Hic Sunt Leones: Private Enforcement of State Aid Law in Slovakia

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From the point of view of EU law, the private enforcement of State aid law, i.e. litigation initiated by private parties before a national court with the aim of preventing the payment of State aid, achieving its recovery or claiming damages, appears to be fairly straightforward. Both the substantive and procedural bases of such claims are relatively clearly set out in the case law of the CJEU and in EC soft law. However, when attempting to translate these EU law guidelines into an actual action under national law, a number of procedural as well as substantive problems arise. There is no unified legal framework and various overlapping areas of national law need to be analysed, in particular public law, general tort law, unfair competition law, State liability law, civil procedure and administrative procedure. This may be one of the reasons why such actions are virtually unknown in Slovakia. The article draws on inspiration mainly from German and Austrian case law and analyses how such claims could be framed under Slovak law. It concludes with the question of whether greater harmonisation could facilitate the development of private enforcement of EU State aid law.

Keywords: Private Enforcement; Slovak Republic; Unlawful Aid; Compatible Aid.

I. Introduction

State aid law is sometimes referred to as the '*Cinderella*' of competition law or as its '*Ugly Sister*'.[1] This designation appears to be unjust. Clearly, the importance of protecting a level playing field from distortions created by States can hardly be overstated. However, one of the reasons for the inferior perception of State aid law may, perhaps, be the different procedural framework. In particular, when it comes to the framework for private litigants to enforce their rights under, respectively, competition law and State aid law, the latter is clearly lagging behind.

As a matter of substantive law, the case for State aid control is compelling. An extensive body of economic literature explains the inefficiencies caused by public subsidies to local industries, poignantly described as a "negative-sum game of individually rational, but collectively wasteful subsidies".[2] In the absence of a regulator, this may result in a "subsidy 'war' that leads to a prisoner's dilemma type of outcome".[3] In other words, State aid law protects competition from undue distortions caused by the State, just as competition law protects competition from undue distortions caused by the businesses themselves. In this sense, State aid control and competition law appear like two (equally beautiful) sisters protecting the same public interest from two separate threats.

As a matter of procedural enforcement, the situation is more complex. In competition law enforcement, the incentives of the respective actors are fairly straightforward. The relevant competition authority (regardless of whether it is acting at a national or

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1 E Gambaro and F Mazzocchi, 'State aid Litigation before the EU Courts. The case of aid schemes' (2016) N.2 Italian Antitrust Review quoting C.D. Ehlermann, in CD Ehlermann and M Everson, 'Selected issues in the field of State Aid' (2001) European Competition Law Annual, 1999. See also L Hencher, T Ottervanger and JP Slot, 'No Longer the Cinderella of Competition Law but not quite the Ugly Sister' (2006) EC State Aid.

2 T Besley and P Seabright, 'The Effects and Policy Implications of State Aids to Industry: An Economic Analysis' (1999) 14(28) Economic Policy, 21.

3 DR Collie, 'State aid in the European Union: The prohibition of subsidies in an integrated market' (2000) 18 International Journal of Industrial Organization, 229.

supra-national level) represents the public interest in maintaining efficient competition and employs its powers to enforce that interest. This is further supplemented by other stakeholders, such as affected undertakings or consumers, who pursue their private interests to obtain compensation by launching private claims. As a matter of policy, facilitating private enforcement thus serves a twofold objective. First, there is the fundamental policy of compensating losses that were sustained as a result of unlawful conduct. On top of that, the claimants' private interests are harnessed to reinforce and supplement the public enforcement of competition law.

In the field of State aid law, the actors threatening to distort competition are States themselves. Consequently, there is a compelling case for public enforcement at the supra-national level. However, such centralisation also brings limitations. Inevitably, the resources of the central enforcing agency, the European Commission, are limited. Therefore, the case for private enforcement looms even larger. Again, there is the obvious underlying policy of compensating losses caused by unlawful conduct. In addition, the collateral benefit is to supplement the enforcement of State aid rules by decentralising it to national courts seized by private litigants.

This article will survey the framework for private enforcement in Slovakia. While this may appear as a very limited exercise, I hope that it can bring broader implications that are relevant beyond Slovakia.

This article will be organised as follows. In section II, I will provide a general introduction to the EU law perspective on the private enforcement of State aid law. In section III, I will attempt to outline the procedural avenues and hurdles for private enforcement in Slovakia. Finally, section IV will discuss the wider policy implications that a survey of private enforcement in a small Member State may have for EU-wide discourse.

II. Private Enforcement of State Aid Law (EU Law Perspective)

In 2005, the Commission adopted the State Aid Action Plan[4] (SAAP) with the aim of improving the effectiveness, transparency, credibility and predictability of the State aid regime. In the field of enforcement, the SAAP highlighted the potential of private litigation before national courts as a means to contribute to increased discipline in the field of State aid.[5]

In 2006, the Commission commissioned a study on the enforcement of State aid law at the national level.[6] The Enforcement Study was complemented in 2009.[7] Although it revealed a significant increase in the number of State aid cases before national courts, it also showed the limited role of "genuine private enforcement before national courts". This applied even more so to the new Member States including Slovakia.

On that basis, the Commission adopted the Notice on the enforcement of State aid law by national courts.[8] Its purpose was to "inform national courts and third parties about the remedies available in the event of a breach of State aid rules and to provide them with guidance as to the practical application of those rules".[9] This guidance is briefly surveyed below.

According to Article 108(3) TFEU, Member States are prohibited from implementing a State aid measure before its approval by the Commission (the standstill obligation).

According to a long line of case law, the standstill obligation is endowed with direct effect. Already in *Costa v ENEL*, the Court of Justice hinted that Article 108(3) TFEU (ex-Article 93(3) EEC) might create individual rights.[10] This was specifically confirmed in the early 1970s in *Lorenz*[11], where the Court of Justice ruled that: "the prohibition on implementation referred to in the last sentence of Article 93(3) [now Article 108(3)] has a direct effect and gives rise to rights in favour of individuals, which national courts are bound to safeguard".[12] As for what legal consequences the violation of this provision should entail,

4 European Commission, State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 final (the **SAAP**).

5 *SAAP* (n 4), [55].

6 Directorate-General for Competition of European Commission, Study on the Enforcement of State Aid Law at National Level. Part 1, Application of EC State aid rules by national courts. Part II, Recovery of unlawful State aid. (Law Com 2006) (the **Enforcement Study**).

7 Directorate-General for Competition of European Commission , 2009 update of the 2006 Study on the enforcement of State aid rules at national level. Final Report (Law Com 2009).

8 European Commission, Notice on the Enforcement of State aid law by national courts (2009/C 85/01)[2009] OJ C85/1 (the **Commission Notice**).

9 *Commission Notice* (n 8), [6].

10 Case 6/64 *Costa v ENEL* [1964] ECR I-585.

11 Case 120/73 *Lorenz* [1973] ECR I-1471, [9].

12 Case 120/73 *Lorenz* [1973] ECR I-1471, [8].

the Court of Justice deferred to national laws. "[W]hile the direct effect of the prohibition in question requires national courts to apply it without any possibility of its being excluded by rules of national law of any kind whatsoever, it is for the internal legal system of every Member State to determine the legal procedure leading to this result".[13]

Aid implemented in breach of the standstill obligation, i.e. without prior notification to, and approval by, the Commission, is considered *unlawful*.[14] Unlawful aid can still be deemed *compatible* with the internal market under Article 107(2) and (3) TFEU, in which case it does not have to be recovered. The authority to rule on the compatibility of aid rests solely with the Commission.[15] However, regardless of whether *unlawful* aid is ultimately deemed *compatible* or not, national courts have jurisdiction, and indeed, are obliged, to draw the necessary consequences from the aid's unlawful character.[16]

The Commission Notice lists remedies against unlawful aid measures that should be available before national courts. These are:

1 preventing the payment of unlawful aid;
2 recovery of unlawful aid (regardless of compatibility);
3 recovery of illegality interest;
4 damages for competitors and other third parties; and
5 interim measures against unlawful aid.

For obvious reasons, the Commission and the EU Courts cannot provide definitive guidance on how these claims should be classified under national law. The Commission Notice does, however, provide some indication of the legal basis of those claims. As for preventing the payment of unlawful aid (if not yet disbursed) and ordering the recovery of such aid (if already disbursed), the Commission Notice reiterates that national courts are obliged to draw all appropriate legal consequences under national law of an infringement of the standstill obligation.[17] The Commission acknowledges that the obligation to prevent the payment of unlawful State aid may arise in a variety of procedural settings; often, this question will come up in the context of the claimant challenging the validity of the national act granting the aid, in which case preventing the payment will usually be the logical consequence of finding invalidity.[18]

In relation to damages claims, the Commission Notice clarifies that these would usually be directed to the authority granting State aid.[19] Such actions can either be brought under national law[20] or under EU law pursuant to the *Francovich* and *Brasserie du Pêcheur* doctrine.[21] The Commission Notice also discusses the character of potential damages, in particular a loss of profit in different factual scenarios. According to the Court of Justice in *SFEI*, Article 108(3) TFEU does not impose any direct obligations on the beneficiary and hence there is no EU law basis for a damages claim against the beneficiary.[22] However, a damages claim against the beneficiary may be based on national law, in particular national rules governing non-contractual liability.[23]

13 Case 120/73 *Lorenz* [1973] ECR I-1471, [9].

14 Save for a few limited exceptions – specifically aid falling under a block exemption or existing aid that is not subject to the standstill obligation.

15 Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, [38]; Case C-17/91 *Lornoy and Others* v *Belgian State* [1992] ECR I-6523, [30]; and Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others* v *France* [1991] ECR I-5505, [14].

16 Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, [38,44 9; Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, [75]; and Case C-295/97 *Piaggio* [1999] ECR I-3735, [31]. On this front, national courts are powerful enforcers of the standstill obligation, as the Commission itself does not have authority to issue a recovery decision purely on the basis of the aid's unlawfulness and always must conduct a compatibility assessment (Case C-301/87 *France* v *Commission* ('Boussac') [1990] ECR I-307, [17-23]; Case C-142/87 *Belgium* v *Commission ('Tubemeuse')* [1990] ECR I-959, [15-19]; Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others* v *France* [1991] ECR I-5505, [14]; and Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, [38].

17 *Commission Notice* (n 8), [28, 30]; Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others* v *France* [1991] ECR I-5505, [10,12]; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, [40, 49, 68]; Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, [39, 47]; Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, [41]; Case 78/76 *Steinike & Weinlig* [1977] ECR 595, [14]; and Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, [49].

18 *Commission Notice* (n 8), [29].

19 *Commission Notice* (n 8), [43].

20 Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, [53, 55]; Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, [56]; and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, [75].

21 Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357; joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

22 *Commission Notice* (n 8), [54]; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, [72-74].

23 *Commission Notice* (n 8), [55].

Finally, the Commission Notice also addresses procedural questions. As a starting point, it recalls the principle of national procedural autonomy that is subject to the principle of equivalence and the principle of effectiveness.[24]

In relation to State aid law, a crucial question is the legal standing of third parties such as competitors or other stakeholders. On that note, the Commission Notice refers to the Court of Justice ruling in *Streekgewest*, according to which EU law precludes national rules from limiting legal standing only to competitors of the beneficiaries.[25] Third parties who are not affected by the distortion of competition resulting from the aid measure can also have a sufficient legal interest of a different character in bringing proceedings before a national court.[26]

On the basis of this brief survey, it is clear that while opening the doors to private enforcement of State aid law is a requirement imposed by EU law on the national legal orders, designing specific procedural avenues and substantive frameworks is a matter of national law. In the following section, I will analyse how such litigation could be framed under Slovak law.

III. Private Enforcement of State Aid Law (National Perspective)

When reading the Commission Notice, it may appear that private enforcement of State aid law from the perspective of EU law should be fairly straightforward. The substantive basis of the claim is given and so is the requirement to provide *locus standi* to both competitors and other third parties.

However, when trying to translate these elements into an actual action under national law – specifically under Slovak law, a number of problems arise, both in terms of substance and procedure. These are analysed below.

1. Current State of Legal Literature and Case Law

At the outset, it must be noted that the literature on private enforcement of State aid law in Slovakia is very limited. There is no comprehensive treatise on the various scenarios that may arise and the corresponding procedural avenues that private litigants can follow. When it comes to State aid enforcement, the public limb, *i.e.* enforcement by the Commission and subsequent recovery by national bodies, has received significantly more attention. This is partially due to the endless *Frucona* saga in which Slovakia has been trying for almost a decade to recover alleged State aid from Frucona Košice a.s. The case went through all levels of the Slovak judicial system in a wide variety of procedural settings and raised a number of academic questions along the way.[27] However, when it comes to private enforcement, the in-

24 *Commission Notice* (n 8), [70].

25 *Commission Notice* (n 8), [72]; Case C-174/02 *Streekgewest* [2005] ECR I-85, [14-21].

26 *Commission Notice* (n 8), [72]; Case C-174/02 *Streekgewest* [2005] ECR I-85, [19].

27 The *Frucona* case would warrant a separate article. By way of brief summary, the Commission decided that Frucona Košice a.s. was the recipient of State aid by virtue of the tax authority accepting a hair-cut on its tax receivables in the context of restructuring proceedings equal to the hair-cut of private creditors. The Commission claimed that the tax authority did not have to do so, because it would have been a priority creditor in bankruptcy proceedings (*State aid implemented by Slovak Republic for Frucona Košice, a.s.* (Case SA.1821), Commission Decision (C25/2005) (ex NN 21/2005) [2006] OJ C233/47). The decision was upheld by the General Court (Case T-11/07 *Frucona Košice v Commission* [2010] ECR II-05453), but overturned by the Court of Justice (C-73/11 P *Frucona Košice v Commission* [2013] ECR II-05453). The Commission then issued a new decision, which was ultimately annulled by the EU Courts (Case T-103/14 *Frucona Košice v Commission* [2016] ECR I-152; Case C-300/16 P *Frucona Košice v Commission*). In Slovakia, the tax authority was trying to recover the aid without much success for a number of years, usually running against the argumentation that the court ruling that concluded the initial restructuring proceedings constitutes *res iudicata* (District Court Košice II (2007) 34Cb/338/2006-85; Regional Court Košice (2008) 2Cob/155/2007-186; Supreme Court of the Slovak Republic (2009) 5MObdo/3/2009; Constitutional Court of the Slovak Republic (2011) II ÚS 501/2010; Supreme Court of the Slovak Republic (2013) 4MObdo/7/2011; Constitutional Court of the Slovak Republic (2015) III ÚS 638/2014). In the meantime, the legislator sought to facilitate the recovery of aid by a specific piece of legislation dubbed ‚*Lex Frucona*' (Amendment 102/2011 of State aid Act 1999), large parts of which were held unconstitutional by the Constitutional Court (Constitutional Court of the Slovak Republic (2012) PL. ÚS 115/2011). And in another curious line of cases, Frucona sought another round of debt restructuring (District Court Košice I (2016) 26R/5/2011; Regional Court Košice (2011) 2CoKR/15/2011; Constitutional Court of the Slovak Republic (2012) II. ÚS 455/2012). Along the way, those cases generated a healthy amount of interest and legal writings [J Gyárfaš, 'Sága Frucona: Všetci kamaráti by ťa chceli mať!' (*Lexforum.cz*, 12 July 2014, at <http://www.lexforum.cz/498> last accessed on 12 June 2017); E Ellyne, 'Frucona Revisited: Confusing EDF and Placing the Burden of Proof Where it Belongs' (*StateAidHub.eu*, 2 June 2016, at <http://stateaidhub.eu/blogs/stateaid/post/6456> last accessed on 12 June 2017); K Csach, 'Frucona revisited. Ústavný súd vracia úder' (*Lexforum.cz*, 19 July 2011, at <http://www.lexforum.cz/322> last accessed on12 June 2017); J Gyárfaš, 'Sága Frucona: Lásku alebo majetok? Dávajte majetok!' (*Lexforum.cz*, 18 February 2011, at <http://www.lexforum.cz/295> last accessed on 12 June 2017); J Gyarfáš, 'Sága Frucona: Pokračovanie bez prestávky, rytmus tango' (*Lexforum.cz*, 9 December 2010, at <http://www.lexforum.cz/280> last accessed on 12 June 2017); M Maliar, 'Cram – down a štátna pomoc v SR' (*Lexforum.cz*, 25 April 2010,

terest of legal commentators has been rather sporadic.[28]

An overview of case law yields even less. I am not aware of any case in which the Slovak courts addressed the private enforcement of EU State aid law.

Therefore, in analysing potential avenues under Slovak law, I will be relying to a large extent on German and Austrian legal doctrine and precedents as Slovak law is, to a large extent, modelled on Austrian and German law. At the same time, German and Austrian doctrine and case law have already addressed many questions that tend to arise in the interaction between national and EU law. Given the similarities of the respective national legal systems, the approaches developed in Germany and Austria can serve as a blueprint for Slovakia.

2. Available Avenues – General Notes

The availability and nature of legal remedies of third party claimants, be they competitors or other third parties, depends first and foremost on whether the aid has already been dispensed. If the aid has not yet been implemented, the primary objective will be to prevent its payment. If the aid has already been dispensed, the claimant may wish to pursue the recovery of such aid (possibly with interest) by the beneficiary or the recovery of damages sustained by the claimant itself.

It must be noted that Slovak law does not provide specific avenues to address unlawful State aid. In other words, whatever actions may be available, they must fit into the existing framework of Slovak remedies. We will analyse the potential avenues to (i) prevent the payment of unlawful aid, (ii) achieve the recovery of aid, and (iii) obtain compensation for losses.

3. Preventing the Payment of Unlawful Aid

Pursuant to the Court of Justice and the Commission Notice, the national court is obliged to prevent unlawful aid from being disbursed.[29] That being said, translating this obligation into national law is far from straightforward. The following avenues can be considered.

a) Civil Action

In trying to prevent the payment of unlawful aid, the claimant could try to avail itself of the general jurisdiction of civil courts. This could take the form of (i) bringing an action for declaratory relief to the effect that the rights and obligations related to the aid are null and void or ineffective, or (ii) bringing an action for injunctive relief to the effect that the aid should not be disbursed. Both alternatives will be analysed in turn.

i. Action for Declaratory Relief

Where the aid measure is a civil act (most notably, a contract) and it is executed in violation of Article 108(3) TFEU, it may be considered null and void[30] or ineffective.[31,32] On that basis, the claimant could file

at <http://www.lexforum.cz/237> last accessed on 12 June 2017); L Tichý, 'Rozhodnutie Európskej komisie vo veciach štátnej pomoci z pohľadu slovenského právneho poriadku' (2011) 2 Justičná Revue, 270; K Csach, 'Vymáhanie protiprávnej štátnej pomoci na základe rozhodnutia Európskej komisie' (2007) 2 Justičná Revue, 198] touching on a wide variety of questions such as the standing of State authorities to file a constitutional claim for alleged violations of their fundamental rights. In other words, the *Frucona* case would easily sustain a dissertation, but it did not touch upon private enforcement of State aid law.

28 K Csach, 'Protiprávna štátna pomoc – právne následky nezákonnej ingerencie verejnej moci do podnikania. Ingerencia orgánov verejnej moci do podnikania' (2006) Zborník príspevkov z vedeckej konferencie, 12; K Csach, 'Konkurenčné žaloby pri poskytovaní a odbúravaní subvencií v nemeckom hospodárskom práve' (2006) 10 Právnik, 1178; M Galandová and M Baus, 'Možnosti obrany konkurenta prijímateľa investičnej pomoci v zmysle vnútroštátneho práva' (*epravo.sk*, 3 September 2013), available at <https://www.epravo.sk/top/clanky/moznosti-obrany-konkurenta-prijimatela-investicnej-pomoci-v-zmysle-vnutrostatneho-prava-727.html> (last accessed on 24 May 2017); K Príkazská, 'Zodpovednosť členského štátu za porušenie práva Európskej únie s konkrétnym zameraním na štátnu pomoc' (Dissertation, Comenius University 2013); E Bukaiová, 'Enforcement of European Union State Aid Rules at National Level' (Master Thesis, Comenius University 2017).

29 *Commission Notice* (n 8), [28].

30 K Príkazská, 'Zodpovednosť členského štátu za porušenie práva Európskej únie s konkrétnym zameraním na štátnu pomoc' (Dissertation, Comenius University 2013).

31 K Csach, 'Protiprávna štátna pomoc – právne následky nezákonnej ingerencie verejnej moci do podnikania. Ingerencia orgánov verejnej moci do podnikania' (2006) Zborník príspevkov z vedeckej konferencie, 12.

32 In my view, the ineffectiveness under section 47 of the Slovak Civil Code seems more convincing than nullity. However, in light of the arguments of the Austrian Supreme Court discussed further below, it is questionable whether any civil sanction concerning the contract is necessary from an EU law point of view. In any event, this question exceeds the scope of this article.

an action for declaratory relief to the effect that rights and obligations arising under such a contract are non-existent.[33]

That being said, it is questionable whether such action would be admissible. The claimant would have to prove that it has a legal interest in such declaration, which is problematic when it comes to rights and obligations between parties other than the claimant.

This was clearly illustrated by two Austrian State aid cases concerning allegedly undervalued disposals of public assets. The first case, *Bank Burgenland,* related to the privatisation of shares in a regional bank. The selling regional government decided to accept a lower bid on the basis of criteria other than the price. The Commission ruled that this constituted unlawful State aid[34] and its decision was upheld by both the General Court and the Court of Justice.[35] In parallel, the unsuccessful bidders brought private claims before the Austrian courts claiming, *inter alia*, declaratory relief to the effect that the share purchase agreement was null and void. This claim was dismissed on the grounds that EU law merely requires the recovery of aid (in this case, the payment by the successful bidders of the amount by which their bid fell short of the claimants' bid). However, reversing the entire transaction would go beyond the objective required by EU law. On that basis, the claimants had no legal interest in a declaration of nullity because this would not alter their legal position.[36]

The second case, *Landesforstrevier L,* also related to the sale of public assets (specifically, forestry land). A public authority intended to dispose of those assets and a group of bidders claimed that the planned disposal violates EU State aid law as the authority did not select the highest bidder. The facts of the case are somewhat different than in that of *Bank Burgenland* as there was no Commission decision and the private enforcement claim was filed before the completion of the sale. The Austrian Supreme Court also opined on whether, in the event that the sale were to go ahead, the claimant would be entitled to claim the nullity of the sale agreement. The Court confirmed that the claimants would have the right to request the recovery of aid; however, this would not be based on the nullity of the underlying agreement, but directly on Article 108(3) TFEU in conjunction with the national law on unfair competition. Consequently, the Supreme Court concluded that the potential nullity or ineffectiveness of the underlying contract is irrelevant from the point of view of the claimant.[37]

All of the arguments described above appear equally valid under Slovak law. Based on established procedural doctrine, an action for declaratory relief is inadmissible when the claimant can exercise its rights by means of an action for performance (including injunctive relief).[38] Arguably, since the claimant can bring an action for injunctive relief preventing the payment of aid (as discussed below), there is no legal interest in such declaration and an action for declaratory relief would not be admissible.

ii. Action for Injunctive Relief Preventing the Payment of Aid

The claimant could file an action for injunctive relief against the granting public authority not to dispense the aid, or against the beneficiary not to accept it. The question is how to formulate this action in terms of substantive law.

One option would be to argue that a substantive basis can be drawn directly from Article 108(3) TFEU. In other words, that Article 108(3) TFEU provides the claimant with an actionable right to prevent the disbursement of aid.

Indeed, there is a notable decision of the Czech Supreme Court that seems to follow this logic.[39] The operator of a private hospital filed an action against a regional government requesting the court to order the respondent to refrain from disbursing financial aid to certain public hospitals. At first instance and

33 Príkazská is discussing an action for declaratory relief that the contract is null and void (K Príkazská, 'Zodpovednosť členského štátu za porušenie práva Európskej únie s konkrétnym zameraním na štátnu pomoc' (Dissertation, Comenius University 2013)). However, the new Code of Civil Litigation adopted in the meantime no longer allows for actions for declaratory relief regarding the nullity of contract. Declaratory relief needs to be tied to specific rights and obligations (M Števček, '*Veľké Komentáre. Civilný sporový poriadok*' (1st edition, C. H. Beck SK 2016), 505).

34 *Bank Burgenland* (Case C56/2006) Commission Decision ex NN 77/2006 [2008] OJ L239/2008.

35 Joined Cases C-214/12 P, C-215/12 P and C-223/12P *Land Burgenland, Grazer Wechselseitige Verscherung AG and Republic of Austria v European Commission* [2013] ECR I-682.

36 OGH, 4 Ob 209/13h, 25 March 2014, p. 12. For a further background on the case, cf. J Barbist, J Halder, R Schachl, 'Praxistudie: Bank Burgenland' in T Jaeger and B Haslinger (eds), *Beihilferecht Jahrbuch 2012* (Vienna/Graz: NWV Recht 2012), 551 – 571.

37 OGH, 4 Ob 154/09i, 19 January 2010.

38 M Števček, '*Veľké Komentáre. Civilný sporový poriadok*' (1st edition, C. H. Beck SK 2016).

39 Supreme Court of the Czech Republic (2014) Cdo 1341/2012.

on appeal, the claim was dismissed because the courts concluded that they had no jurisdiction to assess the compatibility of the aid. The Supreme Court overturned the decision, clarifying that while it is true that national courts have no jurisdiction to rule on the compatibility of the aid, the case at hand did not require such assessment. To the contrary, the courts should have merely assessed whether the measure constituted aid. If that question was answered in the affirmative, the courts should have drawn the necessary conclusions from that finding. On finding that the standstill obligation set out in Article 108(3) TFEU has been violated, the courts are obliged to protect third parties' rights.

The Supreme Court ruling itself did not specifically analyse the legal basis for authorising the national courts to order the public authority not to pay aid in breach of the standstill obligation. However, it does appear that the Court would have derived that obligation directly from Article 108(3) TFEU.

Alternatively, a legal basis may be sought under national law. This could be either on the basis of general provisions safeguarding rights against unlawful interference (usually found in the law of torts) or on the basis of the law of unfair competition.

Under German law, two legal bases in general civil law have been put forward. Firstly, section 823(2) of the German Civil Code (BGB) stipulates the general obligation to compensate losses caused by the violation of a "statute intended to protect another person". Secondly, section 1004(1) BGB protects owners against undue interference with their property and has also become understood as protecting other legal interests.[40] The private enforcement of State aid in Germany has been tested in particular in a series of decisions concerning alleged aid granted by State-controlled airports to certain airline operators (*Berlin Schönefeld*[41]; *Flughafen Lübeck*[42]; *Flughafen Frankfurt-Hahn*[43]; apart from airline operators, the *Konzertveranstaltungen* case is also worth mentioning[44]). The German Federal Supreme Court repeatedly confirmed that the competitor of an aid beneficiary is intended to be protected by the standstill obligation and that Article 108(3) TFEU is thus a "statute intended to protect another person". Consequently, such competitor has a tortious claim under section 823(2) BGB and section 1004(1) BGB.[45]

Under Slovak law, the question of *ex ante* injunctive relief is not settled. The general provision on torts (section 420 of the Slovak Civil Code) that corresponds to section 823 BGB is generally interpreted as a basis for *ex post* damages claims, not for *ex ante* injunctive relief.[46] Injunctive relief might be available under section 417 of the Civil Code which provides the basis for injunctive relief to prevent the threat of losses. Under this provision, a court can order the respondent to undertake active measures to prevent the damage, but also to refrain from harmful activity.[47] Although this provision is usually not used in a business context, it could theoretically, in conjunction with Article 108(3) TFEU, serve as a basis for an *ex ante* injunctive claim to prevent the payment of State aid.

Alternatively, an injunctive claim could be based in the law of unfair competition.

Similarly to Austrian and German law, Slovak law provides for a general prohibition of unfair competition.[48] Under Slovak law, unfair competition is broadly defined as any conduct between competitors that violates "the good morals of competition" and has the potential to harm the interests of a competitor.[49] A competitor has the right to bring an action for injunctive and reparatory relief (both monetary and non-monetary).[50] On that basis, it can be analysed whether the provision and acceptance of unlawful State aid constitutes unfair competition.

Qualifying the implementation of unlawful aid as unfair competition found strong resonance with the

40 F Aust, *Private Enforcement im europäischen Beihilferecht* (GRIN 2011), 6.

41 BGH, 21 July 2011, I ZR 209/09; Ch Koenig and M Hellstern, ‚Die Klagebefugnis bei wettbewerbsrechtlichen Klagen gegen unionsrechtswidrige Beihilfemaßnahmen' (2012) 1 GRUR Int., 14-18.

42 OLG Schleswig-Holstein, 8 April 2015, 6 U 54/06; BGH 9 February 2017, I ZR 91/15.

43 BGH, 10 February 2011, I ZR 136/09.

44 OLG Hamburg, 31 July 2014, 3 U 8/12.

45 BGH, 21 July 2011, I ZR 209/09, paras 18 and 28; BGH, 10 February 2011, I ZR 136/09, para B.I.2; OLG Schleswig-Holstein, 8 April 2015, 6 U 54/06, para 43; OLG Hamburg, 31 July 2014, 3 U 8/12, para 77; also F Aust, *Private Enforcement im europäischen Beihilferecht* (GRIN 2011), 7, and the literature cited therein.

46 The notion of basing an *ex ante* injunctive claim on provisions designed for *ex post* compensation (*Quasinegatorischer Unterlassungsanspruch*) is not developed under Slovak law.

47 M Števček, '*Veľké Komentáre. Civilný sporový poriadok*' (1st edition, C. H. Beck SK 2016), 1328; Supreme Court of the Slovak Republic (2006) R 39/2006.

48 Commercial Code 1991, ss 44 *et seq.*

49 Commercial Code 1991, s 44.

50 Commercial Code 1991, ss 53 – 55.

Austrian courts. In *Landesforstrevier L*, the Austrian Supreme Court opined that a violation of the standstill clause in Article 108(3) TFEU can trigger injunctive relief under the Austrian Unfair Competition Act (UWG). The Court also confirmed that bidders for public assets are at least *ad hoc* competitors.[51] The Austrian Supreme Court reached the same conclusion in the *Bank Burgenland case*, where it confirmed that a violation of the standstill obligation constitutes unfair competitive conduct under section 1(1) UWG and can thus be used as a legal basis for injunctive relief.[52]

The same argument was also upheld by the German Federal Supreme Court. As discussed above, the Federal Supreme Court based injunctive claims against State aid measures on general tort law provisions, but it also upheld parallel claims for unfair competition.[53]

The connection between unlawful State aid and unfair competition was also discussed in a notable Czech case.[54] The private operator of sports facilities filed an action against the Czech Republic represented by the Ministry of Education, Youth and Physical Education for unfair competition. The Ministry was providing grants to non-profit sport facilities, which, according to the claimant, constituted unfair competition. The claim was dismissed on the grounds that the Ministry was not acting "immorally" (which is a constitutive element of unfair competition) because the grant system did not breach State aid law. Nonetheless, the case is interesting because the courts did not dismiss the possibility of filing an unfair competition claim against the authority granting State aid and went on to analyse the constitutive elements of unfair competition.

In our view, all of the above is equally relevant in the Slovak context. Slovak unfair competition law is sufficiently flexible to accommodate a wide variety of actions that are harmful to the competitive environment, including, arguably, unlawful aid. Of course, the specific aspects of each situation would have to be considered, but the overall legal framework is available.

Unlawful State aid could be treated as an act violating "the good morals of competition" and thus constituting unfair competition. Any person whose rights have been infringed or jeopardised by such conduct would have an action for injunctive relief.[55] This may include competitors and other affected persons.[56]

The essential question is whether such claim would be directed against the granting public authority or against the beneficiary.

Most likely, a claim based solely on Article 108(3) TFEU (possibly in conjunction with the general provisions of national tort law) could only be directed against the granting authority. In a related context, the Court of Justice already held that Article 108(3) TFEU does not impose any direct obligations on the beneficiary, only on the granting authority.[57, 58] By extension, this would mean that merely *accepting* the aid (as opposed to *granting* it) does not violate Article 108(3) TFEU.

However, this limitation does not have to apply to unfair competition claims. It can be argued that the beneficiary is acting "immorally" by accepting un-

51 OGH, 4 Ob 154/09i, 19 January 2010.

52 OGH, 25 March 2014, 4 Ob 209/13h. Similarly OGH, 21 June 2011, 4Ob40/11b. Also FP Sutter, 'Kommentar. VII. Rückabwicklung von rechtswidrigen Beihilfen. D. Rückforderung vor nationalen Gerichten und die Frage einer Konkurrentenklage' in H Mayer and K Stöger (eds), *Kommentar zu EUV und AEUV* (Beck 2014).

53 BGH, 21 July 2011, I ZR 209/09, para 35; BGH, 10 February 2011, I ZR 136/09.

54 Supreme Court of the Czech Republic (2016) 23 Cdo 2493/2014.

55 Commercial Code 1991, s 53.

56 A separate discussion relates to *locus standi*. Pursuant to the Commission Notice and case law of the Court of Justice, national law may not limit standing only to the competitors of the beneficiary, but should also grant standing to certain unaffected third parties (*Commission Notice* (n 8), [72] and the case law cited therein). This question was addressed by the German courts in the *Konzertveranstaltungen* case. The appellate court in Hamburg ruled that a claimant who is not a direct competitor of the beneficiary does not have standing to bring the claim as there is no tortious *actio popularis* (OLG Hamburg, 31 July 2014, 3 U 8/12, para 78; for the position under German law, see also Ch Koenig and M Hellstern, ‚Die Klagebefugnis bei wettbewerbsrechtlichen Klagen gegen unionsrechtswidrige Beihilfemaßnahmen' (2012) 1 GRUR Int., 14-18). Under the Slovak law of unfair competition, a claim may be brought by a person, whose rights were affected or jeopardised or by an entity defending collective rights of competitors or consumers (Commercial Code 1991, ss 53 and 54). Whether third persons who fall outside this scope would have legal standing is an intriguing question that exceeds the scope of this article.

57 *Commission Notice* (n 8), [54]; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, [72-74].

58 In Germany, it was ruled that the beneficiary does not violate any legal obligation by receiving the aid, because Article 108(3) TFEU is only addressed to the State, not to the beneficiary (OLG Hamburg, 31 July 2014, 3 U 8/12, para 79). However, this view is not universal and the OLG Hamburg itself referred to commentators that affirm the existence of a claim based on Article 108(3) TFEU in conjunction with section 823(2) BGB directly against the beneficiary (OLG Hamburg, 31 July 2014, 3 U 8/12, paragraph 80 and the sources cited therein).

lawful aid, especially since a diligent businessman would have been able to verify whether the received aid was notified or not.[59] The jury is out on whether such argument would ultimately prevail before the Slovak courts, but it is certainly conceivable that the claimant could have a direct injunctive action against the beneficiary.

Consequently, basing the case on the law of unfair competition may enable a direct action against the beneficiary. On the other hand, if the action were also to be directed against the granting authority, it would bring up the question of whether it is a *competitor*. In the *Bank Burgenland* case, the Austrian Supreme Court opined that the sale of public assets is not an act *iure imperii* and can hence be subject to unfair competition rules. Under Slovak doctrine, the term *competitor* is defined quite broadly[60] and therefore it may encompass the State acting as a seller in privatisation procedures. On the other hand, it would probably not apply to the State awarding tax breaks or direct subsidies by means of administrative decisions.[61]

To sum up, a civil claim for injunctive relief against the implementation of an aid measure seems plausible under Slovak law. It may be based directly on a violation of Article 108(3) TFEU (possibly in conjunction with national tort law provisions) or the national law of unfair competition. Both heads of claims may also be relied on in parallel, with the former being more plausible against the granting authority as a direct addressee of Article 108(3) TFEU and the latter against the competitor arguably acting "immorally" by accepting unlawful aid.

b) Administrative Proceedings

In some cases, the claimant could avail itself of the tools of administrative proceedings.[62]

Where the aid measure is an administrative act, the violation of the standstill obligation, arguably, renders it unlawful.[63] As a consequence, it is not automatically void but it could be annulled on the basis of an administrative appeal or *ex officio*. Unless the appellate administrative body proceeds to annul it *ex officio*, an administrative appeal would have to be filed by a party to the administrative proceedings. The claimant, be it a competitor or another third party, would most likely not be a party to the administrative proceedings.[64] Therefore, under a formal reading, it would be barred from filing an administrative appeal[65] or an action for judicial review.[66]

The claimant could argue that the definition of *party* in administrative proceedings needs to be read in line with the case law of the Court of Justice and the principle of effectiveness. Arguably, there is even some textual basis for this in the Code of Administrative Proceedings, which defines a party as, *inter alia*, someone who claims to potentially be directly affected in terms of their rights, protected interests and obligations. Case law concerning the Aarhus Convention[67] shows that this definition can be stretched to comply with international law require-

59 Case C-5/89 *Commission v Germany* [1990] ECR I-3437, [14]; Case C-169/95 *Spain v Commission* [1997] ECR I-135, [51]; and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, [104]; Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, [25]; and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1857, [64].

60 M Patakyová, '*Obchodný zákonník. Komentár*' (5th edition, CH Beck SK 2016), 180-182.

61 Similarly, some Austrian commentators have concluded that the law of unfair competition may be invoked against the beneficiary of aid, but not against the granting authority, because acts *iure imperii* cannot be treated as competitive conduct (C Lintschinger, 'Private Durchsetzung des Beihilfeverbots und neuere Judikatur österr. Und dt. Gerichte' (2012) JAHRBUCH 505 and the sources cited therein).

62 For the German discussion on whether to bring an action before administrative or civil courts, cf. A Birnstiel and H Heinrich, 'Stärkung des "Private Enforcement" im Beihilfenrecht. Zu den verbesserten Perspektiven der dezentralen Beihilfenkontrolle in Deutschland – zugleich eine Besprechung von BGH 10.2.2011, I ZR 136/09 – Flughafen Frankfurt-Hahn und BGH 10.2.2011, I ZR 213/08 – Flughafen Lübeck' (2011) 2 Beihilfenrecht, 67.

63 K Csach, 'Protiprávna štátna pomoc – právne následky nezákonnej ingerencie verejnej moci do podnikania. Ingerencia orgánov verejnej moci do podnikania' (2006) Zborník príspevkov z vedeckej konferencie, 12.

64 M Galandová and M Baus, 'Možnosti obrany konkurenta prijímateľa investičnej pomoci v zmysle vnútroštátneho práva' (*epravo.sk*, 3 September 2013 at <https://www.epravo.sk/top/clanky/moznosti-obrany-konkurenta-prijimatela-investicnej-pomoci-v-zmysle-vnutrostatneho-prava-727.html> last accessed 24 May 2017). Also cf. the Austrian discussion on this question in C Lintschinger, 'Private Durchsetzung des Beihilfeverbots und neuere Judikatur österr. Und dt. Gerichte' (2012) Jahrbuch Beihilferecht, 505. Some Austrian commentators argue that the position of a party to proceedings follows directly from Article 108(3) TFEU; others object that it would be essentially impossible to identify all potentially affected parties and to award them procedural rights.

65 Code of Administrative Proceeding 1967, s 53.

66 Code of Administrative Judicial Review 2015, s 178.

67 Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministry of the Environment of the Slovak Republic* [2011] ECR I-01255; Supreme Court of the Slovak Republic (2015) 3 Sži 22/2014 (R 104/2015).

ments. That being said, with a lack of precedents and a formalistic legal tradition, trying to claim the position of a party may be an uphill struggle.

If the claimant were to pass the procedural hurdle of establishing that it should be treated as a party and thus awarded standing to challenge the measure by way of an administrative appeal or an action for judicial review, effective remedies would be available.

By way of interim protection, the situation may unfold as follows. If an administrative appeal is available (depending on the specific type of administrative measure in question), the measure would not become final and effective pending such appeal. In other words, the aid awarded under such measure would not be put into effect pending a decision on the appeal. If the administrative measure was challenged by way of an action for judicial review, such action would not automatically suspend its effectiveness. However, the court could suspend its enforceability[68] and thus prevent the aid measure from being implemented.

As a matter of substance, an administrative decision adopted in violation of Article 108(3) TFEU would be unlawful. On that basis, it should be annulled by the reviewing administrative authority or the court.

If the claimant does not establish standing, it could also file a request for *ex officio* review by the appellate administrative body[69] or for review by a prosecutor.[70] However, in both cases, such review is discretionary.

In summary, the avenue of administrative proceedings is theoretically available to prevent the implementation of an aid measure on the basis of an administrative decision. However, the initial procedural hurdle of establishing standing may be cumbersome to pass in practice.[71]

A related question is whether a private litigant could avail itself of the civil actions described in the above section III.3.a) to prevent the payment of aid granted on the basis of an administrative act. The line between civil and administrative law is sometimes blurred in practice and a definitive answer would depend on a case-specific analysis. That being said, it appears unlikely that a claimant could file a civil action against a public authority acting *iure imperii* (*e.g.* awarding a tax break). On the other hand, it is not inconceivable that such civil action would be available against the beneficiary. As discussed in section III.3.a), it can be argued that an undertaking accepting unlawful State aid is acting "immorally" and thus engaging in unfair competition. This conclusion may hold regardless of whether such aid is granted on the basis of a civil contract or an administrative decision. If this is the case, the beneficiary may also be on the receiving end of an unfair competition action.

4. Achieving the Recovery of Unlawfully Paid Aid

Under the Commission Notice, interested third parties should also be able to petition national courts to order the recovery of unlawful State aid (including interest). Specifically, the Commission Notice states that when a national court is confronted with unlawfully granted aid, it must in principle order the full recovery of unlawful aid from the beneficiary.[72]

Again, the substantive basis for such claim under national law must be analysed.

In the event that the aid was granted on the basis of a civil act, it could be argued that the payment constitutes unjust enrichment on the basis that the underlying contract is null and void[73] or ineffective.[74] Consequently, any performance rendered on the basis of such a contract constitutes unjust enrichment and must be restored.[75]

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68 Code of Administrative Judicial Review 2015, s 185.

69 Code of Administrative Proceeding 1967, s 53.

70 Public Prosecutor's Office Act 2001, s 21.

71 For an interesting discussion, cf. BVerwG, 16 December 2010, 3 C 44.09 and DT Wiemer, 'BVerwG: Stärkung des "Private Enorfement" – Anspruch des Konkurrenten eines Beihilfeempfängers auf verzinste Rückzahlung einer wegen Verstosses gegen das Durchführungsverbot (Art 108 Abs 3 Satz 3 AEUV) rechswidrigen Beihilfe' (2011) 2 Beihilfenrecht, 101. Pursuant to these sources, the obligation to repay aid granted by an administrative act can only arise after the annulment of the underlying administrative decision. Third parties should have the right to challenge those decisions and the statutory period to do so should only start after they have (or could have) become aware of the decision.

72 *Commission Notice* (n 8), [30]; Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, [49]; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, [40, 68]; and Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France* [1991] ECR I-5505, [12].

73 K Príkazská, 'Zodpovednosť členského štátu za porušenie práva Európskej únie s konkrétnym zameraním na štátnu pomoc' (Dissertation, Comenius University 2013).

74 K Csach, 'Protiprávna štátna pomoc – právne následky nezákonnej ingerencie verejnej moci do podnikania. Ingerencia orgánov verejnej moci do podnikania' (2006) Zborník príspevkov z vedeckej konferencie, 12.

75 Civil Code 1964, ss 451 *et seq.*

As for the relationship between the granting authority and the beneficiary, unjust enrichment may indeed arise. However, whether such claim can be brought by a third party is debatable.

As the Austrian Supreme Court poignantly explained, a third party claimant has no legal interest in the declaration of nullity of a contract between the granting authority and the beneficiary. The third party does have a claim for the recovery of aid, although this is not based on the nullity of the contract, but rather on the violation of Article 108(3) TFEU in conjunction with national unfair competition law.[76] On that basis, the Austrian Supreme Court concluded that the question of whether a violation of the standstill obligation renders the contract null and void can be left open.[77] This is not in breach of the effectiveness principle because the claimant may claim the prevention of payment, recovery and damages[78] (albeit on a different legal basis).

In a similar vein, the Austrian Supreme Court also circumscribed the claims of a competitor in the *Bank Burgenland* case. It ruled that while EU law requires the recovery of unlawful State aid, it does not require a reversal or nullity of the underlying sale contract; in other words, the requirements of EU law are satisfied by the beneficiary repaying the aid (*i.e.* the difference between the price paid for privatised assets and their market value), rather than reversing the underlying transaction by restoring the shares to the seller.[79] As further explained by the Austrian Supreme Court, a violation of Article 108(3) TFEU constitutes unfair competition and thus gives rise to an adjustment of the purchase price, but not a reversal of the transaction.[80]

Those considerations appear equally relevant under Slovak law. The law of unjust enrichment is unlikely to be a sufficient legal basis for a third party to request that the beneficiary return the aid to the granting authority.

Alternatively, similarly to preventing the disbursement of aid in the first place, the claimant may either rely directly on Article 108(3) TFEU or on the national law of unfair competition.

As for relying directly on Article 108(3) TFEU, such a claim appears plausible, but only against the granting public authority. It is unlikely to be a sufficient legal basis against the beneficiary, as the beneficiary is not an addressee of that provision.

Therefore, similarly to the discussion about injunctive claims in the above section III.3.a), the claimant may prefer to rely on the law of unfair competition. As discussed above, granting State aid may constitute unfair competition. On that basis, competitors may request that the *status quo ante* be restored, which means that the aid (and the relevant illegality interest) must be repaid.

In cases where the aid was granted by means of an administrative act, the situation is less clear.

The claimant could try to challenge the underlying administrative decision (as discussed in section III.3.b)). Once the decision is annulled, the granting public authority should demand the recovery of aid. It is debatable whether the claimant would have a direct action to force the recovery of aid if the authority fails to act. Two avenues may be considered.

Firstly, the claimant could employ administrative remedies against an authority's failure to act.[81] Secondly, the claimant could attempt to launch a civil action for unfair competition despite the fact that when granting the aid, the authority was acting *iure imperii*. The claimant would have to argue that by refusing to return unlawful State aid, the beneficiary is engaged in unfair competition. On that basis, the claimant could request a court to order the beneficiary to refrain from such conduct and to remove the consequences, *i.e.* to return the aid.

This is not implausible. As discussed above, the general clause defining unfair competition is based on the general notion of conduct violating "the good morals of competition". Such an open-ended definition could be used to argue that accepting and retaining unlawful State aid is "immoral". According to established case law of the Court of Justice, a beneficiary of unlawful aid cannot plead legitimate expectations because a diligent businessman would have been able to verify whether the received aid was notified or not.[82] This was held in relation to whether

76 OGH, 4 Ob 154/09i, 19 January 2010, para 3.2.

77 OGH, 4 Ob 154/09i, 19 January 2010, para 3.2.

78 OGH, 4 Ob 154/09i, 19 January 2010, para 3.4.

79 OGH, 25 March 2014, 4 Ob 209/13h, para 9.

80 OGH, 25 March 2014, 4 Ob 209/13h, para 10.

81 Code of Administrative Proceeding 1967, s 50; Public Prosecutor's Office Act 2001, ss 28 and 29.

82 Case C-5/89 *Commission v Germany* [1990] ECR I-3437, [14]; Case C-169/95 Spain v Commission [1997] ECR I-135, [51]; and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, [104]; Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, [25]; and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, [64].

beneficiaries can invoke the principle of legitimate expectations to resist a Commission recovery order. However, the underlying rationale has wider implications. If the beneficiary knew (or should have known) that the aid was unlawful, it can be argued that it acted "immorally" when accepting such aid and continues to act "immorally" by refusing to return it.

It is not clear whether such argument would ultimately prevail. Moreover, specific facts in a given case may also play a role. However, as a general conclusion, a direct claim against the beneficiary of unlawful aid to return such aid, even if it had been granted by an administrative act, appears plausible.

5. Interim Measures in Civil Proceedings

The Commission Notice also addresses interim measures as an effective tool in enforcing rights arising under EU State aid law. The Commission Notice states that national courts are also obliged to take interim measures to safeguard the rights of individuals and the effectiveness of Article 108(3) TFEU.[83]

The need for such interim measures can, essentially, arise in two situations.

First, an interim measure can be requested before the aid has been disbursed to prevent its payment.[84]

Under Slovak procedural law, civil courts can issue interim measures ordering a party to perform an act or to refrain from performing an act.[85] In other words, the scope of an interim measure can essentially encompass any form of conduct. In this sense, it would also be possible to issue an interim measure ordering the granting authority to refrain from implementing an aid measure.

The underlying question is identical to the one concerning a final decision preventing the payment of aid or the ordering of recovery, whether such actionable right exists under Slovak law. As discussed above, I believe that this right does exist.

On that basis, an injunctive order could be made in the form of an interim measure. Such interim measure could be ordered in the course of proceedings on the merits or even in the absence of such proceedings. In the latter case, the parties will either follow up with an action on the merits or the interim measure will effectively resolve the dispute.

Secondly, the Commission Notice also mentions interim recovery to at least terminate the anti-competitive effects of the aid on a provisional basis.[86] In particular, the Commission suggests that the amount of aid and the illegality interest may be put in a blocked account pending a resolution of the matter.[87] In theory, Slovak courts do have the procedural tools to order such measure. Whether such measure would be deemed proportionate depends on the specific case.

Finally, Slovak procedural law also provides an option to order an interim measure to secure the enforcement of a claim pending the outcome of proceedings. With this measure, the court can create a security interest over the debtor's assets. This measure would be a viable option to secure the recovery of State aid, pending the outcome of proceedings on the merits.

6. Obtaining Compensation for Losses

Finally, under the Commission Notice, third parties should also be entitled to compensation for losses incurred as a result of unlawful aid.[88] In practical terms, this would mostly encompass losses of profit of competitors that had to compete with a subsidised undertaking.[89] In general, Slovak law awards compensation for lost profit.

Obviously, quantifying and evidencing such loss would be a challenging endeavour that would warrant a separate examination. In this article, I will only address the legal basis for such damages claims.

In analysing the legal basis for damages claims, it must be distinguished whether the unlawful aid was granted by the State when exercising its public authority (*iure imperii*) or in a commercial setting (*iure gestionis*). Both situations will be analysed in turn.

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83 *Commission Notice* (n 8), [56]; Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France* [1991] ECR I-5505, [12]; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, [52]; and Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, [46].

84 *Commission Notice* (n 8), [58].

85 Code of Civil Litigation 2015, s 325.

86 *Commission Notice* (n 8), [60]; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, [52]; and Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, [46].

87 *Commission Notice* (n 8), [61].

88 *Commission Notice* (n 8), [43]; Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, [53,55]; Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, [56]; and Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008)], [54].

89 *Commission Notice* (n 8), 49.

a) State Aid granted by a Civil Act

Granting State aid in violation of Article 108(3) TFEU constitutes unlawful conduct. In cases where such conduct is not *iure imperii*, it falls under the provisions of civil and commercial law.

As discussed above, section 420(1) of the Slovak Civil Code provides for a general obligation to compensate losses caused by the violation of a legal obligation.[90] Similarly, section 373 in conjunction with section 757 of the Slovak Commercial Code also provides for the obligation to compensate losses caused by such violation of a legal obligation.[91] The standstill obligation enshrined in Article 108(3) TFEU does constitute such a legal obligation and by violating it, the granting authority becomes liable for losses caused as a consequence of such breach.

As discussed above, the provision of State aid can also be qualified as unfair competition under the Slovak Commercial Code. Unfair competition also triggers damages claims.[92]

On that basis, an undertaking that has suffered a loss as a result of State aid being granted to its competitor could claim damages against the entity granting such aid.[93]

A more problematic question is whether such claim could be brought against the beneficiary of the concerned aid measure. It must be reiterated that EU law does not provide the basis for a damages claim against the beneficiary because Article 108(3) TFEU does not impose any direct obligations on the beneficiary.[94] However, the Court of Justice also emphasises that this does not prejudice the possibility of such damages claim being brought under national law, in particular the national rules on non-contractual liability.[95]

Whether such a claim exists under Slovak law is disputable. Since Article 108(3) TFEU does not impose obligations on the beneficiary, it is probably not possible to base a damages claim on the general provisions governing liability for the violation of a statutory obligation.[96]

That being said, the claimant could still invoke the provisions on unfair competition. As discussed above, the general clause defining unfair competition is based on the general notion of conduct violating "the good morals of competition". Such an open-ended definition could be used to argue that accepting unlawful State aid is "immoral", in particular since a diligent businessman would have been able to verify whether received aid was notified or not.[97] On that basis, a damages claim against the beneficiary of unlawful aid appears plausible under Slovak law.[98]

b) State Aid Granted in the Exercise of Public Authority

State aid may also be provided by an act *iure imperii, i.e.* in the exercise of public authority. In these cases, the provisions on tortious civil liability cannot be invoked against the public authority. The same applies to provisions on unfair competition.[99]

The liability for losses caused by the unlawful exercise of public authority is governed by the Act on Liability for Losses caused in the Exercise of Public Authority.[100] Under this statute, the State is liable for losses incurred by private parties as a result of an unlawful decision or undue official conduct. In the for-

90 Section 420(1) of the Civil Code refers to any legal obligation and is thus wider than section 823 BGB.

91 For historical reasons, Slovak law contains parallel provisions on general questions of contract law and tort law – one set of such provisions being set out in the Civil Code and the other set being set out in the Commercial Code. In theory, the Commercial Code should apply to B2B relations, whereas the Civil Code should apply to C2C and B2C relationships. However, in practice, the delimitation of both sets of rules is often blurred and it is not clear whether a breach of Article 108(3) TFEU would constitute a civil tort under section 420(1) of the Civil Code or a commercial tort under section 373 in conjunction with 757 of the Commercial Code. This does not need to be of much concern for the international audience – suffice it to conclude that one or the other would be a suitable basis for a general tort based on the violation of the standstill obligation.

92 Commercial Code 1991, s 53

93 In addition to national law, a damages claim could also be based on the *Francovich* doctrine, as discussed in paragraph 45 *et seq.* of the *Commission Notice* (n 8).

94 *Commission Notice* (n 8), [54]; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, [72-74].

95 *Commission Notice* (n 8), [55]; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, [75].

96 This corresponds to the opinion expressed under German law in OLG Hamburg, 31 July 2014, 3 U 8/12, para 79.

97 Case C-5/89 *Commission v Germany* [1990] ECR I-3437, [14]; Case C-169/95 *Spain v Commission* [1997] ECR I-135, [51]; and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, [104]; Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, [25]; and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, [64]

98 K Príkazská, 'Zodpovednosť členského štátu za porušenie práva Európskej únie s konkrétnym zameraním na štátnu pomoc' (Dissertation, Comenius University 2013).

99 OLG Hamburg, 31 July 2014, 3 U 8/12, paragraph 91.

100 Act on Liability for Losses caused in the Exercise of Public Authority 2003.

mer case, the annulment of the decision in question is a precondition for a successful damages claim.[101]

State aid can be granted by an administrative decision, *e.g.* a tax break. It can also be granted by a judicial decision, *e.g.* a decision in bankruptcy or restructuring proceedings, an interim measure,[102] or even by a legislative act.[103] In those cases, the decision would first have to be annulled (usually on appeal or under a specific procedural remedy).

The claimant would have to establish that it was (or should have been) a party to the proceedings in which the unlawful decision was issued. As discussed in the above section III.3.b), a competitor affected by the awarding of State aid could plausibly argue that it should be a party to the relevant administrative proceedings. However, passing this procedural hurdle would require a relatively flexible interpretation of the relevant procedural rules.

If the aid was granted by official conduct that did not result in a formal decision, a damages claim could be brought. The claimant would have to establish that the official conduct was unlawful.

Finally, even if the aid measure was awarded by an act *iure imperii*, the claimant can still consider a civil damages claim against the beneficiary. As discussed above, the claimant would have to establish that the acceptance of aid constituted "immoral" conduct and thus unfair competition. In those cases, a damages claim against the beneficiary may be conceivable, even though it is probably a long shot.

IV. Conclusion – A Case for More Harmonisation?

To sum up, all types of private actions envisaged under the Commission Notice are, in principle, available under Slovak law. That being said, each of them has its own procedural or substantive difficulties and there are a number of hurdles that they would have to pass.

This is certainly not unique to Slovakia as many of these problems have been addressed in various jurisdictions.[104] Needless to say, the German and Austrian case law cited above also goes to show that even two such well-developed jurisdictions have had to grapple with the interaction between EU State aid law and national law.

These problems are further exacerbated by the fact that answers have to be sought in so many different areas of law. There is not just the interaction between EU law and national law, but also between various areas of national law, in particular public law, general tort law, unfair competition law, State liability law, civil procedure and administrative procedure. In the absence of specific tailor-made rules, a potential claimant would run into a number of procedural and substantive difficulties when pursuing such claim.[105]

In addition, the private enforcement of State aid law has largely escaped the interest of legal commentators in Slovakia[106] and the question is scarcely posed in legal practice. Although there are numerous entanglements between the State and the economy, some of which could be classified as State aid, there are no reported cases of competitors or other third parties attempting to bring these cases before a national court. Based on a few public cases, it appears that economic operators and even other parties (such as public interest NGOs) are well aware of the option to file complaints with the Commission regarding the alleged granting of unlawful State aid.[107] How-

101 In this context Austrian doctrine also refers to an action for damages caused by the exercise of public authority (*Amtshaftungsklage*), cf. C Lintschinger, 'Private Durchsetzung des Beihilfeverbots und neuere Judikatur österr. Und dt. Gerichte' (2012) Jahrbuch Beihilferecht, 505.

102 Case C-590/14 *Alouminion tis Ellados VEAE v Commission* [2016] ECR I-797.

103 C Lintschinger, 'Private Durchsetzung des Beihilfeverbots und neuere Judikatur österr. Und dt. Gerichte' (2012) Jahrbuch Beihilferecht, 505.

104 M Kelve-Liivsoo, A Knjazev and T Kookmaa, 'Legal Remedies Available to Competitors of Recipients of Unlawful State Aid under Estonian Law' (2015) Juridica International, 98109; A Metselaar, 'Who can invoke State aid Law before National Judges? That floating Question of legal interest in the case Law of Dutch Courts' (2014) European State Aid Law Quarterly, 250. Also referring to the discussion on competitors standing in civil cases invoking State aid law in Germany, Portugal, Austria and Sweden: C Arhold, K Struckmann and F Zibold, 'German Federal Court of Justice strengthens procedural rights for competitors of recipients of potential State aid (European Air wars follow up)' (2011) EStAL, 195; M Romao, 'State Aids in Portuguese Case Law: So many but so Little, or Much ado about Nothing?' (2011) EStAL; B Rumersdorfer, 'Did the Sale of a provincial forest district involve State Aid? The Jury is still out' (2011) EStAL, 190; O Eriksson, 'The Swedish Supreme Court opens for Competitors Proceedings in State Aid Cases' (2010) EStAL, 19.

105 E Bukaiová, 'Enforcement of European Union State Aid Rules at National Level' (Master Thesis, Comenius University 2017).

106 Only a few exceptional academic theses address the issue – K Príkazská, 'Zodpovednosť členského štátu za porušenie práva Európskej únie s konkrétnym zameraním na štátnu pomoc' (Dissertation, Comenius University 2013); E Bukaiová, 'Enforcement of European Union State Aid Rules at National Level' (Master Thesis, Comenius University 2017).

107 Eurpean Commission, *State Aid implemented by Slovakia for NCHZ* (Case SA.33797); Commission Decision (2013/C) (ex 2013/NN) (ex 2011/CP) [2014] OJ L/269/2015; *State Aid implemented by Slovak Republic for Spoločná zdravotná poisťovňa, a.s. and Všeobecná zdravotná poisťovňa, a.s.* (Case SA.23008) Commission Decision 2013/C (ex 2013/NN) [2014] OJ L/41/2015

ever, anecdotal evidence suggests that the option to initiate private litigation is rarely used.[108]

This state of affairs may be a vicious cycle. Due to the absence of academic writings, the option to pursue private litigation is largely unknown to potential claimants or the courts. This means that private enforcement actions are not even considered by potential claimants or, to the extent that they are, there is a concern that they will be dismissed by courts unfamiliar with the field. This, in turn, means that actions do not make it to the courts and do not lead to the creation of precedents that would raise the interest of the legal community and reinforce the chances of such actions.

The obvious question is whether more may be done to advance the cause of private State aid enforcement. The comparison with the private enforcement of competition law comes to mind. The Damages Directive[109] and its transposition into national law[110] facilitated the actual enforcement of private damages claims by mandating legal changes in a few crucial areas. However, on top of that, it also had a 'soft' impact in raising awareness of the issue and in triggering a number of articles[111] and seminars. There are no hard numbers to support this claim, but anecdotal evidence suggests that increasing awareness of the option to file private damages claims in the legal and business community will ultimately contribute to an increasing number of such claims and thus to the emergence of case law.

The Commission Notice has already gone a long way to facilitate the private enforcement of State aid law. Nonetheless, private enforcement in Slovakia remains essentially non-existent. The question now remains whether more could be done by way of legislative harmonisation.

108 According to media reports, Fortischem may have filed a damages claim against the Slovak Republic that might be the first State aid private enforcement case in Slovakia – I Haluza, 'Finančníci z pozadia nováckej chemičky žalujú štát' *Trend* (Slovakia, 4 December 2015), see at <http://www.etrend.sk/trend-archiv/rok-2015/cislo-48/financnici-z-pozadia-novackej-chemicky-zaluju-stat.html> (last accessed on 12 June 2017). No judicial rulings on this case seem to be in the public domain. I am not aware of other claims.

109 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

110 Act on certain rules governing actions for damages for infringements of the competition law provisions as amended 2016.

111 D Zavadová, 'Súkromnoprávne vymáhanie súťažného práva a transpozícia smernice o žalobách na náhradu škody spôsobenej porušením súťažného práva' (2015) 8-9/2015 Justičná revue, 987; A Králik, 'Uplatnenie náhrady škody spôsobenej porušením súťažného práva'(2015) 7-8/2015 Bulletin SAK; I Telepčák, 'Vymáhanie náhrady škody spôsobenej porušením pravidiel hospodárskej súťaže – čakajú nás zásadné zmeny?' (*epravo*, 4 March 2015, at <https://www.epravo.sk/top/clanky/vymahanie-nahrady-skody-spsobenej-porusenim-pravidiel-hospodarskej-sutaze-cakaju-nas-zasadne-zmeny-2806.html>, last accessed 3 July 2017); 'Smernica o žalobách na náhradu škody pri porušení predpisov na ochranu práva hospodárskej súťaže EÚ (2014/104/EÚ): smerom proti kartelom?' (Projustice.sk, 22 September 2015, at <http://www.projustice.sk/medzinarodne-pravo/smernica-o-zalobach-na-nahradu-skody-pri-poruseni-predpisov-na-ochranu-prava-hospodarskej-sutaze-eu> last accessed on 3 July 2017).