



The Role of National Judges in the Enforcement of EU-State Aid Law (NatJEUSAL)

Conference report on the second judges' training on 14th-15th November 2019

As part of the initiative “*The Role of National Judges in the Enforcement of the EU-State Aid Law*” funded by the European Commission Directorate General for Competition, which pursues the aim of training of national judges in European State Aid Law in cooperation with several European universities and public institutions, took place on the 14th and 15th November 2019 at the *Julius-Maximilian* University of Würzburg the second conference. Under the direction of Prof. *Florian Bien*, PhD (University of Würzburg) and of Prof. *Bernardo Cortese*, PhD (University of Padua) legal experts and judges from Germany and Latvia first dealt with substantive State aid law and secondly with thereof private enforcement, also with regard to the discussed effect of Commission decisions before national civil proceedings.

Prof. *Markus Ludwigs*, PhD (University of Würzburg) introduced the issue of the conference through an analysis of the State aid concept within the meaning of Art. 107 TFEU, by emphasising above all the considerable Commission’s steering power in the State aid control as significant expression of supranationality in the European legal system, what through the highly significant Communications and Guidelines attributes to the Commission the role of *de facto* legislator. This control procedure aims at stating the existence of the five features of State aid concept under Art. 107 TFEU within a national favourable measure and whether it can be declared compatible with the internal market. *Ludwigs* examined closely the matter of granting of an aid “by a Member State or through State resources”, whose assessment is intended to establish not only the imputability of the measure to the State but also the direct or indirect origin of the funds or, rather, the power of disposal by the State over this financial support. On this subject was highlighted the role of the correlation formula – in German “*je-desto*” formula-, i.e. the stronger the influence of the State on the granting authorities, the closer the classification of the funds as State resources, therefore the judgment of the CJEU in the case of the *EEG* (German law on renewable energy sources) surcharge¹ was analysed as a relevant example. According to *Ludwigs*, however, the CJEU would have wrongly excluded the

¹ Judgement of the Court on 28.3.2019 in Case C-405/16 P

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character of State aid of the *EEG* surcharge on account of excessive formalism, even because the level of judicial control of the State aid matter in question would normally not be as technically comprehensive as that of the Commission. Also the feature of the selectivity of State aid was explained in the light of the recent case-law of the CJEU, which has developed a three-step procedure² in the tax field in order to classify the general tax system of a Member State and, consequently, to determine the inherent justifications for any disparity in treatment resulting from the advantage granted to operators in a comparable situation.

In the wake of *Ludwigs*, Prof. *Sebastian Unger*, PhD (Ruhr-University of Bochum) continued his analysis about substantive State aid law, which does not represent a strict prohibition, but rather a middle path between a preventive prohibition subject to permission and a repressive prohibition subject to exemption, according to a distinction proper to German administrative law. Art. 107 TFEU, in fact, already provides for broad and manifold exceptions: while the legal exceptions under para. 2 are automatically applied if the relevant conditions are met, the Commission, under para. 3, carries out a balancing test of the aid between positive consequences for the economy and negative and distorting effects on competition. *Unger* focused its attention in particular on the General Block Exemption Regulation (GBER) adopted under Article 107(3)(c), which contains a large number of specific horizontal and sectoral aid measures, and aims to disclose the Commission's assessments under Article 107(3) in the form of abstract and general conditions in favour of national legal practitioners, so that they can verify in each individual case whether the envisaged requirements are met. A significant decentralisation of State aid control in favour of the national courts is then outlined and *Unger* proved this circumstance by the example of training aids under Article 31 of the GBER: by virtue of its exclusive competence, the Commission examines whether the aid pursues an acknowledged objective at European level, whether it is necessary and appropriate for the purpose and whether it could have an incentive effect and ultimately compares the obtained results with the effect on trade, which could lead to an exemption from the notification requirement.

² Judgement of the Court on 19.12.2018 in Case C-374/17 *A-Brauerei*

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Accordingly, and only in the case of a specific favourable State measure, national courts verify that the conditions laid down in the GBER are met, thereby confirming the final compatibility of the measure and its legality: according to *Unger*, this strategy relieves the Commission of the task of controlling aid with a low or negligible impact on the internal market, which can be presumed to be compatible from the outset.

Lawyer *Andrés Martin-Ehlers*, PhD (*Oppenhoff & Partner*, Frankfurt) shifted the focus of the conference to the private enforcement of State aid law, thus ushering the participants in a series of lectures on cooperation between the Commission, the European Courts and national jurisdictions. His analysis was based in particular on the legal remedies available at national and European level under Art. 108 (3) TFEU in conjunction with §§ 134 and 823 (2) *BGB* (German civil code) with regard to the decisions of the Commission and its decisive role in State aid control procedure. On the basis of the case-law of the CJEU³, *Martin-Ehlers* stressed first the binding effect of the decision to initiate the formal investigation procedure as an administrative act not only for the aid recipient, who, according to the *Textil-Deggendorf* case-law, is entitled to challenge it primarily before the General Court, such as for the grantor, which must suspend the granting of the aid or recover the amount already granted and place it in a blocked account, but above all for the national courts, whose judicial measures may not conflict with the outcomes of the Commission's decision to initiate the formal investigation procedure, especially since a contrary position would not create anyway a legitimate expectation in favour of the recipient. *Martin-Ehlers*, however, criticised not only such judgements, by which the German courts dissented from the decision to initiate the formal investigation procedure and denied the existence of a State aid in the individual case, but also the Commission, which, in its Communication of July 2019 on the recovery of State aids, did not take into consideration the manifold effects of the aforementioned decisions at national level, what in practice could indirectly contribute to a uniform application of State aid law. Lastly, *Martin-Ehlers*

³ Judgement of the Court on 21.11.2013 in Case C-284/12, *Deutsche Lufthansa*; Order of the Court on 4.4.2014 in Case C-27/13, *Air Berlin*

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analysed the legal remedies available to the competitor in the event of a final positive decision by the Commission and referred to the *Greenpeace Energy* case law, which requires a significant detriment of a settled market position in order to challenge such a Commission's decision, by imposing so high requirements for the lawsuit that the legal protection appears to be shifted back to the national level, where national courts examine the legal standing. This would dangerously lead to different results by virtue of discretionary power of the judges, for this reason and because of the reduction in means of direct lawsuit for the competitors *Martin-Ehlers* proposed an obligation for the national courts request a preliminary ruling before CJEU, what could always indirectly guarantee legal protection before the European courts.

Taking into account the heretofore delivered opinions at the main theme of the conference, *Kathrin Blanck*, PhD (Legal Service - European Commission) highlighted the remarkable features of the 2009 Communication on the private enforcement of State aid law, which allows the courts of the Member States to apply duly State aid law in each judicial measure in accordance of the relevant European case law, what should not be seen as a shift of the legal protection from the European level to the national one - as previous speakers have argued - but as an allocation of tasks between different jurisdictions towards a uniform application of State aid law. The prohibition of implementation pursuant to Article 108(3), third sentence, is intended, on the one hand, to safeguard the obligation for compulsory prior notification and the Commission's monopoly on the concerning decisions and, from the perspective of the judges, on the other hand, to provide for a broader protection for competitors and a uniform application field of State aid law, given that, according to *Blanck*, the role of the parties involved in bilateral proceedings between the Commission and the Member States is very reduced under the current Procedural Regulation. Since a fundamental role is played by the national courts both *ex ante* in applying the standstill obligation and *ex post* in enforcing aid recovery or damages claims, *Blanck* insisted on the importance of cooperation between them and the Commission, which, in particular under Article 29 of the Procedural Regulation, consists either of requests for information from the courts or submission from the Commission of written or, with

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the permission of the court, oral observations, the indispensability of which *Blanck* stressed in particular if the national court wishes to dissent from the legal interpretation of the Commission, as in the analysed *Magic Mountains* and *Parex Banka* cases. It was also reported that national procedural rules sometimes do not provide for the instrument of *amicus curiae*, and in pursuance thereof the Commission is classified as a party or as intervenor, what nevertheless represents neither the aim of the intervention nor the concern of the Commission.

Prof. *Joachim Bornkamm*, PhD, PhD h. c. (former Presiding Judge at *BGH*, Freiburg) referred to standstill obligation under Article 108 (3) TFEU as a protective law within the meaning of § 823 (2) *BGB* and drew a parallel with antitrust law in the light of the case law of the *BGH* (Federal Court of Justice). He recalled that corresponding civil law claims based on a violation of the prohibition of concerted practices and abuse of dominant position had been provided for in the *GWB* (German law against competition restriction) already since 1957, whereas the German legislator had needed more time to implement European antitrust law pursuant to Art. 101 and 102 TFEU through Sections 33 and 33a *GWB* and therefore the courts had long applied § 823 (2) *BGB* in conjunction with § 1004 *BGB* as the only provision to found a claim for damages for the violation of a European norm. In order to demonstrate the influence of these legal consequences for State aid law, *Bornkamm* referred to three known cases concerning aids granted by regional airports to low-cost companies⁴, in which the first instance courts had rejected the classification of the standstill obligation, which the claim was founded on, as protective law within the meaning of § 823 (2) *BGB* in conjunction with § 3a *UWG* (German law against unfair competition), and once again emphasised the *BGH* appeal rulings in the aforementioned case law: the prohibition of granting State aid regards the Member States but the concern and function of the provision also aim to protect the individuals affected by the distortion of competition pursuant to § 823 (2) *BGB* and § 3a *UWG*, especially since legal protection by civil law is integral part of European law towards the effective enforcement of the prohibition of State aid, which the Member States must pursue also by virtue of the principle of

⁴ I ZR 213/08 "*Lübeck*" on 10.02.11, I ZR 136/09 "*Lufthansa*" on 10.02.11, I ZR 209/09 "*Germania*" on 21.07.11

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effectiveness emphasised by the European Court of Justice in the *Courage Ltd* case law. *Bornkamm* also reported on developments in the "*Lübeck*" case, which, following the request of information to the Commission pursuant to Art. 29(1) of Regulation 2015/1589 and the preliminary ruling to the CJEU pursuant to Art. 267 TFEU in Case C-27/13, saw a new judgement by the *BGH*⁵, according to which the national courts should in principle not deviate from the assessment made in the decision to initiate the formal investigation procedure, but an absolute and unconditional obligation does not exist. Furthermore, *Bornkamm* considered that a recovery of the subsidy was disproportionate if the final decision of the Commission was not issued within a certain period of time after the preliminary decision, as in the "*Lübeck*" case; this examination would then be the responsibility of the German courts dealing with the recovery request in the individual case, which could also come to conclusions that deviated from the outcomes of the decision to initiate the formal investigation procedure.

As the highest representative of the administrative jurisdiction, Prof. *Klaus Rennert*, PhD, PhD h.c. (President of *BVerwG*, the Federal Administrative Tribunal, Leipzig) presented his remarks on the weight of Commission's decisions in national State aid proceedings, which from the outset were characterised by an inciting and in part critical statement with reference to the "*Tierkörperbeseitigung*"⁶ case and the objections of the Federal Government ignored by the CJEU in the "*Lübeck*" case (Case C-27/13). In order to introduce the question of binding effect, *Rennert* remarked that the CJEU in the cases concerning regional airports had not considered the distinction between judicial summary proceedings and main proceedings under German law and had only focused on safeguarding the Commission's control procedure during its course: if the competitor submits an application for an interim injunction to suspend the granting of aid or to provisionally recover it into a blocked account, *Rennert* explained that the administrative court, simply because of the opening of the formal investigation procedure, would have no leeway than to issue the

⁵ I ZR 91/15 vom 9.02.17

⁶ BVerwG 3 C 44.09, Judgement on 16th December 2010

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injunction, because these interim measures are not directly founded on and linked to the concept of aid but only to the situation, therefore the national court would have to take all measures to safeguard the investigation procedure. The lecturer wondered whether the national courts must also apply the criteria provided for in Art. 13 of Regulation 2015/1589 in case of an injunction application, because European law regulates precisely this situation, but the case law of the CJEU cannot yet be useful and the question is still open. According to *Rennert*, the problem of the binding effect of a preliminary decision of the Commission under Art. 4 of Regulation 2015/1589 would then arise mainly in main proceedings, whose claim fundament would be whether an aid according to its concept and features under Art. 107 (1) TFEU exists in the individual case, hence he mentioned three arguments rejecting a complete binding effect. Firstly, the binding content of the decision according to the aforementioned Art. 4 is a purely procedural decision and the assessments on the concept of aid are not even a thereof supporting pillar, i.e. the national courts are bound by the tenor of the decision but not by its grounds; secondly, the Commission's opinion is preliminary and still open to review, hence it cannot bind the national courts in the lawsuit, which has instead a definitive effect; thirdly, if the beneficiary is only heard after the decision pursuant to Art. 4, then he has no role in the preliminary control procedure, what in *Rennert's* view is not compatible with the legal protection guaranteed before the courts on the one hand and with Art. 19 (4) of the GG (German fundamental law) on the other hand, but also with Art. 47 of the Charter of Fundamental Rights. *Rennert* linked this three-figure argumentation, which rejects the theory of binding effect as a prohibition of deviation, to the difference between interpretation and application: both if the national courts wish to dissent from the Commission's opinion on the basis of a normative interpretation of the concept of State aid, and if the main proceedings raise new issues of fact, which have not been examined by the Commission concern the interpretation of Art. 107 TFEU, then they must address the CJEU by means of a referral for a preliminary ruling because it is a problem of interpretation of European law under Art. 267 TFEU; if, on the other hand, the concept of State aid is definite but the courts would like to assess some factual circumstances differently, then there is

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a reason for request to the Commission pursuant to Art. 29 of Regulation 2015/1589 further observations on the profile of the application of the law, without being bound by its assessment of the facts. Finally, *Rennert* referred to the possible violation through the judgement of the *BVerwG* mentioned at the beginning of Art. 288 TFEU, according to which all acts of the Union - including the preliminary decisions of the Commission - are legally binding in their entirety, he wondered at the same time whether the binding nature of the act should be linked only to the grounds or also to the disposing parts of the act: he left the question open, but highlighted that the administrative courts are there to control the administration and not even to be bound by the not-founding and integral elements of a preliminary decision.

The last lecturer was *Kathrin Dingemann (Redeker Sellner Dahs, Berlin)*, who referred to the assertion of voidness of contract under § 134 *BGB*, by wondering which form the consequences resulting from a breach of the standstill obligation would take at national level, whose assessment is besides the concern of the courts of the Member States in accordance with the respective legal systems and the means available herein. On the basis of the case law of the *BGH*, which considers the annulment of the contract to be a necessary means for the immediate recovery of an illegal State aid, and on the basis of the explanation provided by the *CELF* case law, *Dingemann* emphasised that neither Union law nor German law requires a total voidness, whilst a partial voidness would be mandatory and appropriate, otherwise it would not be proper to sanction a breach of the standstill obligation- a purely formal breach - in the same way as a violation of the corresponding substantive provision under Art. 107 TFEU. In order to put forward her main objection to the theory of nullity in conjunction with Art. 108 (3), the lecturer explained that in practice the clauses which are contrary to State aid law are agreed as *essentialia negotii*, accordingly, in most cases the parties would not have drawn up a contract without the void part and § 139 *BGB* would not be applicable; in addition, the temporally partial voidness, that arises between the conclusion of the contract and the positive final decision of the Commission, as further developed by the *VG* (first instance administrative court) and *OVG* (higher administrative court) in the *Magic Mountain Kletterhalle*, is indeed appropriate

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but too complicated and in certain contradiction with § 141 *BGB*, which requires a confirmation as a new conclusion of the contract and not an automatic renewal thereof. *Dingemann* spoke rather of a pending ineffectiveness until the final decision of the Commission: after a negative decision, the contract would be definitively ineffective, whereas after the approval of the State aid, the contract would continue in full force and effect *ex nunc*. Although the *VG Berlin* denied the possibility of a pending ineffectiveness because § 108 (1) *BGB* would not be analogously applicable in State aid law, according to *Dingemann*, this assertion arises from a misunderstanding of § 134 *BGB*: this provision does not necessarily mean that the legal transaction, which breaches the statutory prohibition – i.e. Art. 108 (3) TFEU - is null and void, but it has to be assessed whether another legal transaction would stem therefrom, taking into account the rationale of the statutory prohibition, whose aim could also be achieved through a pending ineffectiveness.

Raffaele Palermo – Padova, Würzburg, 11 luglio 2020