PRIVATE ENFORCEMENT OF EU STATE AID RULES: IS THERE ANY ROOM FOR NATIONAL PROCEDURAL AUTONOMY LEFT?

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This article deals with the private enforcement of EU State aid rules in national civil proceedings. This kind of enforcement proved to be highly challenging for national judges, particularly those who ignore the limits of the principle of national procedural autonomy. Since the full understanding of those limits is crucial (also) for private enforcement activities, we focus on the principle of the effectiveness of EU law which, when interpreted and applied correctly, most intensively limits national procedural autonomy. In fact, it is questionable if Member States and their courts and judges enjoy a real or genuine autonomy in the discussed field. For this reason, the article first sets the scene by discussing the fundamental legal concepts and principles as being essential for the private enforcement of EU State aid rules in national civil litigious proceedings, and the interplay between private and public enforcement proceedings. The public enforcement case law is used as a benchmark or guide when dealing with open questions of private enforcement. The article offers a careful analysis of selected legal challenges related to remedies and

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res judicata, *which clearly reveal the limits of the principle of national procedural autonomy as mostly set by the principle of effectiveness of EU law. Finally, the main findings of the article are considered in order to answer the core research question; namely, is there any room left for national procedural autonomy (also) in case of private enforcement of EU State aid rules in proceedings before national civil courts?*

Key words: private enforcement; State aid rules; remedies; national procedural autonomy; effectiveness of EU law; res judicata

1. INTRODUCTION

Enforcement of EU State aid rules is an enigma for numerous national organs.[1] Although the interpretation of supranational substantive rules on State aid is challenging, we note that even more problems arise in the interpretation and (limited)[2] application of national procedural rules. Namely, the latter are not designed to deal with specific features of the former which frequently leads to indirect collisions, i.e., the collisions between the supranational substantive rules and national procedural rules. In principle, these collisions must be decided in favour of the supranational (substantive) rules.[3] In our opinion, this holds for both, public and private enforcement of EU State aid rules as explained in this article.

This article deals with the private enforcement of EU State aid rules which refers to the enforcement activities at the initiative of entitled private persons[4],

1 This is confirmed, once more, by the latest study on the enforcement of EU State aid law. See Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001).

2 In principle, the limited application or even non-application of national procedural rules is necessary when those rules impair the supranational substantive State aid rules.

3 E.g. the case *Lucchini* (CJEU, *Lucchini*, Case C-119/05, ECLI:EU:C:2007:434), where the Court of Justice of the EU stated that national (procedural) rules shall be set aside in favour of the supranational (substantive) rules.

4 In this regard, the EU State aid rules are predominantly used as a sword while according to some scholars those rules can be used also as a shield when the aid recipient claims that there shall be no aid recovery due to the impossibility of recovery or contravening general principles of EU law (Jaeger, T., *Zusammenwirken von Kommission und nationalen Gerichten im Beihilfeaufsichtsverfahren*, in: Hummer, W. (ed.), *Neueste Entwicklungen im Zusammenspiel von Europarecht und nationalem Recht der Mitgliedstaaten*, Springer, Heidelberg, 2010, p. 428). The shield scenario follows the prior public enforcement of EU State aid rules before national courts or organs, i.e., the enforcement at the initiative of the public authority, usually to enforce the

e.g., competitors of the State aid recipient.[5] More precisely, it deals with the private enforcement of the discussed rules in national civil litigious proceedings.[6] In this regard, the article first discusses fundamental aspects of the private enforcement of EU State aid rules in national civil proceedings, and the interplay between private and public enforcement proceedings, including the relevance of the public enforcement case law to the area of private enforcement (section 2). Then, it offers a discussion of selected legal challenges related to remedies and *res judicata*, which reveal the limits of the principle of national procedural autonomy as mostly set by the principle of effectiveness of EU law (section 3).[7] Finally, it considers the main findings in order to answer the article's core research question; namely, is there any room left for national procedural autonomy (also) in case of private enforcement of EU State aid rules in proceedings before national civil courts[8] (section 4)?

2. PRIVATE ENFORCEMENT OF EU STATE AID RULES: SETTING THE SCENE

Private enforcement of EU State aid rules often takes place in civil proceedings before national civil courts.[9] In principle, this holds true when a State aid

European Commission's recovery decision and will not be discussed in this article.

5 Since the competitors are the most frequent initiators of the private enforcement of EU State aid rules, we decided to focus on them with a note that, in principle, everything that holds for them in terms of the private enforcement also holds for the concerned private persons (concerned individuals).

6 Namely, in the early years of the European integration process State aid measures were largely disbursed through acts of administrative law but eventually private law contracts and (more generally) private law acts supporting traditional market transactions came to the forefront. This is one of the reasons which lead us to focus our efforts on private enforcement proceedings taking place in civil litigation. Moreover, an additional important reason for our decision to focus on civil litigation is the fact that the latter has often proved to be more complex and less adaptive to the requirements of EU State aid law when compared to administrative procedure (and administrative dispute).

7 In this regard, the case law on public enforcement is applied as a kind of benchmark or guidance.

8 The same goes for national administrative authorities.

9 Depending on the legal nature of the State aid measure under scrutiny (fn. 6), the private enforcement may also take place in administrative procedures before national administrative authorities and, if the administrative decisions are challenged, in the administrative dispute before national administrative courts; however, due to more stringent rules on legal standing and information asymmetry as well as because most of unlawful State aid measures are designed as private law

measure under review takes the form of a private law contract or – more generally – private law act supporting a traditional market transaction.[10]

In civil litigious proceedings, the court must assess a competitor's claim alleging that a Member State has committed a breach of the so-called standstill-clause laid down in Article 108(3) of the Treaty on the Functioning of the EU (hereinafter: TFEU)[11] (Section 2.1). When dealing with that provision, national civil courts must decide, inter alia, if the reviewed measure is State aid under 107(1) TFEU (Section 2.2). These proceedings are guided by the principle of national procedural autonomy. However, as the case law related to the public enforcement shows, this "autonomy" is significantly limited by various EU principles, but mostly by the principle of effectiveness of EU law. After confirming the relevance of the public enforcement case law for the area of the private enforcement, the limits of national procedural autonomy are discussed by pointing out most obvious encroachments on the "autonomy" (Section 2.3).

2.1. The standstill-clause and unlawful State aid under 108(3) TFEU

The standstill-clause and unlawful State aid are legal concepts stemming from Article 108(3) TFEU. As such, they are autonomous concepts of EU law, and they must be interpreted uniformly. Thus, Member States' authorities are bound by the definitions or interpretations as contained in the Treaties or set by EU institutions.

According to Article 108(3) TFEU, Member States are obliged first to notify their intention to implement new state aid measures (the notification obligation) and refrain from their implementation until the European Commission renders a final decision on their compatibility with the internal market (the standstill obligation). When a Member State fails to satisfy the obligation and

arrangements, national administrative procedures and administrative disputes are less often utilized when compared to national civil procedures. According to the mentioned Study (*op. cit.* (fn. 1)), this finding holds for most Member States.

10 If, however, a State aid measure takes the form of an administrative contract, administrative decision, or of a legislative act, there is principally no ground for the jurisdiction of civil courts. In those cases, the jurisdiction is principally vested in administrative authorities. See Lintschinger, C., *Private Durchsetzung des Beihilfeverbots und neuere Judikatur österr. und dt. Gerichte*, in: Jaeger, T.; Haslinger, B. (eds.), *Jahrbuch Beihilferecht 2012*, Neuer Wissenschaftlicher Verlag, Vienna, 2012, p. 509.

11 See Köhler, M., *Private Enforcement of State Aid Law - Problems of Guaranteeing EU Rights by means of National (Procedural) Law*, European State Aid Law Quarterly, *vol.* 11, no. 2, 2012, pp. 369-370; Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001), pp. 25-26.

implements a State aid measure without prior European Commission's authorisation, that measure is considered "invalid," "illegal" or "unlawful" State aid.[12]

Unlawful State aid impairs the legitimate interest of third persons, in particular the competitors of the State aid recipient. National courts and, where appropriate, other organs have the responsibility to guarantee effective legal protection to impaired persons who claim for that protection. This is possible because, according to the settled case-law after the *Costa* case[13], the last sentence of Article 108(3) TFEU has a direct effect.[14] Concerned individuals may thus invoke the provision in national proceedings and enforce any subjective right it confers to them. Granted, the substance of the subjective rights is not always immediately apparent but must be deduced from the corresponding obligation of the Member State. In the context of State aid rules, the premature implementation of state aid measures constitutes an infringement of the standstill obligation on the part of the Member State. The antithesis of this breach is thus the concerned individual's right "not to put up with State aid measures unless and until they have been previously authorized by the European Commission".[15] This right can be characterized as a "subjective right"[16], since it pertains to individual subjects, i.e., "those affected by the distortion of the competition caused by the grant of unlawful aid."[17]

As the European Commission has explicitly pointed out, competent national organs can adopt different types of remedies, depending on the situation, in order to safeguard the rights of individuals against the unlawful implementation of State aid.[18] For instance, they may decide to suspend or terminate

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12 Thus, unlawful aid means new State aid put into effect in contravention of Article 108(3) TFEU; see Article 1(f) of the 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, OJ L 248, 24. 9. 2015.

13 CJEU, *Costa v E.N.E.L.*, Case 6-64, ECLI:EU:C:1964:66.

14 We should emphasize that there are different approaches to understanding the principle of direct effect. The point of contention seems to be whether all directly effective provisions create subjective rights, or whether the potency to invoke a provision is a right in and of itself. See Prechal, S., *Directives in EC Law*, Oxford University Press, Oxford, 2016, p. 100.

15 Pastor-Merchante, F.; Monti, G., *The functions of national courts in the private enforcement of State aid law*, in: Parcu, P. L.; Monti, G.; Botta, M. (eds.), *EU State Aid Law: Emerging Trends at the National and EU Level*, Edward Elgar Publishing, Chaltentham, 2020, p. 124.

16 See Van Gerven, W., *Of Rights, Remedies and Procedures*, Common Market Law Review, *vol.* 37, no. 3, 2000, pp. 502-503.

17 CJEU, *CELF I*, Case C-199/06, ECLI:EU:C:2008:79, para. 38.

18 See Communication from the Commission Commission Notice on the enforcement

the implementation of the measure, order the recovery of the sums already disbursed, or adopt different provisional (interim) measures to otherwise safeguard the interests of the parties concerned. Finally, they may be asked to rule on compensation for damages suffered by third parties as a consequence of the unlawful implementation of the State aid.[19]

When dealing with Article 108(3) TFEU, national civil courts must decide, inter alia, if the reviewed measure is a State aid under 107(1) TFEU as briefly discussed directly in the next section.

2.2. The notion of State aid under Article 107(1) TFEU

The notion of State aid under Article 107(1) TFEU is a genuine substantive law matter. According to this provision, State aid is "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods […], in so far as it affects trade between Member States."

This wording shall be considered as a general clause (which must be regularly interpreted before the provision's application) rather than a concise, "ready-to-use" definition. The thorough discussion of the general clause is a complex substantive law issue which goes way beyond the purpose of this article; namely, the latter is focused on the selected procedural law challenges. Therefore, only the most fundamental issues concerning the general clause are briefly presented here.[20]

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of State aid rules by national courts, OJ C 305, 30.7.2021, para. 71.

19 *Ibid*.

20 For a detailed discussion see for example Ferčič, A., *Anti-competitive Measures of Member States: State Aid*, in: Ferčič, A. (ed.), *European Union Competition Law*, Europa Law Publishing, Zutphen, 2023, pp. 426-473; Bacon, K., *European Union Law of State aid*, 3rd edition, Oxford University Press, Oxford, 2017, pp. 17-90; Arhold, C., *B. The definition of State aid (I., II. and IV.)*, in: Säcker, F. J.; Montag, F. (eds.), *European State Aid Law, A Commentary*, C. H. Beck, Hart, Nomos, München, Oxford, Baden-Baden, 2016, pp. 82-154, 174-228; Soltész, U., *B. The definition of State aid (III., V. and VI.)*, in: Säcker, F. J.; Montag, F. (eds.), *European State Aid Law, A Commentary*, C. H. Beck, Hart, Nomos, München, Oxford, Baden-Baden, 2016, pp. 154-174, 228-243; Szyszczak, E., *Criterion of State Origin*, in: Hofmann, H. C. H.; Micheau, C. (eds.), *State Aid Law of the European Union*, Oxford University Press, Oxford, 2016, pp. 65-73; Ó Caoimih, A.; Sauter, W., *Criterion of Advantage*, in: Hofmann, H. C. H.; Micheau, C. (eds.), *State Aid Law of the European Union*, Oxford University Press, Oxford, 2016, pp. 84-128; Cisotta, R., *Criterion of Selectivity*, in: Hofmann, H. C. H.; Micheau, C. (eds.), *State Aid Law of the European Union*, Oxford University

Article 107(1) TFEU cumulatively stipulates conditions for the existence of State aid; namely:

- the Member State origin,
- the aid,
- the selectivity or selective effect,
- the (potential) distortion of internal market competition, and
- the (potential) effect on trade between Member States.[21]

As these conditions are undisputedly stipulated in a cumulative fashion, each of them can be considered as a condition *sine qua non*. Consequently, if any of them is not met in an individual case, the measure being assessed shall not be qualified as a State aid under Article 107(1) TFEU.[22]

Press, Oxford, 2016, pp. 129-150; Szyszczak, E., *Distortion of Competition and Effect on Trade between EU Member States*, in: Hofmann, H. C. H.; Micheau, C. (eds.), *State Aid Law of the European Union*, Oxford University Press, Oxford, 2016, pp. 151-160; Maqueda, E. C.; Conte, G., *State Resources and Imputability*, in: Pesaresi, N.; Van de Casteele, K.; Flynn, L.; Siaterli, C. (eds.), *EU Competition Law, Volume IV, State Aid, Book One*, 2nd edition, Claeys Casteels, Deventer, 2016, pp. 211-262; Nykiel-Mateo, A.; Wiemann, J., *Selectivity*, in: Pesaresi, N.; Van de Casteele, K.; Flynn, L.; Siaterli, C. (eds.), *EU Competition Law, Volume IV, State Aid, Book One*, 2nd edition, Claeys Casteels, Deventer, 2016, pp. 263-287; Kerle, C.; Flynn, L., *Advantage*, in: Pesaresi, N.; Van de Casteele, K.; Flynn, L.; Siaterli, C. (eds.), *EU Competition Law, Volume IV, State Aid, Book One*, 2nd edition, Claeys Casteels, Deventer, 2016, pp. 289-354; Medghoul, S., *Distortion of Trade and Competition*, in: Pesaresi, N.; Van de Casteele, K.; Flynn, L.; Siaterli, C. (eds.), *EU Competition Law, Volume IV, State Aid, 2nd edition, Book One*, Claeys Casteels, Deventer, 2016, pp. 355-373; Piernas López, J. J., *The Concept of State Aid under EU Law: From Internal Market to Competition and Beyond*, Oxford University Press, Oxford, 2015, pp. 67-217; Heidenhain, M., *European State Aid Law, Handbook*, C. H. Beck, Hart, Nomos, München, Oxford, Baden-Baden, 2010, pp. 13-141. See also the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016.

21 Since the CJEU and the European Commission sometimes "merge" together two conditions in the context of an assessment of a given public measure (mostly the second and third conditions, and the fourth and fifth conditions), principally when there is no doubt that those two conditions are fulfilled and no thorough analysis is needed, one could get a wrong impression that in the discussed provision there are less than five conditions for the existence of State aid. Yet, at the end of the day, all afore-mentioned conditions must be met to qualify an observed measure as State aid. See Ferčič, A., *op. cit.* (fn. 20), p. 435.

22 As far as a burden of proof is concerned, a person who would like to negate the existence of State aid in a particular case must prove that some of the conditions are not fulfilled. Quite opposite, a person who would like to confirm the existence

Since the conditions for the existence of State aid are not defined in the Treaties nor in the legislative acts deriving from them, the most important interpretative source are judgments and rulings of the Court of Justice of the EU (hereinafter: CJEU).[23] The notion of State aid is an objective and autonomous notion of the supranational law which must be interpreted uniformly; that is to say, its interpretation shall not be compromised by eventual national notions, concepts, and definitions.[24] Also, in the course of interpretation one shall take into account that each of the five conditions for the existence of State aid must be interpreted with due respect of the other conditions since together they form a functional unit.[25] Moreover, one shall take into account that the discussed legal notion must be interpreted on the basis of objective factors. Its function as well as its "design", which covers aid in any form whatsoever[26], advocates for a broad interpretation which is confirmed by the case law.[27] Moreover, when assessing a national measure from the perspective of State aid in the sense of Article 107(1) TFEU, the provision shall be interpreted with reference to the actual or potential effects of the observed national measure, and not with reference to the economic, social, cultural, or other policy aims pursued with it.[28] In other words, in this context the provision does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects.[29]

2.3. The limits of national procedural autonomy

The limits of national procedural autonomy became apparent already in the seminal *Rewe*[30] case. Nowadays, it is even more evident that, when enforcing

of State aid in a particular case must prove that all conditions stipulated in Article 107(1) TFEU are fulfilled.

23 In addition, we advise also to consult the European Commission's decisions as well as soft law instruments, e.g., communications and notices, but only as long as they do not oppose the court's case law.

24 Ferčič, A., *op. cit.* (fn. 20), p. 435.

25 *Loc. cit.*

26 When dealing with the notion of State aid, which is genuine substantive issue, the form that the aid measures take is irrelevant. However, the situation is different when it comes to the procedural dimension. Here, the form is important for concerned individuals since it usually dictates the competent authority where a private enforcement takes place and the applicable procedural rules.

27 Ferčič, A., *op. cit.* (fn. 20), p. 435.

28 *Loc. cit.*

29 *Loc. cit.*

30 CJEU, *Rewe-Zentralfinanz*, Case C-33/76, ECLI:EU:C:1976:188.

the EU (State aid) rules, national courts and other organs principally apply, inter alia, national procedural rules according to the principle of national procedural autonomy which, however, is significantly limited by other principles of EU law, such as the principle of equivalence (non-discrimination) and the principle of effectiveness of EU law. More precisely, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy. This is on condition, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).[31] In addition, the principle of effective judicial protection has more recently been used to limit national procedural autonomy.[32]

There are several cases related to public enforcement of EU State aid rules where the CJEU followed the aforementioned approach, while the situation regarding the private enforcement is less clear. In our opinion, however, the case law on public enforcement can be applied as a benchmark or guidance for the discussion on the limits of national procedural autonomy in the context of private enforcement of EU State aid rules. The differences between the public and private enforcement should not lead to a different application of EU State aid rules. After all, they are two sides of the same coin, and both of them aim to achieve, inter alia, the effectiveness of EU State aid rules. According to our understanding of the European Commission's practice, the latter shares this view. Although the European Commission rightly distinguishes the public enforcement mechanism from the private one[33], it explicitly underlines the importance of the principle of effectiveness (and of some other general principles of EU law) in both mechanisms. Moreover, when demanding the application of the principle of effectiveness also in private enforcement matters, the European Commission uses references to case law dealing with the public enforcement.[34]

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31 CJEU, *Aquino*, Case C-3/16, ECLI:EU:C:2017:209.

32 Widdershoven, R., *National Procedural Autonomy and General EU Law Limits*, Review of European Administrative Law, *vol*. 12, no. 2, 2019, p. 6.

33 It has published two different soft law instruments on the matter; namely, the Communication from the Commission – Commission Notice on the recovery of unlawful and incompatible State aid (OJ C 247, 23. 7. 2019, pp. 1-23), which relates to public enforcement, and secondly, the Communication from the Commission – Notice on the enforcement of State aid rules by national courts (OJ C 305, 30. 7. 2021, pp. 1-28), which relates to private enforcement.

34 See paras. 19 and 20 of the Communication from the Commission – Notice on the

And last but not least, although competitors initiate private enforcement proceedings to protect their own (private) interests, these proceedings ultimately contribute to the protection of public interests and thus, through achieving the same end result (the recovery of unlawful State aid) they incidentally contribute to the system of public enforcement.

Thus, the underlying mechanism of private enforcement of the EU State aid law is subject to ubiquitous friction among fundamental principles of EU law. Most often, national procedural autonomy will come into conflict with the effectiveness of EU State aid law, prompting the national court to undertake appropriate actions. Namely, the national court may either apply the principle of consistent interpretation to the contravening national rule, or – if the latter proves insufficient or inappropriate to clear away the conflicting issue – disapply the contravening national rule. Only rarely will there be proper justification for the third option, namely, the enforcement of the contravening national rule to the detriment of EU law.[35]

It seems that the described state of art has lead Michal Bobek, former AG at the CJEU, to state – in essence – that there is in fact no (real) national procedural autonomy.[36] Taking the linguistic definition as a starting point to avoid confusion, we understand autonomy in its genuine legal meaning as a self-rule, i.e. to act according to one's own rules.[37] This would imply that there is a pro-

enforcement of State aid rules by national courts, in particular fn. 27.

35 National procedural autonomy will most certainly reach its endpoint if national procedural law does not provide for the effective enforcement of EU (State aid) law. This situation arises when national procedural law renders the enforcement of a subjective right derived from EU law excessively difficult or impossible in practice. Such an criterion (named after the respective cases) and is relatively lean towards national procedural law (See CJEU, *Rewe-Zentralfinanz*, Case C-33-76, ECLI:EU:C:1976:188; CJEU, *San Giorgio*, Case 199/82, ECLI:EU:C:1983:318). In later decades, the role of the principle of effectiveness was much more pronounced with the need to guarantee the "full effectiveness" of EU law. The full effectiveness criterion has been used to legitimise the introduction of *de novo* remedies, e. g., the right to damages under *Francovich* (CJEU, Case C-6/90, *Francovich*, ECLI:EU:C:1991:428). After the two extremes of the pendulum, the CJEU developed the procedural "rule of reason" criterion. The national court must conduct a balancing test between the competing interests and ascertain whether the national rule pursues a legitimate aim and is proportionate to reach that aim. If so, the national rule might exceptionally prevail over the enforcement of the subjective right. See Schütze, R., *European Constitutional Law*, Oxford University Press, Oxford, 2012, pp. 389-390.

36 Bobek, M., *Why There is No Principle of 'Procedural Autonomy' of the Member States*, in: Micklitz, H.-W.; De Witte, B. (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Cambridge, Portland, 2012, pp. 305-324.

37 Similarly, some understand autonomy as "the ability to act and make decisions

cedural area of law in which Member State is "free" from EU law constraints, including not being controlled by the CJEU.[38] The situation is, however, rather different. Procedural law is not "*domaine réservé*" of a Member State.[39] Even though the EU has no (explicit) 'procedural competence', the EU legislator has demonstrated that it can (incidentally)[40] affect national procedural law when exercising its competences in area of substantive law. Furthermore, even where such (incidental) "proceduralisation" has not taken place, national procedural law is subject to the omnipresent constraints as set by the EU fundamental principles, such as the principle of effectives, which can ultimately lead to the disapplication of conflicting national procedural rules.[41]

The full and proper understanding of the limits of national procedural autonomy (or its very existence) necessitates a full comprehension of the notion of "procedural law" (Section 2.3.1.) which encapsulates the notion of "remedies". Bearing that in mind, the CJEU has already elaborated which remedies "should" be at the disposal of competitors (2.3.2.). Additionally, public enforcement proceedings may affect the private enforcement proceedings and additionally hinder the degree of national procedural autonomy (2.3.3).

2.3.1. Remedial autonomy as a corollary of national procedural autonomy

As mentioned, the individual derives subjective rights from the direct effect of Article 108 TFEU. The latter "right" must be understood as a legal position, which the individual may enforce using remedies, i.e., classes of action intended to make good infringements of the right concerned, according to the procedures governing the exercise of such actions. The latter mirrors the EU's understanding of the terms and interrelationships of rights, remedies and procedures[42], according to the interpretative autonomy of terms in EU law.[43] This might contrast the domestic doctrines of certain Member States, particularly those of German legal tradition, where the legal system is considered to be a

without being controlled by anyone else"; see *Oxford Advanced Learner's Dictionary*, Oxford University Press, Oxford, 2005, p. 85.

38 Bobek, M., *op. cit.* (fn. 36), p. 317.

39 *Loc. cit*.

40 See Eliantonio, M.; Muir, E., *Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law*, Review of European Administrative Law, no. 1, 2015, pp. 177-204.

41 Bobek, M., *op. cit.* (fn. 36), p. 317.

42 See Van Gerven, W., *op. cit.* (fn. 15), pp. 502-503.

43 Autonomous interpretation of terms in EU law is justified and necessary to ensure the uniform interpretation of EU law.

collection of subjective rights while at the same time "claims" under substantive law are also considered rights.[44] Here, it is important to stress that it is solely the subjective right that is determined by EU law. On the other hand, remedies and procedures both fall under the purview of national procedural autonomy, inasmuch there are no EU provisions on the matter. In fact, theory has seldom referred to "remedial autonomy" as a distinguishable category within the overarching notion of procedural autonomy.[45]

The practical significance of the EU's interpretative autonomy is that the reference to national law made under the principle of national "procedural" autonomy, may necessarily constitute a reference to both substantive and procedural provisions of national law, regardless of their distinction in domestic doctrine.[46] Since Member States have by-and-large not enacted special regulations for the private enforcement of State aid law[47], concerned individuals might face an uphill battle. They must recognise under national law the substantive and procedural provisions which justify their remedy of choice (the relief sought). In the example of national legal systems employing the maxim of *iura novit curia* in the sense that the court applies the law to the facts of the case on its own initiative, the deciding judge plays an important part in the recognition process. For when enforcing State aid law, the national judge acts as the judge of the EU (*juge du droit commun*)[48], and should strive to guarantee the effectiveness of EU law.

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44 Hofmann, F., Kurz, F., *Law of Remedies*, Intersentia, Cambridge, 2019, pp. 9-10.

45 See Trstenjak, V., Beysen, E., *European consumer protection law: Curia semper dabit remedium?*, Common Market Law Review, *vol.* 48, no. 1, pp. 95-124.

46 See Köhler, M., *op. cit.* (fn. 10), p. 380.

47 Belgium, Spain, Finland, the Netherlands, Slovakia have adopted some form of special legislation for the recovery of unlawful aid, however, the latter refers to recovery following a recovery decision issued by the European Commission and not private enforcement proceedings. See Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001), pp. 90-91.

48 Fennelly, N., *The National Judge as Judge of the European Union*, in: The Court of Justice of the European Union, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, Asser, Springer, The Hague, 2013, p. 62.

2.3.2. Remedies for the breach of the standstill clause

While EU law does not prescribe an exhaustive list of remedies, and does not, in fact, bestow upon individuals these remedies[49], the CJEU has nevertheless elaborated and the European Commission has reiterated, which remedies should be available to the concerned individual under national law. These include: suspension of the payment of unlawful aid or the termination of the aid measure; recovery of unlawful aid; recovery of illegality interest; damages (against the Member State); and interim measures.[50] The remedies for unlawful aid have first and foremost a restorative function[51], aimed at eliminating the distortion of competition caused by the unlawful aid.[52] Less expressed, yet still important, is the "prophylactic"[53] function offered by interim measures and the termination of the aid measure. These aim to establish provisional safeguarding of the parties' subjective rights. In connection, the CJEU has stressed that national courts are under the duty to guarantee the effectiveness of EU State aid law in the interim, going so far as to prohibit national courts from staying the national proceedings and awaiting a decision of the European Commission on the compatibility of the measure in dispute.[54]

Under EU law, the above remedies may only be invoked against the Member State and not against the recipients of unlawful aid since the Member State is the exclusive addressee of the standstill clause. On the other hand, EU law does not preclude damages claims against the recipients provided they are rooted in national law.[55]

Notably, the subjective right of the concerned individual ceases in large part if the European Commission declares that the unlawful aid measure is nevertheless compatible with the internal market. In that case, EU law no longer

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[49] This statement might not hold fully true for the remedy of damages, since EU law has also established an autonomous remedy in the form of a right to damages for infringements of EU law committed by the Member State. See: CJEU, *Francovich*, Joined cases C-6/90 and 9/90, ECLI:EU:C:1991:428, para. 35.

[50] See Communication from the Commission Notice on the enforcement of State aid rules by national courts, OJ C 305, 30.7.2021, paras. 72-99.

[51] The CJEU has explicitly rejected the indication of any punitive elements to the recovery obligation (CJEU, *Belgium v Commission*, Case C-75/97, ECLI:EU:C:1999:311, para. 65). On the other hand, national law may permit for punitive damages against the Member State.

[52] See Bacon, K., *European Union Law of State Aid*, 3rd edition, Oxford University Press, Oxford, 2017. P. 557.

[53] See Pastor-Merchante, F.; Monti, G., *op. cit.* (fn. 15), pp. 128-129.

[54] CJEU, *CELF II*, Case C-1/09, ECLI:EU:C:2010:136, paras. 29-30.

[55] CJEU, *SFEI*, Case C-39/94, ECLI:EU:C:1996:285, para. 75.

requires that the unlawful aid be recovered, but merely the payment of illegality interest.[56] Due to the conceptual framing of State aid law, it cannot be considered that the concerned individual is sustaining negative effects from (albeit unlawful) aid declared compatible, thus, from the perspective of EU law, there is no legal position required to be safeguarded anymore.

2.3.3. Stand-alone and follow-on actions

Private enforcement may take place before, in-parallel or after public enforcement proceedings instigated by the European Commission. Private enforcement proceedings are considered "stand-alone" if they are initiated and concluded before the European Commission issues its decision on the allegedly unlawful State aid measure. On the other hand, follow-on proceedings benefit from an existing decision of the European Commission.[57]

In accordance with the so-called Procedural Regulation[58], the European Commission may issue a "negative decision" finding that the measure in question constitutes unlawful State aid and – if the State aid already been paid out – an adjacent "recovery decision", ordering the Member State to recover the amount of the State aid, together with interests for the period of illegality. Since the negative decision contains the finding that the measure in question constitutes unlawful State aid, the concerned individual is relieved from the burden of having to prove to the national court all the qualifying elements of State aid for said measure and its unlawfulness. However, even before the European Commission reaches a final decision, a decision of a provisional nature, namely a "decision to initiate the formal investigation procedure", creates binding effects for national courts. To elaborate, the investigative procedure which takes place before the European Commission may conclude after a preliminary assessment of the measure or may, if doubts are raised regarding the compatibility of the measure, enter the formal investigation procedure. From that moment on, national courts are no longer able to autonomously assess the aid character of the measure and must proceed on the assumption that the measure constitutes unlawful aid.[59]

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56 CJEU, *CELF I*, Case C-199/06, ECLI:EU:C:2007:304, paras. 52-55.

57 Pastor-Merchante, F., *The European Perspective*, in: Wollenschläger, F.; Wurmnest, W.; Möllers, T. M. J. (eds.), *Private Enforcement of European Competition and State Aid Law*, Wolters Kluwer, Alphen aan den Rijn, 2020, pp. 204, 210.

58 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, OJ L 248, 24.9.2015.

59 See CJEU, *Deutsche Lufthansa*, Case C-284/12, ECLI:EU:C:2013:755, para. 43.

However, in our view, none of the findings discussed in this section can render the case law on public enforcement of EU State aid rules irrelevant to the area of private enforcement of those rules. Therefore, we use the case law on public enforcement, discussed in the next chapter, as a benchmark or guide when dealing with open questions of the private enforcement and, ultimately, to answer the article's main research question; namely, is there any room left for national procedural autonomy (also) in case of private enforcement of EU State aid rules in proceedings before national civil courts?

3. SELECTED ISSUES

We attempt to demonstrate the erosion of national procedural autonomy on the example of two select issues. First, we employ the comparative legal method to show that the national laws of selected Member States do not provide for private enforcement of State aid law at the outset due to ineffective legal remedies (or lack thereof). For the purposes of comparison, the German, Austrian and Slovenian national legal orders have been taken into consideration (sections 3.1.). Second, we show that the principle of *res judicata*, which may be considered the outermost bastion of national procedural autonomy has in several cases been found to contravene the effectiveness of EU State aid law and was subsequently disapplied by national authorities (Section 3.2.).

3.1. The lack of effective national remedies: the case of Germany, Austria and Slovenia

Remedies under national law may render the exercise of the subjective right derived from Article 108(3) TFEU excessively difficult or impossible in practice in many ways. For example, national law can prescribe short limitation periods, stringent rules on the burden of proof, or limits on legal standing for example. In extreme cases, national law might not even offer suitable remedies to enforce the subjective right. Our analysis of three national legal orders has found profound doctrinal misunderstandings of the principle of effectiveness, or rather its application to remedial autonomy. Since all three legal orders in question adhere to the German legal tradition, this indicates a systemic problem for a wider group of national legal orders.

3.1.1. The validity of unlawful State aid measures

Although an aid measure implemented in breach of the standstill clause is "unlawful" under EU law, this is a purely "formal" or "procedural" category.[60] It does not render the measure itself automatically invalid but leaves the issue of (in)validity to national law. EU law only requires that the effects of unlawful aid be neutralised.[61] From this point of view, the invalidity of unlawful aid measures may be considered either as a remedy or to justify a separate remedy. In the first case scenario, an action by the individual might aim at merely establishing the invalidity of the aid measure with a request for declaratory relief. In the second case scenario, invalidity is considered as a substantive precondition for condemnatory relief (an action for recovery).

In Germany, the Federal Court of Justice (hereinafter: BGH), established that unlawful aid measures, which take the form of civil (commercial) contracts, are to be considered null and void *ex tunc*[62] in accordance with par. 134 BGB.[63] In turn, the Member State can be compelled to recover the unlawful aid from the recipient in accordance with the law of unjust enrichment. However, German doctrine also considers that an action for declaratory relief suffices, since the postulates of the principle of the "rule of law" should then compel the Member State to recover the unlawful aid *sua sponte*.[64] This would also relieve the competitor of having to quantify the amount of aid when seeking condemnatory relief (action for recovery).

The Austrian Supreme Court of Justice (hereinafter: OGH) has thus far been reluctant to acknowledge the invalidity of unlawful aid measures. Instead, the OGH has *obiter dictum* denied the legal interest (which is a prerequisite for legal standing) of competitors to seek declaratory relief. In line with well-established Austrian doctrine, a party may not seek declaratory relief if the party

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60 This denomination comes from the fact that the standstill clause itself is a procedural rule. It is intended to guarantee the *ex-ante* nature of the European Commission's procedure for the review of the measure's compatibility. See Armbrüster, C., *BGB § 134 Gesetzliches Verbot*, in: Säcker, F. J.; Rixecker, R.; Oetker, H.; Limperg, B. (eds.), *Münchener Kommentar zum BGB*, 8th edition, C. H. Beck, München, 2018, rn. 37-18.

61 Bühner, S., *Die Rückabwicklung unionsrechtswidriger Beihilfen im Privatrecht*, Tectum Verlag, Baden-Baden, 2018, pp. 148-151.

62 BGH, 04.04.2003, V ZR 314/02.

63 Bürgerliches Gesetzbuch (BGBl. I S. 42, 2909; 2003 I S. 738).

64 See Solek, L.; Zellhofer, A., *Nationaler Rechtsschutz gegen formell rechtswidrige Beihilfen in Österreich. Vertiefung ausgewählter Themen*, in: Jaeger, T.; Haslinger, B., *Jahrbuch Beihilferecht*, Neuer Wissenschaftlicher Verlag, Vienna, 2014, p. 560.

has the option to seek condemnatory relief, since the latter is a more potent form of legal protection and consumes the former.[65]

However, this premise is flawed if one accepts the above-described German stance, according to which, declaratory relief is not consumed by an action for condemnatory relief but is its equivalent, because the rule of law should compel the Member State to recover unlawful aid *sua sponte*. Austrian courts have thus far deferred the question of invalidity as not being essential – under EU law, competitors may only seek the neutralisation of the effects of unlawful aid, which may, for example, be realised by the beneficiary paying additional sums of money to supplement the real market value of a contract or return part of the benefits, depending on the aid measure *in concreto*.[66] However, this stance raises further doctrinal inquiries, namely, how specific[67] can (or must) the condemnatory relief sought by the competitor be and furthermore, how would such neutralising transactions take place without affecting the validity of the underlying contract.

Slovenian courts have thus far not directly addressed the issue of validity, however, a recent judgment by the Slovenian Supreme Court suggests such measures would be considered null and void.[68] This would confirm an opinion previously expressed in domestic theory and derived from German law.[69]

3.1.2. (Other) remedies under civil law

Although the BGH established the nullity of unlawful aid measures under German law already in 2003, successive German case law had continuously denied safeguarding the rights of competitors. In a string of cases[70] known colloquially as the "Airline wars"[71] the courts considered that Article 108(3) TFEU was not a so-called "Schutzgesetz" under par. 823(2) BGB (a law intended to safeguard the interests of another (third) person), despite the direct effect of Article 108(3) TFEU. Since German law contains no specific legislati-

65 OGH, 19.01.2010, 4Ob154/09i.

66 OGH, 25.03.2014, 4Ob209/13h.

67 The argument here is that the recovery obligation is imposed on the Member State. Thus, the latter should enjoy discretion regarding the method of recovery.

68 VSRS, 10.05.2023, Sodba II Ips 57/2022.

69 Sladič, J., *Tožba konkurenta prejemnika slovenske državne pomoči*, Lexonomica, *vol*. 6., no. 1, 2014, pp. 88-89.

70 OLG Schleswig, 20.05.2008, 6 U 54/06; LG Potsdam, 23.11.2006, 51 O 167/05; LG Bad Kreuznach, 16.05.2007, 2 O 441/06.

71 See Arhold, C., *European Airline Wars: German Courts Divided over Actions against Low-Cost Carriers*, European State Aid Law Quarterly, *vol*. 7, no. 1, 2008, pp. 31-47.

on for the competitors to demand the recovery (or halting implementation) of unlawful aid, recovery could only be achieved by an analogous use of provisions for the protection of ownership (property) rights under par. 1004 BGB. Out of necessity, this analogous use has since long been established for laws falling into the category of a "Schutzgesetz."

Moreover, one of the courts went as far as arguing that competitors enjoy no rights against the Member State, as State aid law concerns exclusively the relationship between the Member State and the recipient of aid.[72] The courts also denied information claims against the Member State, which would allow competitors to quantify their request for relief in a stage action (German: *Stufenklage*). Once the cases had reached the BGH, the latter reversed the incorrect reasoning in two sister judgments issued in 2011.[73] It explained that individuals derive subjective rights from the standstill clause, which conforms to the notion of a "Schutzgesetz". Furthermore, it found that competitors could raise information claims against the Member State. Although no provision under national law provides such a right in State aid litigation, a right to information can be derived from the principle of good faith. The BGH also dissaplied certain rules on national limitation periods, which would otherwise prevent the enforcement of a judgment for the recovery of unlawful aid. It is important to stress that the BGH reached these conclusions by the application of consistent interpretation to national law, in conjunction with Article 108(3) TFEU. It explicitly held that its decisions were necessary considering the effectiveness of EU law.[74] In the alternative, the BGH stated that remedies for State aid law could be enforced through mechanisms provided by the law of unfair competition in conjunction with Article 108(3) TFEU.

Austrian law provides for functionally equivalent legal grounds as German law. However, the Austrian supreme court (hereinafter: OGH) has thus far withheld from characterising Article 108(3) TFEU as a "Schutzgesetz". Instead, the OGH has upheld the argument that unlawful aid constitutes an act of unfair competition under the general clause of par. 1 UWG.[75] The act of granting unlawful aid is unfair because it strengthens the market position of the recipient in contradiction to the law and honest market practices; this constitutes an infringement of the maxim *par conditio concurrentium*.[76] Thus, competitors

72 OLG Schleswig, 20.05.2008, 6 U 54/06.

73 BGH, 10.2.2011, I ZR 213/08; BGH, 10.2.2011, I ZR 136/09.

74 BGH, 10.2.2011, I ZR 136/09, paras. 28, 30, 48.

75 Bundesgesetz gegen den unlauteren Wettbewerb, StF: BGBl. Nr. 448/1984 (WV).

76 Koppensteiner, H.-G., *Österreichisches und europäisches Wirtschaftsprivatrecht: Teil 8/2 – Staatliche Beihilfen*, Verlag der Österreichischen Akademieder Wissenschaften, Vienna, 2000, pp. 205-206.

may seek claims for the elimination or suspension of the unfair act (recovery and injunctions to refrain from implementation).

In contrast to Germany and Austria, Slovenian law does not operate with the concept of "Schutzgesetz." It also provides no special legal basis for the recovery of unlawful aid. One potential legal ground for private enforcement of State aid law could be the *actio popularis* in Article 133 OZ.[77] The latter provision entitles any person to request that another person remove a source of danger that threatens major damage to the former or an indeterminate number of persons and refrain from the activities from which the disturbance or risk of damage derives, if the occurrence of disturbance or damage cannot be prevented by appropriate measures. Its use would necessitate the application of the principle of consistent interpretation, since the provision is, apart from a mere two diverging exceptions[78], in domestic doctrine understood to refer exclusively to physical (sources of) danger in the context of environmental protection.[79] In the alternative, it is also questionable whether the law of unfair competition allows for effective private enforcement.

In contrast to German and Austrian law, Slovenian law specifies that only an "undertaking" can commit an act of unlawful competition. The law uses the EU notion of undertaking, i.e., entities which conduct an economic activity (offering goods or services).[80] Not only does the Member State often engage in purchasing (as opposed to "offering") activity, but when the Member State does provide State aid, it does so in contradiction to how an economic operator would act – it acts to its own disadvantage. This can be reconciled if we apply the rationale of the CJEU that profit-making motive is not crucial when defining an undertaking, as even conducting services without remuneration will put the provider into a competitive relation to undertakings which compete on a profit-making basis[81], hence rendering the Member State as an "undertaking." To ensure effective private enforcement of State aid law on the basis Slovenian unfair competition law, the court thus might have to disapply part of the provision, if the proposed interpretation is not accepted.

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77 Obligacijski zakonik (Uradni list RS, št. 97/07 – uradno prečiščeno besedilo, 64/16 – odl. US in 20/18 – OROZ631).

78 In these cases the courts recognised the application of Article 133 OZ in private enforcement of antitrust law and financial damage. See VSRS, 23.05.2014, Sodba III Ips 98/2013; VSL, 18.01.2018, Sklep V Cpg 1094/2017.

79 See Jadek Pensa, D., *133. člen*, in: Juhart, M.; Plavšak, N. (eds.), *Obligacijski zakonik: Splošni del s komentarjem (1. knjiga)*, GV Založba, Ljubljana, 2003, pp. 761-763;

80 CJEU, *Klaus Höfner*, Case C-41/90, ECLI:EU:C:1991:161.

81 See CJEU, *MOTOE*, Case C-49/07, ECLI:EU:C:2008:376, para. 28; CJEU, *SELEX*, Case T-155/04, ECLI:EU:T:2006:387, para. 77.

3.2. National *res judicata* as an obstacle to effectiveness

National rules on res judicata may significantly hinder the principle of effectiveness if a final judgment contains an infringement of EU law. A particular issue settled by a judgment must be regarded as final and the issue cannot be re-litigated between the persons bound by the judgment (*ne bis in idem*).[82] Thus, an erroneous decision on the lawfulness of aid measures may prevent successive State aid litigation. Remedies targeting such unlawful aid would necessarily have to breach or circumvent the principle of *res judicata*. There is no denying the controversy of such propositions in EU law. Under the latter, *res judicata* is considered an important and basic principle and an "expression" of the principle of legal certainty found in all the laws of the Member States.[83] Nevertheless, there have been examples, foremost in the area of State aid law, where the CJEU established that the effectiveness of EU law trumps national *res judicata*.

In the landmark case of *Lucchini*, the CJEU found Italian rules on *res judicata* incompatible with guaranteeing the effectiveness of State aid law. Along the same lines, the CJEU has more recently found the incompatibility of German rules on *res judicata* in the case *Klausner Holz*, prompting the national court to disapply the conflicting rules. Since there has been much written on *Lucchini*[84], we shall only shortly recap the CJEU's reasoning therein, to better understand the background, which led to the latest iteration of this lien of case law in *Klausner Holz*.

3.2.1. Lucchini*: piercing the principle of* res judicata

The facts of the case *Lucchini* concerned an aid measure which was implemented before the European Commission reached its decision, finding the measure incompatible. Prior to that decision, Lucchini successfully instituted civil litigation to establish its right to the payment of the aid. The court ordered the competent Italian authorities to pay the amounts claimed. Neither the parties, not the court raised issues of State aid law or took notice of the decision of the

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82 Schaffstein, S., *The doctrine of res judicata before international commercial arbitral tribunals*. Oxford University Press, Oxford, 2016, p. 10.

83 CJEU, *Eco Swiss*, Case C-126/97, ECLI:EU:C:1999:269, para. 46.

84 See Lenaerts, K., *National remedies for private parties in the light of the EU law principles of equivalence and effectiveness*, Irish Jurist, *vol*. 46, no. 1, 2011, pp. 29-31; Turmo, A., *National res judicata in the European Union: Revisiting the tension between the temptation of effectiveness and the acknowledgement of domestic procedural law*, Common Market Law Review, *vol*. 58, no. 2, 2021, pp. 371-374.

European Commission rendered in the meantime. The judgment was confirmed on appeal and became *res judicata* in line with Article 2909 of the Codice Civile[85], which precludes not only the reopening of pleas in law which have already been expressly and definitively determined but also precludes the examination of matters which could have been raised in earlier proceedings but were not. This judgment barred Italian authorities from later attempts at recovering the aid, after an exchange of communication with the European Commission. An action for recovery was nonetheless filed by the national authorities and the national court referred the question for preliminary ruling to the CJEU.[86]

The CJEU found that the consequence of Italian rules on *res judicata* would effectively exceed the limits of the jurisdiction of the national court by violating the exclusive authority of the Commission on assessing the compatibility of aid. The application of national rules would frustrate the "full effect" of EU law in so far as it would make it impossible to recover unlawful aid. The CJEU went on to stress that the national court is under duty to apply the principle of consistent interpretation of national law, if necessary refusing of its own motion to apply the conflicting national provisions on *res judicata*.[87] One commentator has noted that the rationale employed by the CJEU seems to indicate that the Italian judgment should be considered a "null judgment", a concept developed in certain Member States (German: *wirkungsloses Urteil*).[88] According to the latter concept, judgments containing manifest defects, such as infringing upon another authority's exclusive jurisdiction, should be stripped of effect.

In *Lucchini*, the CJEU did not explicitly refer to national procedural autonomy. Rather, the CJEU deferred to the primacy of EU law, which would be bypassed if the European Commission decisions were not given full effect.[89] Primacy, therefore, does not leave open any room for considerations of national procedural autonomy. This approach seems to have been confirmed more recently in the case *Buonotourist*.[90]

However, in *Fallimento Olimpiclub*[91], the CJEU had the chance to frame the relationship between the principle of effectiveness and the national rules on

85 Codice Civile, Gazzetta Ufficiale n. 79 del 4-4-1942.

86 CJEU, *Lucchini*, Case C-119/05, ECLI:EU:C:2007:434.

87 *Ibid*., paras. 59-63.

88 Kornezov, A., *Res Judicata of National Judgments Incompatible with EU Law: Time for a Major Rethink*, Common Market Law Review, *vol*. 51, no. 3, 2014, p. 821.

89 CJEU, *Lucchini*, Case C-119/05, ECLI:EU:C:2007:434, para. 62.

90 CJEU, *Buonotourist*, Case C-586/18 P, ECLI:EU:C:2020:152. See Federico, R., *Lucchini Revisited: When Judgments Harm Competition*, European State Aid Law Quarterly, *vol*. 20, no. 1, 2021, pp. 144-149.

91 CJEU, *Fallimento Olimpiclub*, Case C-2/08, ECLI:EU:C:2009:506.

res judicata in the conventional sense of the restraints on national procedural autonomy.[92] The facts of the case once again concerned the broad scope of Italian rules on *res judicata*. This time, a *res judicata* judgment of a tax court, which contained an erroneous assessment of a VAT advantage, prevented later litigation on the matter and meant that the advantage would perpetuate for each following tax year. The CJEU specified that the primacy-based approach from *Lucchini* was not applicable as it concerned a "highly specific situation" in the area of State aid law.[93] It then conducted the procedural "rule of reason" test of effectiveness, inquiring whether the interpretation of Article 2909 of the Italian Civil Code may be justified with a view of protecting legal certainty. It concluded that due to the cumulative effects of the national judgement, EU law precludes the application of national rules on *res judicata* in this case.[94]

3.2.2. Klausner Holz*: reaffirming effectiveness over* res judicata

The facts of the case concerned the undertaking Klausner Holz, which entered into an agreement to acquire goods from a German federal State in multiple instalments. The later unilaterally revoked the agreement, due to alleged hardships facing Klausner Holz. In turn, Klausner Holz filed an action seeking positive declaratory relief, which was successful. The declaratory judgment affirmed the validity of the contract. This decision was upheld on appeal and became *res judicata*. Subsequently, Klausner Holz initiated new legal proceedings, seeking contract performance and compensation for damages. This time, the German federal State, acting as defendant, introduced a novel objection, claiming that contract performance would infringe State aid law, as the transaction could be considered unlawful State aid. Notably, these arguments had not been presented during the initial trial or the subsequent appeal. Should this argument be accepted, it could render the original contract null and void, in line with par. 134 BGB and would result in the rejection of Klausner Holz's claims.[95] However, the national court was constrained from arriving at such a determination due to the earlier declaratory judgment secured by Klausner Holz, which confirmed the validity of the contract. Thus, it once again became crucial to determine whether the principle of effectiveness takes precedence over the national rules on *res judicata*.

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92 Ortlep, R.; Verhoven, M., *The principle of primacy versus the principle of national procedural autonomy*, Netherlands Administrative Law Library, *vol*. 2012, no. 1, 2012.

93 CJEU, *Fallimento Olimpiclub*, Case C-2/08, ECLI:EU:C:2009:506, para. 25.

94 *Ibid*., para. 32.

95 CJEU, *Klausner Holz*, Case C-505/14, ECLI:EU:C:2015:742, paras. 4-14.

Under German law, specifically par. 322 ZPO[96], judgments can become *res judicata* in so far as a ruling has been given on the complaint made in the "action or on a counterclaim". The CJEU recognised that *res judicata* under German law has certain "subjective, objective and temporal limitations" which preclude subsequent raising of issues that could have been raised in earlier proceedings but were not.[97] The CJEU then reminded the national court of the principle of consistent interpretation, pointing out the fact the earlier judgment contained no observations on the elements of (unlawful) aid as well as pointing out the fact that the earlier judgment was of a declaratory character, while the current proceedings are of condemnatory nature. The CJEU applied the "rule of reason" test, once again confirming that national *res judicata* (and the principle of legal certainty in broader terms) needs to give way to the principle of effectiveness.[98]

It is apparent that the CJEU engaged in a thorough examination of the German doctrine of *res judicata*. The references to the national limits of *res judicata* even seem to indicate that the CJEU attempted to motivate the national court to apply a narrower understanding of *res judicata* in its "objective dimension," in such a way that State aid elements are not encompassed. Nevertheless, upon continuation of the national proceedings, the national courts could not reconcile domestic doctrine by way of consistent interpretation. Thus, the national courts turned to the principle of effectiveness and disapplied the rules on *res judicata* so that the defences by the German federal State were no longer barred.[99] More specifically, it seems the conflicting judgment lacks "substantive *res judicata*" meaning that it cannot produce binding and preclusive effects, yet it retains "formal *res judicata*" as it cannot be challenged by ways or ordinary legal remedies.[100]

The broader picture to take away from *Klausner Holz* is that in a Member State which employs a broad scope of *res judicata*, those rules will need to be disapplied if the judgment infringes State aid law. It seems less likely that the national court would by way of consistent interpretation be able to accommo-

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96 Zivilprozessordnung (BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781).

97 CJEU, *Klausner Holz*, Case C-505/14, ECLI:EU:C:2015:742, para. 30.

98 *Ibid.*, paras. 40-46.

99 LG Münster, 21.06.2018, 011 O 334/12, paras. 149-151; OLG Hamm, 27.02.2020, 2 U 131/18, paras. 151-154.

100 See Paulmichl, P., *Verfahrensautonomie unter Druck: Auf dem Weg zu einem unionsrechtlichen Rechtskraftverständnis im Verbraucherrecht?*, Zeitschrift für das Privatrecht der Europäischen Union, *vol.* 20, no. 3, 2023, p. 110; Schöning, F., *Klausner Holz Niedersachsen: May the Force Be with You*, Journal of European Competition Law & Practice, *vol*. 7, no. 5, 2016, pp. 313-314.

date the effectiveness of State aid law, as domestic rules on *res judicata* and their respective methods of interpretation have, due to their importance, been cultivated for decades, if not centuries. This is evidenced in Germany where the law does not lay down in (explicit) writing the scope of the binding and preclusive effects of judgments, but theory has gradually developed a firm interpretation, later translated into doctrine.[101] These interpretations also form the backbone of domestic doctrines in Austria and Slovenia.[102]

In contrast to cases *Lucchini* and *Falimento Olimpiclub*, as described above, the case *Klausner Holz* did not concern the recovery of State aid following public enforcement proceedings. Rather, the CJEU principally confirmed that even in proceedings initiated by private persons, *res judicata* cannot supersede EU rules on State aid. This seems to affirm the understanding that in (private) enforcement proceedings initiated by the competitor of the State aid recipient, the defendant Member State cannot invoke the objection that there is a *res judicata* judgment preventing it from recovering the unlawful State aid[103], nor could the recipient of the aid in successive litigation (initiated by the Member State after a successful action by the competitor) raise that same objection to avoid paying back the full amount of unlawful State aid and related interest.

4. CONCLUSION

Our analysis shows that the area of State aid law is one where Member States face highly intensive limits of national procedural autonomy, mostly due to the principle of effectiveness. This holds true for public enforcement as well as for private enforcement as explained (especially) in the section 2.3.

The analysed enforcement cases reveal real difficulties and challenges which must be resolved by national judges. In particular, they must be able to properly interpret national procedural rules to ensure that their application does not impair the effect of supranational substantive rules. Where, however, national procedural rules cannot be interpreted and applied in line with the supranational substantive rules, national judges principally are bound to set aside the conflicting national procedural rules. In enforcement proceedings, EU State aid

101 See Voß, C., *Die Durchbrechung der Rechtskraft nationaler Zivilgerichtsurteile zu Gunsten des unionsrechtlichen "effet utile"?*, Nomos, Baden-Baden, 2019, pp. 34, 42-48.

102 Wedam-Lukić, D., *Sporni predmet v civilnem procesu*, Zbornik znanstvenih razprav, *vol.* 53, no.1, pp. 231-276.

103 Depending on the personal scope of national *res judicata* doctrines, this could mean a direct objection based on *res judicata* or an indirect objection where *res judicata* serves to justify *force majeure*.

law has proven to trump even the utmost bastion of national procedural autonomy, namely the principle of *res judicata*. This is all the more pertinent when taking into account that the CJEU reached its conclusions not on the criterion of full effectiveness of EU law, but on the balancing test of the procedural rule of reason and still found that the fundamental interests of legal certainty guaranteed by *res judicata* could not outweigh the interests of effective enforcement of State aid law.

After due consideration of the aforementioned findings, including our strict understanding of the term "autonomy", we conclude that, indeed, in the discussed area, there is no room left for national procedural autonomy as was already suggested a decade ago.[104] While we do not negate that the discussed principle exists at least in nominal terms, since the CJEU makes explicit reference to it, we deem that the principle confers no real or genuine autonomy. National procedural rules are certainly an important factor and a starting point of enforcement before national courts, however, this is principally so only as long as they do not impair the supranational (substantive) rules. In case of an indirect collision, it is the supranational rule which prevails over the national rule. Therefore, we believe that there is no room left for (genuine) national procedural autonomy also[105] when observed in the context of the private enforcement of EU State aid rules.

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104 See fn. 36.

105 This holds true also for the area of public enforcement of EU State aid rules.

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Sažetak

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PRIVATNA PROVEDBA PRAVILA EU-A O DRŽAVNIM POTPORAMA: IMA LI JOŠ MJESTA ZA NACIONALNU POSTUPOVNU AUTONOMIJU?

Ovaj članak bavi se privatnom provedbom pravila EU-a o državnim potporama u nacionalnim građanskim parničnim postupcima. Takva vrsta provedbe pokazala se velikim izazovom za nacionalne suce, posebice one koji ignoriraju ograničenja načela nacionalne postupovne autonomije. Budući da je potpuno razumijevanje tih ograničenja ključno za privatne ovršne djelatnosti, fokusiramo se na načelo učinkovitosti prava EU-a koje, kada se pravilno tumači i primjenjuje, najintenzivnije ograničava nacionalnu postupovnu autonomiju. Zapravo, pitanje je uživaju li države članice i njihovi sudovi i suci stvarnu ili istinsku autonomiju u razmatranom području. Iz tog razloga članak najprije postavlja okvir raspravljajući o temeljnim pravnim konceptima i načelima koji su bitni za privatnu provedbu pravila EU-a o državnoj potpori u nacionalnim građanskim parničnim postupcima, te međudjelovanju između postupaka privatne i javne provedbe. Sudska praksa javne provedbe rabi se kao mjerilo ili vodič kada je riječ o otvorenim pitanjima privatne provedbe. Članak nudi pomnu analizu odabranih pravnih izazova vezanih uz pravna sredstva i pravomoćnost, koji jasno otkrivaju granice načela nacionalne postupovne autonomije koje pak postavlja uglavnom načelo djelotvornosti prava EU-a. Naposljetku, nalaze članka upotrijebit ćemo kako bismo odgovorili na glavno istraživačko pitanje: Ima li mjesta za nacionalnu postupovnu autonomiju u slučaju (među ostalim) privatne provedbe pravila EU-a o državnim potporama u postupcima pred nacionalnim građanskim sudovima?

Ključne riječi: privatna provedba, pravila o državnim potporama, pravna sredstva, nacionalna postupovna autonomija, načelo djelotvornosti prava EU-a, pravomoćnost

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