UNIWERSYTET ZIELONOGÓRSKI

DYSKURS PRAWNICZY I ADMINISTRACYJNY 4/2021 ISSN 2657-926X

Łukasz Stępkowski
Uniwersytet Opolski
ORCID 0000-0001-5324-4218
lukasz.stepkowski@uni.opole.pl

Horizontal Direct Effect of the Standstill Obligation under Article 108(3), third sentence TFEU

Keywords: unlawful aid, State aid, standstill obligation, direct effect, Article 108(3) TFEU

Summary. This paper addresses the issue of direct effect of the standstill obligation (Article 108(3), third sentence TFEU), applicable to recovery of unlawful aid without the need of a Commission decision, arguing that the recent developments of the jurisprudence of the Court suggest that it has horizontal effect. The position of a beneficiary is reviewed with the conclusion that they do not enjoy the same position as a person relying on Article 108(3) TFEU. The law is stated as it stood on 1.04.2021.

Horyzontalny skutek bezpośredni obowiązku zawieszenia udzielania pomocy na podstawie art. 108 ust. 3 zd. 3 TFUE

Słowa kluczowe: pomoc niezgodna z prawem, pomoc państwa, obowiązek zawieszenia (klauzula standstill), skutek bezpośredni, artykuł 108 ust. 3 TFUE

Streszczenie. Niniejsza praca odnosi się do zagadnienia skutku bezpośredniego klauzuli zawieszenia (art. 108 ust. 3 zd. 3 TFUE), mającej zastosowanie do odzyskania pomocy niezgodnej z prawem bez konieczności istnienia decyzji Komisji, wskazując, że niedawny rozwój orzecznictwa wskazuje na jej skutek horyzontalny. Nadto sytuacja beneficjenta jest poddawana ocenie z wnioskiem, że ów nie posiada podobnej pozycji procesowej, co osoba powołująca się na art. 108 ust. 3 zd. 3 TFUE. Praca odnosi się do stanu prawnego z 1.04.2021 r.

Introduction

This paper is to address the issue of direct effect the so-called standstill obligation set by Article 108(3), third sentence TFEU, which the ECJ confirmed as early as in *Lorenz*[1]. However, the scope of the standstill obligation *ratione personae*, apart

[1] This paper constitutes one of the effects for the grant no. 2015/17/N/HS5/02575 (Sytuacja prawna przedsiębiorstwa w prawie Unii Europejskiej dotyczącym pomocy państwa [Legal position of an undertaking in the law of the European Union on State aid]), funded by the National Science Centre (Narodowe Centrum Nauki - NCN, Poland) with the author as the principal investigator. Case 120-73 *Lorenz*, EU:C:1973:152, para. 8. While the ECJ referred to C-6/64 *Costa v ENEL*, EU:C:1964:66 as the first instance of declaring the standstill obligation directly effective, the ECJ in *Costa* merely alluded to what is now Article 108(3), third sentence TFEU as conferring rights

from the fact that it is vertically effective against Member States (i.e. capable of being invoked against a Member State), and whether the standstill obligation is horizontally effective, is rather less clear. Thus, this paper will also consider whether it is still tenable, according to the position of the Court in *SFEI*, to view the duty to abstain from granting unlawful aid, and to recover that unlawful aid where it was granted, as "not imposing any specific obligation on part of the beneficiary of unlawful aid"and being only addressed to a Member State[2]. In addition, the position of the beneficiary itself vis-à-vis the national recovery order, and defences that may impede the application of Article 108(3), third sentence TFEU, will be addressed. The law of the Union is stated as it stood on 1 April 2021.

Invoking the Standstill Obligationin a Horizontal Context

While reliance on Article 108(3), third sentence TFEU against a Member State is certainly within limits of the direct effect that provision has been held to have, the case-law of the Court does not stop there. Reliance on Article 108(3), third sentence TFEU is not indifferent for the potential or genuine beneficiary of aid, as he or she either faces the prospect of not receiving aid or the need of repaying it. At the end of the day, the repayment of aid – where it was already granted – must come from someone, that someone being the beneficiary (or many beneficiaries). Recovery must be made to the benefit of the Member State that granted aid, not to the benefit of a claimant that invokes the standstill obligation (because that would only either extend the circle of beneficiaries or simply change the identity of the beneficiary). The ECJ in *SFEI* held that the beneficiary has no specific obligations under the law of what is now European Union law[3]. The ECJ also held that the standstill obligation was incumbent on Member States, who were to refrain from granting unlawful aid and to recover such aid where it was nevertheless granted. This leads to a dilemma – if beneficiaries had "no specific obligation" to abstain from accepting unlawful aid and to repay unlawful aid where it was accepted, then why would they be inclined to do so? Aid, by definition, constitutes *inter alia* an advantage for its recipient. In the absence of a binding obligation, the beneficiary would be, logically,not quite interested in willing forfeiture of his or her advantage, especially where the unlawful character of aid would become apparent

on an individual ("(…) *but creates no individual rights except in the case of the final provision of [Article 108(3), third sentence TFEU], which is not in question in the present case*"). See also Case C-354/90 *FNCE*, EU:C:1991:440, para. 12.

[2] Case C-39/94 *SFEI*, EU:C:1996:285, para. 73.

[3] This is recalled by J-P. Keppenne, C. Caviedes [in:] L. Ortiz-Blanco (ed.), *EU Competition Procedure* (OUP, Oxford 2013), p. 984, and by C. Quigley,*European State Aid Law and Policy* (Hart, Oxford 2015), p. 657.

much later than the time it was granted. The obligation of a Member State, incumbent only on it, would be something a beneficiary could be indifferent to. While national law theoretically could contain binding obligations for the beneficiary to return unlawful aid, this is not certain. National reports on application of State aid rules suggest that the probability of an actual grant of a remedy under Article 108(3) TFEU is very unlikely[4]. Applicable national law may be either missing entirely[5], not clear[6], or incomplete[7]. There is nothing in the express wording of Article 107, 108 or 109 TFEU to authorize (or force) Member States to implement such legislation. In addition, introduction of such rules without express authorization would amount to Member States legislating in the field of exclusive competence

[4] Study on the enforcement of State aid rules and decisions by national courts (July 2019) ordered by DG COMP, available at https://ec.europa.eu/competition/publications/reports/kd0219428enn.pdf (accessible as of 1.04.2021, hereinafter "the 2019 Study"), p. 78.

[5] See e.g. C. Schepisi [in:] P. Nemitz (ed.), *The Effective Application of EU State Aid Procedures – The Role of National Law and Practice* (Kluwer Law International, Alphen aan den Rijn 2007), p. 270, on Italy ("the Italian legal order does not provide for a specific liability of the public authorities and its servants and the illegal grant of aid is not automatically null and void"). See also G. Belotti [in:] J. Derenne, A. Müller-Rappard, C. Kaczmarek (eds), *Enforcement of EU State Aid Law at National Level* (Lexxion, Berlin 2010), p. 207 ("no specific regime for cases of State liability"). According to the 2019 Study, there was a development in the Italian legal order in that Article 49 of Law number 234/2012 was adopted to provide administrative courts with an express power to enforce State aid rules, while civil courts retain powers to rule on damages (see the 2019 Study's Country Report on Poland by F. Macchi, https://state-aid-caselex-accept.mybit.nl/report (accessible as of 01.04.2021). The new rules apply to proceedings started on, or after 19 January 2013. In addition, there is a view that an Italian court may ex officio raise the issue of unlawful State aid as a "preliminary question" for the parties to discuss pursuant to Articles 183(4) and 101(2) of the Italian Code of Civil Procedure (A. Tedoldi [in:] A. Santa Maria (ed), *Competition and State Aid – An Analysis of the EU Practice, Second Edition* (Kluwer Law International, Aalphenaan den Rijn 2015), p. 258.

[6] See e.g. S. Dudzik [in:] P. Nemitz (ed.), *The Effective Application of EU State Aid Procedures – The Role of National Law and Practice* (Kluwer Law International, Alphen aan den Rijn 2007), p. 340, on Poland (no clear rules). See also R. Gago [in:] J. Derenne, A. Müller-Rappard, C. Kaczmarek (eds), *Enforcement of EU State Aid Law at National Level* (Lexxion, Berlin 2010), p. 285, also on Poland (the lack of any clear legal basis). The 2019 Study finds, *inter alia*, that Polish courts rarely invoke soft-law instruments (see the 2019 Study's Country Report on Poland by J. Kociubiński, https://state-aid-caselex-accept.mybit.nl/report (accessible as of 1.04.2021).

[7] See e.g. J. Kühling and J-D. Braun [in:] P. Nemitz (ed.), *The Effective Application of EU State Aid Procedures – The Role of National Law and Practice* (Kluwer Law International, Alphen aan den Rijn 2007), p. 219, on Germany. The authors note that the interpretation of §134 of the BGH by the Bundesgerichtshof, in that the standstill obligation may be invoked by persons concerned (esp. competitors to the beneficiary) against the beneficiary, should become the rule, and not an exception. This development now appears well-settled in German law, as later reports confirm its relevance (R. Wessely, A. Müller-Rappard [in:] J. Derenne, A. Müller-Rappard, C. Kaczmarek (eds), *Enforcement of EU State Aid Law at National Level* (Lexxion, Berlin 2010), p. 163, the 2019 Study's Country Report on Germany by A. Martin-Ehlers, https://state-aid-caselex-accept.mybit.nl/report (accessible as of 01.04.2021). See also P. Werner [in:] F. Säcker, F. Montag (eds), *European State Aid Law*, (CH Beck, München 2016, p. 1546. Cf. the decision of theBGH – *Urteil des I. Zivilsenatsvom 10.2.2011 - I ZR 213/08*, para. 32 therein.

of the Union without being expressly allowed to do so[8]. The ECJ has recently held that, for the purposes of Article 108(3), third sentence TFEU and powers of national courts, Regulation no. 2015/1589 does not contain *any* relevant provisions, making recourse to the binding nature of Article 3 of the Procedural Regulation as a means of finding an alternate, horizontally applicable legal basis for such an obligation on part of the beneficiary impossible[9]. The Commission notice on the enforcement of State aid law by national courts does not address this issue, which is quite pressing in State aid practice. In addition,there is not an iota of leniency measures for the beneficiary to persuade him- or her to return the aid out of their own volition. The ECJ has long insisted that the recovery of aid is not a "penalty" in the criminal sense, but rather that "abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful"[10]. This logical consequence also includes liquidation of the beneficiary should the repayment of aid turn out to be impossible in full in insolvency proceedings[11]. As a rule, the task of the national courts is to "adopt the appropriate measures to cure the unlawfulness of implementation of the aid, so that the aid does not remain freely available to the beneficiary until such time as the Commission's decision is made[12]. This in turn necessitates taking binding measures that affect the beneficiary's legal position, to his or her detriment. To do so, there must be a legal basis that would allow a national court or another national authority to impose such measures on the beneficiary[13]. A review of case-law of the ECJ discloses that there already are instanc-

[8] I.e. Article 3(1)(b) TFEU, taken together with Article 2(1) TFEU. The ideal solution would be for the Council to adopt a regulation under Article 109 TFEU for the purposes of giving State aid law a horizontally applicable secondary law solution to the problems with private enforcement.

[9] Case C-387/17 *Fallimento Traghetti del Mediterraneo*, EU:C:2019:51, para. 66: "(…) [the Procedural Regulation] does not contain any provision relating to the powers and obligations of the national courts, which continue to be governed by the provisions of the Treaty as interpreted by the Court". On slim chance that the ECJ intended to say less than it actually said, Article 3 of the Procedural Regulation would certainly corroborate a finding that a beneficiary may not do (or contribute to doing) anything that would infringe the standstill obligation, by virtue of the *erga omnes* binding effect of the Procedural Regulation.

[10] Case C-1/09 *CELF/SIDE II*, EU:C:2010:136, para. 54.

[11] Case C-363/16 *Commission/Greece*, EU:C:2018:12, para. 39. The ECJ ruled on a case related to recovery due to a recovery decision of the Commission, but its dictum related to unlawful aid in general, and the restoration of the previous situation before the grant of aid (see para. 37 therein).

[12] Case C-284/12 *Deutsche Lufthansa*, EU:C:2013:755, para. 31, case C-349/17 *Eesti Pagar,* para. 89.

[13] D. Piccinin [in:] K. Bacon (ed.), *European Union Law of State Aid* (OUP, Oxford 2017, p. 564, notes that such national legal basis is not clear in many Member States other than Germany due to the intervention of the BGH. It would follow from C-275/10 *Residex Capital IV*, para. 12 and 21, that Article 3:40(2) of the Netherlands Civil Code (BurgerlijkWetboek) taken together with Article 108(3) TFEU is also capable of providing a national legal basis for a claim for a finding of invalidity. The author's own view is that, under Polish law similarly as in Germany, Article 3(1) of the 1994Act on Combating Unfair Competition (*Ustawa o zwalczani unieuczciwej konkurencji*) inter-

es of the standstill obligation affecting the legal position of the beneficiary, something that would be impossible without a certain "horizontal" dimension. First, the Court has ruled in *CELF/SIDE* – a "horizontal" case between two undertakings – that "applying [what is now EU law], the national court must order the aid recipient to pay interest in respect of the period of unlawfulness". The requirement to pay interest is one of the features of Article 108(3), third sentence TFEU, and one which continues to apply even in the event of the Commission taking a positive decision on the aid at issue. If the recipient of aid *as a matter of EU law* alone must be ordered to pay that interest, then a rule of EU law is in that regard effective against him or her[14]. Second, the ECJ has found that the beneficiary, as a "diligent businessperson", may not entertain legitimate expectations to unlawful aid where the notification procedure was not followed to its conclusion by way of a final decision of the Commission, and that there is *an obligation* for the recipient on part of what is now Article 108(3) TFEU to check whether that procedure was in fact followed in regard to the aid measure at issue[15]. In addition, the beneficiary may not invoke the principle of legal certainty where an aid is unlawful, as it is "foreseeable" according to the ECJ that unlawful aid is going to be subject to recovery[16]. The dictum of the ECJ in *Alcan Deutschland* expressly states that there is an obligation for the beneficiary under what is now Article 108(3) TFEU, and that very beneficiary's rights to invoke the principles of legitimate expectations and legal certainty are being limited due to the standstill obligation's effects on unlawful aid. Third, the Court has accepted that the standstill obligation may affect the validity of State aid measures. Given that the form of aid is in principle irrelevant for the purposes of Article 107(1) TFEU, measures governed by private law may also be State aid measures. Thus, the standstill obligation may come into play in a private-law dispute concerning validity and enforceability of an agreement governed by private law[17]. This includes cancelling a guarantee[18] and disapplying priv-

preted in conformity with Article 108(3) TFEU may be used by a person concerned as a national legal basis of claims against a beneficiary.

[14] Case C-199/06 *CELF/SIDE*, para. 55.

[15] Case C-24/95 *Alcan Deutschland*, EU:C:1997:163, para. 30, 31 and 41, joined cases C-346/03 and C-529/03 *Atzeni and Others*, EU:C:2006:130, para. 64 and 65, joined cases C-183/02 P and C-187/02 P *Demesaand Territorio Histórico de Álava/Commission*, EU:C:2004:701, para. 44 and 45, case C-81/10 P*France Télécom/Commission*, EU:C:2011:811, para. 59.

[16] Case C-148/04 *Unicredito Italiano*, EU:C:2005:774, para. 104.

[17] Case C-505/14 *Klausner Holz Niedersachsen,* para. 10 and 14.

[18] Case C-275/10 *Residex Capital IV*, EU:C:2011:814, para. 21 and 49. It might be added here that the ECJ in *Residex Capital IV* held that "European Union law does not impose any specific conclusion that the national courts must necessarily draw with regard to the validity of the acts relating to implementation of the aid (para. 44)". It conceded that national courts have jurisdiction to cancel a guarantee "where it may be a more effective means" to restore the state of affairs (the competitive situation) before the grant of aid (para. 46). It may be noted that, according to the ECJ in *Residex Capital IV*, nullity of a guarantee (and, by extension, nullity of a measure governed by private

ileges in civil proceedings, i.e. the right to unilaterally register a mortgage over immovable property belonging to farmers or other persons engaged in similar agricultural activities, the right to seek enforcement with an ordinary private document and the right to be exempted from the payment of fees and duties connected with that registration[19].Perhaps most importantly, the ECJ recently held in C-349/17 *Eesti Pagar* that Article 108(3)TFEU constitutes a legal basis for recovery of unlawful aid as it obliges the national authorities to recover, on their own initiative, aid which they have unlawfully granted[20]. Thus, given that it is a case where the beneficiary resisted recovery against him *inter alia* on the ground that there is no obligation to recover unlawful aid, and the higher national court indeed held that there is no provision of EU law that expressly and peremptorily requires Member States to recover unlawful aid where there is no Commission decision[21], this answer from the Court should be taken to mean that both the Member State and the beneficiary are legally bound as a matter of EU law by the standstill obligation, and that the beneficiary must, in principle, submit to recovery of unlawful aid. The ECJ added that, where the beneficiary seeks payment of aid that is subject to the general block exemption (GBER)[22], "it is primarily the duty of the applicant for aid to ensure that it satisfies the conditions laid down by [the GBER], so that it can qualify for aid that is exempted under that regulation, and consequently the granting of aid that is contrary to those conditions cannot be regarded as being exclusively the result of an error committed by the national authority concerned"[23]. No provision of the GBER (or the current GBER II, for that matter) places such a duty on the applicant for block-exempted aid. Assuming that the

law) is not automatic as a matter of EU law (e.g. as in the case of Article 101(2) TFEU); it may be however required by national law (*Klausner Holz Niedersachsen*, para. 14). A national court would be called to find a measure null and void where it would be an effective means of restoring the status quo ante. This dictum in *Residex Capital IV* does not appear in later case-law. However, it is difficult to see why a national court called to erase the effect of altering the competitive situation would *not* be called to declare null and void, as a rule, a measure which is, by its very definition, liable to distort competition. As such, the national court can and should declare the aid measure null and void where it comes to the conclusion that unlawful aid was in fact granted. See also below as to the scope *ratione materiae*. In later case-law, the ECJ simply stated that national courts have the power to cancel a guarantee constituting unlawful aid (case C-438/16 P *European Commission v French Republic and IFP Énergies Nouvelles*, EU:C:2018:737, para. 141).

[19] Case C-690/13 *Trapeza Eurobank Ergasias,* para. 29.

[20] Case C-349/17 *Eesti Pagar,* para. 94.

[21] Case C-349/17 *Eesti Pagar,* para. 30, second indent, para. 33 ab initio.

[22] I.e. Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), now replaced with 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 (GBER II), OJ L 187, 26.6.2014, p. 1–78, with later amendments.

[23] Case C-349/17 *Eesti Pagar,* para. 120.

ECJ intended to say precisely what it said (including the dictum that the GBER must be interpreted strictly[24], so such a duty not provided for thereunder should not be inferred from the GBER itself), this specific obligation must be interpreted as being imposed by Article 108(3) TFEU directly on the beneficiary. If so, this is further evidence that the dictum in *SFEI* as to the absence of any specific obligations of the beneficiary is obsolete as the law of the Union currently stands. It follows from the above that the standstill obligation produces effects that may not be explained by any kind of "adverse repercussions", for those effects genuinely bind the beneficiary and substantively alter his or her legal position. As such, it should be accepted that the standstill obligation is capable of horizontal direct effect and thus may be invoked by the persons concerned directly, against the Member State *and* against the beneficiary. The Court should then expressly clarify in its jurisprudence that, given the hitherto development of EU law, its findings in *SFEI* are out of date and the standstill obligation may be subject to private enforcement against the beneficiary.

Defences to Recovery of Unlawful Aid under Article 108(3), third sentence TFEU

The second issue to cover is the possibility to resist application of the standstill obligation on part of the recipient of aid, or putting it differently, on part of the "final target" of Article 108(3), third sentence TFEU. A beneficiary may find him- or herself defending a claim to recover aid deemed unlawful at a later time; he or she may not be aware from the moment of the grant of aid that it is unlawful. While the ECJ is insistent that a "diligent businessperson" will normally be capable of checking whether a measure was subject to Article 108(3) TFEU before accepting it, this is rather difficult to carry out in practice. The Commission itself, despite having specialist knowledge of EU law, often takes several years to investigate a measure. Therefore, a normal businessperson may find it even more difficult to navigate this area of law, even with expert legal advice. Against this background, the ECJ has held in *OTP Bank* that a beneficiary of unlawful aid "does not have any remedies available in accordance with EU law"[25]. The Court noted before framing this dictum that no "exceptional circumstances" were invoked before the national court to exclude recovery[26]. It would follow that a beneficiary has no specific remedies under EU law, and while he or she can contest the application of the standstill ob-

[24] Case C-349/17 *Eesti Pagar,* para. 60, Case C-493/14 *Dilly's Wellnesshotel GmbH*, EU:C:2016:577, para. 37.

[25] Case C-672/13 *OTP Bank*, para. 78.

[26] Case C-672/13 *OTP Bank*, para. 72 and 73.

ligation before national courts on the basis of national law, he or she is limited to pleading such exceptional circumstances. The ECJ held in *CELF/SIDE* that such exceptional circumstances form the basis of a legitimate assumption on part of the beneficiary that the aid is lawful[27]. Repeated findings of the Court that the decisions of the Commission are void do not constitute "exceptional circumstances[28]", where those decisions were challenged in time. The Court has held in its early case law (223/85*RSV*) that long periods of inactivity on part of the Commission may give rise to legitimate expectations on part of the beneficiary, and thus constitute exceptional circumstances preventing recovery[29]. However, this decision has been effectively overturned in later case-law, with the Court stating that it concerned an "exceptional" set of facts[30].There was a view in the academia that there is no case law which would specify what precisely is to be understood as exceptional circumstances[31]. Apart from its findings in 223/85 *RSV*, the Court did however address an exceptional situation in *Régie Networks*; that case concerned a finding of nullity of a Commission decision not to raise objections to a notified State aid measure on the basis of what is now Article 267(b) TFEU. The Commission decision was not challenged after it was adopted and was only found to be void by way of a preliminary ruling. The Court noted that there are "overriding considerations of legal certainty"justifying a temporal limitation of its decision on validity, because the measure was applicable for a time, many undertakings applied for aid thereunder, and it was notified prior to implementation[32]. Thus, it may be assumed that there may be exceptional circumstances limiting recovery on the basis of Article 108(3), third sentence TFEU where a decision not to raise objections or a positive decision of the Commission, previously unchallenged or upheld, are declared invalid pursuant to Article 267(b) TFEU, on condition that the aid at issue was notified and was being disbursed to a large amount of undertakings for a certain appreciable amount of time. As such, it is my view that the decision in *Régie Networks* sets an example of "exceptional circumstances" preventing recovery[33].

---

[27] Case C-199/06 *CELF/SIDE*, para. 43.

[28] Case C-1/09 *CELF/SIDE II*, para. 52. The Court added(para. 53 and 54) that a beneficiary normally may not invoke the principles of the protection of legitimate expectations, legal certainty and proportionality where an aid measure is unlawful.

[29] Case 223/85 *RSV*, EU:C:1987:502, para. 17.

[30] Case C-372/97 *Italy/Commission,* EU:C:2004:234, para. 117, C-298/00 P *Italy/Commission*, EU:C:2004:240, para. 90.

[31] V. Kreuschitz [in:] H. Hofmann, C. Micheau (eds), *State Aid Law of the European Union* (OUP, Oxford 2016), p. 453.

[32] Case C-333/07 *Régie Networks*, EU:C:2008:764, para. 123.

[33] D. Grenspan and A. Pelin [in:] N. Pesaresi, K. van de Casteele, L. Flynn and C. Siaterli (eds), *EU Competition Law Vol. IV- State Aid* (Claeys&Casteels, Deventer 2016), p. 1495, suggest that exceptional circumstances exist *inter alia* where the Commission cannot order recovery contrary to a general principle of EU law (Article 16(1), second sentence of the Procedural Regulation). This

Lastly, as far as preliminary rulings on validity are concerned, and where there is a parallel Commission decision on recovery, a beneficiary of unlawful aid against whom a national court orders recovery on the basis of Article 108(3), third sentence TFEU, may not plead for that court to make a preliminary reference to the ECJ on validity of the recovery decision where he or she undoubtedly could have challenged that decision him- or herself, yet declined to do so. Such preliminary references will be inadmissible[34]. In a recent decision in C-627/18*Nelson Antunes da Cunha*, the Court found that, by virtue of the principle of effectiveness, national limitation periods that may have expired either before the Commission found the aid to be unlawful, or after the Commission ordered recovery due to a delay on the part of the national authorities in implementing the decision on recovery, must be set aside by the competent national court acting *ex officio*[35]. Furthermore, in C-212/19*Ministre de l'Agriculture et de l'Alimentation v Compagnie des pêches de Saint-Malo*, it was held that the social character of aid does not prevent it from being deemed "State aid" for the purposes of Article 107(1) TFEU[36]. Lastly, Article 106(2) TFEU – and the nature of a SGEI – have been deemed insufficient, by themselves, to prevent Article 108(3), third sentence to apply. Even where there would be a SGEI financed by State aid that would have been compatible with the internal market, that alone does not relieve Member States from their duty to comply with the standstill obligation and to notify such aid, unless covered by appropriate exemptions. In addition, the Court confirmed that the standstill obligation is unimpeded by passing the aid over to third parties, and by receiving it from public undertakings[37].

suggestion is now doubtful given that the ECJ opted to dissociate the Procedural Regulation and the standstill obligation.

[34] Case C-188/92 *TWD Textilwerke Deggendorf*, EU:C:1994:90, para. 17, case C-135/16 *Georgsmarienhütte*, EU:C:2018:582, para. 43 and operative part.

[35] Judgment of the Court of 30 April 2020, case C-627/18 *Nelson Antunes da Cunha, Lda v Instituto de Financiamento da Agricultura e Pescas IP (IFAP)*, EU:C:2020:321, para. 52 and 61, operative part.

[36] Judgment of the Court (Second Chamber) of 17 September 2020, case C-212/19 *Ministre de l'Agriculture et de l'Alimentation v Compagnie des pêches de Saint-Malo*, EU:C:2020:726, para. 41.

[37] Judgment of the Court of 24 November 2020, case C-445/19 *Viasat Broadcasting UK Ltd v TV2/Danmark A/S and Kingdom of Denmark*, EU:C:2020:952, para. 43 ("(…) the obligation, for the recipient of unlawful aid, to pay illegality interest in respect of that aid, even if the recipient is an undertaking entrusted with the operation of a service of general economic interest in accordance with Article 106(2) TFEU"), and 51 ("(…) to aid which that recipient has transferred to affiliated undertakings and to aid received by it from a publicly controlled undertaking").

Conclusions

The analysis carried out above turned out to find that the standstill obligation does have a horizontal dimension, and that certain findings of the ECJ in *SFEI* are outdated. However, the position of the beneficiary is different in that there are no specific remedies under EU law for him or her, and the possibility of successful defence against recovery of unlawful aid is severely limited. It would be important for the clarity and legal certainty of individuals subject to the European Union law of State aid if the Court were to expand its jurisprudence and expressly confirm the horizontal direct effect of the standstill obligation. Recent case-law shows that Article 108(3) TFEU is to apply independently of the 2015/1589 Procedural Regulation. The same case-law clarified that all Member State authorities are under a duty to apply the standstill obligation, which includes inverse vertical direct effect of Article 108(3), third sentence TFEU[38]. The national courts remain the primary enforcers of direct effect of the standstill obligation, but all national authorities are called to apply it within the ambit of their powers. Authorities that granted unlawful aid must recover it *ex officio*. While national courts should take notice of the Commission's decisions on aid, the ECJ is willing to afford them certain latitude, in particular where claims for damages are concerned. The ECJ should also expressly update its position on claims of damages against the beneficiary; it is simply not convincing to speak of specific obligations on part of the recipient of aid and still insist that there is no sufficient basis for claims for damages against him or her. Given the recent developments in the case-law, it would also be helpful if the Commission drafted a new version of its 2009 Notice on the enforcement of State aid law by national courts[39]. The current 2019 Recovery Notice does not address the issue of the standstill obligation before national courts at length, so an additional update of that Notice would also be useful. As far as the current 2019 Recovery Notice does refer to national courts, it only makes such references in the context of the *Zuckerfabrik-Atlanta* case-law, and only in so far as the prospective beneficiary would have to contest the Commission's recovery decision[40]. A clear-cut solution to the problems with private enforcement of State aid law would be either an amendment of the Procedural Regulation and the Enabling Regulation in order to introduce specific rules for private enforcement under secondary law,

[38] Case C-654/17 P *Bayerische Motoren Werke*, EU:C:2019:634, para. 139.

[39] Something the Commission aims to do, see https://ec.europa.eu/competition/consultations/2021_sa_enforcement_notice/index_en.html (accessible as of 01.04.2021).

[40] The Commission's 2019 Recovery Notice, para. 144.

or adoption of a separate regulation by the Council under Article 109 TFEU that would provide a detailed legal basis for the private enforcement of Article 108(3), third sentence TFEU. Lastly, the ECJ should abandon its position in *A-Fonds* in that the need of protecting the powers of the Commission to assess the compatibility of aid is somehow "more important" than the protection of the directly effective rights of individuals. That position amounts to no more than a denial of justice and places excessive emphasis on the need to safeguard the powers of the Commission.

Literature

Bacon K. (ed), *European Union Law of State Aid*, Oxford 2017.
Derenne J., Müller-Rappard A., Kaczmarek C. (eds), *Enforcement of EU State Aid Law at National Level*, Berlin 2010.
Hofmann H., Micheau C. (eds), *State Aid Law of the European Union*, Oxford 2016.
Nemitz P. (ed.), *The Effective Application of EU State Aid Procedures – The Role of National Law and Practice*, Alphen aan den Rijn 2007.
Ortiz-Blanco L. (ed.), *EU Competition Procedure*, Oxford 2013.
Pesaresi N. (ed.) et al., *EU Competition Law Vol. IV- State Aid*, Deventer 2016.
Quigley C., *European State Aid Law and Policy*, Oxford 2015.
Säcker F., Montag F. (eds), *European State Aid Law*, München 2016.
Santa Maria A. (ed), *Competition and State Aid – An Analysis of the EU Practice, 2nd Edition*, Aalphenaan den Rijn 2015.