UNLAWFUL AID AND PUBLIC UNDERTAKINGS: VERTICAL DIRECT EFFECT OF ARTICLE 108(3), third sentence, TFEU

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Abstract: This paper addresses the position of public undertakings that may appear in a State aid law-related context in their capacity of intermediaries or grantors of aid vis-à-vis Article 108(3), third sentence, TFEU, to check whether the standstill obligation directly applies to public undertakings where they act to grant or disburse State aid. Public undertakings must refrain from granting aid in breach of the standstill obligation, as addressees of the standstill obligation. Where a public undertaking fails to apply Article 108(3) TFEU, it opens itself to claims based on Union law, including claims for damages. Union law is stated as it stood on 20 June 2021.

Keywords: European Union law, State aid, vertical direct effect, standstill obligation, public undertakings

1 Introduction

This paper intends to address the issue of the direct effect of the so-called standstill obligation set by Article 108(3), third sentence, TFEU, in the context of invoking this obligation vis-à-vis a public undertaking, such as a company wholly owned by a Member State.

It is perhaps common knowledge that Article 108(3), third sentence, TFEU is directly effective,[1] which the Court ruled on in *Lorenz*.[2] It is

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[1] See eg Communication from the Commission — Commission Notice on the recovery of unlawful and incompatible State aid [2019] OJ C247/1 (hereinafter: 2019 Recovery Notice) para 13.

[2] Case 120-73 *Lorenz* ECLI:EU:C:1973:152, para 8. While the ECJ referred to Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66 as the first instance of declaring the standstill obligation directly effective, the ECJ in *Costa* merely alluded to what is now Article 108(3), third sentence, TFEU as conferring rights on an individual ('(...) but creates no individual rights except in the case of the final provision of [Article 108(3), third sentence, TFEU], which is not in question in the present case').

further universally accepted that this direct effect extends to Member States themselves ('vertical direct effect') in their capacity as parts of the constitutional structure of a given Member State (eg central authorities, regional authorities and municipal bodies, or putting it differently – the legislature, executive authorities and, perhaps less obviously, the courts[3]).

A State aid measure must, among other things, be imputable (or 'attributable') to a Member State, including where there is a public undertaking that disburses aid.[4] What appears less clear is whether public undertakings themselves (eg State-owned companies or other bodies engaged in economic activities) are bound by the standstill obligation, not unlike the logic of 'special powers' referred to by the Court in its case law on directives.[5]

This issue was something which the Court declined to address in *Commerz Nederland*, where a guarantee granted by a municipal company was held to be aid, and thus null and void, with that company being a defendant to a claim made by an aid beneficiary.[6] The current 2009 Court Enforcement Notice does not explicitly identify any bodies that may have the status of a 'granting authority' against which State aid-related claims, including an action for damages, may be brought.[7]

While a State aid measure may be found to exist between a beneficiary and a Member State in the context of a dispute where a public company acts as a defendant for the purposes of national procedural rules, finding that the standstill obligation directly binds a State-owned undertaking would have the effect of opening that undertaking directly to any such claims made by third parties affected by an aid measure as a matter of Union law, in addition to claims directed against public authorities proper.

Thus, the aim of this paper is to check whether the concepts of a 'Member State' and the granting authority for the purposes of Article 108(3), third sentence, TFEU include public undertakings. The law of

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[3] Case C-590/14 P *DEI v Commission* ECLI:EU:C:2016:797, para 68: court order on interim relief as a State aid measure.

[4] Case C-482/99 *French Republic v Commission of the European Communities (Stardust Marine)* ECLI:EU:C:2002:294, para 55; Case C-556/19 *Société Eco TLC v Ministre de la Transition écologique et solidaire and Ministre de l'Économie et des Finances* ECLI:EU:C:2020:844, para 23.

[5] Case C425/12 *Portgás — Sociedade de Produção e Distribuição de Gás SA v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território* ECLI:EU:C:2013:829, para 26.

[6] Case C242/13 *Commerz Nederland NV v Havenbedrijf Rotterdam NV* ECLI:EU:C:2014:2224, paras 4 and 30.

[7] Commission notice on the enforcement of State aid law by national courts [2009] OJ C85/1, para 42.

the Union is stated as it stood on 20 June 2021, with some later developments added beyond that point.

2 Overview of the vertical effect of the standstill obligation

The original position of the Court in *Lorenz* was that individuals do indeed have a directly effective right in the non-infringement of the standstill obligation,[8] and what is now Article 108(3), third sentence, TFEU is immediately applicable. While it is to apply 'for the whole period' of unlawfulness, according to the Court, '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, however, 'for the internal legal system of every Member State to determine the legal procedure leading to this result'.

The Court of Justice added in *Steinike & Weinlig*,[9] and later elaborated on it in *FNCE*,[10] that national courts may have cause to interpret and apply the concept of State aid for the purposes of what is now Article 108(3), third sentence, TFEU to check whether non-notified, but nonetheless implemented aid should have been subject to notification, and if that were the case, draw all necessary conclusions therefrom. It also found in *FNCE* that there are 'obligations of national courts deriving from the direct effect' of what is now Article 108(3), third sentence, TFEU.[11]

As such, the finding in *Lorenz* – that it was 'for the internal legal system of every Member State' to determine how the standstill obligation is to be applied – was altered. The national authority which is supposed to safeguard it must be *a court* (and hence, a judicial authority, not an administrative one).[12] This conclusion has been upheld ever since in later case law, with the Court providing that the task of the national courts is to ensure that all appropriate action be taken, in accordance with their national law, to address the consequences of an infringement of the last

[8] *Lorenz* (n 2) paras 7 and 8.

[9] Case 78-76 *Steinike & Weinlig* ECLI:EU:C:1977:52, paras 14 and 15.

[10] Case C-354/90 *FNCE* ECLI:EU:C:1991:440, paras 10 and 11.

[11] ibid, para 13.

[12] This development mirrors the finding that certain rights under EU law may require that there be a judicial remedy to safeguard them (cf Case 222/86 *Heylens* ECLI:EU:C:1987:442, para 14); apart from *Heylens* and later case law, Union law as it stands includes Article 47 CFREU and the general principle of effective judicial protection alongside that article of the Charter. Thus, while applying EU law on State aid, Union authorities and Member States where they are implementing Union law (as it is understood in the context of post-*Fransson* case law) should act pursuant to Article 47 CFREU, as well. The absence of the effective impact of fundamental rights in the field of State aid, while beyond the scope of this paper, must be noted.

sentence of Article 108(3) TFEU.[13] National courts are thus obliged, as a matter of what is now EU law, to apply and enforce Article 108(3), third sentence, TFEU.[14]

An aid measure which is put into effect in infringement of the obligations arising from Article 108(3) TFEU is unlawful.[15] It should then be said that, for the purposes of vertical direct effect of the standstill obligation, the national courts are the primary enforcers of that rule, as far as it is addressed to the Member States.

However, the courts themselves are not exempt from the rule at issue by virtue of being tasked with that enforcement, and thus they themselves may not undertake any measures that would constitute unlawful aid (for example, by way of orders for interim relief altering an aid measure[16] or by adding more beneficiaries of unlawful aid[17]).

Which national courts are procedurally competent to hear claims based on Article 108(3), third sentence, TFEU is a matter of national law, subject to the principles of equivalence and effectiveness.[18]

Building upon its decisions in *Fratelli Costanzo*[19] and *Ciola*,[20] the Court further clarified in *Eesti Pagar* that, for the purposes of observing and applying the standstill obligation, 'all the authorities of the Member States, that is to say, not merely the national courts but also all administrative bodies, including decentralised authorities' are bound by Article 108(3), third sentence, TFEU, and are required to give full effect to the standstill obligation within the exercise of their respective powers.[21]

This obligation comprises the inverse vertical application of the standstill obligation by a national authority that granted unlawful aid in the first place, and the duty of that authority to recover such aid *ex officio*.[22]

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[13] viz Case C-349/17 *Eesti Pagar* ECLI:EU:C:2019:172, para 89.

[14] This neither precludes the possibility that there may be, apart from national courts, other national authorities tasked with applying the standstill obligation in national proceedings, nor does it preclude the duty of all national authorities to abstain from granting unlawful aid and to recover it where it was granted (cf *Eesti Pagar* (n 13) paras 89-92).

[15] Case C-667/13 *Estado português v Banco Privado Português SA and Massa Insolvente do Banco Privado Português SA* ECLI:EU:C:2015:151, para 59.

[16] Case C-590/14 P *DEI v Commission* ECLI:EU:C:2016:797, paras 59 and 60.

[17] Joined Cases C-393/04 and C-41/05 *Air Liquide* ECLI:EU:C:2006:403, para 45; Case C-368/04 *Transalpine Ölleitung* ECLI:EU:C:2006:644, para 50.

[18] *Transalpine Ölleitung* (n 17) para 45. See also C Quigley, *European State Aid Law and Policy* (Hart 2015) 636.

[19] Case 103/88 *Fratelli Costanzo* ECLI:EU:C:1989:256, para 31.

[20] Case C-224/97 *Ciola* ECLI:EU:C:1999:212, para 30.

[21] *Eesti Pagar* (n 13), para 91.

[22] ibid, para 94.

It would also follow from the case law of the Court that any individual affected by the grant of unlawful aid (or 'a person concerned' by the grant of aid[23]) may invoke the rule following from Article 108(3), third sentence, TFEU. First, it may be a person to whom the negative effects of the distortion of competition created by the grant of unlawful aid are applicable (in particular, a competitor to the beneficiary of unlawful aid[24]), a person affected by a method of financing aid which is an integral part of the aid measure,[25] and a person affected by a tax measure specifically intended to benefit persons not subject to it.[26] The common denominator of those individuals is that their interests are affected by the grant of aid, which in turn corresponds to the notions of a 'party concerned' under Article 108(2) TFEU,[27] and an 'interested party' under Article 2(h) of the current Procedural Regulation.[28] This is essentially a group of persons which is indeterminate *ex ante*,[29] whose position is determined by the fact that the aid at issue in each case is likely to have a specific effect on their situation.[30] The Court has recently and explicitly confirmed that the status of an interested party, while applicable to a competitor to a beneficiary, does not in itself presuppose a competitive relationship of the person concerned vis-à-vis the aid beneficiary.[31]

While such an individual would have to prove his or her standing before the national court in accordance with the rules of national law, those rules must not render the application of the standstill obligation excessively difficult or impossible in practice and must respect the principle of effective judicial protection.[32]

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[23] Case C-17/91 *Lornoy* ECLI:EU:C:1992:514, para 30.

[24] Case C-199/06 *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)* ECLI:EU:C:2008:79, para 50, Commission notice on the enforcement of State aid law by national courts [2009] OJ C85/1 (hereinafter: the 2009 Notice) paras 71 and 72.

[25] Case C-174/02 *Streekgewest* ECLI:EU:C:2005:10, para 19. Such a person may have an interest in preventing the payment, or in the repayment of tax which is an integral part of a State aid measure.

[26] Case C-526/04 *Laboratoires Boiron SA v Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon, assuming the rights and obligations of the Agence centrale des organismes de sécurité sociale (ACOSS)* ECLI:EU:C:2006:528, para 40; Case C-53/00 *Ferring* ECLI:EU:C:2001:627, para 22.

[27] cf L Flynn and H Gilliams, 'Parties That Have Standing to Invoke the Art. 108(3) Prohibition' in L Hancher, T Ottervanger, P-J Slot (eds), *EU State Aids* (Sweet & Maxwell, 2016) 1196.

[28] ie, Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) [2015] OJ L248/9 (hereinafter: Procedural Regulation).

[29] Case 323/82 *Intermills* ECLI:EU:C:1984:345, para 16.

[30] Case C-83/09 P *Commission/Kronotex and Kronoply* ECLI:EU:C:2011:341, para 65.

[31] Case C-647/19 P *Ja zum Nürburgring eV v European Commission* ECLI:EU:C:2021:666, paras 55, 56 and 58.

[32] *Transalpine Ölleitung* (n 17) para 45; *Streekgewest* (n 25) paras 18 and 20.

Where there is an unresolvable conflict[33] between Article 108(3), third sentence, TFEU (or binding EU law in general) and national law, a national court must disapply those conflicting provisions of national law during proceedings,[34] including those that enshrine the principle of res judicata in national law,[35] even if the direct effect of Article 108(3), third sentence, TFEU does not include a power to assess the compatibility of aid with the internal market. That ultimate authority to decide on the compatibility of State aid with the internal market is primarily[36] a matter for the Commission, subject to the supervision of the CJEU.[37]

3 Public undertakings in the context of State aid

For the purposes of Article 108(3) TFEU, the Member States are under an obligation both to notify to the Commission each measure intended to grant new aid[38] for the purposes of Article 107(1) TFEU and not to implement such a measure, in accordance with Article 108(3) TFEU, until that institution has taken a final decision on the measure.[39] However, the case law appears not to be immediately clear on what exactly is to be understood as 'Member State' for the purposes of the standstill obligation and its addressees *ratione personae*.[40]

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[33] Case C-505/14 *Klausner Holz Niedersachsen* ECLI:EU:C:2015:742, para 35.

[34] Case C-690/13 *Trapeza Eurobank Ergasias* ECLI:EU:C:2015:235, para 53.

[35] *Klausner Holz Niedersachsen* (n 33) para 46.

[36] Exceptionally, aid may be found compatible by the decision of the Council, taken on the basis of Article 108(2), third paragraph, TFEU. Somehow, this exception often evades the Court as it recalls who is and who is not to decide on the compatibility of aid.

[37] Case C-598/17 *A-Fonds* ECLI:EU:C:2019:352, para 46. This leads the ECJ to find that where the assessment of compatibility is inextricably linked to the assessment of other issues of EU law that have direct effect (eg one of the fundamental freedoms of the internal market), a national court must not undertake that other assessment (*A-Fonds*, para 52). In my view, this position of the Court is difficult to accept, because it leads to the deprivation of judicial review for individuals petitioning the national court to safeguard their directly effective rights, and because the powers of the Commission to assess the compatibility of aid under Article 107(2) and (3) TFEU, taken together with Article 108(2) and (3) TFEU, do not enjoy any supra-legal character over other binding rules of primary EU law (eg over the free movement of capital).

[38] Existing aid is subject to Article 108(1) TFEU. However, the concept of 'new aid' includes alterations thereof, that is, any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the internal market, subject to Article 4(1) and (2) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2004] OJ L140/1, as amended), and the case law of the Court. See most recently Case C-128/19 *Azienda Sanitaria Provinciale di Catania v Assessorato della Salute della Regione Siciliana* ECLI:EU:C:2021:401, paras 30 and 33.

[39] Case C-493/14 *Dilly's Wellnesshotel GmbH v Finanzamt Linz* ECLI:EU:C:2016:577, para 31; Case C-81/10 P *France Télécom SA v European Commission* ECLI:EU:C:2011:811, para 58.

[40] A certain difficulty in dealing with measures involving undertakings all over the Union was noted as early as in 2007 by P Nemitz, who posited then that 'transparency problems

According to Maqueda and Conte, the notion of 'Member State' for the purposes of Union law on State aid is a 'wide one' and includes 'all levels of public authorities, regardless of whether it is a national, regional or local authority'.[41] However, were that to be only the public-law authorities of a given Member State, a claim founded on Article 108(3) TFEU and brought before a national court against a public undertaking would never have been successful, or even possible.

Instead, it may be observed in the Court's case law that individuals affected by aid, in particular competitors of aid beneficiaries, do try to bring proceedings pursuant to the applicable national law directly against public undertakings that grant aid,[42] invoking what is now Article 108(3) TFEU to various results – and that the Court is not immediately dismissive of the application of Article 108(3) TFEU in such a context.

It may be further noted that it follows from the case law that the Court does not consider the definition of a 'public undertaking' as provided by Article 2(b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings[43] to be directly relevant for the purposes of Article 108(3) TFEU. Instead, 'public undertakings' for the purposes of

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may arise if public undertakings are used by central or regional authorities as vehicles to grant aid (idem, also ed, *The Effective Application of EU State Aid Procedures – the Role of National Law and Practice*, Alphen aan den Rijn 2007, 12)'.

[41] Eduardo Cabrera Maqueda and Giuseppe Conte, 'Notion of a Member State' in N Pesaresi, K van de Casteele, L Flynn, C Siaterli (eds), *EU Competition Law – Volume IV State Aid – Book One* (Claeys and Casteels 2016) 212.

[42] See eg Case C284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* ECLI:EU:C:2013:755, para 14: an airport operator as a defendant to a dispute initiated by a competitor; Joined Cases C-341/06 P and C-342/06 P *Chronopost SA and La Poste v Union française de l'express (UFEX) and Others* ECLI:EU:C:2008:375, para 10: the provision of logistical and commercial assistance to subsidiaries; Case C-445/19 *Viasat Broadcasting UK Ltd v TV2/Danmark A/S and Kingdom of Denmark* ECLI:EU:C:2020:952, para 12: public broadcasters, with the defendant having received aid and transferred some of it to subsidiaries; C-262/18 P and C-271/18 P *European Commission and Slovak Republic v Dôvera zdravotná poist ov a, a.s.* ECLI:EU:C:2020:450, paras 3-5; dispute between health insurance bodies, with the complainant attempting to obtain annulment of a Commission decision finding that alleged beneficiaries are not undertakings (decision upheld on appeal, with the Court setting aside the decision of the GC while limiting the onward march of *MOTOE* case law in the field of health insurance).

[43] [2006] OJ L318/17. Article 2(b) reads that 'public undertakings' mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it, whereas a 'dominant influence' on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking: (i) hold the major part of the undertaking's subscribed capital; or (ii) control the majority of the votes attaching to shares issued by the undertakings; or (iii) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

Article 108(3) TFEU are taken by the Court to mean those undertakings whose resources are State resources for the purposes of Article 107(1) TFEU, and whose actions are at least capable of being imputed to a Member State.[44]

Imputability to a Member State as regards a given undertaking does not necessarily mean that a Member State may exercise, or has exercised, dominant influence over that particular public undertaking, even where that public undertaking is subject to a majority shareholding of a Member State.[45] An 'undertaking' is in turn understood to be any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, whereas any activity consisting of offering goods or services on a given market is an economic activity.[46]

While public undertakings (such as they are referred to by the Court) undoubtedly may be, and often indeed are, recipients of State aid (ie beneficiaries) up to and including recipients of aid in their capacity as an undertaking entrusted with the operation of a service of general economic interest in accordance with Article 106(2) TFEU,[47] they may also be involved in the grant of a State aid measure as intermediaries that disburse aid.

Should that be the case, it must be said that the Court has found that the prohibition laid down in Article 107(1) TFEU covers both aid

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[44] See Case C-160/19 P *Comune di Milano v European Commission* ECLI:EU:C:2020:1012, paras 36 and 37, where the Court dismissed an express point of appeal that Directive 2006/111/EC was not followed, deeming it irrelevant and applying its *Stardust Marine* and *Commerz Nederland* case law in addition to the issue of State resources. The Court has also expanded upon the concept of a 'public body' for the purposes of Article 3(4) of Annex I to GBER, to include 'entities such as universities and higher education establishments as well as a chamber of commerce and industry, provided that those entities are created to specifically meet needs in the general interest, have legal personality and are either financed for the most part or controlled directly or indirectly by the State, by regional or local authorities or by other public bodies'. See Case C-516/19 *NMI Technologietransfer GmbH v EuroNorm GmbH* ECLI:EU:C:2020:754, para 58 and the operative part.

[45] Case C-329/15 *ENEA SA v Prezes Urzędu Regulacji Energetyki* ECLI:EU:C:2017:671, para 32. Nevertheless, while a majority shareholding does not, on its own, make the activities of an undertaking automatically imputable to a Member State that holds those shares, the existence of such a majority shareholding cannot be, in my view, indifferent for imputability. I am of this opinion because the Court has already held that a majority shareholding coupled with the power to appoint directors of an undertaking makes that undertaking subject to control of a Member State for the purposes of the *Stardust Marine* criteria (see *Comune di Milano* (n 44) para 32).

[46] See Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* ECLI:EU:C:2006:8, paras 107 and 108.

[47] See eg Joined Cases C-434/19 and C-435/19 *Poste Italiane SpA v Riscossione Sicilia SpA agente riscossione per la provincia di Palermo e delle altre provincie siciliane and Agenzia delle entrate – Riscossione v Poste Italiane SpA* ECLI:EU:C:2021:162, para 34.

granted directly by the State and aid granted through a public or private body appointed or established by that State to administer it, and EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid.[48]

Union law on State aid is also unimpeded where State resources are managed by a legally distinct private undertaking under the control of a Member State.[49] Where a State creates or exercises its powers as a shareholder in an undertaking to effect or influence the grant of aid, this does not exclude the application of the standstill obligation even where that undertaking acts as an intermediary with separate legal personality, on condition that the measure is imputable to a Member State.[50] It is the general position of the Court that imputability may not be presumed solely on the ground that an undertaking is public and that a Member State controls it in general.[51] Nevertheless, imputability does not necessarily refer to a Member State at the level of the centralised authorities of a given Member State, but equally may be engaged by infra-state authorities.[52]

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[48] Case C-706/17 *Achema AB and Others v Valstybinė kainų ir energetikos kontrolės komisija (VKEKK)* ECLI:EU:C:2019:407, paras 50 and 51; Joined Cases C-52/97, C-53/97 and C-54/97 *Epifanio Viscido* (C-52/97), *Mauro Scandella and Others* (C-53/97) *and Massimiliano Terragnolo and Others* (C-54/97) *v Ente Poste Italiane* ECLI:EU:C:1998:209, para 13.

[49] Case C-656/15 P *European Commission v TV2/Danmark A/S* ECLI:EU:C:2017:836, para 48.

[50] Case C-150/16 *Fondul Proprietatea SA v Complexul Energetic Oltenia SA* ECLI:EU:C:2017:388, paras 19 and 20, with the indicators for imputability being integration of an undertaking into the structures of the public administration, the nature of the undertaking's activities, and the exercise of the latter on the market in normal conditions of competition with private operators; the legal status of the undertaking (public law or ordinary company law); the intensity of the supervision exercised by the public authorities over the management of the undertaking; or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.

[51] See, eg, Case T-305/13 *SACE* ECLI:EU:T:2015:435, para 41 (ruling upheld on appeal, Case C-472/15 P *SACE* ECLI:EU:C:2017:885; imputability held to exist on the basis of general criteria, cf paras 55-81. The decision in *SACE* is notable for a measure that was made between a parent company and a subsidiary, without explicit involvement on the part of a Member State). The GC and the Court have applied the *Stardust* criteria to check whether actions of a particular undertaking have been deliberately caused by a Member State, or whether such actions are otherwise imputable (or are unlikely not to be imputable) to a Member State. However, latest case law has explicitly confirmed that 'it cannot be demanded that it be demonstrated, on the basis of a precise instruction, that the public authorities specifically incited the public undertaking to take the measure in question' (cf Case C-425/19 P *European Commission v Italian Republic and Others* ECLI:EU:C:2021:154, para 60), making earlier case law that had stressed a lack of presumption and suggested to seek direct State influence over a public company somewhat less relevant. Thus, I do not believe that it is necessary, as Union law stands now, for a Member State to have 'touched the money', as E Szyszczak put it (cf E Szyszczak, 'Imputability of a Measure to the State' in H Hofmann, C Micheau (eds), *State Aid Law of the European Union* (Oxford 2016) 72).

[52] It might also be that a measure might only be imputable at a level below that of central authorities. See Case C88/03 *Portugal v Commission* ECLI:EU:C:2006:511, para 55, and

Where imputability is engaged, it is settled case law that the actions taken by a public undertaking may bring about a measure of State aid, even in the context of private law,[53] and that regard must primarily be had to the effects of the aid on the favoured undertakings or producers and not the status of the 'institutions' distributing or administering the aid.[54] In *Fondul*, the Court has indeed explicitly said that, in the context of attributing a measure to a Member State, it is the undertaking that effects a State aid measure ('an aid measure taken by a public undertaking').[55]

However, on the issue of the application of Article 108(3) TFEU, the Court in *Fondul* did not explicitly address the issue of whether the public undertaking itself was bound by the standstill obligation, and whether it should be treated as a part of a Member State to which aid is imputed. Instead, the Court merely stated that 'national authorities' are required to notify that aid to the Commission before it is put into effect, in accordance with Article 108(3) TFEU, without specifying whether the public undertaking is counted among them.[56]

In *Mytilinaios Anonymos Etairia – Omilos Epicheiriseon*[57] which concerned unlawful aid and where the aid measure (a preferential energy tariff) was explicitly taken by a public undertaking under the influence

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the cases that follow that decision. Interestingly, the GC in Case T111/15 *Ryanair DAC v Commission* ECLI:EU:T:2018:954, para 98, noted that 'measures adopted by infra-State entities (decentralised, federated, regional or *other* [emphasis added]) of the Member States, whatever their status and description, fall, in the same way as measures taken by the federal or central authority, within the ambit of Article 107(1) TFEU, if the conditions laid down by that provision are satisfied'. Concerning that 'other' option, that case referred to a public body composed of *inter alia* municipal bodies that allegedly has had the status of an undertaking; its decisions have been deemed to be imputable to a Member State (cf paras 94 and 105 thereunder).

[53] Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* ECLI:EU:C:1996:285, paras 58 and 62: '(…) the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, is capable of constituting State aid if the remuneration received in return is less than that which would have been demanded under normal market conditions (…)'.

[54] Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost SA, La Poste and French Republic v Union française de l'express (Ufex), DHL International, Federal express international (France) SNC and CRIE SA* ECLI:EU:C:2003:388, paras 66 and 68 (on condition that such measures are not in line with the Market Economy Investor Principle, and Case 78-76 *Steinike & Weinlig* (n 9) para 21.

[55] *Fondul* (n 50) para 18. As such, any conceivable logic of 'implied measures' taken by a Member State was not followed by the Court.

[56] ibid, para 43.

[57] Case C-332/18 P *Mytilinaios Anonymos Etairia – Omilos Epicheiriseon v European Commission* ECLI:EU:C:2019:1065, para 3, taken together with Commission Decision of 13 July 2011 no 2012/339/EU on the State aid No SA.26117 — C 2/10 (ex NN 62/09) implemented by Greece in favour of Aluminium of Greece SA (notified under document C(2011) 4916) [2012] OJ L166/83, paras 5, 8, 28 and the operative part.

of a Member State, the measure was imputed by the Commission to a Member State and the actual grantor was treated as an interested party to the proceedings, and not as a (granting authority of a) Member State.

The current Procedural Regulation does not recognise public undertakings, even where they grant aid, as full parties to administrative proceedings.[58] It appears that, at best, a public undertaking may have the status of 'interested party' for the purposes of Article 24 of Regulation no 2015/1589.

It may be further noted that the Court has recently agreed with AG Tanchev in Case C-425/19 P *European Commission v Italian Republic and Others* that the concept of an 'emanation of the State' developed for the purposes of the vertical effect of directives[59] has not been developed for the purpose of classifying as State aid the measures adopted by such organisations or bodies and cannot, therefore, be applied to the question of whether aid measures are imputable to the State.[60]

While that concept indeed cannot be superimposed on the issue of imputability, which is not an issue of direct effect but of one of the prerequisites for a State aid measure to exist, the question of direct effect of the standstill obligation vis-à-vis a public undertaking certainly could have been at least referred to and explored as an example of a 'relation to vertical effect of directives' that the classification of a measure as State aid may have for an undertaking that took the measure.[61] In addition, the complete absence of any binding effect of the standstill obligation vis-à-vis public undertakings that grant aid would have been puzzling, due to the fact that it produces, as a matter of Union law, certain obligations for a beneficiary which may be a private entity.[62]

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[58] Specifically, the current Procedural Regulation still does not refer to any right on the part of an undertaking to engage in an adversarial debate with the Commission (formal investigation procedure included; as regards the previous regulation similar to the current one, see K Lenaerts, I Maselis, K Gutman, *EU Procedural Law* (Oxford 2015) 296 fn 227.

[59] See eg Case C-413/15 *Elaine Farrell v Alan Whitty and Others* ECLI:EU:C:2017:745, paras 33, 34 and 35.

[60] Case C-425/19 P *European Commission v Italian Republic and Others* ECLI:EU:C:2021:154, para 77; see also Case C-425/19 P ECLI:EU:C:2020:878, Opinion of AG Tanchev, para 128.

[61] Something the AG apparently omitted to mention in a case that involves alleged unlawful aid granted by a distinct entity organised under private law. Cf AG Tanchev's opinion (n 60) para 129, and the original Commission Decision (EU) 2016/1208 of 23 December 2015 on State aid granted by Italy to the bank Tercas (Case SA.39451 (2015/C) (ex 2015/NN)) [2016] OJ L203/1, paras 33 and 170.

[62] Such as the obligation to pay interest as a matter of Union law. See *CELF/SIDE* (n 24) para 52.

4 On direct applicability of the standstill obligation to public undertakings

To resolve whether Article 108(3), third sentence, TFEU is directly applicable to public undertakings in their capacity as grantors of State aid, one can (re-)turn to one of the recent decisions of the Court in the matter of the standstill obligation, namely in *Eesti Pagar*. In addition, it would appear practical for the purposes of direct effect of Article 108(3), third sentence, TFEU to address the further issue of damages and the issue of validity of State aid measures, where they may be employed by a public undertaking.

In *Eesti Pagar*, the Court reiterated that 'the prohibition on implementation of planned aid laid down in the last sentence of Article 108(3) TFEU has direct effect and that the immediate enforceability of the prohibition on implementation referred to in that provision extends to all aid which has been implemented without being notified',[63] and that 'a national authority, such as EAS' was bound by this rule, safeguarded by the principle of effectiveness.[64]

What is not immediately apparent from that decision of the Court is the nature of the 'national authority' that erroneously granted and then attempted to recover unlawful aid, namely EAS, or Ettevõtluse Arendamise Sihtasutus (Enterprise Estonia), an Estonian governmental agency.[65] It follows from Estonian national law that the body at issue is in fact a legal person entered in the Estonian non-profit associations and foundations register, a *sihtasutus* ('foundation'),[66] and therefore a body legally distinct from the 'classic' national authorities of that Member State. On inspection of that body's activities, it follows that it provides a set of services to 'clients', which include commercial assistance and advisory services,[67] up to and including business intelligence services.[68]

In my view, in the context of its activities to the benefit of its 'clients' which apparently included Eesti Pagar AS (itself a company operating a business for profit), and in recognition of the fact that EAS offers a service (even if non-profit), EAS must be recognised as a public undertaking

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[63] *Eesti Pagar* (n 13) para 88.

[64] ibid, paras 95, 105 and 140, and the operative part.

[65] See Enterprise Estonia, <https://www.eas.ee/eas/?lang=en> accessed 28 June 2021.

[66] Registry code 90006006 cf <https://ariregister.rik.ee/ettevotja> accessed 28 June2021. See also the English translation of the Estonian 1995 Foundations Act §1(1) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/514012021003/consolide> accessed 28 June 2021.

[67] See the EAS *business* strategy 11-12 <https://www.eas.ee/wp-content/uploads/2019/06/EAS_Strateegiline_Kava_190614_ENG.pdf> accessed 28 June2021.

[68] ibid, 13: '(...) including conducting a background check on the export partner in the Asian market'.

for the purposes of Union law on State aid.[69] Thus, by holding that EAS is in fact bound by the standstill obligation enshrined in Article 108(3) TFEU, up to and including that it is under a duty to recover unlawful aid *ex officio* as a 'national authority', the Court has already confirmed that public undertakings are, in fact, directly susceptible to the prohibition of unlawful aid where they act as grantors of aid.

Such applicability necessarily means that any such body should refrain from granting State aid where it was not notified, and no exception from the standstill obligation is applicable. As such, it should be found that public undertakings that are the grantors of State aid measures are covered by the concept of granting authorities bound by Article 108(3) TFEU and thus by the concept of a 'Member State' for the purposes of the standstill obligation.

The net effect of the Court's position is that a public undertaking that granted aid, as a granting authority, is open to claims founded on Article 108(3), third sentence, TFEU where it failed to act pursuant to that rule – in particular to claims for damages brought against the authority. Where a national authority effects a breach of the standstill obligation, a national court may be required to rule on an application for compensation for the damage caused by reason of the unlawful nature of the aid – as a matter of European Union law.[70]

As the Court apparently confirms the applicability of the standstill obligation to public undertakings, it is then reasonable to consider the issue of the damages they may incur when granting unlawful aid. According to the Court in *Traghetti del Mediterraneo (III),* when an applicant is able to demonstrate before the national court that they have suffered loss caused by the premature implementation of State aid and, more specifically, as a result of the illegal time advantage which the beneficiary gained from such implementation, the action for damages can, in principle, be upheld even though the Commission has already approved the aid in question by the time the national court decides on the application.[71] As a public undertaking can act as a granting authority, it is not inconceivable that it might find itself defending a claim to that effect, based on the standstill obligation.

According to the Court, those claims for damages are subject to limitation periods set by applicable national law, itself subject to the

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[69] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* ECLI:EU:C:2008:376, para 27; Case C-74/16 *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe* ECLI:EU:C:2017:496, para 46.

[70] *Transalpine Ölleitung* (n 17) para 56; *CELF/SIDE* (n 24) para 53.

[71] Case C-387/17 *Presidenza del Consiglio dei Ministri v Fallimento Traghetti del Mediterraneo SpA* ECLI:EU:C:2019:51, para 60.

principles of equivalence and effectiveness.[72] The nature of this claim is that it follows directly from Union law and is founded on the principles introduced by the Court in its case law on Member State liability.[73] As such, it must be available to a person concerned who suffered loss due to the grant of unlawful aid, irrespective of any administrative proceedings opened by the Commission and even of a positive decision made by it.[74]

Lastly, as regards the area where the grant of unlawful aid might affect a public undertaking, the direct effect of the standstill obligation vis-à-vis a public undertaking which grants or disburses aid may affect the validity of a national measure taken by it to grant aid or disburse it. According to settled case law, the validity of decisions giving effect to aid measures is affected where there is a grant of unlawful aid.[75] For instance, where there is an agreement governed by private law, a national court seized of a claim by a person affected should by default rule that such an agreement is null and void.

As public undertakings are reasonably likely to implement measures governed by private law, susceptible to being vitiated by nullity, it is reasonable to additionally consider the repercussions of unlawful aid where a public undertaking is deemed to have granted unlawful aid, or where it is deemed to have been an intermediary therefor. There have been views to the effect that the nullity of a measure is not an automatic consequence of its unlawfulness[76] on the basis of the decision of the Court in *Residex IV*.[77] While it may be conceded that Article 108(3) TFEU does not explicitly refer to nullity, the decision in *Residex IV* must be read

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[72] Case C-627/18 *Nelson Antunes da Cunha, Lda v Instituto de Financiamento da Agricultura e Pescas IP (IFAP)* ECLI:EU:C:2020:321, paras 30 and 52, where the Court noted that a national court must refuse of its own motion to apply a national limitation period, applicable to the recovery of aid that is to be recovered, which expired even before the adoption of the Commission recovery decision. See also A Tedoldi, 'Actions for Damages against the State' in A Santa Maria (ed), *Competition and State Aid: An Analysis of the EU Practice* (Kluwer Law International 2015) 286-291.

[73] 2009 Court Enforcement Notice, para 45. See also L Flynn, H Gilliams, 'Damage Claims against a Member State that Granted the Aid' in L Hancher, T Ottervanger, PJ Slot (eds), *EU State Aids* (Sweet and Maxwell 2016) 1194, who are of the same view, and further note that a grant of unlawful aid 'may constitute negligence by both the Member State that awarded the aid and the undertaking that accepted the aid'.

[74] 2009 Court Enforcement Notice, J Keppenne, C Caviedes, 'Liability of the Member State' in L Ortiz-Blanco (ed), *EU Competition Procedure* (OUP 2013) 984, para 50.

[75] See eg *Laboratoires Boiron* (n 26) paras 30 and 38.

[76] See D Piccinin, 'Enforcement in the National Courts' in K Bacon (ed), *European Union Law of State Aid* (OUP 2017) 556.

[77] Case C-275/10 *Residex Capital IV CV v Gemeente Rotterdam* ECLI:EU:C:2011:814, para 44, wherein the Court stated that 'with regard to cancellation of the guarantee, and irrespective of who the beneficiary of the aid may be, European Union law does not impose any specific conclusion that the national courts must necessarily draw with regard to the validity of the acts relating to implementation of the aid'.

in its context.[78] The issue was whether the aim of applying Article 108(3) TFEU to an unlawful measure, namely restoration of the competitive situation existing prior to the payment of the aid in question, would be more effectively served by other means than finding a guarantee null and void, by cancelling it.

The Court further noted that national courts must ensure that the measures which they take with regard to the validity of the abovementioned acts make it possible for such an objective to be achieved.[79] In my view, unlawfulness of a State aid measure would by default lead to the nullity of that measure (for instance, an agreement), and the national court seized of such a dispute should declare so,[80] unless there are more effective options available to such a court.

Certain national laws may in themselves contain a rule that an agreement contrary to a binding rule of law is void, making the nullity of an unlawful measure the 'default option' as well.[81] However, national laws may also prescribe certain consequences that follow from nullity, in particular the one that any consideration made by a party to the benefit of another should be returned pursuant to the rules of unjust enrichment,[82] or that remuneration should be paid for using the other party's property.

It is thus not inconceivable that declaring a State aid measure in the form of an agreement to which a public undertaking and a benefi-

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[78] It may also be added that later jurisprudence referring to the decision in *Residex IV* interpreted it to the effect that the essence of it was 'that national courts have jurisdiction under Article 108(3) TFEU to cancel a State guarantee in a situation in which unlawful aid was implemented by means of that guarantee, which had been given by a public authority in order to cover a loan granted by a finance company to an undertaking which would not have been able to secure such financing under normal market conditions (Case C-438/16 P *European Commission v French Republic and IFP Énergies nouvelles*, EU:C:2018:737, para 141)'.

[79] *Residex Capital IV* (n 77) paras 45 and 46.

[80] See also 2009 Court Enforcement Notice, para 29, wherein the Commission states that 'preventing the unlawful payment will usually be the logical consequence of finding that the granting act is invalid as a result of the Member State's breach' of what is now Article 108(3) TFEU.

[81] For instance, pursuant to Polish civil law, an act in law contrary to a statute or intended to circumvent a statute is null and void, unless an applicable provision prescribes a different effect, in particular the one that the terms and conditions vitiated by nullity are to be superseded by appropriate provisions of a statute (Article 58§1 of the Polish Civil Code). A similar rule would follow from §134 of the German BGB ('Ein Rechtsgeschäft, das gegen ein gesetzliches Verbot verstößt, ist nichtig, wenn sich nicht aus dem Gesetz ein anderes ergibt'); see also P Werner, 'Consequences of a Violation of the Standstill Obligation' in F Säcker, F Montag (eds), *European State Aid Law: A Commentary* (Beck 2016) 1544.

[82] This is the position in Polish law, where declaring an agreement null and void would require the parties to restore their previous positions pursuant to the rules on unjust enrichment (specifically, on payments not due, or ' wiadczenia nienale ne'), irrespective of any claims in damages (Articles 410§1 and 414 of the Polish Civil Code).

ciary are parties could have the effect of exacerbating the position of the granting authority and allowing a beneficiary to retain his or her advantage, either in full or in part. Should that be the case, the national court should consider alternatives to a finding of nullity.

5 Concluding remarks

As AG Wathelet posited in his Opinion in C-349/17 *Eesti Pagar*, direct application of Article 108(3) TFEU by the granting authorities (or 'inverse vertical direct effect') opens a 'new route' for recovering unlawful aid,[83] as public undertakings that grant aid are under a duty to give full effect to the standstill obligation and, where appropriate, recover any unlawful aid granted by them. This duty applies to them directly by virtue of Article 108(3) TFEU.[84]

It is commendable that the Court has not followed the AG on his remark that this 'route' should be reserved for cases of 'manifest' unlawfulness, for there is nothing in the case law of the CJEU that would authoritatively suggest a threshold for unlawful aid to appear where a measure was implemented in breach of the standstill obligation. It remains to be seen how this line of case law on Article 108(3) TFEU will develop.

One particular development to follow is the subsequent and rather succinct view of the Court that unlawful aid has, for the purposes of Article 108(3) TFEU, a somewhat 'infectious' nature – in that Article 108(3) TFEU must be interpreted as meaning that the obligation which is incumbent on national courts to order the recipient of State aid implemented in breach of that provision to pay illegality interest in respect of that aid applies also to aid which that recipient has transferred to affiliated undertakings and to aid received by it from a publicly controlled undertaking.[85] As such, where unlawful aid was received by a beneficiary from a public undertaking, that beneficiary could be liable for the 'illegality interest' as a matter of Union law even where they passed aid to subsidiaries.

Another development to follow would be the position of a public undertaking whose resources are directed by an authority of a Member State, with that authority (and not the undertaking itself) taking a decision on how those resources are to be paid out to beneficiaries. The Court has already found that resources of public undertakings may be regarded as State resources where the State is capable, by exercising its dominant influence over such undertakings, of directing the use of their

[83] Case C-349/17 ECLI:EU:C:2018:768, Opinion of AG Wathelet, para 110.

[84] *Eesti Pagar* (n 13) para 94.

[85] *Viasat Broadcasting* (n 42) para 51.

resources in order to finance, where appropriate, advantages to the benefit of other undertakings.[86]

It still remains to be seen whether a public undertaking so influenced by a Member State could, as a matter of Union law, be jointly and severally liable with the granting authority for, or deemed to have contributed to, any consequences an unlawful State aid measure would have – even where that undertaking acted as an intermediary and not as a grantor of unlawful aid.

Suggested citation: L Stępkowski, 'Unlawful Aid and Public Undertakings: Vertical Direct Effect of Article 108(3), third sentence TFEU' (2021) 17 CYELP 159.

[86] eg *Poste Italiane SpA* (n 47) para 44. See also R Wesselink and M Bredenoord-Spoek, 'Resources from State-owned Enterprises (Public Undertakings)' in P Werner and V Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer Law International 2017) 101.