National judges increasingly rely on the Practical Guide, considered a useful framework to assess the reliability of the damage estimation put forward by the experts hired by the parties.<sup>243</sup> At the moment of writing, the Commission is in the process of adopting new Guidelines on the estimation of the passing-on effect in competition law cases.<sup>244</sup> The Consortium considers that such guidance can be seen as a positive example: if applied in the area of State aid enforcement, it may increase the number of successful damages claims in national courts, thus supporting a growth in cases of private enforcement of State aid rules.

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<sup>242</sup> Commission Staff Working Document, Practical Guide Quantifying Harm In Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. Published in Strasbourg 11.6.2013, SWD (2013) 205.

<sup>243</sup> In relation to the positive impact of the Practical Guide on damage estimation by national courts in competition law cases, see Laborde J.F. (2017), "Cartel Damage Claims in Europe: How Courts Have Assessed the Overcharges. Concurrences Review N° 1-2017, Article No. 83418, pp. 36-42.

<sup>244</sup> Commission public consultation on Draft guidelines for national courts on how to estimate the share of cartel overcharges passed on to indirect purchasers and final consumers. [http://ec.europa.eu/competition/consultations/2018\\_cartel\\_overcharges/index\\_en.html](http://ec.europa.eu/competition/consultations/2018_cartel_overcharges/index_en.html) (last accessed on 12.3.2019).

## 3. Best Practices in State aid enforcement

### 3.1. Introduction

Starting from the trends described in Chapter 2, the purpose of this chapter is to identify examples of best practices in the enforcement of State aid rules at the national level. In particular, the Consortium aims at describing the characteristics of the best practices and discussing the likely reasons behind each practice.

Section 3.2 provides a definition of the concept of 'best practices' relied on in this Study. In addition, it explains the criteria that the Consortium used to select best practices and the indicators against which they have been tested.

Section 3.3 depicts each best practice in detail and in a contextualised manner, making reference to the relevant country reports and case summaries included in Annex 3.

Section 3.4 concludes by providing a summary of the findings.

### 3.2. The concept of best practices

According to the Consortium, best practices are those which ensure an effective resolution of the issue at hand and which get closest to achieving the aims of State aid rules both in public enforcement (i.e. recovering unlawful aid, by thus removing the distortion of competition caused by the aid) and in private enforcement cases (i.e. safeguarding the rights of the claimant and removing the unlawful aid, by thus eliminating the distortion of competition caused by the aid).

The nature of best practices may vary. Some practices are found in the application of certain rules of national procedure which accelerate claims. Furthermore, a best practice can relate to the judicial system, and concern competence, case management or other procedural rules. Alternatively, it can be grounded in administrative or legislative measures, as long as they add to the ability of courts to properly handle and resolve cases. In addition, a best practice does not necessarily need to be applicable across the EU, but it can also be found only in one Member State.

Where possible, the analysis pays careful attention to the reasons for the existence of each best practice. This implies a good understanding of the legislative framework relevant for the enforcement of State aid rules and the legal tradition of the individual country. The proper understanding of the considerations behind each best practice allows for the exploration of whether and to what extent each practice can be replicated in other Member States. For example, one question discussed in this chapter is whether a best practice is the result of either endogenous or exogenous factors that are not present in a different national context. In the analysis, the procedural autonomy that each Member State retains within the EU is a relevant factor to take into consideration. In other words, the Study discusses whether and to what extent the practice could be 'exported' to other Member States, for example *via* an amendment to the national framework or the adoption of the practice by national courts. In particular, the Study discusses the 'replicability' of best practices in terms of a cost-benefit analysis, and in the light of the procedural autonomy of the Member States in designing the national regimes of State aid enforcement.

Furthermore, some best practices represent a particularly efficient way of managing a procedural or substantive issue. On the other hand, other practices represent measures taken by the Member State(s) to remedy a shortfall, a weakness, or a friction between

the national framework and the adequate enforcement of State aid rules. In other words, a best practice can be both a way to enhance performance, as well as an efficient way to solve an existing problem.

It is worth clarifying that this chapter does not consider as a best practice any conduct that is 'expected' – i.e. where a national court or a Member State simply follows the relevant legal framework, for instance by either respecting the primacy of Union law or cooperating with the Commission.

The majority of the best practices identified by the Study concern public enforcement of State aid rules. While in Chapter 2 the Consortium has identified a large number of private enforcement cases across the majority of Member States, only a limited number of actions have been successful in national courts. As discussed in Chapter 2, in fact, the number of successful actions for damages and interim injunctions remain very limited across the EU. Therefore, the number of private enforcement cases identified in Chapter 2 is too limited to allow the identification of best practices. Conversely, recovery orders by national courts in private enforcement cases are more frequent; we should welcome this trend but, at the same time, the recovery orders are related to the specificities of each case, and thus no best practice emerges in the design of this remedy.

### **3.3. Identification of best practices – examples from the case summaries and country reports**

For each best practice, the Consortium first defines the practice and its benefits. The Consortium then turns to national experiences from the case summaries and country reports in Annex 3, in order to illustrate the best practice and to identify the indicators that help clarify the effectiveness of the practice under consideration. Finally, Section 3.3 provides brief remarks on how these best practices might be disseminated across the Member States.

The Consortium has identified seven best practices, that can be divided into three categories:

- Best practices related to recovery: specific legislation, recovery instructions in State aid instruments and national penalties for delays of recovery;
- Best practices concerning national screening mechanisms: *ex-ante* mechanisms (i.e. non-binding compatibility assessment with State aid rules) and *ex-post* mechanisms (i.e. State aid assessment as part of the decision-making process of the administrative authority);
- Best institutional practices: rules clarifying the jurisdiction of the courts in State aid disputes and the principle of investigation.

#### **3.3.1. Specific framework governing aid recovery**

##### **Best practice**

The analysis of the case summaries in Annex 3 reveals that no homogeneity exists concerning the procedures followed by the Member States in State aid recovery actions. Nevertheless, a number of Member States have adopted legislation concerning the implementation of recovery decisions in the recent years. Member States that have such

legislation in place include Spain, the Netherlands, Slovakia, Belgium and Finland.<sup>245</sup> Estonia is in the process of adopting such legislation; as noted by Estonian country report, the new legislation is likely to be adopted after the recent CJEU ruling in *Eesti Pagar*.<sup>246</sup> In Germany, the Federal Ministry for Economic Affairs and Energy (BMWi) controls the enforcement of State aid recovery, thus centralising and streamlining the recovery procedure.

The Consortium considers the adoption of a specific legal framework concerning aid recovery as a best practice, due to the following reasons:

- It helps to speed up the aid recovery procedure: Member States should recover the aid within four months after the adoption of the recovery decision.<sup>247</sup> However, national authorities often do not comply with this timeline. A specific legal framework on aid recovery clarifies the obligation for the granting authority to recover the aid from the beneficiary, it provides a clear timeline for the recovery procedure, and it clarifies the legal value of the recovery decision and its direct applicability.
- It increases legal certainty for all relevant stakeholders, including the entity responsible for the aid recovery: The specific legislation often resolves inconsistencies between existing national rules and State aid rules
- Such legislation could safeguard the beneficiary's right of defence.

## National experiences

### *Comprehensive legal frameworks concerning aid recovery*

As mentioned in Section 2.2.1, Spain has adopted a specific legal framework on aid recovery. In particular, Law 34/2015 (also referred to as: the 'LGT') has introduced rules concerning the recovery of fiscal aid.<sup>248</sup> As mentioned in the Spanish country report, the new legal framework was introduced in order to remedy certain frictions between the existing national legislation and EU State aid rules. Before the adoption of the LGT, a number of Spanish courts had confirmed the primacy of Union law over conflicting national law.<sup>249</sup> In addition, Spanish courts had recognised that the plaintiffs could not challenge the content of Commission decisions in the context of recovery proceedings.<sup>250</sup> On the other hand, in *Álava*, the Spanish Supreme Court annulled the recovery order, since the authority in charge of recovery had not observed the beneficiary's right to be heard.<sup>251</sup> Therefore, the LGT was adopted both to clarify the

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<sup>245</sup> Other Member States that have similar legislation but which are not discussed in this chapter are Italy (Article 48 of Law no. 234/2012 establishes the proceeding to be followed for the recovery of State Aid) and Croatia (Article 13 of the State Aid Act explains that recovery will be carried out either in accordance with the rules set out in the mere legal act on the basis of which State aid has been granted, or, if not regulated therewith, in accordance with the general rules regulating the relationship between the public administrative body and the beneficiary).

<sup>246</sup> *Supra*, Case C-349/17, *Eesti Pagar AS*.

<sup>247</sup> *Supra*, 2007 Recovery Notice.

<sup>248</sup> Law 34/2015 added a new Title VII (Arts. 260 a 271) to the 2003 General Taxation Law; Title VII regulates the procedures to be followed for the enforcement of decisions to recover fiscal State aid. In addition, two regions (i.e. Navarre and Basque Country) adopted similar legislation, due to the high degree of fiscal autonomy that they enjoy in Spain.

Law 34/2015, of 21<sup>st</sup> September 2015, partially amending General Taxation Law 58/2003, of 7<sup>th</sup> December 2003.

<sup>249</sup> See, for instance, ECLI:ES:TSJPV:2012:3337 (Case summary ES11).

<sup>250</sup> *Ibid*.

<sup>251</sup> ECLI:ES:TS:2013:3083 (Case summary ES8).

procedural steps of the aid recovery and to safeguard the beneficiary's procedural rights during the recovery proceedings.

The main features of the LTG are:

- The possibility of modifying administrative acts incompatible with State aid rules, even if these acts have acquired the status of *res judicata*.<sup>252</sup>
- The prohibition of the beneficiary requesting the deferral or payment in instalments of the tax debts resulting from the enforcement of the recovery decision.<sup>253</sup>
- Title VII of the LTG clarifies that the Spanish tax administration is responsible for enforcing the recovery decisions. In addition, it introduces a ten-year limitation period in this field, in line with the time limit established by the applicable EU law. The new time limit replaces the four-year limitation period generally applicable to taxation cases in Spain.<sup>254</sup>
- LTG provides that late payment interest will be governed by the relevant provisions under Union law.<sup>255</sup>

The Netherlands is another example of a Member State that has recently adopted comprehensive legislation on aid recovery. In particular, the State Aid Recovery Act entered into force in July 2018.<sup>256</sup> The legislation provides a legal basis for administrative bodies to recover unlawful State aid. Similar to the case of Spain, the Netherlands adopted the Act in order to address certain problems with regard to aid recovery. Specifically, existing Dutch rules did not provide for a separate and comprehensive legal basis for the recovery of unlawful aid. This implied that the aid had to be recovered on the basis of different legal provisions (i.e. through administrative, private or tax rules), depending on the characteristics of the measure. Such fragmented legal framework created disparities among aid recovery procedures and some degree of legal uncertainty. In addition, the previous rules did not provide the possibility to recover the interest: in 2006, the Administrative Jurisdiction Division of the Council of State ruled that Dutch administrative law did not include any legal basis to recover interest.<sup>257</sup> On the contrary, the recently approved State Aid Recovery Act introduces a general system of enforcement and ensures effective recovery after a Commission decision.

Finland has also enacted specific national legislation, introducing a procedural framework for the recovery of unlawful State aid.<sup>258</sup> In 2001, Finland adopted the Act to enable the application of Council Regulation (EC) No 659/1999.<sup>259</sup> Even though the State aid Procedural Regulation was directly applicable in Finland, the Act clarified the responsibilities of different administrative bodies in the context of the aid recovery proceedings. Based on Section 1 of the Act, a recovery decision shall be implemented without delay. The authority that has granted the aid is also responsible for implementing that decision. The Ministry of Economic Affairs and Employment shall

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<sup>252</sup> Article 263 LGT.

<sup>253</sup> Article 65 LGT.

<sup>254</sup> Article 262 LGT.

<sup>255</sup> Article 262(2) LGT.

<sup>256</sup> *Wet van 21 februari 2018, houdende regels voor de terugvordering van staatssteun (Wet terugvordering staatssteun or State Aid Recovery Act)*.

<sup>257</sup> See ruling ECLI:NL:RVS:2006:AU9416, para. 2.8.1.

This judgment is surprising since the recovery of interest is provided for by Article 16(2) of Regulation No 2015/1589 [2015] OJ L 248/9.

<sup>258</sup> Laki eräiden valtion tukea koskevien Euroopan unionin säännösten soveltamisesta (28.3.2001/300).

<sup>259</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. Replaced by Regulation No 2015/1589, *supra*.

implement the recovery decision in cases where the granting authority (i.e. responsible for the aid recovery) cannot be identified.

The country report for Estonia includes an example of a similar best practice. Indeed, a number of cases in this Member State showed the difficulties faced by national judges to properly cope with recovery procedures. In order to solve such problems, Estonia is planning to issue an amendment to the Estonian Competition Act. The latter legislation should require the granting authority to recover the unlawful aid (i.e. on its own initiative and even in the absence of a recovery decision). In addition, the new legislation should introduce new procedural rules concerning the interest calculation and the limitation period. Following the recent ruling by the CJEU in *Eesti Pagar*, Estonia is expected to adopt the new legislation in the near future.<sup>260</sup>

#### *Ad hoc legal frameworks*

The Consortium has found an interesting situation in Belgium. Rather than a legislative instrument of general application, Belgium adopted *ad hoc* legislation as a follow-up to the Commission decision in the *Excess Profit* case.<sup>261</sup> After having consulted the Commission, on 25<sup>th</sup> December 2016 Belgium adopted the new law.<sup>262</sup> The new legislation aimed at facilitating the enforcement of the Commission decision in the *Excess Profit* case, since recovery would have been impossible in accordance with ordinary procedures.

#### *Impetus from national courts*

In a number of countries, the framework governing the aid recovery derives from judgments of national courts. In France, for example, the beneficiary argued in *Société Vergers de Châteaubourg v Ministre de l'action et des comptes publics* that the recovery order had to be annulled,<sup>263</sup> since the administration issuing the order had not allowed the beneficiary to comment on the aid amount and calculation method used in the order. The Court of Appeal ruled in favour of the beneficiary, considering that the State administration had violated the beneficiary's right of defence by not allowing the beneficiary to comment before the adoption of the recovery order.

Spanish case law also provides good examples of the role played by national courts in the context of aid recovery. The Spanish Supreme Court has established that the recovery procedure must meet the basic procedural guarantees of hearing, motivation, determination of the amount, and indication of the appeals that may be lodged.<sup>264</sup> In order to implement the case law of the Spanish Supreme Court, the LTG provides that the recovery orders should provide for a period of ten days within which the beneficiary can make representations to the authority in charge of the aid recovery.<sup>265</sup> In addition, the recovery order should specify the aid amount and interest to be paid, and the possibility to appeal the administrative order in court.<sup>266</sup>

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<sup>260</sup> *Supra*, Case C-349/17, *Eesti Pagar AS*.

<sup>261</sup> Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium. OJ L 260/61, 27.9.2016.

It is worth noting that a request for a preliminary ruling has been sent to the CJEU concerning this *ad hoc* legislation in May 2018. The preliminary ruling by CJEU is pending at the time of writing the Study.

<sup>262</sup> Belgian Gazette of 29.12.2016, 90879.

<sup>263</sup> 16NT02839 (Case summary FR8).

<sup>264</sup> See, among others, ECLI:ES:TS:2013:3083 (Case summary ES8); STS 4968/2013; STS 1139/2015; STS 198/2017 (Case summary ES3).

<sup>265</sup> Country report, Spain.

<sup>266</sup> Country Report, Spain.

## Replicability

The design of a dedicated framework for recovery is a matter for national procedural autonomy. Moreover, there are differences among the legislative initiatives noted above (e.g. the Spanish legislation applies to recovery of fiscal measures, while the Dutch legislation does not). However, there may be scope for the creation of a working group on State aid recovery within the Association of European Administrative Judges.<sup>267</sup> The working group could gather further information about how these initiatives work in the different Member States.

### 3.3.2. Instructions about recovery contained in the act granting the aid

#### Best practice

In Belgium and the UK, the granting authority may include specific instructions concerning the possible aid recovery in the act granting the aid. At first sight, this approach can appear unusual: in case the granting authority is uncertain whether the measure constitutes State aid, it should notify the measure to the Commission. However, given the uncertainties as to the notion of State aid caused by the evolution of CJEU case law, this measure can work as a precaution against unexpected findings. In particular, such practice could limit the negative effects of a recovery decision. From this perspective, the inclusion of recovery instructions in the aid instrument may have the following positive outcomes: it may clarify the obligations of the public authority that grants the aid; it may speed up the recovery procedure, and more generally, it may enhance legal certainty for relevant stakeholders.

#### National experiences

Belgium provides an interesting example of the application of this practice. In a number of cases, the act granting the aid included specific recovery procedures in case the measure did not comply with State aid rules.<sup>268</sup>

The country report for UK highlights that, when the aid is granted through contracts, the funding agreement may contain provisions which offer the granting authority a contractual method of recovery, in case a recovery decision is issued by the Commission at a later stage.

It is quite difficult to judge the effectiveness of these experiences. Nevertheless, the general lesson from the country reports included in Annex 3 is that recovery orders are often challenged in court. Therefore, a provision that clarifies *a priori* how the recovery should take place seems likely to speed up the recovery procedure and avoid litigation.

#### Replicability

This is a simple administrative practice that can be implemented by every granting authority, without the need for any legislative reform.

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<sup>267</sup> <https://aeaj.org/> (last accessed on 12.2.2019).

<sup>268</sup> Country Report, Belgium.



### 3.3.3. Penalties for the State due to slow aid recovery

#### Best practice

A further best practice is the imposition of a penalty on the national authority that has the obligation to recover the aid in case of delays in enforcing the Commission decision. This practice, in fact, creates an incentive for prompt recovery and it provides a general deterrent effect for all the parties that have an obligation to recover. The procedure is similar to the infringement procedure under Article 258-260 TFEU, applicable when a Member State delays the enforcement of a recovery decision. In the latter case, the CJEU can sanction the Member State *via* the imposition of either a daily payment or a lump sum, which is to be paid to the EU's own resources.<sup>269</sup> By contrast, at national level, the penalty would be paid to the State's own budget. Therefore, the national penalty would have a 'weaker' deterrent effect than the possible penalty imposed under Union law. However, the penalty could still incentivise the granting authority to complete the recovery on time, as penalties for delay could disrupt the budgetary allocation within the State and thus negatively affect the internal budget of the granting authority.

#### National experiences

The country report for France explains that courts frequently use the threat of financial penalties against the State when they order the recovery of unlawful aid. This procedure is known as '*astreinte*'. In *Vent de Colère*,<sup>270</sup> the French court ordered the granting authority to pay a daily penalty payment of EUR 10,000 until the date of effective recovery. The granting authority had to pay the penalty if it had not fulfilled its recovery obligation within six months from the date of the judgment.

Similarly, in *CELF*,<sup>271</sup> the Court of Appeal upheld the judgment of the lower court and ordered the French State to recover the aid within three months of the date of notification of the judgment. If the State failed to recover the aid, it would have to pay a penalty of EUR 1,000 for each day of delay.

#### Replicability

The national administrative law provides the legal basis for the approach followed by French courts. The penalty payments ordered by French courts are also applicable in other fields of administrative practice. Accordingly, in jurisdictions where these kinds of sanctions are possible, national courts could relatively easily consider this approach.

### 3.3.4. State aid assessment as part of the decision-making process of administrative bodies: ex-ante control

#### Best practice

Granting authorities must take into consideration the need for compliance with State aid rules when planning an aid measure. However, national rules expressly requiring the administrative bodies to take State aid rules into account in their decision-making process can be considered as a best practice for various reasons: first, it helps to ensure *ex-ante* control and compliance with State aid rules; second, it contributes to a higher degree of legal certainty for stakeholders, including beneficiaries, competitors and third parties, which might be more comfortable in referring to national rather than Union law;

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<sup>269</sup> See, for example, case C-496/09, *Commission v. Italy* (2011) ECLI:EU:C:2011:740.

<sup>270</sup> ECLI:FR:CESSR:2016:39372120160415 (Case summary FR4).

<sup>271</sup> 274923 (Case summary FR9).

third, it makes it easier to identify the responsibilities of different administrative authorities in the case of unlawful aid.

### National experiences

The Local Government Act in Finland obliges municipalities to take State aid rules into account in their decision-making process.<sup>272</sup> In particular, the Finnish Supreme Administrative Court has ruled against a number of municipalities for violation of the Local Government Act.<sup>273</sup>

The Netherlands provides a similar practice. Under the Act on Compliance with European Legislation by Public Entities (the 'Act on Compliance'),<sup>274</sup> the competent Minister may instruct a public body to comply with Union law, including State aid rules. By way of example, the relevant Minister may instruct a public entity to notify an aid measure to the Commission. Additionally, the Minister may impose penalties if the public body does not follow such instructions. The Ministerial powers pertaining to the Act on Compliance are supplementary to those one based on the Provinces and Municipalities Act.<sup>275</sup> The latter act provides the Minister of the Interior and Kingdom Relations with certain enforcement instruments (e.g. letter of warning, suspension) in case a province or municipality does not comply with State aid rules.<sup>276</sup>

To the knowledge of the Consortium, the Dutch Government has not yet made use of the powers granted by the Act on Compliance. Additionally, as the new rules were adopted in 2018, it is not possible to assess their concrete impact. Nevertheless, the Netherlands constitutes a second clear example of legislative intervention aimed at introducing State aid assessment in the decision-making process of public administrations, and thus preventing inconsistencies between national and EU State aid rules.

In Cyprus, the Office for the Commissioner for State Aid Control was established in preparation for Cyprus' accession to the EU.<sup>277</sup> Among its tasks, the Commission has to assess the compatibility of draft aid measures with GBER conditions.<sup>278</sup> In addition, all State institutions have to request the opinion of the Commissioner concerning the compatibility of a new aid measure with State aid rules before the measure is notified to the Commission.<sup>279</sup> Although the opinion is non-binding, State authorities are required by law to ask for such an opinion.<sup>280</sup> The opinions of the Commissioner thus work as an *ex-ante* system of control, which can anticipate possible incompatibility concerns later raised by the Commission after the aid notification. Finally, the Commissioner's opinions are often relied upon by public authorities in the context of recovery proceedings in national courts.<sup>281</sup>

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<sup>272</sup> Local Government Act 410/2015. See Country Report, Finland.

<sup>273</sup> KHO:2009:89 (Case summary FI2).

<sup>274</sup> *Wet van 24 mei 2012, houdende regels met betrekking tot de naleving van Europese regelgeving door publieke entiteiten (Wet Naleving Europese regelgeving publieke entiteiten)* (European Legislation by Public Entities).

<sup>275</sup> *Wet van 10 september 1992, houdende nieuwe bepalingen met betrekking tot provincies* (Provinces Act), *Wet van 14 februari 1992, houdende nieuwe bepalingen met betrekking tot gemeenten* (Municipalities Act).

<sup>276</sup> *Ibid.*

<sup>277</sup> [http://www.publicaid.gov.cy/publicaid/publicaid.nsf/index\\_en/index\\_en?OpenDocument](http://www.publicaid.gov.cy/publicaid/publicaid.nsf/index_en/index_en?OpenDocument) (last accessed on 12.2.2019).

<sup>278</sup> See Cyprus country report in Annex 2.

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.*

<sup>281</sup> See, for example, 1258/2001 (Case summary CY2).

## Replicability

An *ex-ante* system of control could be introduced in the Member States that have established a State Aid Monitoring Authority during the EU pre-accession phase, like Cyprus. However, national procedural autonomy could represent an obstacle to the introduction of such a system. In other words, the principle of procedural autonomy would obstruct the introduction of *ex-ante* system of control *via* EU harmonisation.

### 3.3.5. State aid assessment as part of the decision-making process of administrative bodies: ex-post assessment

#### Best practice

After the aid measure is authorised by the Commission, there is always a risk that the beneficiary either receives funds without being entitled to them, or that it receives more funds than it is entitled to. This risk is foreseen by Art 108(1) TFEU, whereby the Commission keeps under constant review aid previously authorised.<sup>282</sup> A complement to Article 108(1) TFEU is a national system to check for such over-payment and secure recovery. A national *ex-post* system of assessment could afford a smooth aid recovery and act as a deterrent in relation to the misuse of aid. In particular, it should be noted that the GBER provides for a system of *ex-post* monitoring, requiring national authorities to recover the aid which is not compliant with the GBER conditions.<sup>283</sup>

#### National experiences

In a number of case summaries, the granting authority made *ex-post* determinations to avoid over-payment. This occurred in Austria, where the public service broadcaster had to return certain revenues that would exceed the amounts allowed under a previous Commission decision.<sup>284</sup> Similarly, in Slovenia,<sup>285</sup> the national court reduced a subsidy to prevent excessive profits, as required by the national legislation. Finally, in the Netherlands, the court adopted a recovery order after a re-calculation of the beneficiary's entitlement.<sup>286</sup>

These examples reveal the importance of this kind of mechanism, which expedites recovery and allows for decentralised State aid enforcement. It also means that interested parties can raise concerns at national level rather than with the Commission, thus facilitating the resolution of their concerns.

#### Replicability

Since *ex-post* monitoring is increasingly becoming a standard practice as a result of the State Aid Modernisation and after the decentralisation of State aid control brought about by the new GBER, other Member States could adopt a similar solution. In particular, the *ex-post* assessment would be suitable for aid measures addressing a large number of beneficiaries, where the recovery following a Commission decision would be particularly complex. On the other hand, for one-off measures, *ex-post* monitoring may be less cost-effective.

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<sup>282</sup> European Commission, Code of Best Practice for the conduct of State aid control procedures. OJ C 253/14, 19.7.2018, para. 82-87.

The Code which foresees that the Commission will monitor a sample of measures annually.

<sup>283</sup> *Supra*, 2014 GBER, Article 12, monitoring generally, and Article 26(7) monitoring and claw-back mechanisms.

<sup>284</sup> Ro 2015/03/0014 (Case summary AT6).

<sup>285</sup> ECLI:SI:UPRS:2013:I.U.289.2012.13 (Case summary SI3).

<sup>286</sup> ECLI:NL:RVS:2015:1152 (Case summary NL7).

### 3.3.6. Rules clarifying jurisdiction of the courts in State aid disputes

#### Best practice

As discussed in Section 2.4, national judges are still generally unfamiliar with State aid rules. In particular, this seems the case for judges either from ‘smaller’ Member States or those which have recently joined the EU, who thus have had fewer opportunities to deal with State aid cases.<sup>287</sup> The Consortium refers in particular to ‘smaller’ Member States in terms of GDP and population, as well as to the Member States that joined the EU in 2004, 2007 and 2013.<sup>288</sup> In these countries, national courts seem less likely to hear public and private enforcement cases concerning State aid rules. The creation of a specialised court, or a chamber of a court, could resolve this problem: a team of judges, at least at first instance, could in fact become specialised in State aid matters. A specialised court/chamber could have a better degree of expertise and familiarity with State aid rules in comparison to non-specialised courts. According to an OECD report, specialised courts in competition law can bring greater efficiencies (e.g. procedures for similar cases can be standardised; the court may rule on the case within a shorter period of time).<sup>289</sup> In addition, specialised courts could promote uniformity in judgments and improve the quality of decisions.<sup>290</sup> The application of State aid rules by a specialised court/chamber could achieve similar benefits.

#### National experiences

In general, Member States do not attribute exclusive jurisdiction for State aid cases to a particular court. This means that both public and private enforcement cases can be heard by civil as well as administrative courts. As discussed in Chapter 2, courts have jurisdiction in State aid rules on the basis of the remedy requested by the plaintiff and the type of aid measure at stake.

Ireland is an exception in this regard. According to Rule 4(1) of the Rules of the Superior Courts, the Competition List of the High Court has exclusive jurisdiction to hear competition law proceedings, which include State aid cases.<sup>291</sup> Besides improving the familiarity of national judges with State aid matters, the establishment of a specialised court could reduce the length of court proceedings. In Ireland, for example, the specialised competition list was established in order to expedite judicial proceedings.<sup>292</sup> However, the small number of State aid cases heard in Ireland do not allow us to test if this system has worked ‘faster’ in comparison to other countries that do not have a specialised court.

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<sup>287</sup> See, in particular, the country reports concerning Croatia, Cyprus, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia and Slovenia.

The Consortium refers in particular to “smaller” Member States in terms of GDP and population, as well as to the Member States that joined the EU in 2004, 2007 and 2013.

<sup>288</sup> Please note that the qualification of ‘smaller’ Member States used in this context is different from that one used in Chapter 2.

<sup>289</sup> OECD Secretariat, “The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences”. Report published on 9.1.2017. The report is available at: <http://www.oecd.org/daf/competition/resolution-of-competition-cases-by-courts-2016.htm> (last accessed on 12.2.2019).

<sup>290</sup> *Ibid.*

<sup>291</sup> Country Report, Ireland.

<sup>292</sup> Country Report, Ireland.

In Italy, Article 49(3) of Law No. 234/2012 attributes exclusive jurisdiction to the administrative courts for cases concerning:

- Aid granted in violation of the standstill obligation.
- Decisions or acts issued to execute recovery decisions, irrespective of the kind of aid and of the entity which granted the aid.<sup>293</sup>

In Italy, Law 234/2012 has clarified the courts' jurisdiction in public and private enforcement cases, though neither a specialised State aid court nor a specialised chamber or list has been established. However, as discussed in the Italian country report in Annex 3, the Italian Supreme Court has carved out various exceptions, further limiting the scope of the exclusive jurisdiction of different courts.

## Replicability

It is worth noting that the design of a judicial system is a matter for national procedural autonomy. Moreover, the choice of a Member States to create specialised courts is usually the result of a more root and branch reform of the legal system as a whole. Specialised courts are also more easily designed in 'larger' Member States (i.e. in terms of GDP and population), due to the likely 'larger' number of cases that the specialised court/chamber would be expected to hear in comparison to 'smaller' Member States.<sup>294</sup> Accordingly, it is unlikely that this practice can be replicated easily, although courts/chambers specialised both in competition law and State aid might prove to be the most attractive solution. Rather than establishing a separate specialised court dealing with State aid matters, Member States could either attribute exclusive jurisdiction to chambers of existing courts (i.e. Ireland), or adopt procedural rules to clarify the courts' jurisdiction both in public and private enforcement cases.

### 3.3.7. Proceedings guided by the principle of investigation

#### Best practice

A number of country reports in Annex 3 have highlighted that parties in State aid proceedings often lack knowledge about the specificities of State aid rules, and thus do not formulate proper claims.<sup>295</sup> This may explain why the majority of claims, especially in private enforcement cases, have been rejected by national courts.

The court report for Estonia, however, reveals a procedure where the judge takes a more active role in guiding the parties in formulating their claims.

#### National experiences

In Estonia, the administrative proceedings are guided by the principle of investigation, found in the Code of Administrative Court Procedure<sup>296</sup>. The latter principle requires that the competent court must ascertain the facts of the case on its own initiative, including gathering evidence or imposing on the parties the obligation of presenting relevant evidence. Furthermore, the court must provide the parties with an explanation about the proceedings and the legal formalities, in order to guarantee the parties' interest. In

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<sup>293</sup> Country Report, Italy.

<sup>294</sup> Please note that the qualification of 'smaller' Member States used in this context is different from that one used in Chapter 2.

<sup>295</sup> See country reports by Croatia, France, Hungary, Italy, the Netherlands, Sweden.

<sup>296</sup> *Halduskohtumenetluse seadustik* - RT I, 23.02.2011, 3 (available at: <https://www.riigiteataja.ee/en/eli/512122017007/consolide>, last accessed on 12.2.2019).

particular, during the proceedings, the judge can point out to the parties any defect of form that would prevent a declaration from being heard by the judge.

In the context of State aid proceedings, the principle of investigation could be relied upon by national judges to indicate to the plaintiffs what remedies are 'allowed' under State aid rules. For instance, in a private enforcement case, the judge could indicate to the plaintiff that the request of extension, rather than recovery of the unlawful aid, falls outside the scope of State aid remedies.

However, in the case summaries reported in Estonia, there is no clear evidence that this principle has been applied. Furthermore, further verification would be required, in order to test how this approach could work in practice.

The principle of investigation might be considered a best practice, to the extent that it affords both the plaintiff and the defendant ample opportunities to present their claim in the best possible way, allowing for a more accurate judgment by the court. The procedure may also reduce the likelihood of an appeal. On the other hand, this principle might also lengthen the court proceedings.

### **Replicability**

The principle of investigation appears an idiosyncratic procedure, tied to the legal culture of the jurisdiction under study. As with other best practices, the principle of national procedural autonomy limits the extension of such an approach across the EU.

## **3.4. Conclusions on best practices in State aid enforcement**

The trends identified in Chapter 2 suggest that State aid enforcement at national level is becoming more effective in most Member States. The best practices presented in this chapter reveal that a growing number of Member States are aware that amending national procedures may be vital to making the enforcement of State aid rules more effective. Many of these practices are designed to embed a 'culture' of State aid enforcement among the national stakeholders (i.e. granting authorities, beneficiaries and third parties).

The Consortium has based its indicators for best practices on the experience gathered from the country reports and case summaries identified in the Study. The best practices that the Consortium has subsequently discerned mainly concern national procedural rules and judicial practices that can contribute to the reduction of the length of the aid recovery proceedings after a Commission decision. In particular, the Consortium has identified seven best practices, divided in three categories:

- Best practices related to recovery: specific legislation, recovery instructions in State aid instruments and national penalties for delays of recovery;
- Best practices concerning national screening mechanisms: *ex-ante* mechanisms (i.e. non-binding compatibility assessment with State aid rules) and *ex-post* mechanisms (i.e. State aid assessment as part of the decision-making process of the administrative authority);
- Best institutional practices: rules clarifying the jurisdiction of the courts in State aid disputes and the principle of investigation.

In recent years, a number of Member States have adopted specific legal frameworks governing aid recovery. Although these laws broadly differ in terms of scope of

application, administrative authorities involved and procedural steps in the recovery process, they represent a best practice 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 litigation, thus ensuring the effective enforcement of recovery decisions. Further best practices identified in relation to aid recovery are the inclusion of instructions about possible recovery proceedings in the administrative act granting the aid, as well as the adoption of internal penalties to sanction the national authorities if they do not enforce the Commission decision in a proper and timely fashion. The latest best practice complements the financial penalties that the CJEU could impose on a Member State in the context of infringement proceedings due to the failure to implement a recovery decision.

Additionally, the Consortium considers the screening mechanisms introduced in a number of Member States as a best practice. Such mechanisms could work either *ex-ante* (i.e. a national authority provides a non-binding compatibility assessment to the granting authority, thus anticipating the likely Commission assessment of the aid measure before its notification) or *ex-post* (i.e. a national authority monitors the compatibility of aid measures already implemented with GBER,<sup>297</sup> *de minimis* Regulation<sup>298</sup> and the concept of aid, and it can eventually order the recovery of the unlawful aid without a Commission decision. The legality of the *ex-post* system of control has been recently confirmed by the CJEU in *Eesti Pagar*,<sup>299</sup> and it is in line with the increased relevance of the GBER after the State Aid Modernisation.<sup>300</sup> Finally, it is worth pointing out that the *ex-ante* mechanisms are based on non-binding opinions delivered by national authorities to the granting institution concerning the likely compatibility of the planned aid measure with State aid rules; such non-binding opinions do not replace the Commission exclusive competence in carrying out the compatibility assessment under Article 107(2) and 107(3) TFEU and under the provisions adopted pursuant to Articles 93, 106(2), 108(2) and 108(4) TFEU.

Finally, at the institutional level, the Study notes as best practices the rules clarifying the court jurisdiction in State aid disputes, as well as the principle of investigation in court proceedings. While the former best practice makes national judges more familiar with State aid rules, the latter aims at supporting the plaintiff in developing a claim in line with the remedies available under State aid rules, thus increasing the number of successful claims in national courts.

While the abovementioned best practices may provide helpful lessons, the principle of national procedural autonomy militates against some of them becoming more generally widespread. On the other hand, a number of the best practices simply create working practices that make State aid monitoring and enforcement smoother, and thus they can easily replicated in different Member States. In other words, the best practices identified in the present Study mostly concern judicial practices that could be easily applied by national courts, rather than requiring legislative intervention. Since the beginning of State Aid Modernisation, the Commission has set up a number of working groups bringing together representatives from both the Member States and the Commission to discuss issues related to State aid enforcement.<sup>301</sup> The Commission could thus establish a working group to facilitate the exchange of best practices among the Member State representatives. Within such a working group, the Member States could assist each other, in order to either refine existing policies (i.e. for the Member States that already apply one of the best practices) or in considering how far these practices could improve

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<sup>297</sup> *Supra*, 2014 GBER.

<sup>298</sup> *Supra*, *de Minimis* Regulation.

<sup>299</sup> *Supra*, Case C-349/17, *Eesti Pagar AS*.

<sup>300</sup> [http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html) (last accessed on 18.6.2019).

<sup>301</sup> *Supra*, Code of Best Practice, para. 89.

State aid enforcement in their country (i.e. for Member States that do not have such practices).



## 4. Use of the cooperation tools by the Commission and the national courts

### 4.1. Introduction

The current State aid Procedural Regulation codifies tools for cooperation between the Commission and national courts. These tools are set out in Article 29 of the State aid Procedural Regulation. The box below presents the text of this article.

#### **State aid Procedural Regulation, Article 29(1) and 29(2):**

“29(1) For the application of Article 107(1) and Article 108 TFEU, the courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid rules.

29(2) Where the coherent application of Article 107(1) or Article 108 TFEU so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State aid rules. It may, with the permission of the court in question, also make oral observations.”

In short, national courts can request information or request opinions from the Commission (see Article 29(1)) and the Commission may submit observations, on its own initiative, as an *amicus curiae* in national court proceedings regarding State aid and its enforcement (see Article 29(2)). It is important to note that the request for information and the request for opinion already existed before their codification in the State aid Procedural Regulation in 2015. Before 2015, national courts had the possibility to ask the Commission for information or for its opinion in accordance with the 2009 Enforcement Notice.<sup>302</sup> The State aid Procedural Regulation states in this context that the cooperation tools (should) mainly contribute to the overall “*consistency in the application of the State aid rules*” across the EU.<sup>303</sup>

This chapter presents the results of the analysis with regard to the actual use of the tools for cooperation between the Commission and the national courts and the views of the courts regarding these tools. The specific research objective was to gather knowledge on the use of and views of national courts on the cooperation tools provided for in Article 29 of the State aid Procedural Regulation. Additionally, the analysis aimed at providing information on potential actions to render the cooperation tools more efficient (if needed) both at EU level and at individual Member State level.

In order to fulfil the research objectives, the Consortium employed various data collection methods: desk research (using data available within the Commission), interviews with Commission staff, an online questionnaire addressed to the relevant courts, and interviews with several selected courts. Annex 1 provides further details about the methodology applied.

This chapter contains four main sections. First, it provides a general introduction to the three cooperation tools (Section 4.2), explaining how they work and how often they are used. The next part provides a detailed analysis of the use of the cooperation tools in practice, based upon insights obtained from the online questionnaire and from

<sup>302</sup> *Supra*, 2009 Enforcement Notice.

<sup>303</sup> *Supra*, 2009 Enforcement Notice, recital 37.

interviews with judges. A distinction is made between the results for national judges who did (Section 4.3) and national judges who did not (Section 4.4) use (one of) the cooperation tools. The chapter ends with the main conclusions and recommendations on how the tools could be used in a more efficient way (Section 4.5).

## 4.2. General introduction to the cooperation tools

As presented above, Article 29 of the State aid Procedural Regulation mentions three cooperation tools, namely: the request for information; the request for an opinion; and *amicus curiae* observations.

### 4.2.1. The request for information or the request for an opinion (Article 29(1) State aid Procedural Regulation)

The use of both the request for information and the request for an opinion lies within the discretion of the national courts. Under the request for information tool, the court may ask the Commission to disclose information concerning a pending Commission proceeding or to transmit certain documents that it has in its possession. The latter mainly refers to copies of existing Commission decisions, factual data, statistics, market studies, economic analyses, etc. The Commission aims to respond to a request for information within one month.<sup>304</sup>

No structural statistics on the use of this tool are publicly available. The Commission Staff Working Documents accompanying the Commission annual reports on Competition Policy do contain some information on the requests for information received by the Commission.<sup>305</sup> In the period 2014 – 2017, judges submitted at least seven requests for information to the Commission, with courts in Germany, Italy, the Netherlands and Spain having used the tool.<sup>306</sup><sup>307</sup> Due to the confidential character of the request for information, the Commission does not disclose information on the specific (content) details of these requests.

Under the request for an opinion, courts can ask the Commission for an opinion on factual, economic, and legal matters concerning the application of State aid rules. When providing the opinion, the Commission will limit itself to providing the factual information, or economic or legal clarification sought. The Commission will not consider the merits of the case pending before the court. In addition, the opinion is not binding, so a national court is not obliged to follow it. The Commission aims to give its opinion within four months.<sup>308</sup>

Since 2009, the Commission provided at least 21 opinions at the request of national courts.<sup>309</sup> Courts in Croatia, Finland, Germany, Greece, Italy, Latvia, the Netherlands and Romania have submitted a request for opinion (see Figure 29). In the majority of these 21 cases, the main question was whether a measure would constitute State aid

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<sup>304</sup> *Supra*, 2009 Enforcement Notice, para. 84.

<sup>305</sup> The reports are available at: [http://ec.europa.eu/competition/publications/annual\\_report/index.html](http://ec.europa.eu/competition/publications/annual_report/index.html) (last accessed on 18.6.2019).

<sup>306</sup> Here and later in the text when discussing the number of times other tools are used, the phrase “at least” is included to reflect the uncertainty with respect to the full number of cases. The figures presented in the text refer to the numbers that the Consortium managed to identify.

<sup>307</sup> Annual reports on competition policy, more specifically: SWD(2015) 113 final, SWD(2016) 198 final, SWD(2017) 175 final and SWD(2018), 349 final (available at: [http://ec.europa.eu/competition/publications/annual\\_report/index.html](http://ec.europa.eu/competition/publications/annual_report/index.html), last accessed on 18.6.2019).

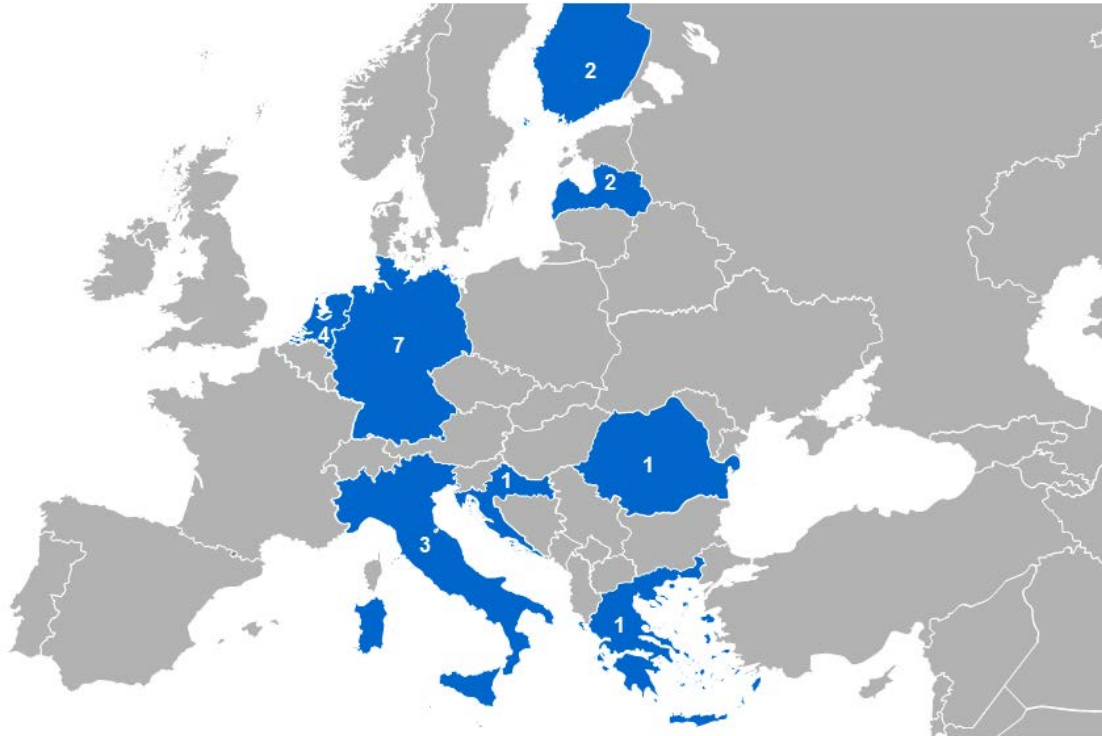
<sup>308</sup> *Supra*, 2009 Enforcement Notice, para. 94.

<sup>309</sup> Commission Staff Working Documents accompanying the Commission annual reports on Competition Policy (available at: [http://ec.europa.eu/competition/publications/annual\\_report/index.html](http://ec.europa.eu/competition/publications/annual_report/index.html), last accessed on 18.6.2019).

or not. Other questions related to the notion of an undertaking, sometimes in connection with *de minimis* aid, methods to calculate market prices or the applicability of the GBER in State aid cases.

**Figure 29 - Number of requests for opinion per Member State (2009 – 2018)**

Sources: Overview provided by the Commission, website DG Competition, Commission Staff Working Documents accompanying the Commission annual reports on Competition Policy, and interviews with judges.



#### 4.2.2. Amicus curiae observations (Article 29(2) State aid Procedural Regulation)

The Commission can provide a national court with *amicus curiae* observations. Through this tool, the Commission presents its vision (observations) on a particular State aid aspect of the case. If needed, the Commission may request relevant documentation in order to assess the matter.

The discretion to provide *amicus curiae* observations lies with the Commission. Therefore, it is not possible for third parties to request that the Commission submits *amicus curiae* observations in a particular case as it is contrary to the independence of national courts.<sup>310</sup> The Commission is obliged to inform the Member State concerned of its intention to submit *amicus curiae* observations before formally doing so. The court does not have to follow the advice given by the Commission; *amicus curiae* observations are non-binding.

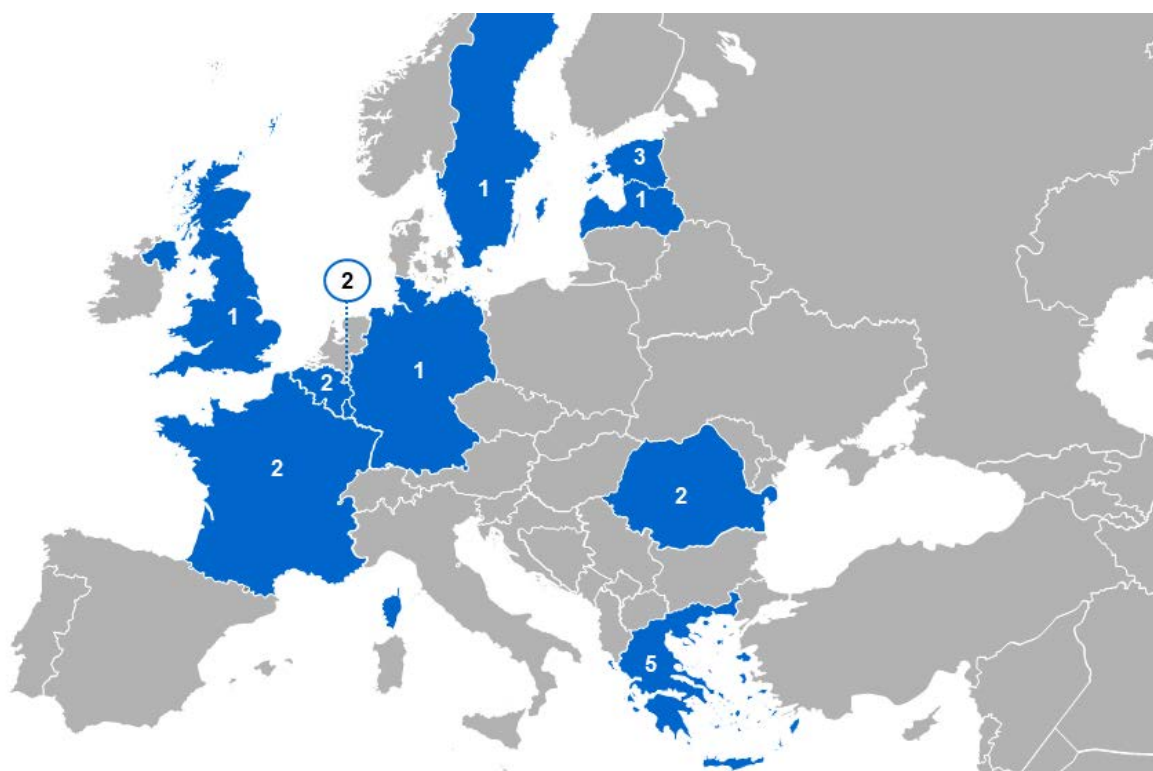
Since 2014, the Commission has provided at least 20 *amicus curiae* observations. Courts in Belgium, Estonia, France, Germany, Greece, Latvia, Luxembourg, Romania, Sweden and the United Kingdom have received one or more *amicus curiae* observations (see Figure 30). Six of the *amicus curiae* observations identified related to the *Micula* case, which evolved around the fact that Romanian authorities had compensated foreign investors that had invested in disadvantaged Romanian regions. The Commission

<sup>310</sup> *Supra*, SWD(2016) 198 final.

ordered Romania to recover the incompatible State aid. As the foreign investors were located in different Member States, the *Micula* case was pending before several national courts. In these countries, the Commission provided the courts with *amicus curiae* observations. Other cases involving *amicus curiae* observations concerned the definition of SGEI (Service of General Economic Interest), the execution or suspension of recovery decisions, the implementation of an arbitration award and guidance on when to use national or Union law.

**Figure 30 - Number of *amicus curiae* observations per Member State (2014 – 2017)**

Sources: Overview provided by the Commission, website DG Competition, Commission Staff Working Documents accompanying the Commission annual reports on Competition Policy, and interviews with judges.



### 4.3. Use and views - national courts that used the tools

This section focuses on the experiences with and views on the cooperation tools from the perspective of judges who either submitted a request for information / request for an opinion, or who received *amicus curiae* observations. Information from the online questionnaires and interviews with national judges form the basis of the analysis in this section. For summaries of the interviews and the aggregated outcomes of the online questionnaire, please refer to Annex 4.

#### 4.3.1. Use of the cooperation tools

##### Familiarity and experience with the tools

Out of the 78 judges who participated in the online questionnaire, six indicated that they have used one or more tools. This means that 8% of the judges who participated in the questionnaire had practical experience with one of the cooperation tools. The Consortium did not explicitly ask the judges which tool(s) they had used or received.

Additionally, the Consortium interviewed 27 judges. Five of them indicated that they had used one or more of the cooperation tools. This equals 19% of the sample. All five judges participating in the interviews (and who had used one or more of the cooperation tools) had used the request for opinion. Two of them had also used a request for information in the same case.

In the remainder of this section, we present information obtained from the 11 judges, who have used the cooperation tools. The table below presents the main characteristics of these judges.

**Table 4 - Characteristics of the ‘users’, from the online questionnaire and interviews**

Respondents’ characteristics	Online questionnaire (number of judges is 6)	Interviews (number of judges is 5)
Countries - Member States in which the judges are working	4 Member States	5 Member States
Experience - number of years working as a judge	Between 10 and 20 years: 4 More than 20 years: 2	Between 10 and 20 years: 5
Type of court - type of court the judge currently works for	Court of first instance: 3 Court of Appeal: 1 Supreme Court: 2	Court of first instance: 1 Supreme Court: 4
Expertise – number of cases involving State aid elements (per year) and type of cases	Fewer than 1 case: 3 Between 1 and 5 cases: 3 Existence of State aid: 5	Fewer than 1 case: 3 Between 5 and 10 cases: 2 Existence of aid: 5

Source: interviews and online questionnaire; note: all these respondents indicated to be a practising judge or member of a court involved in cases, which (partly) include State aid elements.

There seems to be more familiarity with the request for opinion than the other tools. Out of the 11 judges (that took part in the online questionnaire or the interviews), all but one indicated that they were familiar with the request for opinion. The request for information is less well-known among judges, with three out of six judges participating in the questionnaire indicating that they were familiar with the request for information. The familiarity with *amicus curiae* observations is even a bit lower, with two out of six judges participating in the online questionnaire indicating that they were familiar with *amicus curiae* observations. The Consortium did not explicitly investigate the familiarity with the request for information tool and *amicus curiae* observations during the interviews.

### Ways to solve a problem

The five judges interviewed that had made use of (one of) the cooperation tools and the six judges participating in the online survey indicated that, in case of lack of clarity or uncertainty in relation to State aid issues, they have multiple options for seeking guidance. The most likely course of action is to invest time and effort themselves to try to find an answer to the (legal) question at hand: three out of six judges in the online questionnaire considered it most likely this action would be taken, and another two considered it very likely. Another route that judges indicated that they follow is consultation with fellow judges, preferably judges working at the same court: two judges considered this action most likely and another three judges considered it very likely. During the interviews, the five judges interviewed who had used cooperation tools, indicated that for them these two routes are the most common ones followed as well.

With regard to more in-depth legal questions, such as the explanation and interpretation of State aid rules, the five judges interviewed who made use of cooperation tools mainly pointed out that they prefer to refer a request for a preliminary ruling to the CJEU. Contacting fellow judges in other Member States does not seem to be a real option for judges, according to the responses in the online questionnaire and interviews. Additionally, the judges who participated in the online questionnaire considered the referral of a request for a preliminary ruling to the CJEU a slightly more likely action (2x most likely, 2x very likely) than approaching the Commission (2x most likely, 2x very likely).

Judges typically approach the Commission to gain a specific understanding of what constitutes State aid. Three out of the five judges interviewed who have used the cooperation tools, have limited experience in the area of State aid.<sup>311</sup> These judges decided to approach the Commission as they were unsure whether a case involved State aid elements and wished to obtain general guidance. The other two, more experienced, judges approached the Commission with a request for information to support a decision on whether a particular measure constituted State aid or not. While doing so, these judges also decided to request an opinion.<sup>312</sup>

Although approaching the Commission may not be the most likely action for judges, the use of cooperation tools seems to have a clear function for the judges who used it. It appears that when judges are unsure whether a case contains State aid elements, they submit a request for opinion to the Commission. When they have other questions, judges either consult their fellow judges or refer a request for a preliminary ruling to the CJEU, the latter especially with regard to in-depth legal questions.

### Knowledge sharing

The majority of the judges who participated in the online questionnaire (number of judges is six) indicated that, at least to some extent, they actively shared knowledge on State aid issues with fellow judges: three actively shared knowledge, while two sometimes shared knowledge. This seems to happen informally and in a non-structured manner, as all six judges indicated that they are not part of a formal national network in which information is shared. In addition, most of them are not members of an informal network either on a national or European level, although they do meet fellow judges. This was confirmed by the interviews: the five judges interviewed who had made use of cooperation tools highlighted that information is shared internally (between national judges of the same court, sometimes between national judges of different courts), but that no formal structures for knowledge sharing on State aid issues exist. It appears from the interviews that judges do attend workshops or training sessions on State aid issues; however, this happens on an *ad hoc* basis.

### 4.3.2. Views on the cooperation tools

#### Experience with the cooperation tools

The Consortium asked the six judges participating in the online questionnaire who indicated having used the tools (request for information / opinion) how they had experienced the procedure. The majority of the judges who participated *via* the questionnaire (four out of six judges) agreed with the statement that the procedure is easy and effective, while two judges disagreed with that statement. One of the judges,

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<sup>311</sup> It should be noted that these three judges all had limited experience with State aid cases (less than one State aid case per year) with one judge indicating that the case for which the Commission was approached was the first State aid case (s)he handled.

<sup>312</sup> Both judges handling between five and ten cases involving State aid elements on a yearly basis.

who did not find the procedure easy and effective, found it difficult to understand which procedure to follow. The other five judges had no such problems.

A similar picture results from the interviews. The majority of judges (four out of five in this category) stated that it was clear to them which procedure they should follow. Only one judge stated that the procedure was not so clear and that quite some time was spent by the judge and support staff, in order to find out how the request needed to be submitted and which information needed to be included.

In the opinion of all six judges in the online questionnaire, the information on the website of the Commission was at least to some extent clear and sufficient. None of the judges were of the opinion that the website does not suffice. Judges, during the interviews, did not explicitly comment on the information provided on the website of the Commission (DG Competition).

None of the judges who participated in the online questionnaire experienced language barriers. All five judges interviewed who made use of cooperation tools fully share this view and they indicated that they communicated with the Commission in their national languages. They also appreciated this possibility, as they felt most confident when they could express themselves in their national language. The advantage of communicating in the national language mentioned is the reduction of translation errors and misinterpretations. In addition, it is easier to formulate a question precisely and with the nuances one can only make in one's national language.

With regard to the procedure, the Consortium concludes on the basis of the outcomes of the online questionnaires and interviews, that the judges generally seem to be quite satisfied with the current procedure. As highlighted above, many of them indicated that they knew whom to contact, which procedure to follow and how to formulate the request. Judges particularly appreciated the possibility of communicating in their national language. With regard to the procedure, the judges did not see an urgent need for the Commission to change the procedure. Nevertheless, the judges have some suggestions for further increasing the use of the cooperation tools (please refer to Section 4.3.3).

Besides questions on the procedure itself, the Consortium asked the judges, both participating in the online questionnaire and interviews, how they experienced the quality of the Commission's response(s) to the request for information / opinion. The six judges participating in the online questionnaire found the guidance provided to be, to a certain extent, useful. The Consortium asked the judges if the Commission's response was "useful, somewhat useful or not useful". Only one judge explicitly stated that the opinion given was useful to the case. The others found it somewhat useful. The interviews (with the five judges who used one or more of the tools) gave a mixed picture as well. Two judges indicated that the opinion received was not useful. One of these judges stated that, although they clearly asked whether the case contained State aid elements, the answer provided argumentation both in favour and against, which was not what the judge was looking for; this judge desired a clear positive or negative conclusion. In addition, the judge deemed the response too long (in number of pages). The other judge noted that the Commission advised to refer a request for a preliminary ruling to the CJEU. The remaining three judges held mixed views on the usefulness of the opinion they received. They indicated that the opinions presented some useful guidance, but that it was difficult to apply it to their specific cases.

Four out of the six judges participating in the online questionnaire were of the opinion that the response to their request was not too late in the light of their national proceedings. Nevertheless, three out of those four did not fully agree that the response

was on time. Therefore, there might have been some delays, but these were still acceptable. Judges participating in the interviews raised similar arguments. The majority of the five judges interviewed that made use of cooperation tools indicated that the response received was somewhat later than expected, but that it did not create delays in the court case. Often the judges had already suspended these cases for other reasons. Only one judge clearly noted that the response provided was too late in view of the ongoing case. The judge indicated that, in view of the national lead times for cases, the response came too late and they had to adjourn the ongoing case, which was unacceptable.

Contrary to the views on the procedure, the Consortium concludes that the judges seem less satisfied with the opinions provided. The most important reason for the dissatisfaction concerns the usefulness of the opinion received. As stated above, some judges expected a more straightforward or conclusive answer, while they received an answer, which still needed interpretation. In addition, most judges indicated that they did not receive the Commission's observations within the four months indicated by the Commission. Nevertheless, for the majority of judges, the longer response time is not a major problem, as their cases tend to last much longer.

#### **Future use of the cooperation tools**

The online questionnaire and the interviews show that, among the group of users, the overall attitude towards the cooperation tools is quite positive. Four judges who participated in the online questionnaire indicated that they were willing to use one of the tools in the future. The other two judges stated that they doubt whether they will use one of the tools in the future. Both judges stating this provided a reason for it. The first judge indicated that the Commission's response was not conclusive and as a result, the judge felt that using the tool was an unnecessary delay in the case. The other judge indicated that State aid cases are rare in their day-to-day work, so the opportunities for using the tools are limited.

A similar conclusion comes from the interviews. Four out of the five judges indicated that they were open to using one of the tools in the future, as they had experienced the procedure as positive and an added value to their case. Nevertheless, future use will depend on the particular case at hand. The fifth judge indicated doubt as to whether they would use the tool in the future. The main reason was the long time period between sending in a request and receiving a response, as well as, in the eyes of the judge, the limited usefulness of the response. It was not clear for the judge how to proceed with the response given.

#### **4.3.3. Potential for improvement of the use of the tools**

The Consortium asked the judges to indicate the actions, which the Commission could take to improve the cooperation between the national courts and the Commission (including the cooperation tools). The most common suggestions are:

- a) A better indication of the timeframes used for responding;
- b) Shorter response times for Commission responses.

Four out of the six judges using one of the cooperation tools and participating in the questionnaire indicated that they agree with these suggestions at least to some extent. Three out of the six judges indicated that it would be beneficial if they were better informed regarding the point of contact within the Commission. In addition, three of the six judges indicated that guidance on how to formulate a question would be a welcome addition.



In addition to the suggestions made by judges in the online questionnaire, the five judges interviewed who had made use of cooperation tools put forward some additional ideas for consideration. The main suggestions given were:

- The Commission could promote the tools more. It might be possible that many judges are not aware of the tools' existence and therefore do not use them. As a result, overall use remains limited. Nevertheless, the use of the tools should remain discretionary and should not become a mandatory requirement (contrary to referring requests for preliminary rulings to the CJEU).
- The judges would welcome the sharing of experiences as well as outcomes, especially of the request for opinion and the *amicus curiae* observations. This would enable judges to find information more easily and in their own time. From a practical point of view, the judges suggested the adoption of a system similar to that of referring requests for preliminary rulings to the CJEU: for each article, the questions posed together with their answers could be published on the EUR-Lex-website.
- It would be helpful if judges could easily find more practical guidance both on the procedure (e.g. can requests be sent in by mail or fax or is postal service always required?), as well as on the information required. With regard to the former, the Commission could introduce an online platform, which offers the opportunity for a judge to ask a question online on a protected platform only accessible by judges. For the latter, the Commission could create a procedure similar to sending in requests for preliminary rulings. When submitting a request for a preliminary ruling, a clear guidance document is available which indicates which general information needs to be sent, how detailed the question must be and which supporting evidence needs to be shared.

According to the Consortium, the suggestions made by the judges, both in the survey and in the interviews, seem both effective and proportional. The suggestions could be effective, as there is a clear link between the needs of the judges (see previous analysis) and the suggestions made. The suggestions seem proportional as they seem to allow for the attainment of the desired effects at relative limited expense. The Consortium highly recommends the Commission to consider the suggestions made.

#### **4.4. Use and views - national courts who did not use the tools**

This section focuses on the views on the cooperation tools from the perspective of national judges who did not use any of the tools. Information from the questionnaires and interviews with national judges forms the basis of the analysis in this section as well. For summaries of the interviews and the aggregated outcomes of the online questionnaire, please refer to Annex 4.

A total of 72 of the 78 judges who participated in the online questionnaire indicated that, at least occasionally, they deal with State aid related cases, but do not have any experience with using the cooperation tools. Out of the 27 judges interviewed, 22 indicated having at least some experience with State aid, but not having used the tools. In this section, we present the information obtained from these 94 judges (the 72 judges without experience with cooperation tools participating in the online questionnaire and the 22 judges without experience with cooperation tools participating in the interviews).

The 72 respondents from the online questionnaire originate from 21 Member States, are often quite experienced and work for different types of courts. An important observation

is that the respondents are often not ‘specialised’ in State aid: approximately 60 of the respondents noted working fewer than five times a year on a case which involves State aid elements and nearly half even less often than once a year. For the details, see the next table (Table 4).

The 22 judges who participated in the interviews, originate from 17 Member States, namely Austria, Belgium, Bulgaria, Croatia, France, Germany, Greece, Hungary, Italy, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Slovakia and Spain. Similar to the judges who participated in the online questionnaire, the judges interviewed stated that they were not ‘specialised’ in State aid. It is not possible to provide further details on the work experience of the judges, as the Consortium did not systematically collect this information during the interviews.

**Table 5 - Characteristics of the ‘non-users’ in the online questionnaire**

Respondents’ characteristics	Remarks
Countries - Member States in which the judges are working	21 Member States (Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Sweden).
Experience - number of years working as a judge	The majority of the judges has 10-20 years (53%), some more than 20 years (32%) of experience. The remaining judges started working as a judge less than 5 years ago (8%) or have 5-10 years of experience (7%).
Type of court - type of court the judge currently works for	The respondents work for courts of 1 <sup>st</sup> instance (31%), courts of appeal (32%) and the supreme court (18%). A number of respondents (19%) indicated to work for another type of court, usually specialised courts.
Expertise – number of cases involving State aid elements (per year) and type of cases	The majority of the judges works on 1-5 State aid cases (31%) or fewer than 1 State aid case (49%) per year. 15% works on 5-10 cases per year and 6% on more than 10 cases per year. Most of these cases relate to the “existence of State aid / Qualification of a measure as State aid” (54% of the respondents mentioned this), followed by the “recovery of aid” (39%) and the compatibility of the State aid with the internal market (17%).

Source: online questionnaire; note: all these respondents indicated to be a practising judge or member of a court involved in cases, which (partly) include State aid elements; note: the listed specialised courts have not been reclassified into 1<sup>st</sup> instance, courts of appeal or Supreme Court.

#### 4.4.1. Use of the cooperation tools

##### Familiarity with the tools

The Consortium asked the judges participating in the online questionnaire, who did not use the cooperation tools, to what extent they were familiar with the existence of the cooperation tools. In the questionnaire, 41 of the 72 respondents indicated that they are familiar with at least one of the cooperation tools. The majority of the judges who are familiar with the cooperation tools are familiar with all three tools (19 out of the 41 respondents), followed by the request for information (12 out of the 41 respondents) and the request for opinion (7 out of the 41 respondents). There is less familiarity with *amicus curiae* observations (5 out of the 41 respondents).<sup>313</sup>

<sup>313</sup> Note: two respondents checked two options - e.g. *amicus curiae* observations and request for opinion.

Approximately four out of ten respondents participating in the online questionnaire were not familiar with the cooperation tools at all. There is no specific geographical pattern with regard to the respondents who indicated a lack of familiarity with the cooperation tools. The judges originate from thirteen different Member States (AT, BE, BG, DK, EL, ES, FI, IT, LV, NL, PL, PT and SE). At the same time, other respondents from the same Member State indicated familiarity with the tools. Interviewees from four different Member States indicated that they had the impression that most judges in their country were unaware of the cooperation tools.

From the questionnaire, respondents who indicated that they were familiar with at least one of the cooperation tools (41 judges), approximately 22 judges indicated that they had considered using the tool, 15 judges had not considered it and the remaining four judges indicated "not applicable".<sup>314</sup>

### **Ways to solve a problem**

The online questionnaire shows that the judges do not consider it a natural choice to approach the Commission in case they have a question. Respondents were asked which 'actions' they would take if they faced questions related to State aid in the case they were working on. The data show that the most likely two options for a judge are (i) to invest time and effort to solve the issue themselves (45 of the 72 judges considers this a most likely action) and (ii) to informally consult with fellow judges in their own country (26 of the judges considers this a most likely action to take). Requesting a preliminary ruling from the CJEU is considered less likely (19 out the 72 judges), as is the 'action' to approach the Commission (18 judges).

The interviews with the 22 judges who have not used one of the cooperation tools confirm the outcome of the online questionnaire. Approximately one in three interviewees indicated that the 'natural choice' of a judge, in order to come to a good understanding and judgment, is to invest more time and effort in a case or to consult their direct fellow judges. Approximately one in three interviewees, significantly overlapping with the previous one third, indicated that referring a request for a preliminary ruling from the CJEU cannot be directly compared to an opinion from the Commission. An answer from the CJEU has in principle 'more legal value' than an opinion from the Commission, according to these judges. In this context, judges also note to prefer to approach a 'fellow court', instead of an 'administrative body' such as the Commission. The judges interviewed indicated that the main value added for the cooperation tools is provision of a concrete and targeted answer within a reasonable time period.

### **Knowledge sharing**

The Consortium asked the judges in the online questionnaire about the extent to which judges normally share knowledge about State aid issues and how this takes place. The information collected shows that only a very limited number of the judges are part of a formal or informal national or international network. However, most of the judges indicated that they are (sometimes) involved in some means of knowledge-sharing, e.g. direct sharing with fellow judges, attending workshops or knowledge sessions.

#### **4.4.2. Views on the cooperation tools**

The Consortium asked the judges who did not use cooperation tools, both in the online questionnaire and in the interviews, to provide their views on the cooperation tools.

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<sup>314</sup> Online questionnaire, question 13 and 14 (72 judges responded).

Specific attention was paid to (1) specific reasons or obstacles which (may) hinder the use by national courts of the cooperation tools, i.e. the request for information or request for an opinion; and (2) the overall attitude towards the cooperation tools (including *amicus curiae* observations).

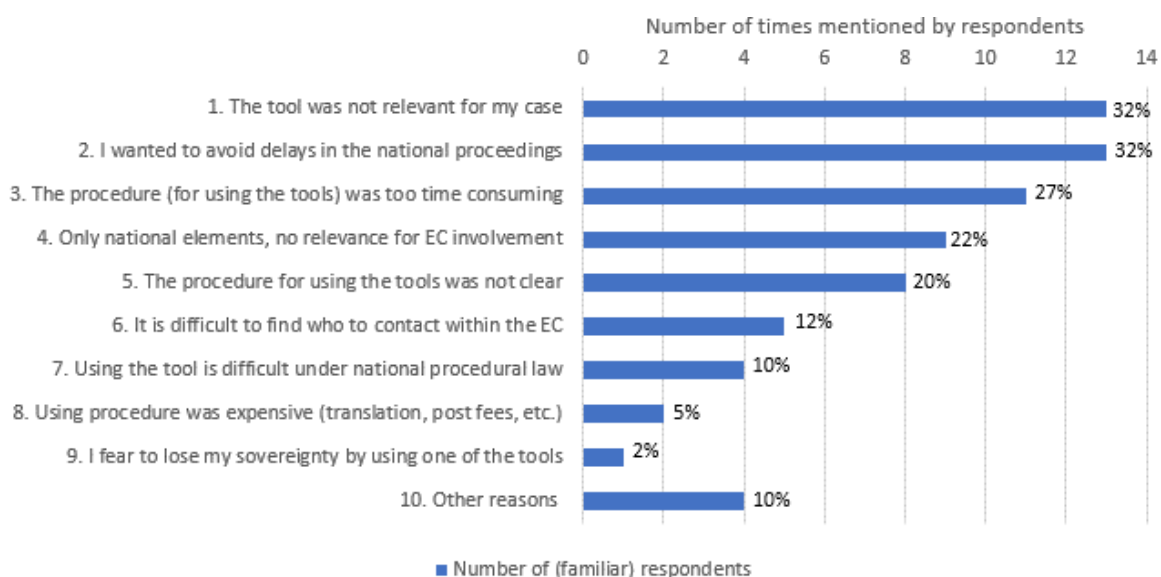
### (1) Reasons / obstacles, which (may) limited the use of the cooperation tools

In both the online questionnaire and the interviews, the Consortium asked the judges for the main reasons and / or obstacles why judges did not use either the request for information and / or the request for an opinion. In analysing the responses, it is important to make a distinction between those judges who are familiar with the cooperation tools (42 of the online questionnaire respondents) and those who are not (30 of the online questionnaire respondents).

The next figure (Figure 31) presents the results for the information obtained from the online questionnaire for judges who were familiar with the cooperation tools. The main reasons listed relate to a lack of relevance for the case and the wish to avoid delays.

Judges hardly consider potential barriers, such as procedural costs and loss of sovereignty, a barrier to use the cooperation tools. Five of the respondents provided “other reasons” and referred to a lack of relevance in their cases (three times), the additional time a procedure would take (twice) and the observation that CJEU case law was consistent and clear.

**Figure 31 - Non-users: listed reasons for not using the request for information / opinion (for respondents who were familiar with the tools)**



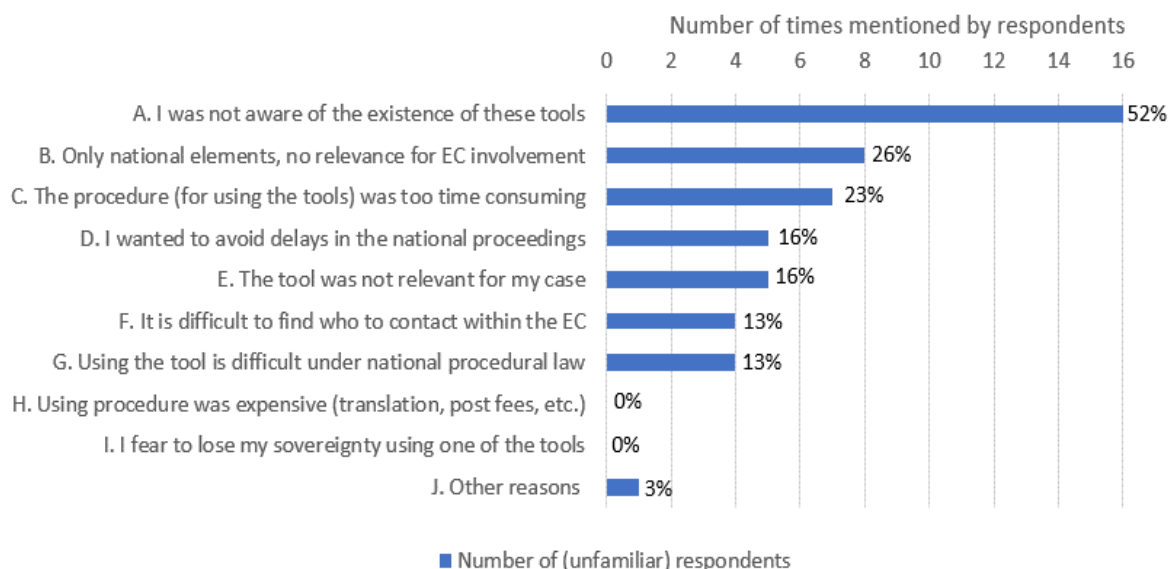
Source: online questionnaire, question 15 (number of judges indicating this is 41); selection of those respondents who were familiar with the cooperation tools (question 13).

Note: the percentages refer to the number of times a reason was considered a relevant reason, as percentage of the total number of respondents.

The respondents who were unfamiliar with the cooperation tools (thirty-one judges) also listed the main reasons for not using the tool. The figure below (Figure 32) presents the results. Only half of these respondents listed “the unawareness of the existence of the tool” as a reason. For the other reasons indicated by the judges, we understand that these respondents gave their reaction on the hypothetical situation that they would have been familiar with the tools. The main listed reasons, other than lack of awareness, for not using the cooperation tools relate to the lack of relevance, the time a procedure

would take and the avoidance of delays. Again, judges hardly mentioned any other potential barriers, like procedural costs and loss of sovereignty. One respondent gave an “other reason”: the judge indicated that the court had never handled a case where a need for cooperation tools existed, but also indicated that the court would submit any “non-factual, open legal question” to the CJEU and not to the Commission.

**Figure 32 - Non-users: listed reasons for not using the request for information / opinion (for respondents who were unfamiliar with the tools)**



Source: online questionnaire, question 15 (number of judges indicating this is 31); selection of those respondents who were unfamiliar with the cooperation tools (question 13).

Note: the percentages refer to the number of times a reason was mentioned, as percentage of the total number of respondents.

When reflecting on the various reasons, which both groups of national judges (72 judges) listed, the Consortium can make four observations:

- As none of these respondents has used any of the cooperation tools, a few of the reasons listed can only be based upon perception. Examples are the expectation that a procedure would be (too) time consuming (mentioned by 18 out of 72) or the expectation that the outcomes of the tool would be difficult to use under the national procedural law (8 out of 72), for example, the outcomes of the tools might not be used as evidence according to national procedural law. It is not exactly clear where this perception comes from, but some interviewees indicated that they had been involved in similar procedures (e.g. referring a request for a preliminary ruling to the CJEU), which were sometimes quite burdensome.
- Half of the respondents indicated that, within the context of their own professional situation, the tools would not have been relevant for their cases (18 out of the 72 respondents) and / or that their cases only included national elements with limited relevance for the Commission’s involvement (17 out of the 72 respondents). This indicates that, given the type of cases with which the respondents were dealing, the cooperation tools may often not be relevant or needed in cases.
- A quarter of the respondents (18 out of 72) indicated that a delay in the national proceedings would be an important reason for not using the cooperation tools. One of the respondents explained in this context that the (time) pressure on judges to proceed with their cases can be seen as a big hurdle, as judges need to have very

good reasons to extent their judgment even a few months as judges have many cases pending. However, in the interviews, more than half of the judges indicated that a response time of four months for the Commission to reply to a request for opinion, would (often) be well acceptable and would not necessarily be a big hurdle. Only in cases where there exists a certain time pressure (e.g. in bankruptcy cases), a period of four months can be considered too long.

- Finally, it is important to mention that a group of respondents indicated that the procedure for using the tools was unclear or that it was difficult to find a contact within the Commission (respectively 15 and 9 out of 72). Given the fact that various contact details (P.O. Box, telephone number and e-mail address) are quite prominently published on the State aid website of DG Competition<sup>315</sup>, it is not clear why the judges mentioned these problems. The online questionnaire did not provide further details on this topic.

The interviews with the judges (22 judges who had not used one of the tools) clearly showed that there is a strong preference for working in the national language of their own Member State. The fact that the Commission indeed offers this possibility is highly appreciated and the Consortium expects that this results in a better understanding by the judges of the Commission's position. Consequently, judges do not consider the language as an important (potential) barrier for the use of the cooperation tools.

## **(2) Overall attitude towards the cooperation tools**

The results from the online questionnaire and the interviews show that, among the group of non-users, the overall attitude towards the cooperation tools is quite positive.

The interviews revealed that the judges have quite a positive attitude towards *amicus curiae* observations. Most of the judges indicated that, in a situation where the Commission were to approach them, they would be open to the opinion of the Commission as this would contribute to and strengthen the overall quality of their understanding of the case at hand. In this context, one of the interviewees made the comparison with the opinion / involvement of an external academic expert, which the judge sees as a valuable contribution.

In the online questionnaire, a large majority of the respondents (64 out of the 72 respondents) indicated that they would consider the use of one of the cooperation tools (i.e. the request for information / opinion) in the future. The remaining 8 respondents are uncertain ("doubtful") whether they would consider using them. Among the respondents who were familiar with the cooperation tools, the overall attitude is even more positive, as 39 out of the 41 respondents indicated that they would consider using them in the future. Within the group, which is unfamiliar, the respondents are less confident (25 out of the 31 judges indicated "yes").

The judges who indicated that they would consider the use of the cooperation tools in the future (64 out of the 72), were asked to give their motivation for this. Approximately 40 respondents made use of this opportunity and clarified their motivations in an open text box. Although the responses vary, there is a very clear message from these answers: the judges value the possibility to make use of the knowledge and expertise of the Commission in order to improve and strengthen their overall understanding of the case at hand. Judges gave various opinions in this line of reasoning:

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<sup>315</sup> See <http://ec.europa.eu/competition/court/contacts.html> (last accessed on 18.6.2019).

- The tools enable judges to gather more information (if needed), learn from the opinion provided and make a better judgment;
- The cooperation is a useful way to better understand the case law (if needed) and ensure a right and balanced decision;
- The cooperation will contribute to a more unitary jurisprudence at national and EU level, and / or decisions, which are in line with CJEU case law.

Four of the eight judges who are doubtful that they would use the cooperation tools in the future also provided a reason. These reasons vary significantly: consideration that the CJEU is most likely better positioned to provide the advice sought; the need for ensure independence; general lack of knowledge about the availability of the tools; and the expected delay for the case.

#### 4.4.3. Suggestions for increasing the use of the tools

The Consortium also asked the respondents who had no experience with the cooperation tools to give their opinion on how the use of cooperation tools by the Commission and the national courts could be improved. They had the possibility to respond to nine statements and indicate to what extent they agreed with the statements. As the responses between those respondents who were and were not familiar with the cooperation tools hardly differed, the analysis presents the outcomes for the whole group (72 judges). With the exception of the guarantee on sovereignty, respondents were overall quite positive about the various suggestions. For five of the statements, the majority of the respondents (between 38 and 44 judges) indicated their full agreement. This related to better knowing whom to contact within the Commission, having another point of contact (outside the Commission, for instance a national point of contact), the existence of an online portal where questions can be asked, more information on State aid issues, as well as more training and guidance.

In addition to the online questionnaire, the Consortium also discussed the potential for strengthening the use of cooperation by the Commission and national courts during the interviews. The judges gave various ideas and suggestions, such as:

- It was suggested by the judges that the Commission ensures that there is an **online portal**, where relevant and up-to-date information on (the interpretation of) State aid rules is easily accessible. Judges confronted with a specific question related to State aid rules, see the Commission (website) as an important source of information.
- Judges suggested ensuring that the online portal would offer **transparency** about the procedure for the request for information / opinion, especially with regard to the right contact persons within the Commission, guidance on the information the Commission needs to have, the duration of the procedure, clarity about the confidentiality, etc.
- Some judges suggested that the Commission offers the possibility to have **(informal) contact with the Commission prior to the submission** of the request for information / opinion. This contact can be used to inform / advise the national court and (if still applicable) fine-tune the request from the side of the court;
- Some judges suggested that the Commission ensures a rather pro-active role / position towards the national courts, **advocating / sharing knowledge about State aid**, for example by facilitating knowledge events, workshops, training sessions, etc. Judges indicated that it is important to stimulate the general

knowledge about the State aid rules and subsequently inform the judges that it is possible to approach the Commission for support and advice. A few judges indicated that it would be very beneficial if (local) activities are organised in the national language, as the use of English may form an important obstacle to judges participating;

- Related to the previous point is the suggestion of judges that the Commission would stimulate the **use and membership of knowledge networks** at European level by actively promoting their participation; ideally this is also stimulated at national level, but it is acknowledged that this is mainly the responsibility of the individual Member States;
- One of the interviewees suggested **expanding the scope** of the cooperation tools and offering general prosecutors the possibility to request the Commission's opinion about (potential) State aid issues. This may create some clarity in the early stages of (complex) cases (e.g. on potential tax fraud, violation of the State aid rules, etc.) and contribute to the overall cost-efficiency of the legal system.

The Consortium considers the suggestions offered by the judges to be effective in meeting the judges' needs and stimulating the use of the tools. A clear link between the problems described and the solutions provided is evident. The Consortium deems the suggestions proportional in the sense of the resources required. The measures proposed are not expensive and easily achievable (e.g. add information to the website or a promotional campaign). The main point of doubt is the suggestion to expand the scope of the tools, which may constitute a more fundamental decision, for which the Consortium considers the need for a more fundamental policy analysis, beyond the scope of this Study.

#### **4.5. Conclusions on cooperation tools**

Based on the data gathered and the analysis presented in Chapter 4, the Consortium makes a number of key observations and draws some conclusions on the use of and views on the cooperation tools by national courts.

Only a limited number of judges have experience with using one or more of the tools; Judges seem to use the tools only on a limited scale (see Section 4.2). The limited use of the cooperation tools may be explained by a lack of relevancy of the tools for individual cases. However, it shows from our research that there seems to be a significant lack of awareness on the existence of the cooperation tools among judges. The questionnaire results, as well as the interview findings, show that a large share of judges is not aware of the existence of the cooperation tools. Around 30 judges who took part in the online questionnaire indicated that they had not heard of any of the cooperation tools before participating in the Study. The judges interviewed confirmed this finding. Several of them also indicated that their fellow judges were not familiar with the tools' existence. This apparent lack of awareness underlines the recommendation to raise awareness among judges on the existence of the tools.

From the data gathered, it is apparent that judges who deal with State aid cases form a diverse group. They differ in level of work experience, the type of courts for which they work and the type of cases they handle. The majority of judges are not specialised in the field of State aid: approximately 60 of the judges who participated in the Study deal with fewer than five cases containing State aid elements per year, often (almost half of the respondents) fewer than one State aid case per year. State aid therefore does not appear to be part of judges' day-to-day business and judges specialised in



State aid are rare. This limited involvement in State aid cases may further explain the limited awareness among judges for the existence of the tools.

Even when judges are familiar with the cooperation tools, our research shows that making use of these tools does not appear to be the most likely action judges will take when seeking information on State aid issues in their cases. The vast majority of judges will first invest time and effort in trying to find an answer to the (legal) question at hand themselves, followed by consulting fellow judges, preferably judges working at the same court. Although seeking advice from the Commission is not the primary action foreseen by judges, they do appear to value having the option of approaching the Commission for input.

Judges who indicated to have used cooperation tools, appear to hold mixed views on the current set-up of the cooperation tools. With regard to the procedure, the majority of judges are of the opinion that it is easy and effective. Nevertheless, some judges also contended that it was not always clear to them which procedure they need to follow. Improving the accessibility of practical guidance on the procedure, with respect for the information provided and the location(s) where the Commission makes this information available may help address this issue raised.

Although many judges have not used one of the cooperation tools, the willingness to use them in the future cases is large. Almost 70 out of the 78 judges indicated that they would use of the tools if they would have a suitable case for it. This clearly underlines the relevance of the cooperation tools for judges.

The main suggestions from judges for improvements related to the cooperation tools are:

- The Commission could issue more practical guidance both on the procedure as well as on the information required offer more easily findable, for example on an online portal;
- The Commission could promote the cooperation tools more;
- The Commission could share experiences of judges as well as outcomes of requests for opinion and *amicus curiae* observations;
- Some judges would appreciate the possibility to have (informal) contact with the Commission prior to the submission of the request for information / opinion.
- Some judges would much appreciate it if the Commission could shorten the response times for Commission responses;

The main potential endeavours that the Commission could undertake to support the use of cooperation tools include:

- Improving (the accessibility of) practical guidance on the cooperation tools procedures. Potential places where this information would be made available could be, in addition to the website of the Commission (DG Competition), locations that judges typically use for finding legal information, such as the EUR-Lex-website.
- The dissemination of information on and promotion of both State aid rules in general and the cooperation tools in particular, with the aim of increasing overall awareness among national judges. To achieve this, the Commission could introduce an online platform, which offers the opportunity for a judge to look-up the required information as well as to ask a question online on a protected platform only accessible by judges.

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