Rethinking Illegal State Aid in the EU: A Preventive Approach to the Protection of Affected Undertakings

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Abstract

The paper examines the evolution of EU State aid control from a predominantly reactive system towards a more preventive model. The object of study is the concept of unlawful State aid and its implications for the effective protection of undertakings affected by distortive public interventions within the internal market. Moving beyond the traditional understanding of unlawfulness as a procedural breach of Article 108(3) TFEU, the paper advances a broader interpretation, viewing it as an indicator of structural deficiencies within national administrative frameworks responsible for the design and implementation of support measures. Methodologically, the research combines a doctrinal analysis of EU primary and secondary law with an examination of the case law of the Court of Justice of the European Union, complemented by a comparative assessment of national enforcement practices, particularly in sectors such as air transport and energy. The results show that unlawful State aid stems not from isolated infringements, but from recurring administrative shortcomings, including fragmented competences, weak ex ante assessment, and policy priorities over legal compliance. These findings highlight the limits of an ex post system. The paper advocates a preventive model based on stronger ex ante mechanisms and competition-based assessments, with implications for legal certainty and enforcement.

Keywords: *unlawful State aid; affected undertakings; ex ante assessment; national courts; standstill obligation; recovery of State aid.*

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1. Introduction

The control of State aid constitutes one of the central pillars of European Union competition law, designed to preserve undistorted competition within the internal market by subjecting selective public interventions to a structured system of supervision. Built upon Articles 107–109 TFEU and implemented through a predominantly centralised administrative framework, this system has traditionally been conceptualised as reactive in nature, relying on the ex post assessment of aid

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measures by the European Commission and, where necessary, on the recovery of unlawful or incompatible aid.[2] While this model has ensured a considerable degree of coherence and uniformity in the application of State aid rules, it has also revealed, in practice, a number of structural limitations that call into question its capacity to guarantee timely and effective protection for market participants adversely affected by unlawful interventions.

Recent developments in sectors such as air transport and energy, as well as the recurrence of cases involving the implementation of non-notified or improperly structured support measures, suggest that the phenomenon of unlawful State aid cannot be adequately explained solely by reference to isolated breaches of the standstill obligation under Article 108(3) TFEU. On the contrary, these situations point to the existence of deeper systemic deficiencies within national administrative frameworks responsible for the design, assessment, and implementation of public support measures.

Against this background, the present paper addresses a central problem that remains insufficiently explored in the literature, namely the lack of connection between the formal architecture of State aid control and the effective protection of undertakings affected by unlawful aid. Although the system is formally structured around the relationship between Member States and the Commission, its practical functioning necessarily implicates a wider range of actors, including competing undertakings whose market position is directly impacted by the granting of selective advantages.[3] These undertakings cannot be regarded as peripheral beneficiaries of an abstract system of control, but rather as holders of a legally protected interest, whose effective protection is indispensable for ensuring the full effectiveness of Articles 107 and 108 TFEU.

From this perspective, the paper advances the argument that the current enforcement paradigm of EU State aid law remains structurally incomplete, insofar as it relies predominantly on ex post corrective mechanisms (such as aid recovery, interim measures, and judicial actions) which are often incapable of preventing the consolidation of unlawful competitive advantages. The reactive nature of these instruments limits their capacity to restore competitive conditions in a timely manner and to safeguard the position of affected undertakings before distortions become entrenched in the market.

The novelty of the present research lies, first, in the reconceptualization of unlawful State aid as an indicator of systemic administrative failure, rather than a purely procedural breach, and second, in the articulation of a preventive approach to State aid control, centred on the protection of affected undertakings[4] as an intrinsic

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[2] Ginevra Bruzzone and Marco Boccaccio, „Infrastructures and SGEI: the scope of State aid control and its impact on national policies" in Pier L. Parcu, Giorgio Monti, and Marco Botta, eds., *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar Publishing, 2020), pp. 70-98, https://doi.org/10.4337/9781788975254.

[3] Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart Publishing, 2013), 39, https://doi.org/10.5040/9781472561237.

[4] Clélia Jadot, "Damages Actions and State Aid: Time for Action at EU Level?" *Market and Competition*

component of the legal framework. Building upon the analytical foundations developed in my doctoral research, the paper proposes a shift in perspective from reactive enforcement towards preventive governance, emphasising the need to integrate ex ante control mechanisms before aid is granted. In particular, it advances the proposal of mandatory competition-based assessments for certain categories of high-risk public interventions, designed to enhance legal certainty and reduce the incidence of unlawful aid.

Methodologically, the study adopts a combined doctrinal, jurisprudential, and comparative approach. It relies on the systematic analysis of EU primary and secondary law, the examination of the case law of the Court of Justice of the European Union, and a functional comparison of national enforcement practices. This triangulation of methods allows for a more nuanced understanding of the interaction between the centralised control exercised at EU level and the decentralised mechanisms of enforcement at national level, particularly in relation to the role of national courts[5] as guarantors of the standstill obligation and of the effectiveness of EU law.

The structure of the paper reflects this analytical framework. Following the present introduction, the study first examines the traditional reactive model of State aid control and its inherent limitations. It then revisits the concept of unlawful State aid in light of systemic administrative deficiencies and analyses the position of affected undertakings within the current legal architecture. A dedicated section explores comparative aspects of national enforcement, highlighting variations in administrative capacity and judicial intervention across Member States. Building on these findings, the paper develops the argument for a preventive model of State aid control and outlines concrete proposals for the introduction of ex ante assessment mechanisms. The final section presents the conclusions, synthesising the main findings and discussing their implications for the future evolution of EU State aid law.

2. The EU State Aid Control System: A Reactive Enforcement Model

The system of State aid control in European Union law is characterised by a distinctive institutional architecture centred on the ex ante notification requirement and the ex post assessment of compatibility,[6] combined with a predominantly administrative enforcement mechanism. At the core of this system lies the supervisory role of the European Commission, which enjoys exclusive competence to assess the compatibility of State aid with the internal market pursuant to Articles 107 and 108 TFEU. This centralisation of decision-making authority reflects the need to ensure uniformity in the application of State aid rules across Member States and to prevent

Law Review 6, no. 1 (2022): 94, https://doi.org/10.34632/mclawreview.2022.11305.

[5] Jacques Derenne and Denis Jouve, "State Aid & National Enforcement: An Overview of EU and National Case Law," *e-Competitions*, no. 110999 (February 24, 2023): 4–5, https://orbi.uliege.be/handle/2268/312088.

[6] Piet Jan Slot and Martin Farley, *An Introduction to Competition Law*, 2nd ed. (Hart Publishing, 2017), 272, https://doi.org/10.5040/9781849469173.

divergent national approaches that could undermine the functioning of the internal market.[7]

At the same time, this institutional design reveals a certain structural tension between the formal logic of the system and its practical operation. While the legal framework suggests a preventive model based on prior control, the actual functioning of the system shows that intervention often takes place only after the aid has already produced effects. In this sense, the system appears, in practice, less as a mechanism of prevention and more as a mechanism of correction.

Under Article 108(3) TFEU, Member States are required to notify any planned aid measure to the Commission and to refrain from implementing it until a final decision has been adopted. This "standstill obligation" constitutes a cornerstone of the State aid regime, ensuring that potentially distortive measures are subject to prior scrutiny.[8] It is also one of the few elements of the system that is clearly designed to operate ex ante. However, in practice, the effectiveness of this preventive mechanism is significantly weakened by the fact that the Commission's intervention often occurs only after the measure has already been implemented, either de facto or in substance. As a result, a system that is formally preventive becomes, in reality, largely reactive.

This transformation is not merely accidental, but reflects deeper structural features of the enforcement model[9]. The Commission depends, to a large extent, on information provided by Member States or third parties, and its procedural timelines, although regulated, are not always compatible with the speed at which economic advantages may affect market conditions. Consequently, even when the standstill obligation is formally respected, the delay inherent in administrative procedures may reduce the effectiveness of preventive control.

Accordingly, the recovery of unlawful and incompatible aid has emerged as the principal corrective instrument through which the Commission seeks to restore the status quo ante. The Court of Justice has consistently held that recovery is not a sanction, but a logical consequence of the finding of incompatibility, aimed at eliminating the distortion of competition caused by the aid.[10] The centrality of recovery also reveals the limits of the current system. By definition, recovery intervenes only after the aid has been granted and its effects have already materialised on the market. From an economic perspective, this means that the beneficiary

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[7] Anthony Arnull and Damian Chalmers, eds., *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), 674, https://doi.org/10.1093/oxfordhb/9780199672646.001.0001.

[8] Miroslava Scholten, ed., *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023), 434, https://doi.org/10.4337/9781802208030.

[9] Agnieszka Knade-Plaskacz, "Enforcement of State Aid Law at National Level. The Relationship between National Courts and the European Commission," *Juridical Tribune* 3, no. 2 (2013): 116–125, https://tribunajuridica.eu/arhiva/An3v2/8%20Knade.pdf.

[10] Court of Justice of the European Union, *Belgium v. Commission (Tubemeuse)*, Case C-142/87, judgment of March 21, 1990, para. 66, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61987CJ0142; European Commission, "Commission Notice on the Recovery of Unlawful and Incompatible State Aid," *Official Journal of the European Union* C 247 (July 23, 2019), paras. 14–16, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019XC0723(01).

undertaking may have already consolidated a competitive advantage which cannot be entirely neutralised through repayment.[11] On the other hand, the practical implementation of recovery decisions raises significant difficulties at national level. Member States are responsible for executing recovery in accordance with their domestic legal systems, subject to the principles of equivalence and effectiveness. In theory, this decentralised enforcement mechanism ensures flexibility and respect for national procedural autonomy. In practice, however, it often leads to fragmentation, delays, and inconsistent outcomes.[12] The Court of Justice has repeatedly emphasised that Member States must take all necessary measures to ensure immediate and effective recovery, underlining that no national rule or difficulty may justify failure to comply with EU law obligations.[13]

These structural limitations are further compounded by the temporal dimension of the Commission's procedures. The duration of preliminary examinations and formal investigations, combined with the time required for judicial review before EU courts, often results in prolonged periods during which unlawful aid continues to produce effects on the market. In such situations, the distortion of competition is maintained and may become deeply embedded.

The above-mentioned elements suggest that the current model of State aid control, while coherent and well-structured from a legal and institutional standpoint, is not fully adapted to the realities of modern economic dynamics. Its reliance on ex post corrective mechanisms, combined with procedural and structural constraints, limits its capacity to prevent distortions at an early stage and to ensure effective protection for undertakings affected by unlawful aid.

3. Unlawful State Aid as a Structural Failure

In EU competition law, unlawful State aid is traditionally defined in a formal and procedural manner, namely as aid implemented in breach of the notification and standstill obligations laid down in Article 108(3) TFEU. According to this classical understanding, unlawfulness arises independently of the substantive compatibility of the measure with the internal market and is triggered solely by the failure to comply with procedural requirements.[14] This definition offers legal certainty, but it remains

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[11] Leigh Hancher, Tom Ottervanger, and Piet Jan Slot, *EU State Aids*, 5th ed. (Sweet & Maxwell, 2016), 1109–1115, https://openlibrary.org/books/OL39817008M.

[12] European Commission, "Commission Notice on the Recovery," paras. 66–70.

[13] Court of Justice of the European Union, *Commission v. Germany*, Case C-5/89, judgment of September 20, 1990, ECLI:EU:C:1990:320, paras. 17–19, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61989CJ0005.

[14] Council Regulation (EU) 2015/1589 of July 13, 2015, Laying Down Detailed Rules for the Application of Article 108 of the Treaty on the Functioning of the European Union, *Official Journal of the European Union* L 248 (September 24, 2015): 9–29, art. 1(f), https://eur-lex.europa.eu/eli/reg/2015/1589/oj/eng; Court of Justice of the European Union, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. SIDE*, Case C-199/06, judgment of February 12, 2008, ECLI:EU:C:2008:79, paras. 35–41, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62006 CJ0199. For a broader analysis of State aid and its incompatibility with the internal market, see Cătălin-Silviu

conceptually limited. However, the present paper argues that the occurrence of unlawful State aid is rarely accidental. Rather, it often results from recurring administrative shortcomings that affect the capacity of national authorities to design and implement support measures in compliance with EU law. From this perspective, unlawful State aid should be reconceptualised as an indicator of structural failure within national administrative systems. This approach allows for a shift from a narrow focus on individual breaches to a broader understanding of systemic deficiencies, such as insufficient expertise in State aid matters, fragmented decision-making competences, and the lack of effective internal control mechanisms.[15]

This reconceptualization is supported by the functional role of Article 108(3) TFEU within the State aid regime. The standstill obligation is not merely a procedural formality, but a substantive safeguard aimed at preventing distortions of competition before they materialise. Unlawfulness must be understood as a legally significant situation that activates immediate consequences within the national legal order, independently of any subsequent decision of the Commission on compatibility.[16] The Court of Justice has consistently confirmed this interpretation. In *CELF*[17], the Court held that national courts are required to ensure that all consequences of a breach of the standstill obligation are drawn, including, where appropriate, the suspension of the aid and the recovery of amounts already granted. Similarly, in the case *Eesti Pagar*,[18] the Court emphasised that national authorities and courts are under an obligation to verify compliance with Article 108(3) TFEU and to take all necessary measures to remedy unlawful aid, even in the absence of a prior Commission decision. These judgments confirm that unlawfulness has autonomous legal effects and is not dependent on the subsequent administrative qualification of the measure. Further clarification is provided in earlier case law, such as *FNCE*[19], where the Court recognised that individuals may rely on Article 108(3) TFEU before national courts to challenge the implementation of unlawful aid.

The persistence of unlawful State aid in practice suggests that the mere existence of these legal obligations is not sufficient to ensure effective compliance. As

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Săraru, "State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law," in *Studies of Business Law – Recent Developments and Perspectives*, ed. Cătălin-Silviu Săraru (Frankfurt am Main: Peter Lang, 2013), 39–48, https://doi.org/10. 3726/978-3-653-03073-0.

[15] Herwig C. H. Hofmann and Claire Micheau, eds., *State Aid Law of the European Union* (Oxford University Press, 2016), 45–52, https://doi.org/10.1093/law-ocl/9780198727460.001.0001.

[16] Albert Sánchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd ed. (Hart Publishing, 2015), 404, https://doi.org/10.5040/9781474203418.

[17] *CELF*, C-199/06, paras. 38–41, 55.

[18] Court of Justice of the European Union, *Eesti Pagar AS v. Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, Case C-349/17, judgment of March 5, 2019, ECLI:EU:C:2019:172, paras. 89–95, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0349. For commentary, see Iulian Băiculescu and Ioan Lazăr, "Rolul instanțelor naționale în controlul ajutoarelor de stat: reflecții pe marginea Cauzei C-349/17 – Eesti Pagar," *Revista Română de Drept al Afacerilor*, no. 2 (2025), https://rrda.ro/wp-content/uploads/2025/07/sumarRRDA2_2025.pdf.

[19] Court of Justice of the European Union, *Fédération nationale du commerce extérieur des produits alimentaires and Others v. France (FNCE)*, Case C-354/90, judgment of November 21, 1991, ECLI:EU:C:1991:440, para. 12, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61990CJ0354.

highlighted in legal literature, the enforcement of State aid rules depends heavily on the interaction between EU institutions and national administrative and judicial structures. Where national systems lack the necessary expertise, coordination, or procedural tools, the preventive function of Article 108(3) TFEU is significantly weakened.[20] This is particularly visible in cases where aid measures are adopted under time pressure or justified by considerations of economic urgency or strategic importance. In such contexts, the legal constraints imposed by EU State aid rules may be perceived as secondary, leading to the implementation of measures without proper notification or assessment.

The implications of this reconceptualization are significant. First, it highlights that unlawful State aid should not be treated merely as a procedural anomaly to be corrected ex post, but as a signal of deeper systemic issues requiring structural solutions. Second, it reinforces the role of national courts as essential actors in ensuring the effectiveness of EU law, particularly in situations where administrative control is insufficient[21] or delayed. Third, it underscores the need to strengthen ex ante mechanisms and administrative capacities at national level, in order to reduce the incidence of unlawful aid.

4. Comparative Perspectives on National Enforcement

The effectiveness of the European Union State aid control system cannot be fully understood if it is analysed exclusively at the level of EU rules. Although the substantive framework is harmonised, its practical operation depends, to a considerable extent, on how those rules are internalised and applied within national legal systems. Accordingly, the enforcement of State aid law reveals a form of functional diversity: formally uniform norms coexist with significantly different outcomes in practice, depending on the administrative structures, institutional capacity, and procedural traditions of the Member States.[22]

A closer look at national practice (particularly through the analysis of recent cases in sectors such as air transport and energy) confirms that the persistence of unlawful State aid is often linked to structural features of domestic systems rather than to isolated instances of deliberate non-compliance. This observation is also confirmed in recent comparative analyses of national enforcement practice, which highlight the diversity of judicial and administrative responses to unlawful State aid across Member States. In particular, examples drawn from jurisdictions such as France, Italy, and Germany illustrate the increasingly active role of national courts in ensuring compliance with the standstill obligation, including the suspension of aid measures and the recovery of unlawfully granted advantages.[23]

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[20] Lorenzo Coppi, „The role of economics in State aid analysis and the balancing test" in Erika Szyszczak, ed., *Research Handbook on European State Aid Law* (Edward Elgar Publishing, 2011), 64-89, https://doi.org/10.4337/9780857936424.

[21] Derenne and Jouve, "State Aid & National Enforcement," 4–6.

[22] Knade-Plaskacz, "Enforcement of State Aid Law," 120–122.

[23] Derenne and Jouve, "State Aid & National Enforcement," 10–12.

A first relevant aspect concerns the organisation of administrative competences. While EU law imposes clear obligations (most notably the duty to notify and the standstill obligation under Article 108(3) TFEU) it does not prescribe a specific institutional model at national level. As a result, the way in which State aid rules are implemented varies significantly. In more centralised systems, where specialised expertise and coordination mechanisms are developed, compliance tends to be more consistent. In more fragmented systems, however, the dispersion of competences among different authorities increases the risk that measures are adopted without a comprehensive legal and economic assessment.[24]

The Romanian practice analysed in my doctoral research provides a particularly illustrative example of these dynamics, not only because of the number of relevant cases, but also due to the structural characteristics of the national administrative system in which they occurred. These cases show that unlawful State aid often does not arise from a single, clearly identifiable decision, but from a sequence of measures adopted over time.

In the *CFR Marfă* case,[25] the advantage granted to the state-owned railway freight operator did not originate in a single act that could be easily qualified as State aid. Instead, it resulted from a combination of state interventions, including debt cancellations, the conversion of public claims, and various financial support mechanisms, adopted over a longer period and treated, at national level, as distinct and unrelated measures. Each intervention was, in isolation, presented as justified by specific economic or administrative considerations, such as the need to restructure the company, ensure continuity of services, or manage public debt exposure. However, from the perspective of EU State aid law, such a fragmented approach is insufficient. The assessment of State aid does not focus solely on the formal classification of individual measures, but on their economic effect and their cumulative impact on competition. When analysed together, these interventions conferred a significant selective advantage on CFR Marfă, relieving it of financial burdens that would normally have affected its market position and allowing it to operate under conditions that were not available to its competitors. This case is particularly relevant because it exposes a structural limitation of fragmented administrative systems, namely their inability to capture the overall economic logic of state intervention. In such contexts, the absence of a coordinated assessment framework may lead to situations in which measures that appear individually justified produce, in their cumulative effect, a selective advantage incompatible with EU State aid rules.

A comparable dynamic can be observed in the *Compania Națională a Uraniului (CNU) case*,[26] where public support was granted in a sector characterised

[24] Hofmann and Micheau, *State Aid Law of the European Union*, 63–70.

[25] European Commission, Commission Decision (EU) 2021/69 of February 24, 2020, on State Aid SA.43549 (2017/C) (ex 2017/FC) (ex 2016/NN) (ex 2015/EO) Implemented by Romania for CFR Marfă, *Official Journal of the European Union* L 32 (January 29, 2021): 1–61, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021D0069.

[26] European Commission, Commission Decision (EU) 2020/1012 of February 24, 2020, on State Aid SA.48394 2018/C (ex 2017/N) Which Romania Has Partly Implemented in Favour of National Uranium

by strong strategic and political sensitivities. The intervention was justified, at national level, by reference to public interest objectives, including energy security, the maintenance of domestic uranium production, and the continuity of activities linked to the nuclear sector. In this context, the measure was initially perceived as necessary and legitimate, reflecting broader concerns related to national policy priorities. The subsequent assessment at EU level revealed that the conditions required for compatibility with the internal market were not fulfilled. In particular, doubts were raised regarding the proportionality of the aid, the absence of a credible restructuring plan, and the risk of prolonged distortion of competition. What is particularly significant in this case is not only the incompatibility of the measure, but the decision-making process that led to its adoption. The support appears to have been granted in a context where sectoral and strategic considerations prevailed, while the legal constraints imposed by EU State aid rules were not fully integrated into the analysis. This reflects a broader pattern in national practice, where immediate economic or political objectives, particularly in strategic sectors, tend to prevail over compliance with EU State aid rules. In such cases, unlawfulness often stems not from deliberate circumvention, but from a structural imbalance between policy choices and legal requirements.

The cases in the *air transport sector* further confirm this tendency and illustrate how similar dynamics may occur in different economic contexts. In the *TAROM case*,[27] the Romanian authorities granted rescue and restructuring aid to the national airline, invoking the need to ensure the continuity of air transport services and to preserve a national operator with strategic importance. The measure was framed within the logic of maintaining connectivity and preventing market disruption, particularly in a sector already facing structural difficulties. From a state aid perspective, the case raised complex issues concerning the compatibility of the measure with EU rules, especially in relation to the credibility of the restructuring plan, the burden-sharing requirements, and the prospects of restoring long-term viability without continued state support. A similar situation can be observed in the *Blue Air case*,[28] where public support was granted in a context marked by significant economic pressure, including the effects of market instability and broader crises affecting the aviation sector. The intervention was justified by reference to exceptional circumstances and the need to stabilise the market, but it also raised important questions regarding the respect of procedural obligations, including notification, as well as the proportionality and necessity of the measure.

Company (CNU), *Official Journal of the European Union* L 224 (July 13, 2020): 11–37, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020D1012.

[27] European Commission, Decision C(2020) 1160 final of February 24, 2020, on State Aid SA.56244 (2020/N) – Romania – Rescue Aid to TAROM, notice in *Official Journal of the European Union* C 310 (September 18, 2020): 3, https://competition-cases.ec.europa.eu/cases/SA.56244.

[28] European Commission, Commission Decision (EU) 2024/1675 of February 16, 2024, on the State Aid SA.62829 (2023/C) Implemented by Romania for Blue Air Aviation SA, *Official Journal of the European Union* L, 2024/1675, June 14, 2024, recitals 57–60 and arts. 2–3, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32024D1675.

These cases demonstrate that, in practice, the boundary between justified State intervention and unlawful aid is often difficult to draw. This difficulty is particularly evident in situations characterised by urgency, economic stress, or strong policy considerations. Under such conditions, decisions are often taken rapidly, with a focus on immediate outcomes, while the legal implications under EU State aid rules may receive less attention. In my opinion, the analysed cases reveal a consistent structural pattern. Unlawful State aid tends to arise from a combination of factors, rather than from a single identifiable failure, reflecting deeper deficiencies in administrative design and decision-making processes.

At the same time, the role of national courts introduces an additional layer of complexity.[29] While the European Commission exercises centralised administrative control, national courts are responsible for ensuring the effectiveness of Article 108(3) TFEU within their respective legal systems. The Court of Justice has consistently emphasised that national courts must protect the rights of individuals affected by unlawful aid and must ensure that the standstill obligation produces its full effect.

In *FNCE*,[30] the Court recognised that Article 108(3) TFEU has direct effect and can be relied upon before national courts, which must act when the standstill obligation is breached. This approach was further developed in *SFEI*,[31] where the Court clarified that national courts must take all necessary measures to give full effect to Article 108(3) TFEU in situations involving unlawful aid. More recently, in *Eesti Pagar*,[32] the Court extended these obligations by stating that national authorities, not only courts, must verify compliance with State aid rules and take appropriate action, even in the absence of a prior decision by the Commission. Despite this clear case law, the reality is that the ability of national courts to provide effective protection varies in practice. Undertakings affected by unlawful aid often face practical difficulties, such as limited access to information, high evidentiary requirements, and delays in proceedings. These obstacles can reduce the effectiveness of judicial remedies and, as a result, weaken the overall functioning of the State aid system.[33]

The case studies examined in this research confirm that these limitations are not merely theoretical, but are reflected in concrete situations where procedural constraints and delays diminish the effectiveness of judicial intervention. Moreover, even where judicial avenues are formally available, their practical impact is often reduced by the complexity of the issues involved. From a broader perspective, this

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[29] On national enforcement, see Iulian Băiculescu and Ioan Lazăr, "Neexecutarea obligației de recuperare a ajutoarelor de stat și rolul instanțelor naționale: comentariu asupra Hotărârii CJUE în Cauza C-51/20 Comisia c. Grecia," *Revista Română de Drept al Afacerilor*, no. 3 (2025), https://rrda.ro/wp-content/uploads/2025/07/sumarRRDA3_25.pdf. For the judgment discussed, see Court of Justice of the European Union, *Commission v. Greece*, Case C-51/20, judgment of January 20, 2022, ECLI:EU:C:2022:36, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CJ0051.

[30] *FNCE*, C-354/90, para. 12.

[31] Court of Justice of the European Union, *Syndicat français de l'Express international (SFEI) and Others v. La Poste and Others*, Case C-39/94, judgment of July 11, 1996, ECLI:EU:C:1996:285, paras. 68–71, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61994CJ0039.

[32] *Eesti Pagar*, C-349/17, paras. 89–95.

[33] Hancher, Ottervanger, and Slot, *EU State Aids*, 1135–1140.

comparative analysis highlights a fundamental paradox. While EU law establishes a uniform framework of rules, its effectiveness depends on national systems that remain structurally diverse and only partially harmonised. As a result, the level of protection afforded to affected undertakings may differ significantly across Member States.

5. National Enforcement and the Transition towards a Preventive Model of State Aid Control

The effectiveness of the European Union State aid control system cannot be assessed exclusively by reference to the centralised administrative role exercised at EU level. While the European Commission remains the primary authority responsible for the assessment of compatibility, the practical functioning of the system depends, to a decisive extent, on the capacity of national authorities and courts to ensure compliance with the procedural and substantive requirements of EU law. In this sense, the enforcement of State aid rules is inherently multi-level, combining centralised supervision with decentralised implementation.[34] Within this architecture, national authorities and courts must not be understood as merely auxiliary or derivative actors. On the contrary, they perform a constitutive role in ensuring the effectiveness of Article 108(3) TFEU and, more broadly, in safeguarding the integrity of the internal market. The analysis developed in the present research demonstrates that the current framework, although formally coherent, remains structurally oriented towards ex post correction and only partially integrates a preventive logic capable of addressing distortions before they materialise.

A central element of this framework is the standstill obligation laid down in Article 108(3) TFEU,[35] which prohibits Member States from implementing aid measures prior to their notification and approval. This obligation is not merely procedural in nature, but reflects a substantive requirement aimed at preserving the competitive equilibrium of the market. Its function is inherently preventive: by suspending the implementation of aid until it has been assessed, it seeks to avoid the creation of distortive advantages that may later prove difficult to eliminate. The Court of Justice has consistently recognised the fundamental importance of this obligation and has attributed to it direct effect within national legal systems. In FNCE,[36] the Court held that individuals may rely on Article 108(3) TFEU before national courts, thereby confirming that the standstill obligation generates rights which must be effectively protected at national level. This approach can be observed also in SFEI,[37] where the Court clarified that national courts are required to ensure that all consequences of a breach of the standstill obligation are drawn, including the suspension of the aid and the protection of the rights of affected undertakings. The

[34] Hancher, Ottervanger, and Slot, *EU State Aids*, 1050–1055.
[35] Ioan Lazăr and Laura Lazăr, *Tratat de Dreptul Uniunii Europene în domeniul concurenței* (C.H. Beck, 2025), 640–642, https://www.beckshop.ro/tratat-de-dreptul-uniunii-europene-in-domeniul-concurentei.
[36] *FNCE*, C-354/90, para. 14.
[37] *SFEI and Others*, C-39/94, paras. 39–40, 67–71.

evolution of the case law reaches a particularly significant point in Eesti Pagar[38], where the Court extended these obligations beyond judicial authorities and affirmed that national administrative bodies themselves are required to verify compliance with State aid rules and to take appropriate measures in the event of unlawful aid, including recovery. This judgment marks an important step towards a more integrated understanding of enforcement, in which responsibility is shared across different levels of governance.

These developments support a broader conceptual shift. National courts and authorities must be regarded not as secondary actors implementing decisions adopted at EU level, but as co-guarantors of the State aid control system. Their role is not limited to reacting to violations identified by the Commission, but includes the proactive enforcement of EU law obligations, the prevention of unlawful aid, and the protection of the rights of affected undertakings. In this sense, they contribute directly to the effectiveness and credibility of the system as a whole.

This interpretation is reinforced by the principle of sincere cooperation enshrined in Article 4(3) TEU, which imposes on Member States a duty to take all appropriate measures to ensure fulfilment of their obligations under EU law. This principle must be understood not only as a general obligation of coordination, but also as a concrete requirement to organise national administrative and judicial systems in a manner that prevents violations of State aid rules.[39] It implies, in particular, that Member States must ensure that their internal procedures allow for the timely identification and assessment of aid measures and that they provide effective mechanisms for preventing their unlawful implementation.

At the same time, the enforcement of State aid rules at national level remains subject to the principles of equivalence and effectiveness,[40] which define the limits of national procedural autonomy. While Member States retain discretion in designing their procedural frameworks, such frameworks must not render the exercise of rights derived from EU law impossible or excessively difficult. In the context of State aid, this requirement entails the availability of effective remedies, including interim measures, recovery actions, and, where appropriate, claims for damages.

In my opinion, the practical application of these principles reveals significant limitations. The analysis of national practice, including the case studies examined in this research, shows that access to effective remedies is often constrained by procedural barriers, informational asymmetries, and delays in judicial proceedings. These factors may significantly reduce the capacity of affected undertakings to challenge unlawful aid in a timely and effective manner, thereby weakening the preventive function of Article 108(3) TFEU.

The evidence provided by the examined cases further illustrates that the current system operates predominantly as a mechanism of correction rather than prevention. In sectors such as air transport, measures are frequently adopted under

[38] *Eesti Pagar*, C-349/17, paras. 90–95.
[39] Lazăr and Lazăr, *Tratat de Dreptul Uniunii Europene în domeniul concurenței*, 642–643.
[40] Lazăr and Lazăr, *Tratat de Dreptul Uniunii Europene în domeniul concurenței*, 643–644.

conditions of urgency, with notification occurring only after implementation or at a stage when the aid has already produced effects on the market. In the TAROM and Blue Air cases, for example, public interventions were justified by reference to economic necessity and strategic considerations, yet they raised significant concerns regarding compliance with procedural requirements and the proportionality of the measures.

A similar pattern emerges in the energy sector, where interventions are often framed in terms of public interest objectives, such as energy security or the preservation of critical infrastructure. In the *Compania Națională a Uraniulu*i (CNU) case, the granting of aid was driven by such considerations, but the subsequent assessment revealed shortcomings in relation to compatibility and proportionality. These examples suggest that unlawful aid frequently results from deficiencies in the design of the measure itself, rather than from purely procedural breaches.

Taken together, these observations lead to an important conclusion: the current State aid regime allows for preventive control but does not sufficiently require or institutionalise it. The standstill obligation provides a formal mechanism of prevention, yet its effectiveness depends on the willingness and capacity of national authorities to apply it rigorously. In the absence of strong ex ante evaluation mechanisms, the system tends to operate reactively, correcting distortions only after they have occurred. Against this background, the present paper argues for a transition towards a more explicitly preventive model of State aid control. Such a model would involve a reorientation of the system from ex post recovery towards ex ante assessment, ensuring that the legality and compatibility of aid measures are evaluated before their implementation.

This approach is consistent with broader developments in economic regulation, where preventive tools (for example, compliance systems and risk assessments) are increasingly used to manage complex regulatory risks. A central element of this proposal is the introduction of mandatory ex ante competitive assessments for certain categories of high-risk public interventions. These assessments would require national authorities to examine, in a structured manner, whether a measure confers a selective advantage, whether it is likely to distort competition, and whether less distortive alternatives are available. Such a mechanism would enhance the quality of administrative decision-making while significantly reducing the risk of unlawful aid emerging and distorting competition.

The adoption of a preventive model would also entail important institutional implications. It would require the development of specialised administrative expertise, improved coordination between authorities, and a more structured interaction with the European Commission. At the same time, it would strengthen the role of national courts by providing a clearer framework for early intervention and by facilitating access to effective remedies. This shift must be closely linked to the protection of undertakings affected by unlawful State aid. The current system tends to protect such undertakings primarily through ex post mechanisms, such as recovery or damages. However, effective protection requires that distortions be prevented before they materialise. This implies not only access to judicial remedies, but also access to

relevant information, the possibility to trigger early review of aid measures, and the development of procedural tools that enable timely intervention.

6. Conclusions

The analysis in this paper shows that the traditional understanding of unlawful State aid, seen mainly as a procedural breach of Article 108(3) TFEU, is no longer sufficient to explain how problems arise in practice. Although the notification obligation and the standstill requirement remain essential, recent case law and national practice show that unlawfulness often reflects more than a simple procedural failure. In many cases, it points to deeper weaknesses in how national authorities design and implement support measures.

A first conclusion is that unlawful State aid should be understood in a broader and more realistic way, not merely as a procedural irregularity, but also as an indicator of structural deficiencies at national level. These deficiencies typically stem from weak ex ante assessment, fragmented decision-making processes, and the tendency to prioritise short-term economic or political objectives over compliance with EU law, a combination that helps explain why unlawful aid continues to emerge despite the existence of a well-developed legal framework.

A second important conclusion concerns the role of undertakings affected by unlawful aid, which should not be regarded as external to the system, but rather as actors whose rights are directly impacted. The case law of the Court of Justice confirms that Article 108(3) TFEU can be relied upon before national courts and that those courts are required to ensure effective judicial protection. In this sense, the protection of affected undertakings is not a secondary consideration, but an integral component of the logic underlying the State aid control system.

The paper also demonstrates that national courts and authorities play a central role, not merely as secondary actors intervening after the European Commission. National courts are required to ensure compliance with the standstill obligation and to intervene where unlawful aid has been granted, while national authorities must organise their procedures in a manner that prevents breaches of EU law. Taken together, Article 108(3) TFEU, Article 4(3) TEU, and the principles of equivalence and effectiveness confirm that national enforcement constitutes an essential component.

At the same time, the system remains largely reactive; although it incorporates certain preventive elements, in practice it continues to rely predominantly on ex post correction. Recovery constitutes the principal instrument for addressing unlawful aid, yet it intervenes too late, after the advantage has already been granted and often once its effects have materialised on the market. For this reason, recovery alone cannot ensure full protection of competition or of the undertakings affected.

The case studies analysed in the paper support this conclusion, as the Romanian cases — CFR Marfă, Compania Națională a Uraniului, TAROM, and Blue Air — demonstrate that unlawful aid often results from a combination of factors, including fragmented competences, weak ex ante assessment, and decisions taken

under pressure or for strategic reasons. In many instances, the issue was not merely procedural, but concerned the design of the measure itself, thereby confirming that unlawful aid is frequently rooted in structural weaknesses.

Based on these findings, the paper argues for a shift towards a more preventive model of State aid control, in which prevention plays a more prominent role in ensuring the effective protection of competition. The proposal advanced in this paper — namely, the introduction of mandatory ex ante competitive assessments for high-risk measures — would enable the earlier identification of potential risks and reduce the likelihood of unlawful aid being granted.

Bibliography

I. Books and Articles

Arnull, Anthony, and Damian Chalmers, eds. *The Oxford Handbook of European Union Law.* Oxford University Press, 2015. https://doi.org/10.1093/oxfordhb/9780199672646.001.0001.

Băiculescu, Iulian, and Ioan Lazăr. "Neexecutarea obligației de recuperare a ajutoarelor de stat și rolul instanțelor naționale: comentariu asupra Hotărârii CJUE în Cauza C-51/20 Comisia c. Grecia." *Revista Română de Drept al Afacerilor*, no. 3 (2025). https://rrda.ro/wp-content/uploads/2025/07/sumarRRDA3_25.pdf.

Băiculescu, Iulian, and Ioan Lazăr. "Rolul instanțelor naționale în controlul ajutoarelor de stat: reflecții pe marginea Cauzei C-349/17 – Eesti Pagar." *Revista Română de Drept al Afacerilor*, no. 2 (2025). https://rrda.ro/wp-content/uploads/2025/07/sumarRRDA2_2025.pdf.

Bruzzone, Ginevra and Marco Boccaccio, „Infrastructures and SGEI: the scope of State aid control and its impact on national policies" in Pier L. Parcu, Giorgio Monti, and Marco Botta, eds., *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar Publishing, 2020), pp. 70-98, https://doi. org/10.4337/9781788975254.

de Cecco, Francesco. *State Aid and the European Economic Constitution.* Hart Publishing, 2013. https://doi.org/10.5040/9781472561237.

Coppi, Lorenzo, „The role of economics in State aid analysis and the balancing test" in Erika Szyszczak, ed., *Research Handbook on European State Aid Law* (Edward Elgar Publishing, 2011), 64-89, https://doi.org/10.4337/9780857936424.

Derenne, Jacques, and Denis Jouve. "State Aid & National Enforcement: An Overview of EU and National Case Law." *e-Competitions*, no. 110999 (February 24, 2023): 1–20. https://orbi.uliege.be/handle/2268/312088.

Hancher, Leigh, Tom Ottervanger, and Piet Jan Slot. *EU State Aids.* 5th ed. Sweet & Maxwell, 2016. https://openlibrary.org/books/OL39817008M.

Hofmann, Herwig C. H., and Claire Micheau, eds. *State Aid Law of the European Union.* Oxford University Press, 2016. https://doi.org/10.1093/law-ocl/9780198727460.001.0001.

Jadot, Clélia. "Damages Actions and State Aid: Time for Action at EU Level?" *Market and Competition Law Review* 6, no. 1 (2022): 89–122. https://doi.org/10.34632/mclawreview.2022.11305.

Knade-Plaskacz, Agnieszka. "Enforcement of State Aid Law at National Level. The Relationship between National Courts and the European Commission." *Juridical Tribune* 3, no. 2 (2013): 116–125. https://tribunajuridica.eu/arhiva/An3v2/8%20Knade.pdf.

Lazăr, Ioan, and Laura Lazăr. *Tratat de Dreptul Uniunii Europene în domeniul concurenței.* C.H. Beck, 2025. https://www.beckshop.ro/tratat-de-dreptul-uniunii-europene-in-domeniul-concurentei.

Săraru, Cătălin-Silviu, "State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law," in *Studies of Business Law – Recent Developments and Perspectives*, ed. Cătălin-Silviu Săraru (Frankfurt am Main: Peter Lang, 2013), 39–48, https://doi.org/10.3726/978-3-653-03073-0.

Sánchez-Graells, Albert. *Public Procurement and the EU Competition Rules.* 2nd ed. Hart Publishing, 2015. https://doi.org/10.5040/9781474203418.

Scholten, Miroslava, ed. *Research Handbook on the Enforcement of EU Law.* Edward Elgar Publishing, 2023. https://doi.org/10.4337/9781802208030.

Slot, Piet Jan, and Martin Farley. *An Introduction to Competition Law.* 2nd ed. Hart Publishing, 2017. https://doi.org/10.5040/9781849469173.

II. International Documents and Regulations

Council of the European Union. Council Regulation (EU) 2015/1589 of July 13, 2015, Laying Down Detailed Rules for the Application of Article 108 of the Treaty on the Functioning of the European Union. *Official Journal of the European Union* L 248 (September 24, 2015): 9–29. https://eur-lex.europa.eu/eli/reg/2015/1589/oj/eng.

European Commission. Commission Decision (EU) 2020/1012 of February 24, 2020, on State Aid SA.48394 2018/C (ex 2017/N) Which Romania Has Partly Implemented in Favour of National Uranium Company (CNU). *Official Journal of the European Union* L 224 (July 13, 2020): 11–37. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020D1012.

European Commission. Commission Decision (EU) 2021/69 of February 24, 2020, on State Aid SA.43549 (2017/C) (ex 2017/FC) (ex 2016/NN) (ex 2015/EO) Implemented by Romania for CFR Marfă. *Official Journal of the European Union* L 32 (January 29, 2021): 1–61. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021D0069.

European Commission. Commission Decision (EU) 2024/1675 of February 16, 2024, on the State Aid SA.62829 (2023/C) Implemented by Romania for Blue Air Aviation SA. *Official Journal of the European Union* L, 2024/1675, June 14, 2024. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32024D1675.

European Commission. "Commission Notice on the Recovery of Unlawful and Incompatible State Aid." *Official Journal of the European Union* C 247 (July 23, 2019): 1–23. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019XC0723(01).

European Commission. Decision C(2020) 1160 final of February 24, 2020, on State Aid SA.56244 (2020/N) – Romania – Rescue Aid to TAROM, notice in *Official Journal of the European Union* C 310 (September 18, 2020): 3. https://competition-cases.ec.europa.eu/cases/SA.56244.

III. Case Law

Court of Justice of the European Union. *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. SIDE.* Case C-199/06. Judgment of February 12, 2008. ECLI:EU:C:2008:79. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62006CJ0199.

Court of Justice of the European Union. *Commission v. Germany.* Case C-5/89. Judgment of September 20, 1990. ECLI:EU:C:1990:320. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61989CJ0005.

Court of Justice of the European Union. *Commission v. Greece.* Case C-51/20. Judgment of January 20, 2022. ECLI:EU:C:2022:36. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CJ0051.

Court of Justice of the European Union. *Eesti Pagar AS v. Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium.* Case C-349/17. Judgment of March 5, 2019. ECLI:EU:C:2019:172. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0349.

Court of Justice of the European Union. *Fédération nationale du commerce extérieur des produits alimentaires and Others v. France (FNCE).* Case C-354/90. Judgment of November 21, 1991. ECLI:EU:C:1991:440. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61990CJ0354.

Court of Justice of the European Union. *Syndicat français de l'Express international (SFEI) and Others v. La Poste and Others.* Case C-39/94. Judgment of July 11, 1996. ECLI:EU:C:1996:285. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61994CJ0039.

Court of Justice of the European Union. *Belgium v. Commission (Tubemeuse).* Case C-142/87. Judgment of March 21, 1990. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61987CJ0142.