



EJTN AD Webinar Series

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*CJEU Case Law in the Field of State Aid:
The Role of National Courts in State Aid Enforcement*

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Outline

- **Introduction:** the role of national courts in the enforcement of State aid rules.
- **2019 EU Commission study:** enforcement of State aid law by national courts of the EU MS (2007-2017).
- **CJEU case law on private enforcement of State aid law:**
 - 1) *Lufthansa*;
 - 2) *Eesti Pagar*;
 - 3) *BMW*.



Role of national courts in State aid enforcement

What is State aid 'control'?

- **Aim:** avoiding a subsidies race among EU MS ➤ distortion of competition within EU internal market.
- **'Any aid' is prohibited:**
 1. Grant;
 2. Fiscal exemption / rebate;
 3. Loan / guarantee at more favourable interest rate than market conditions;
 4. Sale /concession of State's owned property at more favourable conditions than market conditions.
- Two categories of aids:
 - 1) **Horizontal aids:** granted to every undertaking in order to fulfill certain objectives of public interest (i.e. environmental aid) → less problematic.
 - 2) **Vertical aids:** granted to a single undertaking (i.e. rescue and restructuring aid) → more problematic under State aid rules.

Definition of aid under Art. 107(1) TFEU

- *Save as otherwise provided in the Treaties, any aid **granted by a Member State or through State resources** in any form whatsoever which distorts or threatens to distort competition by **favouring certain undertakings** or the production of certain goods shall, in so far as it **affects trade between Member States**, be incompatible with the internal market*
- **‘Any aid’ is incompatible** with the EU internal market ➤ **cumulative conditions:**
 - 1) Aid recipient: undertakings;
 - 2) State’s owned resources;
 - 3) Selectivity: the aid is discriminatory;
 - 4) Advantage: the aid generates an advantage for the beneficiary;
 - 5) Aid distorts intra-community trade;
 - 6) Aid distorts competition ➤ presumed when the other conditions are fulfilled.

Justifications

- **Only EU Commission can authorize an aid measure**, otherwise prohibited under Art. 107(1) ➤ notification to EU Commission.
- **Art. 107(2): aid 'shall' be compatible**
 - 1) 3 narrow exceptions (i.e. consumers, natural disasters, Germany re-unification);
 - 2) EU Commission shall approve it = no discretion.
- **Art. 107(3): aid 'may' be compatible**
 - 1) Broader list of exceptions;
 - 2) EU Commission decides about fulfillment exceptions under Art. 107(3);
 - 3) EU Commission elaborates Guidelines and Notices to explain how conditions under Art. 107(3) are fulfilled in different industries.

Enforcement State aid rules – EU Commission

- **Art. 108(3) TFEU:**

- 1) EU MS have **to notify to the Commission any new aid**, in order to be exempted under Art. 107(2)(3);
- 2) **Stand-still obligation:** EU MS cannot implement an aid scheme before receiving the approval by the EU Commission ➤ **unlawful aid.**

- **Decisions adopted by the EU Commission** (Investigations in 2 phases):

- 1) Positive: approval aid;
- 2) Conditional: approval aid, subject to conditions;
- 3) **Negative ➤ incompatible aid :**
 - a) Order the EU MS not to implement the aid;
 - b) **Unlawful aid :** order the EU MS to **recover the aid.**

- Assessment of the EU Commission is the same for new and unlawful aid ➤ **NO penalty for breach stand-still obligation.**

Exemptions from the duty of notification

- **2013 *De Minimis* Reg.:** the amount of the aid is ‘very small’ (i.e. less than € 200.000 for 3 fiscal years) ➤ NO impact intra-community trade = measure is NOT State aid under Art. 107(1).
- **2014 General Block Exemption Reg (GBER):** horizontal aids that fulfil certain conditions do NOT have to be notified ➤ *prima facie* exempted under Art. 107(3) TFEU:
 - 1) Horizontal aids;
 - 2) Max. aid threshold for each category of aid;
 - 3) Max. aid intensity for each category of aid;
 - 4) Aid must have an incentive effect.

Enforcement of State aid rules – national courts

- **Types of proceedings:**
 - 1) **Public enforcement:** national courts **implement the EU Commission recovery decisions** concerning unlawful/illegal aid;
 - 2) **Private enforcement:** national courts hear claims concerning a **breach of the stand-still obligation** under Art. 108(3) TFEU.
- **Both civil and administrative courts of the EU MS are competent to hear public and private enforcement cases:** jurisdiction based on the type of aid (e.g. loan v. tax rebate) ➤ NO specialized court.

National courts – public enforcement

- **National courts cannot review the legality of EU Commission decision** ➤ exclusive competence GC/CJEU (*TWD*).
- **Competence of national courts in recovery proceedings:**
 - 1) Suspension recovery decision (*Atlanta, Zuckerfabrik*);
 - 2) Quantification of the aid;
 - 3) Identification of the aid beneficiary (e.g. bankruptcy);
 - 4) Assessing impossibility of the recovery ➤ ‘absolute impossibility’;
 - 5) Assessing the recovery time limit ➤ 10 years from the moment the aid is granted.

National courts – private enforcement

- **Private enforcement:** competitor of the aid beneficiary challenges the breach of stand-still obligation ➤ NO notification to EU Commission.
- **Assessment by national court ➤ is the measure a real ‘aid’?**
 - 1) Cumulative conditions under Art. 107(1) TFEU;
 - 2) *De Minimis* Reg.;
 - 3) GBER;
 - 4) Existing aid:
 - a) Aid granted before joining the EU;
 - b) Aid previously approved by the EU Commission.

Private enforcement - remedies

- **Remedies** that national courts can adopt in private enforcement cases (*SFEI*):
 - 1) **Injunction**: stop the implementation of the aid;
 - 2) **Temporary aid recovery** until EU Commission decision;
 - 3) **Damage compensation** ➤ State liability (*Francovich*):
 - a) EU law grants right to individuals ➤ Art. 108(3) grants right to competitors;
 - b) ‘Serious breach’ of EU law ➤ lack of aid notification is a ‘serious breach’;
 - c) Causal link between the damage suffered by the competitor and the lack of aid notification.

Procedural rules

- **Procedural autonomy:** both in public and private enforcement, national courts follow national procedural rules, subject to the principle of **‘equivalence’ and ‘effectiveness’** (*Transalpine Ölleitung*).
- **EU Commission soft law:**
 - 1) Public enforcement: 2019 Recovery Notice
 - 2) Public and private enforcement: **2009 Enforcement Notice** ➤ **under review.**
- 2015 Procedural Reg: **cooperation tools EU Commission – national courts:**
 - 1) Request of info;
 - 2) Request of opinion;
 - 3) *Amicus curiae*.



2019 Commission study

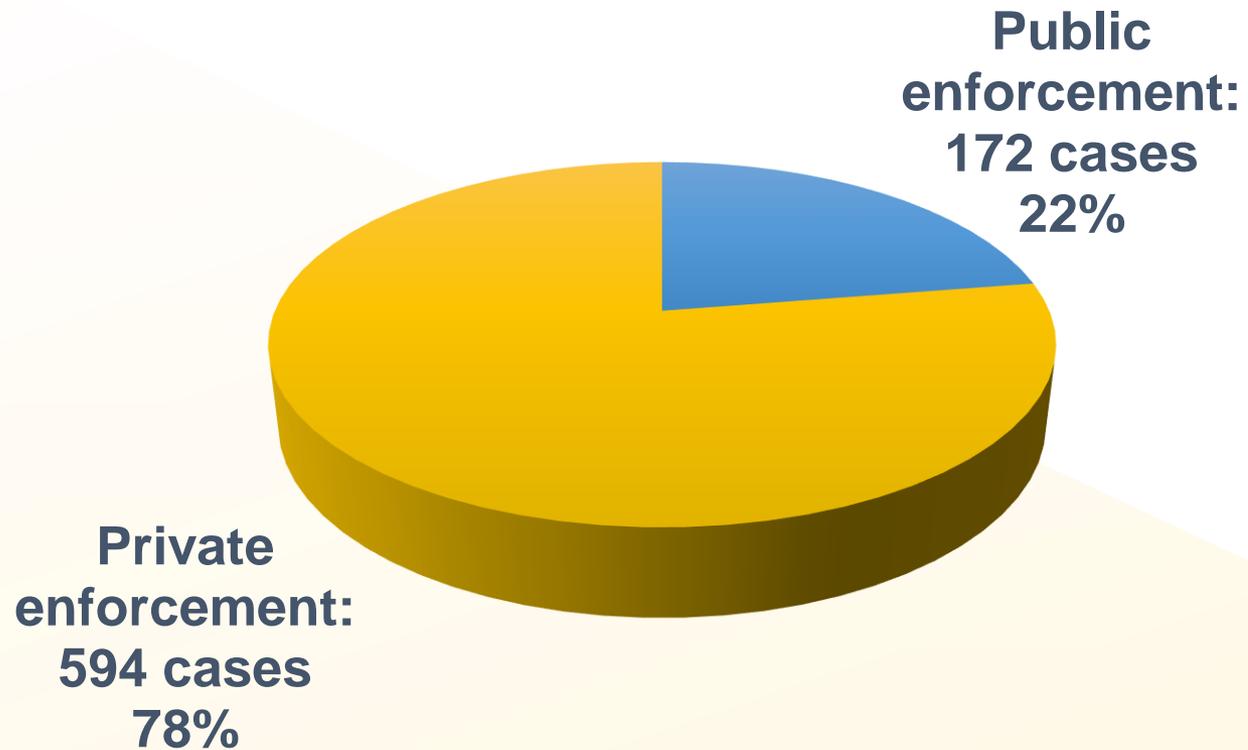
Study – aim and scope

- **Aim:** assessing trends in State aid enforcement by national courts during the past decade, in order consider a possible revision of the 2009 Enforcement Notice.
- **Consortium:** Spark Legal Network, European University Institute, Ecorys, Caselex.
- **Geographic scope:** all EU MS, including UK.
- **Temporal scope:** State aid judgements ruled in 2007-2017.
- **Both public and private enforcement** rulings covered by the study.

Study - output

- **766 State aid rulings** identified in 27 EU MS ➤ 145 case summaries.
- 28 country reports:
 - 1) Summary procedural rules;
 - 2) Enforcement trends.
- Interviews with national judges about State aid cooperation tools.
- **Final report:**
 - 1) Comparative findings;
 - 2) Best practices;
 - 3) Results of the interviews.

Number of rulings identified



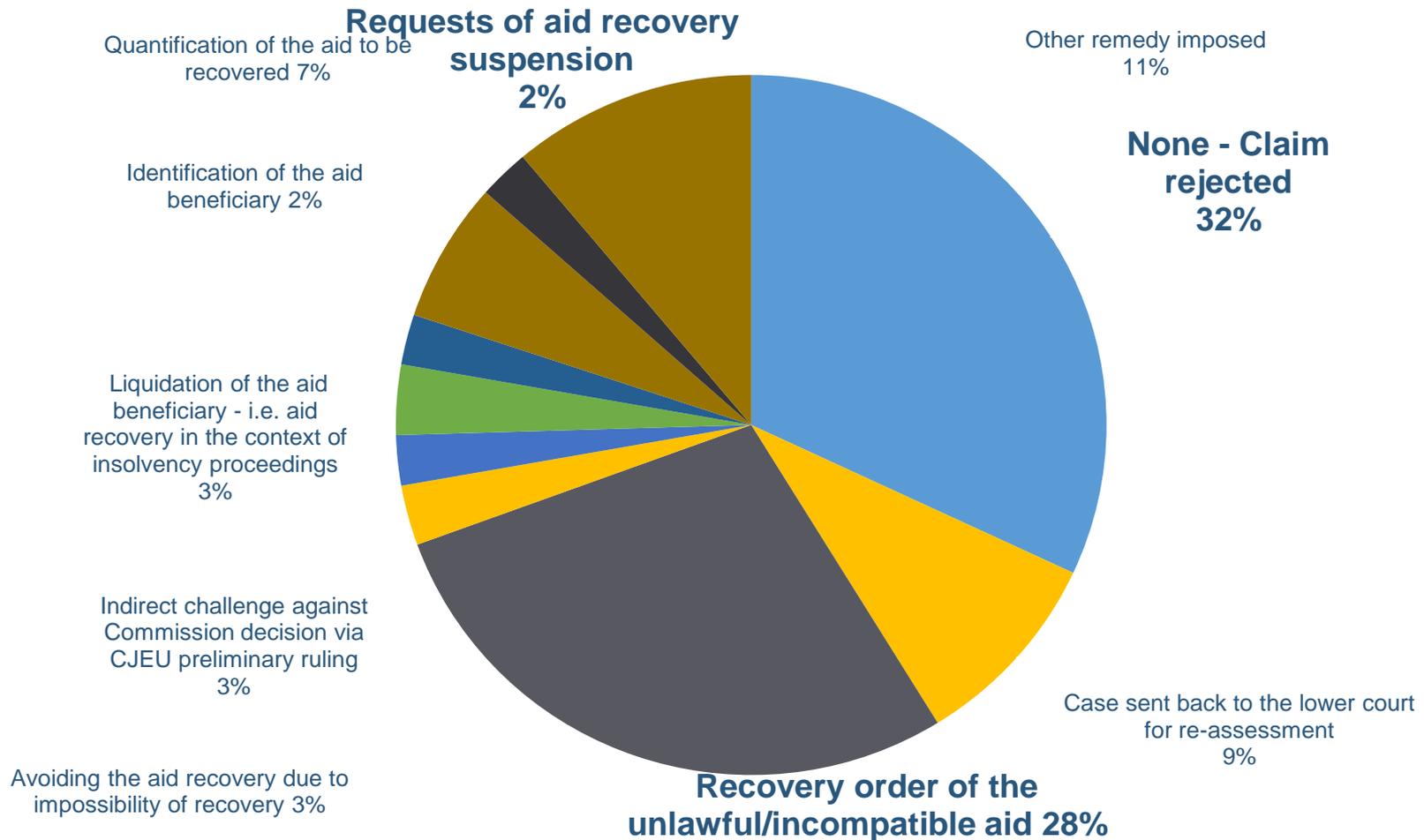
Trends – public v. private enforcement

- **Statistical trends ➤ major difference with 2006 Study:**
 - 1) Overall number of State aid rulings has increased.
 - 2) Prevalence of private enforcement ➤ 78% of the relevant rulings identified.

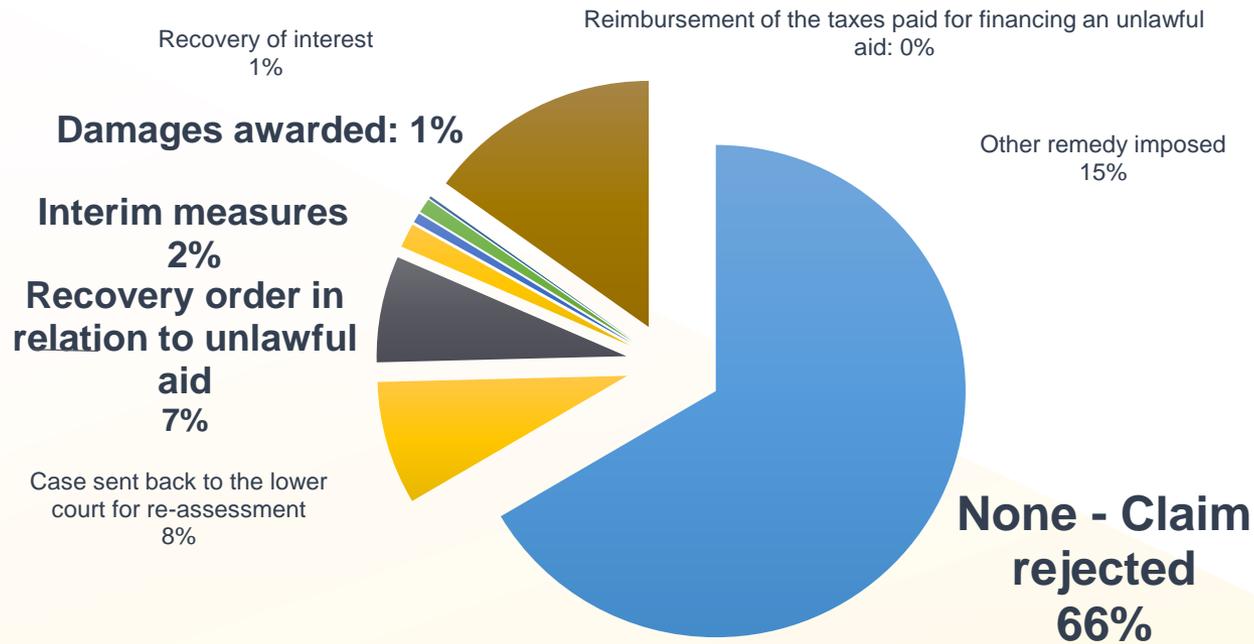
- **Reasons lower number public enforcement cases:**
 - 1) Direct applicability of Commission recovery decisions (e.g. UK, ES).
 - 2) Adoption specific legal framework governing aid recovery (e.g. BE, ES, NL, FI, SK).
 - 3) National courts rarely suspend Commission decisions in accordance with *Zuckerfabrik/Atlanta* case law.

- **Reasons higher number private enforcement cases:**
 - 1) Consequence of the 2008 financial crisis.
 - 2) Increased awareness by companies and law firms.

Remedies awarded in public enforcement cases



Remedies awarded in private enforcement cases



Trends - remedies

- **Statistical trends ➤ claims mostly rejected:**

- 1) Public enforcement: positive ➤ effective enforcement Commission decisions.
- 2) Private enforcement: negative ➤ while the overall number of private enforcement cases has increased during the past decade, most of the claims are still rejected by national courts.

- **Reasons why private enforcement claims are rejected:**

- 1) Claimants do NOT put forward well-structured arguments.
- 2) National courts need to assess the legality of the measure under different areas of law (e.g. tax law, administrative law).
- 3) National courts face difficulties in verifying whether a measure is indeed an aid.
- 4) National courts are unlikely to order recovery of unlawful aid while the case is pending at the EU Commission.
- 5) High burden of proof for the claimant, especially in damage claims ➤ damage quantification and causal link.

Compatibility with EU acquis

- Rulings adopted by national courts are **generally compatible with EU State aid *acquis***.
- **Departures from the 2009 Enforcement Notice:**
 - 1) Recovery order annulled by national court due to the breach of the right of oral hearing (*Alava*, ES).
 - 2) Recovery ordered annulled by national court due to breach of the legitimate expectations of the illegal aid beneficiary (*Sardenia Hotels*, IT).
 - 3) Suspension national recovery order during national appeal proceedings (HR, PL).
 - 4) Hybrid cases: recovery ordered by national authorities without Commission intervention (e.g. *Sheeps*, NL; *Broadcasting Television*, AT) ➤ anticipation *Eesti Pagar* and *BMW*.



Recent CJEU case law

Pending issues in private enforcement of State aid law

- In *SFEI*, CJEU ruled that **national courts always have to order the recovery of unlawful aid** → recovery as right of competitors deriving from stand-still obligation under Art. 108(3) TFEU
- **Problems:**
 - 1) Should national courts order recovery of the unlawful aid even if the EU Commission opens, in the meantime, investigations on the case and it might later authorize the unlawful aid? (*Lufthansa*)
 - 2) Can national authorities order the aid recovery before the Commission decision? What is the role of national courts (*Eesti Pagar; BMW*).

Lufthansa

- **Facts:**

- 1) Request of preliminary ruling from *Oberlandesgericht Koblenz*;
- 2) Frankfurt Hahn was small airport in Frankfurt owned by German Länder (i.e. Rhineland-Palatinate);
- 3) Ryanair was the main airline using the airport (95% passengers);
- 4) Airport did not charge any fee to Ryanair for taking-off and landing → State aid NOT notified to EU Commission = unlawful aid;
- 5) Lufthansa started private enforcement action in German court;
- 6) EU Commission opened investigations = phase I decision: fee exemption was *prima facie* State aid.

- **Question:** was *Oberlandesgericht Koblenz* bound by EU Commission preliminary decision concerning the existence of State aid?

Lufthansa – CJEU ruling

- Opening of investigations by EU Commission ‘does NOT release’ national courts from ordering recovery unlawful aid (para. 32) → reference to *SFEI*
- BUT, “...national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional” (para. 41)
- **2 scenarios:**
 - 1) Before EU Commission adopts preliminary decision, national court interpret the concept of aid under Art. 107(1) (para.34);
 - 2) After EU Commission adopts preliminary decision, national court has to follow EU Commission view (para. 39):
 - a) EU Commission, no aid = national court does NOT order recovery;
 - b) EU Commission, yes aid = national court orders recovery.
- In case national court has ‘doubts’ concerning EU Commission preliminary decision, it can ask **preliminary ruling from CJEU** (para. 43)

Lufthansa - relevance

- CJEU repeated *SFEI* case law: as a general rule, EU Commission investigations do NOT have an impact on recovery proceedings in national courts.
- BUT, in *Lufthansa* CJEU recognized for the first time that the overlapping role of EU Commission and national courts concerning the interpretation of aid definition under Art. 107(1) TFEU may generate legal uncertainty.
- Indirectly, **CJEU recognized that national courts are bound by preliminary decision of EU Commission**, subject to possibility to ask preliminary ruling from CJEU.

Eesti Pagar, C-349/17

- **Facts:**

- 1) Request for preliminary ruling from Tallinn Court of Appeal.
- 2) Eesti Pagar was a small manufacturer of loaf bread.
- 3) In 2008, Eesti Pagar received from the Estonian authorities € 526.000, in order to improve its production line ➤ NO notification to EU Commission.
- 4) In 2013, granting authority informed Eesti Pagar that the aid breached GBER conditions ➤ recovery order adopted by Estonian authorities.
- 5) Eesti Pagar challenged the recovery order in court.

- **Questions:**

- 1) Can Estonian authorities adopted a recovery order without Commission decision?
- 2) Can the recovery be avoided due to the breach of the legitimate expectations enjoyed by the aid beneficiary?

Eesti Pagar – CJEU ruling

- CJEU, second question:
 - 1) As a consequence of the stand-still obligation under Art. 108(3), **national authorities have to recover unlawful aid even in the lack of a Commission recovery decision** (para. 89).
 - 2) The obligation **to recover unlawful aid is applicable to ‘...the national courts but also to all administrative bodies’** (para. 90).
- CJEU, third question:
 - 1) Commission did NOT transfer any decision-making power to national authorities
➤ **Commission has exclusive jurisdiction to apply Art. 107(3) TFEU** (para. 102).
 - 2) Decision by national authorities granting the aid does **NOT create any legitimate expectation for the beneficiary concerning the aid compatibility under Art. 107(3) TFEU** ➤ aid recovery is always possible (para. 104).

Eesti Pagar - relevance

- After adoption GBER in 2014, 80% aid schemes are block-exempted (i.e. NO notification to EU Commission) ➤ **increasing number of cases where national authorities recover unlawful aid without Commission decision.**
- *Eesti Pagar* clarified for the first time that **national authorities can order the aid recovery due to a breach of GBER conditions, BUT compatibility assessment remains an exclusive task of the EU Commission.**
- Argument breach legitimate expectation rejected due to the supranational nature of EU State aid rules, like in *Germany v. Commission*.

BMW, C-654/17

- **Facts:**

- 1) Germany granted € 49 million aid to BMW, in order to build a new factory in Leipzig to product electric cars.
- 2) Germany considered that aid fulfilled 2008 GBER conditions ➤ NO notification to EU Commission.
- 3) EU Commission opened investigations for breach stand-still obligation: the amount of the aid was NOT proportional, though it complied with the thresholds mentioned in GBER for regional aid.
- 4) EU Commission authorized the aid, subject to a reduction to € 17 million.
- 5) GC upheld EU Commission decision.
- 6) BMW appealed to the CJEU.

- **Plea II:** Commission proportionality assessment under GBER caused legal uncertainty for the aid beneficiary and the granting authority.

BMW – CJEU ruling (plea II)

- Aid presumed to be justified under Art. 107(3) if it fulfils GBER conditions ➤ national authorities assess GBER conditions (para. 136-137).
- BUT, GBER did NOT transfer the compatibility assessment from EU Commission to national authorities ➤ reference to *Eesti Pagar* (para. 142).
- **Competitors may challenge decision of granting authorities under GBER** either to the EU Commission OR **in front of national courts** (para. 144).
- Max. aid threshold indicated in GBER has a ‘procedural nature’ (para. 155) ➤ it does NOT replace an ad-hoc assessment by EU Commission.
- **Conclusions: CJEU upheld the previous GC ruling and EU Commission decision.**

BMW - Relevance

- *BMW* confirms the the position expressed by CJEU in *Eesti Pagar*.
- *BMW*: national authorities may assess compatibility aid measure with GBER conditions, BUT EU Commission can always re-assess the case under Art. 107(3) ➤ decision national authorities do NOT create a legitimate expectation for the aid beneficiary.
- **Role of national courts in private enforcement cases:**
 - 1) Competitors may ask the aid recovery of the unlawful aid (*SFEI*).
 - 2) Competitor may challenge the validity of the decision of a granting authority considering an aid measure compatible with GBER conditions (*Eesti Pagar*, *BMW*).



Conclusions

Conclusions

- **National courts are involved in the enforcement of State aid rules:**
 - 1) Public enforcement: implementation Commission recovery decisions;
 - 2) Private enforcement: enforcement stand-still obligation.

- **2019 EU Commission study:**
 - 1) Increasing number of private enforcement cases;
 - 2) National courts rarely award remedies ➤ NO recovery unlawful aid.

Conclusions

- **Recent CJEU case law on private enforcement:**

- 1) *Lufthansa*: national courts should follow the Commission assessment of the aid, even if preliminary;
- 2) *Eesti Pagar / BMW*: national courts may review the decisions of national authorities under GBER ➤ broadening private enforcement State aid law.

- **Revision 2009 Enforcement Notice ➤ pending issues:**

- 1) Consequence *Eesti Pagar / BMW*: remedies that national courts may adopt after reviewing a decision of a national authority under GBER?
- 2) Public enforcement: should national court order the recovery while Commission decision is pending for appeal at the GC (*Junta de Galicia*)?
- 3) Temporary recovery unlawful aid: escrow account?
- 4) Limited number damage claims: Commission guidance on damage quantification?

Thank you for your attention!

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