ESA | EFTA Surveillance Authority

Study on private enforcement of state aid rules by national courts in the EEA EFTA States

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Table of EU and EEA relevant abbreviations

CJEU	Court of Justice of the European Union
EC	European community
EEA	European Economic Area
EEA Agreement	Agreement on the European Economic Area, OJ L 1, 3.1.1994, pp. 3-522
EEC	European Economic Community
EEC Treaty	Treaty establishing the European Economic Community
ESA	EFTA Surveillance Authority
EU	European Union
GBER	The Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1–78, EEA Supplement No 71, 27.11.2014, p. 61
OJ	Official Journal of the European Union
Protocol 3 SCA	Protocol 3 to the Surveillance and Court Agreement, as amended by the Agreements amending Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), signed in Brussels on 21.3.1994, 6.3.1998 and 10.12.2001
SCA	Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, OJ L 344, 31.12.1994, pp. 1-8
TFEU	Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, p. 1–388

Abstract

The present Study aims to give an overview of private enforcement of state aid rules by national courts in the EEA EFTA States since the entry into force of the EEA Agreement 25 years ago. The findings of the Study are based on relevant cases identified in the three EEA EFTA States, as well as information from state aid practitioners and judges in the EEA EFTA States.

The Study revealed that there have been rather few private enforcement cases in each of the EEA EFTA States since the entry into force of the EEA Agreement. The Study identified 45 judgments of varying relevance from the EEA EFTA States. Of these, six concern the private enforcement of the standstill obligation and two concern the recovery of unlawful state aid based on a negative decision with recovery from ESA. The Study identified one ruling in which the plaintiff succeeded in its claim that the standstill obligation had been breached. The Study did not identify any case where the national court had initiated the cooperation procedure pursuant to ESA's Enforcement Guidelines.

The Study also revealed that the national legal frameworks implementing the standstill and recovery obligations under the Surveillance and Court Agreement are rather unclear. The degree of ambiguity varies between the EEA EFTA States. Moreover, it found that the knowledge about state aid rules amongst practitioners and judges seems to be rather low. These factors, including the lack of case law, could be mutually reinforcing elements explaining the lack of private enforcement.

In order to facilitate private enforcement in the EEA EFTA States going forward, the Study considers that an amendment of the national legal frameworks for state aid in all three EEA EFTA States would be useful. ESA could also consider contributing to increased knowledge about state aid law in the EEA EFTA States, for example by offering training to national judges.

1 Introduction and context

1.1 Background – EEA rules on state aid and the role of national courts

The EEA Agreement entered into force 25 years ago. For the EEA EFTA States,[1] this implied *inter alia* that they since have had to adhere to the state aid rules in the EEA Agreement.[2] The state aid rules in the EEA Agreement mirror those of the EU Treaties in substance. However, in terms of state aid procedure, it is the EFTA Surveillance Authority ('ESA') that has the exclusive right to declare state aid compatible with Article 61(2) or (3) of the EEA Agreement, not the European Commission (the 'Commission').

While only ESA can approve state aid, national courts also have an important role to play as regards the enforcement of state aid rules. According to established jurisprudence of the European Courts, national courts' responsibilities pertain mainly to two types of situations:

(i) the private enforcement of the standstill obligation, and
(ii) recovery of unlawful aid.

The standstill obligation laid down in Article 108(3) of the TFEU, and in the last sentence of Article 1(3) in part I of Protocol 3 to the Surveillance and Court Agreement ('SCA') is a key pillar of the EU/EEA system for state aid control. It entails that EEA EFTA/EEA EU States cannot implement state aid prior to the approval by respectively ESA or the Commission. A breach of the standstill obligation entails that any state aid granted is to be considered unlawful.

The role of national courts in state aid control pertains predominately to situations in which the standstill obligation has been breached. According to the case law of the European Court of Justice, the standstill obligation gives rise to individual rights of affected parties (such as the competitors of the beneficiary). These affected parties are entitled to enforce their rights by bringing legal action before competent national courts. Such legal action includes the following remedies:

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

National courts in the EFTA/EEA EU States, thus have an important function in ensuring the adherence to the standstill obligation and protecting the rights of parties affected by a breach of the standstill obligation. In addition, national courts can be involved in cases pertaining to the recovery of state aid, particularly in situations where

[1] Iceland, Liechtenstein and Norway.
[2] The state aid rules are enshrined in chapter 2 of part IV of the EEA Agreement, Articles 61 to 64, including protocols and appendices thereto.

the Commission or ESA have ordered the recovery of incompatible state aid in a negative decision.

According to Article 14(3) in part II of Protocol 3 to the SCA, the EEA EFTA States must implement recovery decisions without delay. Recovery takes place according to the procedures available under national law and national courts may be directly involved in the recovery of unlawful aid. That is so when, the national recovery order or the underlying ESA decision, is challenged in a national court.

Given the importance of national courts for the proper functioning of state aid control in the EEA, the Commission and ESA have adopted guidelines on the role of national courts in state aid enforcement. The most recent guidelines available are the Commission's enforcement guidelines,[3] to which ESA's chapter on the enforcement of state aid rules by national courts in its State Aid Guidelines (the 'Enforcement Guidelines')[4], corresponds. The Commission has also adopted guidelines on the recovery of unlawful and incompatible state aid,[5] which correspond to ESA's chapter on the recovery of unlawful and incompatible state aid.[6]

1.2 The scope, structure and objective of the present study

The aim of the present study ('the Study') is to provide an overview of private enforcement of the state aid rules by national courts of the EEA EFTA States. The Study is meant to provide a comprehensive overview of relevant state aid cases since the entry into force of the EEA Agreement in 1994, thus covering a period of approximately 25 years.

The main objective of the Study is to identify state aid related cases brought before national courts in the EEA EFTA States, and to analyse what these cases mean for private enforcement of state aid rules. The Study also seeks to identify ways to improve cooperation between ESA and national courts. In addition, the Study provides a brief introduction to the EEA EFTA States' legal systems and a description of how private enforcement, as well as enforcement of recovery, (may) function in these national legal orders.

The Study consists of the following parts:

- EEA EFTA wide conclusions
- Chapter 1: The State Study on Private Enforcement of state aid rules in Iceland
- Chapter 2: The State Study on Private Enforcement of state aid rules in Liechtenstein

[3] Commission Notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1.
[4] EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts, OJ L 115, 5.5.2011, p. 13–30.
[5] Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007, p. 4-17. There is currently a Public consultation on the Notice on the recovery of unlawful and incompatible State aid; the Draft Recovery Notice is available here: http://ec.europa.eu/competition/consultations/2019_recovery_notice/index_en.html.
[6] EFTA Surveillance Authority Decision No 788/08/COL of 17 December 2008 amending, for the sixty-seventh time, the procedural and substantive rules in the field of State aid by introducing a new chapter on recovery of unlawful and incompatible State aid, OJ L 105, 21.4.2011, p. 32–78.

- Chapter 3: The State Study on Private Enforcement of state aid rules in Norway

The State Studies provide an in-depth analysis for each EEA EFTA State. The State Study for Iceland has been produced by Advel Attorneys[7], the State Study for Liechtenstein by the Liechtenstein Institute[8] and the State Study for Norway by Kluge Advokatfirma AS[9] ('Kluge'). Each State Study is a self-standing document, and the result of the research performed by the three contractors mentioned above. The abstract and the EEA EFTA wide conclusions, prepared by Kluge, are based on the findings of the State Studies.[10]

2 Main findings on the EEA EFTA States level

There has been little private enforcement of state aid rules in the EEA EFTA States since the entry into force of the EEA Agreement in 1994 and in each of the EEA EFTA States Iceland, Liechtenstein[11] and Norway.

In total, the Study identified 45 cases[12] of varying relevance.[13] Of those cases, 19 pertain to Norway, 24 to Iceland[14] and two[15] to Liechtenstein. This number also includes cases where state aid rules were used in support of a particular interpretation, for example as a defensive instrument by the state or public undertakings or where claims for aid were made.

If only 'real' private enforcement cases are counted (i.e. cases in which a claim was based on the breach of the standstill obligation) the Study identified only six cases, of which five pertain to Norway,[16] and one to Iceland.[17]

In addition, there are landmark judgments from the Constitutional Court of Liechtenstein and the Norwegian Supreme Court concerning the implementation of an ESA decision on national level.[18] Both cases, in essence, indicate that the Norwegian and Liechtenstein legal orders do not contain any major obstacles to the enforcement of a negative decision with recovery from ESA.

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[10] Kluge does not assume responsibility for the accuracy of the information pertaining to Iceland and Liechtenstein.
[11] In Liechtenstein, the EEA Agreement entered into force in 1995.
[12] A 'case' is considered one case even if judgments by various instances exist.
[13] See Annex I.3 List of relevant rulings identified in Iceland, Annex II.2, List of relevant rulings identified in Liechtenstein and Annex III.3 List of relevant rulings Identified in Norway. See Annex I.1 Summaries of the selected rulings in Iceland, Annex II.1 Summaries of the selected rulings in Liechtenstein and Annex III.1 Summaries for the selected rulings in Norway, for further information on the selected cases.
[14] These cases are listed in Annex I.3. Annex I.3 includes 29 cases, but 5 are not EEA relevant.
[15] Note however, that Liechtenstein's case VGH 2008/8, as described in Annex II.2 raised no questions under EEA (state aid) law.
[16] *Synnøve Finden*, *Norfrakalk, Kattekleiv, Gauselparken, Aktieselskapet Saudefaldene.* See Annex III.2 for further information on the five cases.
[17] Case E-4326/2010 *Telecommunication Fund*. See Annex I.1 for further information on the case.
[18] The Norwegian case *Hydro/Søral*, see Annex III.1 for further information on the case. The Liechtenstein case StGH 2013/196 regarding the recovery of tax benefits. See Annex II.1 for further information on the case.

To date, there has only been one case in which a court in an EEA EFTA State concluded that the standstill obligation had been breached. In the Norwegian *Synnøve Finden* case, from 2019, a regulation was found invalid as a result of the breach.[19]

In addition, the Study found a few (unsuccessful) actions for damages. In Norway, the cases *Norfrakalk* and *Synnøve Finden* were identified, both relatively recent judgments.[20] The cases show that the plaintiffs struggle to show that they have incurred a loss, and that the loss has been caused by the alleged breach of the state aid rules. In Iceland, the exclusion of state liability makes it impossible for a competitor to claim damages from the state for loss caused as a result of state aid rules.[21]

Conversely, no case practice regarding interim measures or recovery of illegality interest was found. It is doubtful whether any interim relief is available in Iceland.[22]

One overarching observation that can be drawn from the sample of cases identified by the Study is that while there are few 'real' private enforcement cases, state aid rules are slightly more frequently used in support of another claim, or as a means to convince courts of a certain interpretation of a rule, scheme or contractual clause. The Study identified 10 such cases, which are all pertaining to Norway.[23] In particular, in Norway, state aid rules are also used slightly more frequently as a 'defensive instrument' by the state, other public authorities or publicly owned companies. In these 'defensive' cases, it was argued that a certain interpretation of a rule or contract would entail the granting of unlawful aid, and thus had to be incorrect. Naturally, there is a large degree of overlap between cases of defensive use of state aid rules and the use of state aid rules for interpretative purposes.

The Study also identified a Norwegian case in which actions were brought seeking the granting of aid, based on arguments of discrimination.[24]

Finally, the Study identified a few Icelandic cases where national courts have assessed the compatibility of state aid measures, despite the fact that the compatibility assessment is the exclusive responsibility of ESA, subject to review by the EFTA Court.[25] National courts can only assess whether the standstill obligation has been

[19] See Annex III.1 for further information on the case. The final judgment is from February 2019.
[20] In *Norfrakalk,* the damages claim was based *inter alia* on a breach of the standstill obligation. In *Synnøve Finden* it was based on Norwegian Public Law.
[21] Damages may, however, be claimed on other legal grounds.
[22] See Chapter 1, section 5.4.
[23] A/S Norske Shell, Boreal, Havlandet Marinfisk Russenes AS, summarized in Annex III.1, and Bjølve Bruk AS (Gulating Court of Appeal, LG-2010-147380), Aktieselskapet Saudefaldene (tax case) (Supreme Court judgment, HR-2017-1231-A, Ventor Sp. Zoo (Gulating Court of Appeal, LG-2015-59453), Noretyl AS (Agder Court of Appeal, LG-2015-150132), Rem Ship AS (Borgarting Court of Appeal, LB-2010-189962), Østfold Energi AS (Borgarting Court of Appeal, LB-1998-1805), Vadheim Marin Fisk AS (Oslo District Court, TOSLO-2010-60850). Similar arguments are found in some of the Icelandic cases listed in Annex I.1.
[24] See for example *Kattekleiv,* summarized in Annex III.1. The case revolved around claims according to which it would be discriminatory to award aid to one company but not to another (the applicant). In Liechtenstein's State Study, it is indicated that such cases are likely also in Liechtenstein, see section 5.7, fourth paragraph in Chapter 2.
[25] EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts, OJ L 115, 5.5.2011, p.13 (the "Enforcement

breached, but do not have the power to declare a state aid measure compatible with Article 61(2) or (3) of the EEA Agreement and/or ESA's guidelines. Judgments entailing compatibility assessments could be an obstacle to private enforcement in Iceland.

Given the small sample of relevant cases, it is challenging to draw any robust conclusions as to the solidity and suitability of the EEA EFTA States' national legal order for private enforcement and effective recovery. This is in particular the case for Iceland, where the Study has not identified any cases concerning recovery, and Liechtenstein, where the Study has not unearthed any private enforcement cases. The conclusions and recommendations of this Study should therefore be read with this thin empirical underpinning in mind.

Similarly, the small sample of cases makes it difficult to detect trends. Furthermore, the distribution of cases – most of them stem from Norway – entails that overall trends in the EEA EFTA States are based in particular on developments in Norway. That being said, the following cautious observations can be made:

- The first two cases in which state aid rules were mentioned in a case before an EEA EFTA State court are an Icelandic judgment from 1998[26] and a Norwegian judgment from 1999.[27] In the Norwegian case, the Court did not consider the state aid arguments raised before them. In the Icelandic case, the District Court found that the measure constituted state aid, but, somewhat surprisingly, that the aid was compatible with Article 61(3)(b). The Supreme Court confirmed the Court's assessment of the plea relating to state aid.

- The frequency of litigation revolving around, or featuring claims based on state aid law, has increased steadily over the last years. In Norway, it took 12 years from the entry into force of the EEA Agreement before a Norwegian court ruled on the substance of a state aid claim.[28] In Iceland[29] and Liechtenstein[30], most cases date from the second half of the EEA agreements lifetime. Almost all final judgments of relevance identified by the Study date from the period after 2006.[31]

- The most interesting/relevant cases to date on private enforcement of state aid rules and effective enforcement of recovery, are all relatively recent:
    - Liechtenstein's Constitutional Court handed down its judgment in *K AG vs VGH* in 2014.[32]

guidelines"), section 1.1.3 '*Respective roles of the EFTA Surveillance Authority and national courts*', see paragraph 17 with reference to case practice from the Court of Justice.

[26] Case HRD 166/1998 *Gunnar Pétursson*, see Annex I.1.

[27] *Østfold Energi AS*, LB-1998-1805.

[28] See *Kattekleiv,* from 2006, summarized in Annex III.1.

[29] See Annex I.3. However, 18 of Iceland's cases relate to the measures enacted by the Icelandic authorities in the aftermath of the financial crisis and are similar in substance.

[30] Note, however, that Liechtenstein only has one case of EEA relevance, *K AG vs VGH* from 2014, summarized in Annex II.1.

[31] The exception is the Icelandic case HRD 166/1998 *Gunnar Pétursson*, see Annex I.1.

[32] Case StGH 2013/196, see Annex II.1. Importantly, the case left open whether the legal basis for the recovery claim was based on national law or direct application or Article 14(3) Part III of Protocol 3 of

- Arguably the Study's most important judgments, the Norwegian cases *Hydro/Søral*, *Synnøve Finden* and *Norfrakalk*, all date from the period 2013 to 2019.[33] In Norway, one could argue that the depth of the courts' analyses and, to some extent, the quality of their assessments, have improved in recent years. *Norfrakalk*, for example, contains a thorough analysis of the standstill obligation and *Boreal*, a relatively detailed assessment of the notion of advantage.[34]

In light of the above, and with the necessary caution given the small sample of cases, it is possible to deduce a slight upward trend in the frequency of private enforcement of state aid claims in EEA EFTA States' courts.

Nonetheless, and notwithstanding any upward trend, the fact remains that private enforcement of state aid rules remains a rare phenomenon in the EEA EFTA States.

The Study will attempt to provide some plausible explanations for this in section 5 below. First, however, the Study will briefly describe how the standstill obligation and recovery is, or could be, enforced in Iceland, Liechtenstein and Norway.[35]

3 Enforcement of the standstill obligation

3.1 The EEA EFTA States' legal framework for private enforcement

It follows from the foregoing that the standstill obligation is the key basis for private enforcement of state aid rules before national courts. In contrast to the EU legal order, the EEA Agreement does not have direct effect, and individuals cannot, in principle, derive rights thereof directly. In Liechtenstein, the EEA Agreement has direct effect in so far as the relevant provision has not been implemented into national law, and it concerns the four freedoms, or where it is sufficiently precise to be self-executing.

Enforcement of state aid rules in the EEA EFTA States requires that the standstill provision is implemented (correctly) in the respective national order. As follows from the individual State Studies, the standstill obligation has been implemented in the EEA EFTA States in the following manner:

- In Iceland, it is implemented by Article 30 of the Competition Act;[36]

- In Norway, (it is assumed that) the standstill obligation is implemented through Article 5 of the Act on State Aid[37] (in combination with) Article 3 in part II of Protocol 3 to the SCA, which is implemented into Norwegian law through the Regulation on EEA Procedural Rules for State Aid.[38]

the SCA. Thus, the case did not clarify whether Protocol 3 of the SCA has direct applicability in Liechtenstein.

[33] The final judgments.

[34] The cases are summarized in Annex III.1.

[35] The individual State Studies in Chapters 1, 2 and 3 provide a more in depth-analysis of this topic.

[36] Competition Act No 44/2005 (í. *Samkeppnislög nr. 44/2005*).

[37] Lov om offentlig støtte av 1. januar 1994.

[38] Forskrift om EØS-prosedyreregler for offentlig støtte av 30. oktober 2009. Note that part I of Protocol 3 to the SCA is not implemented into Norwegian law.

- In Liechtenstein, the standstill obligation has not been implemented into national law. The Liechtenstein courts have not yet clarified whether the standstill obligation has direct effect. However, since Liechtenstein has a monistic tradition, the authors of the Liechtenstein State Study presume that the standstill obligation in Article 1(3) in part I of Protocol 3 to the SCA applies directly.[39]

The State Study for Iceland indicates that there appear to be doubts as to the effect of Iceland's implementation of the standstill obligation. Article 30 of the Competition Act regulates the situation where a state aid measure has been notified to ESA, but is silent on the legal status of an aid measure which has not been notified.[40] The lack of cases where a third party has sought to invoke the standstill obligation before the courts could indicate that practitioners have not found the legal basis to pursue such a claim to be sufficiently clear. The *Telecommunication Fund* case, the only Icelandic case where a plaintiff has sought to invoke the standstill obligation, was dismissed by Reykjavik District Court on procedural grounds.[41]

In any event, even if the standstill obligation appears to form part of the EEA EFTA States' domestic legal order, that in itself does not necessarily mean that their legal systems have sufficient and clear legal bases for the different remedies on which parties affected by a breach of the standstill obligation should be able to rely.[42] The question thus arises if that is the case for all three EEA EFTA States.

In the absence of case law/practice that would provide definitive answers, the following brief observations can be made:

- In Iceland, Article 30 of the Competition Act does not appear to provide an adequate legal basis to invoke the standstill obligation.[43] In June 2019, the Ministry of Finance and Economic Affairs published a draft bill for a new Act on State Aid Procedures, which constitutes a comprehensive implementation of the EEA state aid rules, as well as the repeal of Article 30 of the Competition Act. If the new Act on State Aid Procedures is adopted, this might facilitate private enforcement in Iceland.

- In Liechtenstein, there appear to be a number of possible legal bases that could be relied upon for the different remedies in the different types of cases, including the Act Against Unfair Competition,[44] and the State Liability Act.[45] If and under which circumstances private enforcement actions could be successfully brought, has not been tested to date.

In Norway, it would appear that the legal order provides for the different remedies. To some extent, the cases identified in the Study also indicate that private actions can be

[39] See Chapter 1, section 3.1 *Direct Applicability of the EEA Agreement.*
[40] Competition Act No 44/2005 (í. *Samkeppnislög nr. 44/2005*).
[41] Case E-4326/2010 *Telecommunications Fund*. See Annex I.1 for further information on the case.
[42] Including preventing the payment of unlawful aid, recovery of unlawful aid (regardless of compatibility); recovery of illegality interest; damages for competitors and other third parties; and interim measures against unlawful aid.
[43] Competition Act No 44/2005 (í. *Samkeppnislög nr. 44/2005*).
[44] Gesetz vom 22.10.1992 gegen den unlauteren Wettbewerb, LGBl. 1992 Nr. 121, LR 240.
[45] Gesetz vom 22.9.1966 über die Amtshaftung (AHG), LGBl. 1966 Nr. 24, LR 170.

successful, provided that a breach of the standstill obligation can be proven.[46] That being said, the national legal framework is short on detail and lacking in clarity.[47]

3.2 Private enforcement of the standstill obligation in the EEA EFTA States

As explained in the foregoing, private enforcement of state aid rules is intrinsically linked with (alleged) breaches of the standstill obligation. Without there being a breach of said obligation, legal remedies such as claims for damages, for (interim) recovery or for having an act declared void cannot succeed.

Such private enforcement has rarely occurred in the 25 years in which the EEA Agreement has been in force in EEA EFTA States, and the standstill obligation has been alleged in a clear, unambiguous manner in only six cases to date.[48]

Given that there has only been one case in which a national court concluded that the standstill obligation had been breached, there is a limit to the Study's potential findings as to the robustness and suitability of the EEA EFTA States' legal systems as regards the enforcement of the standstill obligation and private enforcement.[49] *Synnøve Finden* indicates that private enforcement can succeed. In Iceland and Liechtenstein, no actions based on a breach of the standstill obligation have been (successfully) brought, thus any attempt to do so is fraught with uncertainty.[50]

Furthermore, in the EEA EFTA States, there is no case practice concerning the following remedies: (i) interim measures, including interim recovery, and (ii) recovery of illegality interest. That being said, that does not mean that such claims could not be successfully made, but the respective legal systems have not been put to the test to date.

In Iceland, the implementation of the standstill obligation in Article 30 of the Competition Act is '*at best vague*'.[51] The only case where a plaintiff sought to enforce the standstill obligation before an Icelandic court was dismissed on procedural grounds.[52] Since this case in 2010, no one has attempted to invoke the standstill obligation before an Icelandic court, which could indicate that the current legal basis is insufficient and that a revision is due.[53] In Norway, *Synnøve Finden*,[54] as well as the

[46] See *Synnøve Finden*, summarized in Annex III.1.
[47] This was also confirmed in the questionnaires received from state aid experts in Norway, see Annex III.3.
[48] One Icelandic case E-4326/2010 *Telecommunications Fund*, and in five Norwegian cases *Synnøve Finden, Gauselparken*, *Norfrakalk*, *Kattekleiv, Saudefallene*. See Annexes I.1 and III.1 for further information on the cases. Liechtenstein's courts have not yet dealt with a private enforcement case.
[49] The Norwegian case *Synnøve Finden*, see Annex III.1 for further information on the case.
[50] In the Icelandic case E-4326/2010 *Telecommunications Fund*, a breach of the standstill obligation was attemtpted brought, however it was dismissed on procedural grounds.
[51] See Chapter 1, section 3.2.
[52] Case E-4326/2010 *Telecommunications Fund,* see Annex I.1 for further information on the case.
[53] In June 2019, the Ministry of Finance and Economic Affairs published a draft bill for a new Act on State Aid Procedures, which constitutes a comprehensive implementation of the EEA state aid rules, as well as the repeal of Article 30 of the Competition Act. If the new Act on State Aid Procedures is adopted, this could possibly make private enforcement easier in Iceland.
[54] See Annex III.1 for further information on the case.

other cases in which a breach of the standstill obligation had been alleged,[55] indicate that the Norwegian legal system provides sufficient remedies for an effective enforcement of the standstill obligation. Recent case practice, most importantly *Synnøve Finden* and *Norfrakalk,* clarifies that (distant) competitors generally have legal standing in private enforcement actions, including those directed against schemes based on a law or a regulation.[56] However, these two cases also demonstrate intrinsic difficulties related to pleading a successful damages claim based on a breach of the standstill obligation, i.e. that the unlawful aid resulted in a loss causally linked to the granting of the unlawful aid.[57] The Icelandic and Liechtenstein State Studies indicate that these conditions would be equally challenging there.[58]

4 Recovery of unlawful state aid

4.1 The EEA EFTA States' legal framework for recovery of unlawful state aid

Where ESA has taken a negative decision with recovery, the EEA EFTA States are obliged to recover the unlawful state aid from the beneficiary. However, there are no clear EEA rules as to the manner in which recovery should be enforced. The EEA EFTA States may under certain circumstances be required to rely on national courts for the enforcement of recovery orders that are based on a negative decision from ESA. Recent jurisprudence from the Court of Justice suggest that the EEA EFTA States may be obliged to recover unlawful state aid also in the absence of a negative decision by ESA. National recovery orders based on the EEA EFTA States' general obligation to recover unlawful state aid may also need to be enforced through court proceedings.[59]

The foregoing describes one situation in which national courts can become involved in the enforcement of recovery. In addition, national courts can also face state aid issues in cases concerning actions for the annulment of a national recovery order, or where beneficiaries challenge a recovery decision by ESA before national courts.

If and how national courts can become involved in the enforcement of recovery, also depends on the national procedures for recovery.

- In Liechtenstein, a recovery decision by ESA will oblige the state to take the necessary steps to recover unlawful state aid. The granting authority would have to take the necessary national measures to recover the state aid from the beneficiary. If the state aid has been granted through an administrative act, the granting authority can revise or amend the act, depending on the underlying

[55] The Norwegian cases *Gauselparken*, *Norfrakalk*, *Kattekleiv, Saudefallene*. See Annex III.1 for further information on the cases.
[56] *Synnøve Finden* indicates that, in certain cases, a competitor will have legal standing not only to challenge the administrative act granting aid, but also a legislative act, e.g. a law or a regulation. The cases are summarized in Annex III.1.
[57] However, the judgment in *Norfrakalk* can be interpreted as showing that an action for damages could succeed. While the court concluded in that case that the standstill obligation had not been breached, it found that it could not be excluded that the other conditions for damages were met. See Annex III.1 for further information on *Synnøve Finden* and *Norfrakalk.*
[58] See Chapters 1 and 2.
[59] Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar AS*, C-349/17, ECLI:EU:C:2019:172.

legal basis for the granting act and the authority's competences.[60] If the state aid has been granted through a contract under private law, the granting authority would most likely have to initiate a process before the civil court to have the contract annulled.[61]

- In Iceland, ESA's recovery decision creates an obligation on the part of the Icelandic state to recover the unlawful state aid but does not create a direct obligation on the beneficiary to repay such state aid. Section 31 of the Competition Act provides a legal basis for recovery of unlawful state aid from the beneficiary and the payment of interest. There are no national procedures which regulate how to effectuate the recovery of state aid under Icelandic law. It is assumed that Icelandic authorities must adopt an administrative decision under national law, ordering the repayment of the state aid.

- In Norway, ESA's recovery decision creates an obligation on the part of the Norwegian state to recover the unlawful state aid. However, ESA's decision does not create an obligation on regional authorities to recover the state aid. Section 5 of the Act on State Aid,[62] gives the Ministry[63] the right to instruct a regional authority to recover unlawful state aid, including interest. Moreover, ESA's decision does not create an obligation on the beneficiary to repay the unlawful state aid. In order to recover the state aid from the beneficiary, the granting authority must take a national decision ordering the recovery of such unlawful state aid. Section 5 of the Act on State Aid[64] most likely provides a legal basis for such recovery decision but may have to be supplemented by national rules such as the standstill obligation – as implemented into Norwegian law through the Regulation on EEA Procedural Rules for State Aid,[65] Norwegian public law and/or Norwegian private law.[66]

In all three EEA EFTA States, the beneficiary has the right to challenge a decision from a granting authority ordering the recovery of the unlawful state aid. Moreover, should the beneficiary refuse payment or challenge the amount to be paid, enforcement would have to be enforced by bringing proceedings in front of national courts.

4.2 Recovery of unlawful state aid in the EEA EFTA States

There have been few examples of court cases relating to the enforcement of recovery decisions in the EEA EFTA States.

In Iceland, there have not been any cases concerning enforcement of the recovery of unlawful state aid before national courts. In Norway, there has been one case, *Hydro/Søral*, from 2013.[67] In Liechtenstein, there has been one case, *K AG vs VGH,*

[60] In the cases set out in Annex II.1, the aid was granted through an administrative act, e.g. under public law.
[61] There has been no case law in Liechtenstein on aid granted under a contract, e.g. through civil law.
[62] Lov om offentlig støtte av 1. januar 1994.
[63] Ministry of Trade, Industry and Fisheries.
[64] Lov om offentlig støtte av 1. januar 1994.
[65] Forskrift om EØS-prosedyreregler for offentlig støtte av 30. oktober 2009.
[66] See Chapter 3, section 4.
[67] See Annex III.1, for further information on the case.

from 2013.[68] In both cases, the beneficiary challenged the recovery order before national courts. Both national courts found that the recovery order was lawful, and that the beneficiaries had a duty to repay the unlawful state aid.

- The Norwegian case, *Hydro/Søral,*[69] concerns the question whether the granting authority's recovery claim had lapsed under the Norwegian Act on Limitation Period for Claims.[70] The Court found that the order had not lapsed under the Act.

- The Liechtenstein case, *K AG vs VGH*, concerned the question of whether a national recovery order could be based on the EEA Agreement and Protocol 3 to the SCA.[71] The Court concluded that there was a legal basis for the recovery of the unlawful state aid, and that the unlawful state aid could be recovered. However, the Court left open the question of whether the recovery order in this particular case was based on national law or direct application of Article 14(3) in part III of Protocol 3 of the SCA.[72]

It appears that there are no major obstacles to the enforcement of recovery decisions in the EEA EFTA States. The three legal systems seem well suited to recover aid from a beneficiary based on a negative ESA decision. Although the scarcity of case law entails a certain level of uncertainty concerning this conclusion, it could also indicate that national authorities normally succeed in recovering unlawful state aid through 'informal' procedures, i.e. without bringing proceedings before a court.

Nevertheless, there are still questions related to recovery through private enforcement that remain unresolved in the EEA EFTA States. Note that the two recovery cases above were based on a negative ESA decision with recovery. There have been no recovery cases in the EEA EFTA States, which were *not* based on a negative ESA decision, leaving a number of questions open.[73] For example, *Hydro/Søral* only clarified issues relating to statute of limitations in cases where ESA has taken a negative decision but did not clarify the situation where ESA has not taken a decision.[74] Moreover, national procedures for recovery of unlawful state aid could be clarified in further detail. In Iceland there are no national procedures for the recovery of unlawful state aid. In Norway, the national procedure for the recovery of unlawful state aid is partly set out in Section 5 of the Act on State Aid,[75] but it is unclear who is obliged to recover the state aid and how such state aid should be recovered, e.g. through an administrative act under Norwegian public law or as a (regular) money claim.

[68] Case StGH 2013/196 *K AG vs VGH*, see Annex II.1 for further information on the case.
[69] See Annex III.1 for further information on the case.
[70] Lov om foreldelse av fordringer av 1. januar 1980, 1. august 1988.
[71] See Annex II.1 for further information on the case.
[72] See summary of the case in Annex II.1.
[73] There have not been any cases similar to the judgment of the Court of Justice of 5 March 2019, *Eesti Pagar AS*, C-349/17,
[74] See Annex III.1 for further information on the case.
[75] Lov om offentlig støtte av 1. januar 1994.

5 Obstacles to private enforcement of state aid rules

5.1 Legal framework

The Study has shown that there is little private enforcement of state aid rules in the EEA EFTA States. This could indicate that there are legal obstacles and difficulties for private enforcement of state aid rules.

The Study has identified certain obstacles to the enforcement of the standstill obligation in the EEA EFTA States.

- In Iceland, it appears that the standstill obligation has not been correctly implemented under national law. Article 30 of the Competition Act,[76] does not appear to provide an adequate legal basis to invoke the standstill obligation and there has been no attempt to invoke the standstill obligation since the unsuccessful attempt in 2010.[77]

- In Norway, there does not appear to be any legal obstacles for private enforcement of the standstill obligation.[78] However, its implementation under Norwegian law is arguably insufficient or unclear, which could possibly prevent competitors from enforcing their rights in front of a national court, depending on the circumstances of the case.[79]

- In Liechtenstein, there have been no cases before the courts regarding the enforcement of the standstill obligation, however, the legal system in itself, being a monistic system, does not seem to indicate that there are legal obstacles to private enforcement.

Thus, while the Study has not identified any obstacles to the enforcement of a recovery decision, the national framework in Norway and Iceland could arguably be clearer as regards the procedure for recovery and the general duty for authorities to recover unlawful state aid, also in the absence of an ESA decision.[80] Likewise, the national framework in Liechtenstein remains vague because the standstill obligation has not been implemented into national law and there has not yet been a case where the standstill obligation was invoked.

The Study has also revealed that Icelandic courts have carried out not only assessments of whether a measure constitutes state aid, but also whether state aid is compatible with the EEA Agreement, for example in *Deka Bank* and in *Gunnar Pétursson*.[81] In both cases, the district court concluded that the aid was compatible with the EEA Agreement. National courts do not have the power to declare a state aid

[76] Competition Act No 44/2005 (í. *Samkeppnislög nr. 44/2005*).
[77] E-4326/2010 *Telecommunications Fund*, see Annex I.1 for further information on the case.
[78] A claim regarding a breach of the standstill obligation was successful in *Synnøve Finden* and was also invoked in *Norfrakalk*, see Annex III.1.
[79] See the questionnaires from state aid experts in Annex III.3.
[80] In Chapter 3, section 5.5., difficulties pertaining to the enforcement of recovery in Norway are identified in more detail.
[81] In case HRD 596/2012 *Deka Bank*, the District Court conducted a compatibility assessment. In case HRD 166/1998, *Gunnar Pétursson,* the District Court found that aid granted to a loan fund was compatible with the EEA Agreement under Article 62(3)(b) and the Supreme Court confirmed the District Court's assessment.

measure compatible with Article 61(2) or (3) of the EEA Agreement; such compatibility assessments are the exclusive responsibility of ESA. The Icelandic courts' practice whereby courts, in breach of the division of powers under the EEA Agreement, are carrying out compatibility assessments, could be an obstacle to private enforcement.

5.2 The application of the notion of state aid

Some of the Norwegian and Icelandic cases appear to indicate that courts had, or should have had, from an objective point of view, difficulties regarding the interpretation of the notion of aid pursuant to Article 61(1) of the EEA Agreement. However, in none of the cases was the cooperation procedure with ESA initiated, and only in the Norwegian case *Synnøve Finden*[82] and the Icelandic case *Lanasysla riskins*[83] did the courts request an advisory opinion from the EFTA Court.

The Norwegian State Study identified four cases in which different courts found that a particular measure did not constitute state aid, without either requesting an advisory opinion from the EFTA Court or requesting ESA's opinion through the cooperation procedure, even though it appears that it was, or should have been, objectively difficult to come to this conclusion.[84] In Iceland, there appear to be several cases in which the courts have struggled with the interpretation of the notion of aid.[85] There are also examples showing that in some of these cases the court merely dismisses the claims of unlawful state aid without making an assessment of whether the measure constitutes state aid, or where the court undertakes a compatibility assessment in order to 'skip' the state aid assessment.

In many of the cases where the national courts had difficulties with the correct application of the notion of aid, it would have been beneficial to initiate the cooperation procedure with ESA or to request an advisory opinion from the EFTA Court. This could have led to a more thorough assessment of whether state aid was present in these cases, which could potentially have led to a different outcome in the case.

5.3 Small number of private enforcement cases

In the foregoing, it has become apparent that the number of cases relating to the enforcement of state aid rules before the courts of the EEA EFTA States, has been relatively limited since the entry into force of the EEA Agreement 25 years ago.

While the rather limited empirical results of the Study do not enable the drawing of robust conclusions, the following tentative observations can be made as to plausible reasons for the small number of cases before national courts of the EEA EFTA States. First and foremost, it is far from clear whether there is, or has been, a vast potential of plausible (private) enforcement cases in the EEA EFTA States.

- In Liechtenstein, the granting state aid, let alone granting unlawful state aid, appears to be a rare event. The country's small size and low number of

[82] See Annex III.1 for further information on the case.
[83] HRD 17/2001, see Annex I.1 for further information on the case.
[84] See Chapter 3, section 5.2. The four cases are *Kattekleiv, Saudefaldene, Boreal and Gauselparken,* all summarized in Annex III.1.
[85] HRD 596/2012 *Deka Bank,* HRD 27/2001, *Lanasysla rikisins,* HRD 166/1998 *Gunnar Pétursson*.

inhabitants, as well as its business-friendly low general taxation level, places natural limits on the instances in which state aid is granted.

- In Norway, to Kluge's knowledge and understanding, breaches, and in particular blatant breaches of the standstill obligation, are not that frequent. Cases that could potentially be brought before a court may often also entail complex assessments under Article 61(1) of the EEA Agreement, which could make a complaint to ESA more tempting than a lawsuit.

- In Iceland, the legal framework creates obvious hindrances for private enforcement, particularly the fact that the standstill obligation has not been fully implemented into Icelandic law.

Successfully litigating a state aid case requires in-depth knowledge of state aid law on the part of the applicant *and* the relevant court. All three State Studies have indicated that such knowledge is not widely spread among the legal community in the three EEA EFTA states, including the national courts. In addition, the national legal frameworks are somewhat lacking in detail and clarity, adding another layer of risk.[86]

It could be argued that the unclear legal framework, the small amount of case law in Norway, and the virtual absence of any relevant case practice in Iceland, are mutually reinforcing factors. In the absence of clear rules, it is risky to bring proceedings in front of a national court. Yet the fact that there is so little private enforcement, results in a situation where case law has not 'filled the gaps' in the legal framework.

In Norway, there is a possibility that recent judgments, most notably *Synnøve Finden*, have filled some of these gaps, and may trigger a (slight) increase in private enforcement.[87] If that materialises remains to be seen; it could well be that private enforcement of the standstill obligation will remain an exceptional event for a Norwegian court, and even more so for a court in Iceland and Liechtenstein, in the years to come.[88] The reason for this could be that a court case is perceived to be costlier, or in any event, riskier from an economic perspective, than submitting a complaint to ESA.[89]

6 Cooperation with ESA and the enforcement guidelines

The Study could not identify an instance where there has been cooperation with ESA in accordance with the cooperation procedure of the Enforcement Guidelines.[90] However, the Study did identify one reference to the Enforcement Guidelines; in *Norfrakalk*,[91] a case decided by Oslo District Court in Norway.

[86] See the State Studies in Chapters 1 and 3 for more information.
[87] See Annex III.1 for further information on the case.
[88] So far, no court in Iceland nor Liechtenstein has found a breach of the standstill obligation.
[89] In the Liechtenstein State Study, costs of a lawsuit and expenses are indicated as a potential obstacle, see section 5.4 in Chapter 2.
[90] EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts, OJ C 85, 9.4.2009.
[91] See Annex III.1 for further information on the case.

The reasons why courts have not taken advantage of this possibility are unclear. As set out above, in a number of Norwegian and Icelandic cases, the judgments' analyses of state aid issues indicate that cooperation could have been beneficial.[92] In addition to the fact that there were few cases in which the cooperation procedure could have been useful, one possible explanation is that the courts are not aware of the procedure.[93] Moreover, the Norwegian, German and Icelandic versions of the Enforcement Guidelines may not be known to the courts. Another plausible reason, at least when it comes to Norwegian courts, could be efficiency considerations. If the court involves ESA or requests an advisory opinion from the EFTA Court, this could mean that, in some instances, the court proceedings may take longer.[94] In legal literature such considerations have been considered as one (of several) possible explanations for the small number of advisory opinions requested from Norwegian courts, and it is, in Kluges opinion, not unlikely that similar considerations could be relevant when considering the involvement of ESA under the cooperation procedure.[95]

7 Best practices

Given the small case sample, identifying '*best practices*' is a challenging undertaking.

Cases that raise complex issues pertaining to the notion of aid would benefit from either a request for an advisory opinion from the EFTA Court, or from seeking ESA's input through the cooperation procedure. The fact that Oslo District Court stayed the proceedings in *Synnøve Finden* and requested an advisory opinion, can perhaps be described as a best practice.[96]

Oslo District Court's assessment of whether the state aid rules had been breached, and whether there were grounds for a damages claim in *Norfrakalk* suggests that the responsible judge had, or had acquired, a good knowledge of EEA and state aid law.[97] In terms of use of legal sources, and depth of analysis, this judgment is hardly comparable with any other judgment the Study identified.

In view of the above, as regards national courts, an obvious best practice would seem to be to seek legal advice from ESA or the EFTA Court in cases dealt with by judges who neither have the relevant expertise nor time to acquire that expertise.

In terms of (best) practices when it comes to the claims brought by parties in the cases analysed in this Study, it would appear that the lack of clarity in the judgment results, at least in part, from unclear claims (the Norwegian case *Kattekleiv* being one example).[98] The reason may be that state aid arguably remains an 'obscure area of

[92] See section 5.2 above.
[93] The Norwegian case *Norfrakalk*, is the only case identified in which the Court has referred to the enforcement guidelines.
[94] In *Synnøve Finden,* for example, it took almost a year from the District Court requested an advisory opinion from the EFTA Court until the EFTA Court made its advisory opinion.
[95] Halvard Haukeland Fredriksen, 'Om mangelen på tolkningsspørsmål fra norske domstoler til EFTA-domstolen' in Jussens Venner 06/2006 (volume 41) p. 372-402.
[96] See Annex III.1 for further information on the case.
[97] See Annex III.1 for further information on the case.
[98] See Annex III.1 for further information on the case.

law'.[99] It could also, at least to some extent, be the result of a rather unclear national legal framework for state aid, and for private enforcement of state aid rules.

In terms of best practice when it comes to preventing the distribution of unlawful state aid, the State Study for Liechtenstein has identified a change after the recovery case *K AG vs VGH.*[100] There appears to be a greater awareness of state aid rules, and greater care in ensuring that aid schemes are compatible with state aid rules.[101]

8 Conclusions and recommendations

The Study shows that there has been little private enforcement in the EEA EFTA States since the entry into force of the EEA Agreement. Moreover, the Study shows that the national rules implementing the standstill obligation and regulating recovery procedures under national law, are unclear.[102]

It follows from the foregoing that one obvious recommendation would be a revision of the Norwegian and Icelandic legal framework relating to state aid. The implementation of the standstill obligation is unclear both under Icelandic and Norwegian law. As regards the enforcement of recovery, in particular in situations where ESA has not taken a negative decision, a revision could make it easier to ensure Iceland and Norway's compliance with relevant EEA/EU case law.

It would go beyond the scope of this Study to provide detailed recommendations as to how the legal framework in the three EEA EFTA States should be revised. Preliminarily, it would appear that the following issues could be addressed in revisions in Iceland and Norway:

- An unequivocal implementation of the standstill obligation in Norwegian and Icelandic law, as well as clear regulation governing the consequences of a breach, including the obligation of national courts to order recovery.
- Clearer and more detailed procedural rules for private enforcement, and enforcement of recovery alike. This could include provisions making it clear that the granting authority has an obligation to recover even in the absence of a negative decision from ESA, provisions explaining how a granting authority should recover unlawful aid, e.g. which administrative procedures a granting authority should avail itself of to recover unlawful state aid and provisions on procedural issues, for example legal standing, e.g. under which circumstances a competitor can bring a claim against the granting authority alone, and when it needs to involve a beneficiary.
- A legislative clarification as to the applicability of the Norwegian statute of limitations.
- In Iceland, the regulation should make it easier for third parties to invoke an injunction under the Act of Injunction. Under the current regulation it is doubtful whether such interim relief is available.
- In Iceland, the exclusion of state liability may well provide an obstacle to private enforcement, because it makes it impossible for a competitor to claim damages

[99] See Annex III.3 *Questionnaires for Norway,* section 2.1.
[100] See Annex II.1 for further information on the case.
[101] See Chapter 2, section 5.6 *Best practice.*
[102] This is particularly the case for Iceland and Norway. See Chapters 1 and 3.

from the state for loss caused as a result of state aid rules. Moreover, it should be examined whether the exclusion of liability in this situation contravenes the general principle of state liability under EEA law.

In Iceland, the Ministry of Finance and Economic Affairs have published a draft bill for a new Act on State Aid Procedures, which includes a more precise wording on the duty of Icelandic authorities to notify state aid to ESA, rules on recovery and interest, rules on limitation of claims, rules on the cooperation of national courts with ESA as well as ESA's power to request information and impose fines. However, the proposal includes the (continued) exclusion of state liability in the case of unlawful state aid. If the amendment is submitted to and passed by Parliament, it will strengthen the legitimacy of state aid procedure in Iceland and provide a more robust implementation of the general principles of state aid law such as the notification obligation and the recovery of unlawful aid.

In order to increase the knowledge of courts and judges regarding state aid rules, including of cooperation possibilities with ESA in state aid cases, it might be advisable for ESA to offer training to judges or courts, possibly in the context of seminars available to all judges. In these seminars, ESA should also explain the division of competence between ESA and national judges, e.g. making it clear that national courts do not have the power to conduct compatibility assessments of unlawful aid.

ESA could for example also dedicate a section to private enforcement on its own website, where it highlights the possibility of cooperation with national courts. ESA could also consider making its translated versions of the Enforcement Guidelines more accessible on its website.

In terms of content of the Enforcement Guidelines, the Study has not identified any obvious gaps in terms of issues addressed. That being said, and in particular in view of the relatively high share of cases in which state aid rules were used as a means to interpret certain acts, in particular contracts, it could be considered dedicating a section to this topic. For example, the guidelines could explain that where it is possible to interpret a certain act in different ways, one of which would entail the granting of unlawful state aid, the court would be obliged to choose the interpretation that does not infringe EEA state aid law.

Chapter 1: Iceland

1 Executive summary

Private enforcement of the state aid rules is practically non-existing in Iceland. The study revealed one case where a plaintiff sought to enforce the standstill obligation before Icelandic courts. The case was dismissed on procedural grounds. No cases concerning the recovery of unlawful state aid were identified.

In a few cases, plaintiffs have maintained that a certain measure should be considered as unlawful state aid under Article 61 EEA as a supplementary legal argument whereas the dispute in these cases centred on other points of law. In some instances, the national courts have addressed the argument pertaining to unlawful state aid by examining the compatibility of the aid. It seems that national courts have to a large extent been unfamiliar with the state aid rules and the division of competence between ESA and the national courts prescribed by the EEA Agreement.

The study reveals that there are obstacles to pursuing private enforcement cases in Iceland. The implementation of the standstill obligation into national law is vague and national procedural rules are ill suited to private enforcement cases. In addition, the knowledge of the state aid rules of relevant stake holders, both practitioners and judges, appears to be rather low.

Private enforcement would benefit from a clearer and more robust national legislation tailored to overcome both material and procedural hurdles. In addition, training of the stakeholders accompanied by inter alia clearer guidance on private enforcement by ESA on its website is to be recommended.

2 Methodology

Following the award of the contract on 8 April 2019, ADVEL Attorneys have undertaken a comprehensive study regarding the enforcement of State aid rules by national courts in Iceland.

The study is based on an in-depth search in the official data bases of Icelandic courts. The data bases are provided on-line and accessible to all and comprise all cases from 1 January 1999. Older judgments are included in a private data base, which is accessible by subscription.

The search was based on the relevant provisions of the Icelandic Competition Act and state aid related keywords.

In addition to the analysis of the available cases in Iceland a series of interviews with different stakeholders (i.e. judges and private practitioners) were conducted in order to clarify some of the points addressed in the identified cases and to collect input on challenges to private enforcement of the state aid rules.

The provisions of the Competition Act and the EEA Act which provide for the implementation of the state aid rules in national law were examined as well as key aspects of the Civil Procedure Act and the Act on Injunction. Furthermore, a draft bill on State aid Procedures was examined.

3 The legal system of Iceland and availability of judicial relief

3.1 Introduction

Iceland has a dualistic legal system. This entails that individuals or economic operators cannot rely on international law before domestic courts unless such measures have been duly incorporated into national law by an act of Parliament. The main part of the EEA Agreement was incorporated into national law by Act No 2/1993 on the European Economic Area (í. *Lög nr. 2/1993 um Evrópska efnahagssvæðið*) ("the EEA Act").[103] Conversely, the SCA and Protocols thereto have not been incorporated into national law. Article 3 of Act No 2/1993 is intended to implement Protocol 35 to the EEA Agreement. Article 3 provides that statutes and regulations shall be interpreted, in so far as appropriate, in conformity with the EEA Agreement and the rules laid down therein.[104]

Iceland currently has a three-tier judicial system after the establishment of an Appeals Court (í. *Landsréttur*) in 2018. Court actions commence in the District Court (í. *Héraðsdómur*). The District courts are eight in number and located around the country. The ruling of a District Court can be appealed to the Court of Appeal, provided specific conditions for appeal are satisfied. In certain cases, and subject to the granting of permission to appeal by the Supreme Court (í. *Hæstiréttur*), a ruling of the Court of Appeal may be appealed to the Supreme Court, which is Iceland's court of highest instance. In most instances, however, the judgement of the Court of Appeal will be the final resolution in the case.

3.2 Legal framework relating to state aid law

As mentioned above, the main part of the EEA Agreement has been incorporated into national law. Thus, Article 61 EEA can be relied upon in national proceedings. The SCA has not been incorporated into national law. However, it could be inferred from the wording of Article 3 of the EEA Act that national law should be interpreted in conformity with the SCA in so far as appropriate.

There is no legal act which deals exclusively with state aid. Two provisions of the Competition Act No 44/2005 (í. *Samkeppnislög nr. 44/2005*) ("the Competition Act")[105] contain material state aid rules. First, Article 30 states that if state aid covered by Article 61 of the EEA Agreement has been notified to ESA, Icelandic authorities shall not be competent to decide whether such aid is compatible until ESA has stated its opinion in the matter. Second, Article 31 provides a legal basis for recovery. The provision stipulates that Icelandic authorities shall, following a recovery decision from ESA, take measures to recover granted aid from the beneficiary. The beneficiary of the aid shall pay interest, as decided by ESA on the amount claimed. Interest shall be payable from the date on which the aid was at the disposal of the beneficiary until the date of its recovery. In addition, withdrawal of aid which has been deemed incompatible with the EEA Agreement by ESA shall not give rise to liability on the part of the relevant authorities for damages to the party affected by the decision or any party claiming losses as a result of the withdrawal. In addition, Article 32 of the

[103] Available online at https://www.althingi.is/lagas/nuna/1993002.html, last checked 13 June 2019.
[104] See unofficial translation by ESA in a Letter of Formal Notice to Iceland concerning the implementation of Protocol 35 to the EEA Agreement 13 December 2017. ESA Decision No 212/17/COL.
[105] Available online at https://www.althingi.is/lagas/149b/2005044.html, last checked 13 June 2019.

Competition Act provides a legal basis for the incorporation of EEA acts by regulation. Thus, Regulation No 1165/2015 incorporates the De Minimis Regulation[106] and the GBER.[107]

Article 30 of the Competition Act regulates the situation when an aid measure has been notified to ESA. However, it is silent on the legal status of an aid measure which has not been notified. It follows that the implementation of the standstill obligation into national law is at best vague. The lack of cases where a third party has sought to invoke the standstill obligation before the courts further indicates that practitioners have not found the legal basis to pursue such a claim to be strong.

Article 31 of the Competition Act, on the other hand has a clearer wording as regards recovery, laying down the duty to recover unlawful aid and the duty to pay interest. With regard to recovery, one must, however, bear in mind that there are only a handful of instances where ESA has adopted a negative decision including recovery directed at Iceland.

In June 2019, the Ministry of Finance and Economic Affairs published a draft bill for a new Act on State aid Procedures (í. *Meðferð ríkisaðstoðarmála - frumvarpsdrög*).[108] The proposal is intended to provide for a more comprehensive implementation of the EEA State aid rules, including provisions related to Protocol 3 SCA and the Procedural Regulation.[109] Thus the proposal includes a more precise wording on the duty of Icelandic authorities to notify aid to ESA, the standstill obligation, rules on recovery and interests, rules on limitation, rules on the cooperation of national courts with ESA as well as the powers of ESA to request information and the imposition of fines. However, the wording of the standstill obligation in the proposal is still somewhat vague as regards to non-notified aid. Furthermore, the proposal does not provide for a legal basis for interim relief.

The proposal provides for the repeal of Articles 30 and 31 of the Competition Act. Interestingly, the proposal entails the continued exclusion of state liability in the case of unlawful state aid, see further discussion below.

If the bill is submitted to and passed by Parliament, it will strengthen the legitimacy of state aid procedures in Iceland and provide a more robust implementation of the general principles of state aid law such as the standstill obligation and recovery of unlawful aid.

3.3 Consequences of unlawful state aid

A decision by ESA on the compatibility of a state aid measure is directed at the Icelandic authorities. Such a decision does therefore not have direct applicability under

[106] Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid. OJ L 352, 24.12.2013, p. 1, and EEA Supplement No 36, 12.6.2014, p. 644-651.
[107] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. OJ L 187, 26.06.2014, p. 1, and EEA Supplement No 23, 23.4.2015, p. 813-890
[108] Accessible at https://samradsgatt.island.is/oll-mal/$Cases/Details/?id=1377, checked on 13 June 2019. Previous versions of the draft bill were published in the consultation portal of the Icelandic Government in January and May 2019.
[109] 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, p. 9. Not yet incorporated into the EEA Agreement.

Icelandic law. It further follows from Article 31 of the Competition Act that withdrawal of aid which has been considered incompatible with the EEA Agreement does not give rise to liability for damages for any party affected by such a decision.

However, a negative decision will have consequences as the Icelandic authorities are under the principle of cooperation and duty of loyalty enshrined in Article 3 EEA required to respond to the decision by adopting appropriate measures, in addition to the obligations stipulated by Article 14(3) of Part II of Protocol 3 SCA.

If the beneficiary is a private undertaking, the Icelandic authorities will have to adopt a decision withdrawing the measure in question or enter into an agreement with the beneficiary on the recovery payment. If the incompatible aid measure has a specific legal basis, such as an exemption from tax in the Act on Income Tax, the Government will need to introduce a bill to Parliament revoking that provision.

In the instances where ESA has adopted a negative decision where the beneficiary was a private undertaking, none of the beneficiaries have brought the withdrawal of the state aid measure to court. On the other hand, the recovery of unlawful aid has proven to be time-consuming and somewhat problematic, as evidenced by case E-25/15.[110] In that case, the EFTA Court found that Iceland was in breach of its obligations by failing to take within the prescribed time all the necessary measures to recover unlawful aid following a negative decision by ESA.[111] The Icelandic authorities argued in that case that despite the fact that administrative procedures and dialogue with the aid beneficiaries had resulted in a more prolonged recovery process the recovery would be completed within a reasonable timeframe, albeit exceeding the time-limits imposed by the relevant ESA decision. These arguments were dismissed by the EFTA Court.

3.4 Competent courts and powers held by Icelandic courts relating to state aid law

3.4.1. General

The Constitution of Iceland provides that the judiciary can only be established by law. In the performance of their official duties, judges shall be guided solely by the law.

As described above, Iceland has a three-tier court system where the majority of cases is subject to a two-tier review, i.e. District courts and the Court of Appeal. All cases are handled by the general courts as there are no specialised courts in the court system.[112]

Procedures for civil cases are laid down in the Act on Civil Procedure No 91/1991 (í. *Lög nr. 91/1991 um meðferð einkamála*) ("Civil Procedure Act").[113] An action for annulment of an administrative measure follows the general procedure of the Civil Procedure Act.

[110] Case E-25/15 *ESA v Iceland*.
[111] Decision No 404/14 COL.
[112] The specialized courts in Iceland, the Labour Court (í. *Félagsdómur)* established by the Act on Trade Unions and labour disputes No 90/1938 (í. *Lög nr. 80/1938 um stéttarfélög og vinnudeilur)* concerns the participation of the social partners and the Impeachment Court (í. *Landsdómur*) established by the Act on the Impeachment Court No 3/1963 (í. Lög nr. 3/1963 um landsdóm) which provides for the participation of Members of Parliament in its procedures are not included in the general court system.
[113] Available online at https://www.althingi.is/lagas/149b/1991091.html, last checked 13 June 2019.

Article 25 of the Civil Procedure Act stipulates that questions on the interpretation of law may not be brought before the courts unless in connection with a genuine dispute. However, an individual with genuine interest may request a ruling on the existence of a right or interest, for instance, the existence of liability.

The Civil Procedure Act provides that it is for the parties to a case to define the dispute. Judges are competent to rule in any dispute which may be brought before the courts in accordance with national law unless the jurisdiction is excluded by law, agreement or general practice. It is for the plaintiff to define the dispute at hand in a written summons to the court, describing the facts of the case, the legal arguments and points of law relied upon. In the same manner, the defendant provides his description of facts, legal arguments and points of law in the statement of defence. Although the main principle of the civil procedure is that cases are argued orally before the judge(s) the written submissions frame the dispute to be settled.

Under the Civil Procedure Act, a court will give a final ruling on the dispute of the case at hand. The Act does not provide for the possibility to grant interim relief against a measure of the authorities. The only interim relief available under national law is to seek an injunction. As described below, a petition for an injunction is in the first instance an administrative procedure. If a decision on the granting or refusal of an injunction is appealed to the district court, it may be decided upon request to apply the Civil Procedure Act's provisions on expedited procedures in the case.

The procedure for an injunction is governed by the Act on Arrest, Attachment and Injunctions No 31/1990 (í. *Lög nr. 31/1990 um kyrrsetningu, lögbann o.fl.*) ("Act on Injunction").[114] A petition for an injunction is brought before a District Commissioner (í. *sýslumaður*) who is a member of the executive branch. The decision of the Commissioner may however be appealed to the district courts. An injunction may be sought against an imminent or commenced act of an individual or economic operator if it is deemed proven or likely that the act will contravene legitimate interests of the claimant which will suffer a loss if he is forced to wait for a court ruling on the matter. However, an injunction cannot be imposed against the official acts of the executive branch of the state or municipalities. An injunction granted by the Commissioner is always subject to a confirmatory ruling by the district court. It is for the petitioner to bring the matter before the court. Failure to initiate proceedings for a confirmatory ruling by the courts leads to the expiry of the injunction order.

3.4.2. Legal standing

The Civil Procedure Act provides that any person, company, association or institution who has rights or obligations under law can be a party to a case. A plaintiff will, therefore, have to substantiate that he has rights under national law concerning the dispute and that the defendant is eligible to bear the corresponding obligations. It is thus for the parties to substantiate that they have legal standing or lack thereof. Lack of legal standing leads to a ruling in favour of the opposite party, not a mere dismissal of the case. The Civil Procedure Act, however, requires that a plaintiff sets the legal arguments for a case as described above. If the plaintiff is unsuccessful in providing legal arguments for his rights in a given case it may be dismissed by reason of lack of clarity. Therefore, there may be a thin line between lack of standing and the clarity of legal arguments to establish a right.

[114] Available online at https://www.althingi.is/lagas/149b/1990031.html, last checked 13 June 2019.

In most private enforcement cases the case would be brought against the public authority granting the aid. Under the Civil Procedure Act, a plaintiff should, however, include the beneficiary in the suit if that party's rights and obligations may be affected by a ruling in favour of the plaintiff (í. *réttargæsla*), for instance in the case of an annulment of a decision benefitting that third party.

A competitor to a beneficiary would in most instances be considered to have legal standing in a case concerning state aid granted to that beneficiary. In cases concerning action for damages due to a breach of competition law the legal standing of competitors to the infringing company has thus widely been accepted. The situation would become a little more nuanced in the case of an association with a more peripheral interest related to the state aid measure.

3.4.3. Remedies

As the law currently stands in Iceland the remedies available for an injured party in a state aid case are limited.

First, as concerns the standstill obligation the avenues open to a grieved third party are to bring a civil suit against the awarding authority seeking confirmation of the existence of rights under the state aid rules. In this instance, however, the current vague reference to standstill in the Competition Act does not provide a solid legal basis for such an action. A third party may also petition an injunction against the allocation of the aid. The legal hurdle to overcome in this instance is whether the granting of the aid would be considered as an official act within the meaning of the Act on Injunction. As described above, such a petition must first be presented to the District Commissioner whose decision, negative or positive, may be appealed to the district court. Although the court may upon request avail itself of the expedited procedures provided in the Civil Procedure Act the whole procedure is time-consuming enough to question whether it may qualify as interim relief under the State aid Guidelines.

With regard to recovery, Article 31 of the Competition Act provides a firmer legal basis for an action of recovery before the courts. It provides for the duty of repayment of unlawful aid and the payment of interest on such a claim. In this instance, however, the decision of ESA related to recovery needs to be clearly worded both in terms of the amount to be recovered and the interest to be paid.

Article 31 of the Competition Act explicitly excludes any liability of the authorities granting unlawful aid, be it the executive branch of Government or municipalities. On the other hand, state liability for damages suffered as a result of a breach of EEA law is an established principle of EEA law and has been recognised by Icelandic courts. Considering the implementation of Protocol 35 to the EEA Agreement into national law which merely requires courts to interpret laws and regulations in conformity with EEA obligations in so far as possible, it would seem rather unlikely that a court would be prepared to set aside an explicit provision of national law excluding state liability.

3.4.4. Statute of limitations

A recovery of unlawfully granted state aid would constitute a pecuniary claim under the Act on the statute of limitation of claims No 150/2007 (í. *Lög nr. 150/2007 um fyrningu kröfuréttinda*).[115] The general limitation period of a pecuniary claim is four years from the date when the claimant first could raise the claim against the debtor.

[115] Available online at https://www.althingi.is/lagas/149b/2007150.html, last checked 13 June 2019.

The question here is whether Icelandic court would consider the granting of the aid or the finding of illegality as the starting date for the purpose of the limitation. As there have been no cases related to recovery before the courts it is difficult to provide a concrete answer to that question.

4 Procedures concerning the recovery of unlawful state aid

4.1 National procedures for the recovery of unlawful state aid where ESA has taken a negative decision

Article 14(3) Part II of Protocol 3 to SCA provides that recovery of unlawful state aid shall be effected without delay and in accordance with the procedures under the national law of the EFTA State concerned, provided that they allow for the immediate and effective execution of the decision of ESA.

As described above, Article 31 of the Competition Act provides that unlawful state aid shall be recovered. There are however no national procedures which describe how to affect the recovery. As a decision of ESA on the incompatibility of aid measures is directed at the EFTA State in question, i.e. Iceland, the decision as such does not create any obligation on the part of the beneficiary to repay the aid granted. One would, therefore, assume that the Icelandic authorities would need to adopt a decision under national law ordering the repayment of the aid. As with any administrative decision, the authorities would in this procedure need to respect the affected party's rights under administrative law, including the right to be heard.

The legal basis of such a decision would be Article 31 of the Competition Act. In addition, Article 33 of the Competition Act provides that any agreements conflicting with the provisions of the Act are null and void. In the case of an unlawful aid granted by an agreement, Article 33 could, therefore, serve as an additional legal basis.

Should the beneficiary refuse payment or challenge the amount to be paid, enforcement would have to be pursued by lodging a suit before the district court to obtain a definitive ruling on the obligation of repayment.

As previously mentioned, no cases concerning recovery have ended up before the national courts. One can, therefore, assume that the issue of recovery has hitherto been dealt with by informal procedures or agreement with the beneficiaries.

4.2 National procedures for the recovery of unlawful state aid where ESA has not taken a negative decision, e.g. where state aid is implemented in breach of the standstill obligation

In the absence of specific procedures for the recovery of unlawful state aid, the legal basis for recovery is limited to Article 31 of the Competition Act which presupposes the existence of a negative decision of ESA. Furthermore, Article 14 Part II Protocol 3 SCA limits the duty to recover unlawful aid to a decision of ESA to that effect. A decision to grant aid by a public authority would fall under the remit of administrative law. Therefore, any decision to withdraw aid and/or demand repayment of granted aid from a private undertaking would need to meet the general requirements of administrative law.

In the EU pillar, the duty to recover unlawful aid, whether it has been notified to the Commission or in the absence of a notification, follows from the direct effect of Article 108 TFEU.[116] In Iceland, the main part of the EEA Agreement, including Article 61 and Article 3, has been implemented into national law. The question is, therefore, whether a public authority can invoke Article 61 EEA, as implemented in the EEA Act, as a legal basis for recovery in the absence of a negative decision by ESA. Given that the decision of public authority needs to meet the requirements of administrative law the result would depend on the specific circumstances of the case, i.e. the evaluation of the legitimate expectations of the beneficiary.

The draft bill on the Act on State Aid Procedures includes a provision allowing for the recovery of unlawful non-notified aid. It therefore appears that the Icelandic authorities are of the opinion that a clearer legal basis for such an action is desirable.

Notwithstanding, the course of obtaining repayment of unlawful aid from the recipient by informal procedures, i.e. agreement, would remain open to the Icelandic authorities.

4.3 Possible actions for contesting the validity of the recovery decisions, or in case no recovery is ordered

4.3.1. Action contesting the validity of ESA's decision to recover unlawful state aid

An action contesting the validity of ESA's decision to recover unlawful state aid would under the SCA be brought before the EFTA Court under the procedure prescribed by Article 36 SCA. This would apply to both public authorities and the aid recipient. State aid decisions of ESA are governed by the provisions of the SCA which is an international agreement and has not been transposed into national law. It is therefore difficult to see how national courts would have jurisdiction in a case contesting the validity of ESA's decision. Of course, it cannot be excluded that a beneficiary would seek to contest the validity of a decision of the Icelandic authorities ordering recovery and thus indirectly challenging the validity of ESA's decision. It would then fall upon the national judge to uphold the division of competences prescribed by the state aid rules. One could suggest that in such a case it would be natural for the court in question to seek the advisory opinion of the EFTA Court. This route would however be subject to the discretion of the national court.

4.3.2. Action in case no recovery is ordered by the Icelandic authorities

A competitor could pursue a case before the national court against the authorities for failing to act in the event that the authorities do not comply with a negative decision by ESA. In such a case the competitor would also bring suit to the recipient in order for said party to protect his rights (í. *réttargæsla*). The legal basis for such a suit would be administrative law supported by Article 31 of the Competition Act in conjunction with Article 61 EEA as implemented in national law. In general, the threshold for obtaining a ruling from a national court ordering the authorities to act, i.e. to order recovery of unlawful aid from a third party, would be quite high.

[116] See e.g. Case C-349/17 *Eesti Pagar AS*, judgment of 5 March 2019.

4.3.3. Action contesting the Icelandic authorities' decision to recover unlawful state aid

A beneficiary may challenge the decision of the Icelandic authorities to recover unlawful state aid under the general principles of administrative law. Grounds for contesting such a decision could be manifest material or procedural errors, such as misinterpretation of the grounds of an ESA decision, wrongful application of EEA law in the absence of an ESA decision or insufficient application of the principle of the right to be heard. Furthermore, such a challenge could be based on the statute of limitation of the claim concerned.

5 Summary of conclusions drawn from the cases below and the interviews

5.1 Introduction and overview of findings

As mentioned above, there is only one case where the plaintiff explicitly sought to invoke the standstill obligation before the national courts. There are no cases related to the recovery of unlawful aid. In a few cases, plaintiffs have invoked Article 61 EEA as a supplementary legal argument for the unlawfulness of a measure without referring to the standstill obligation as such. At times, this has led to an examination of the compatibility of the aid by the national courts in contravention with the division of competences prescribed by the EEA state aid rules.

In case No 166/1998 of the Supreme Court,[117] the plaintiff sought a declaration of the illegality of a special industry fee, primarily on the basis of the fee being unconstitutional. As a supplementary legal argument the plaintiff further maintained that the fee constituted unlawful state aid under Article 61 EEA. In this case, the District Court assessed the compatibility of the measure under Article 61(3)(c) EEA and found it to be compatible aid. The District Court, however, rejected to assess the compatibility of the Industry Fund with the state aid rules. The Supreme Court confirmed the ruling of the District Court on its merits.

Similarly, in case E-8613/2009[118] the District Court assessed the compatibility of a measure under Article 61(3)(b) EEA. The case concerned the possible tort liability of the Icelandic State due to failure to act in time with regard to the precarious situation of the commercial banks and certain measures enacted by the Government in the aftermath of the banking crisis. These inter alia included the establishment of new banks and the division of assets between the fallen banks and the new banks. One of the many legal arguments put forward by the plaintiff was that the division of assets amounted to unlawful state aid. The District Court rejected the plea by finding that the measures were in any event compatible with Article 61(3)(b) EEA. The Court further noted that the plaintiff had not substantiated how this plea in law supported the main subject matter of the action, namely the tort liability of the State. The plea was thus rejected both on material and procedural grounds. The case was appealed to the Supreme Court.[119] The Supreme Court did not find it necessary to address the question of unlawful aid in that the plaintiff had failed to substantiate how this plea in law supported the claim of liability.

[117] Case No 166/1998 of the Supreme Court of Iceland.
[118] Case E-8613/2009 DekaBank v Iceland.
[119] Case No. 596/2012 DekaBank v Iceland.

These cases demonstrate that the national courts have considered it necessary to assess compatibility of state aid measures despite the fact that such an assessment is the exclusive competence of ESA under the EEA state aid rules. This position of national judges could simply be a matter of lack of knowledge of the state aid rules. On the other hand, it must also be borne in mind that the SCA, and its Protocols, is not implemented into national law. It follows from the Civil Procedure Act that courts are required to address all pleas in law presented by the parties to a case. It cannot therefore be excluded that the courts consider that they are under national law obliged to address arguments related to unlawful state aid both on merits and procedural grounds.

It is also interesting to note that both cases concern potential aid measures which had not been notified to ESA.[120] However, plaintiffs in these cases did not seek to enforce the standstill obligation as such, merely presenting arguments concerning alleged unlawful aid as a supplementary legal argument to the main pleas in law.

Given the scarcity of cases where arguments related to state aid have been raised, yet alone "real" cases of private enforcement, it is hard to identify a particular trend in Iceland. However, the use of state aid related arguments has increased in the latter part of the EEA Agreement's lifetime. The Study revealed that there are 26 cases where state aid arguments of some sort have been presented. Thereof 18 cases related to the measures enacted by the Icelandic authorities in the aftermath of the financial crisis and are similar in substance.

Awareness of the State aid Guidelines on the role of national courts in the enforcement of the state aid rules is augmenting both on the part of judges and private practitioners. However, the main concerns relate to the implementation of the state aid rules into national law, in particular, the lack of a clear legal basis for the enforcement of the stand still obligation. In addition, the possibility to seek interim relief by petitioning an injunction is at best unclear since official acts are excluded from injunctions as a matter of law.

5.2 Enforcement of standstill obligation and of recovery of unlawful state aid

The Telecommunications Fund case[121] is the only case where the plaintiff sought to invoke the standstill obligation. The case was dismissed by Reykjavík District Court on procedural grounds. The court held that the plaintiff had not adequately set out the claim for the imposition of the standstill obligation in the written summons filed with the court. In the written summons, the plaintiff had based the claim on Article 30 of the Competition Act in conjunction with Article 61 EEA as well as referring to the Guidelines on enforcement of state aid rules by national courts. The court did not examine the applicability of the legal basis or explore the applicability of the Guidelines in its conclusions.[122]

As mentioned above, there are a few cases where plaintiffs have argued that a measure constitutes unlawful aid as an additional legal argument for the invalidity of a certain measure or to support a claim for tort liability. In a series of cases challenging

[120] The rescue and restructuring of the commercial banks post financial crisis was first notified to ESA in September 2010, see further discussion in Research handbook on State aid in the banking sector, Edward Elgar Publishing 2017, p. 465.
[121] Case E-4326/2010 of the District Court of Reykjavík.
[122] It should be disclosed that counsel for the plaintiff is a partner at ADVEL Attorneys.

changes to priority claims to the estate of the fallen banks in the aftermath of the financial crisis, plaintiffs briefly refer to such measures as unlawful aid within the meaning of Article 61(1) EEA, see discussion above. These arguments were dismissed by the courts without further examination. In a case concerning state support to a domestic flight route, the plaintiff argued that the measure in question was in breach of Article 61 EEA and referred to the duty to notify aid under Protocol 3 SCA.[123] The Icelandic Government, in turn, argued that the measure in question was in conformity with the transport rules of the EEA Agreement and therefore in conformity with Article 61 EEA. The court found that the plaintiff had not presented sufficient evidence to support that there had been a distortion of competition leading to a loss suffered by the plaintiff. The court, therefore, did not address the pleas related to Article 61 EEA and Protocol 3 SCA specifically. In a recent case concerning the de-bundling of an Energy Company, the plaintiff argued inter alia that the allocation of pension obligation between the two de-merged entities amounted to state aid under Article 61 EEA.[124] The district court dismissed this argument without providing further grounds. The Appeals Court considered the agreement in question to breach the prohibition of concerted practices under Competition law and declared it void on those grounds without addressing arguments relating to state aid.

There are no cases concerning enforcement of the recovery of unlawful state aid before Icelandic courts.

5.3 The use of the ESA's guidelines on enforcement of state aid law by national courts

The Guidelines on enforcement of state aid law by national courts have not been used by any court in Iceland to date. However, interviews revealed raised awareness of the Guidelines and a more positive attitude towards the use of the Guidelines as a frame of reference in the future. Some practitioners had been unaware of the existence of the Guidelines. The Ministry of Finance and Economic Affairs recently launched a webpage dedicated to state aid where links to the State aid Guidelines are provided. That should in general raise awareness of the Guidelines of all stakeholders.

5.4 Obstacles/difficulties regarding private enforcement of state aid law

Since there are no cases concerning enforcement of the recovery of unlawful state aid before Icelandic courts, it is evidently difficult to conclude on whether there are any obstacles or difficulties to private enforcement in this respect. The legal basis for recovery in Article 31 of the Competition Act is relatively clear although no national procedures specifically addressing recovery, the statute of limitation etc. are in place. It must also be considered that the Icelandic authorities seem to have been able to recover unlawful aid granted without having to bring the matter to court.

On the other hand, it is evident from the lack of cases based on Article 30 of the Competition Act that the provision does not provide an adequate legal basis to invoke the standstill obligation. This view was commonly shared by practitioners. Judges did not feel it was appropriate to share their views on this question.

In addition, it is doubtful that any interim relief is available to grieved third parties under Icelandic law as the Act on Injunction excludes official acts. The wording of Article 3

[123] Case E-6117/2010 of the District Court of Reykjavík.
[124] Case 409/2019 of the Appeal Court of Iceland.

of the EEA Act, which implements Protocol 35 EEA, does not seem to be sufficiently strong to suggest that the provisions of the Act on Injunction could be interpreted in conformity with the EEA Agreement in a manner which would exclude the applicability of the express exclusion of official acts in state aid cases.

5.5 Cooperation with ESA

Icelandic courts have not availed themselves of the possibility to cooperate with ESA in state aid cases. However, the courts are in general positive towards seeking the advisory opinion of the EFTA Court as demonstrated by numerous references from Icelandic courts. If the draft bill on State aid procedures is passed by Parliament, the courts will have a firmer ground for cooperation with ESA which renders it more likely.

5.6 Best practice

As demonstrated in this study, national enforcement of the state aid rules in Iceland is still in its infancy. It is therefore difficult to identify any national practice which could be considered best practice EEA wide.

5.7 Conclusions and recommendations

The conclusions drawn from the study is that it is imperative for the successful private enforcement of the state aid rules in Iceland to fully implement the state aid rules into national law. The draft bill currently in public consultation would thus serve as a huge improvement of the legal situation and increase transparency for various stakeholders. However, the draft bill does not adequately address the enforcement of the standstill obligation and the need for a clearer legal framework for interim relief.

Finally, the fact that public authorities are exempt from liability in the event of granting unlawful aid and/or withdrawal of aid limits the remedies available to third parties. It should also be examined further whether the exclusion of liability in this respect contravenes the general principle of state liability under EEA law.

Chapter 2: Liechtenstein

1 Executive summary

In the Principality of Liechtenstein (hereafter: Liechtenstein) private enforcement of state aid rules as well as the recovery decisions of unlawful state aid are rare. Since 1994, there have been two cases regarding state aid recovery.[125] One of these cases concerned the recovery of tax benefits (tax recovery case[126]) due to a negative decision of the EFTA Surveillance Authority (ESA) that was later confirmed by the EFTA Court. The second case did not concern recovery of unlawful aid. The case was entirely national and concerned the recovery of media support (media support case[127]). In addition, there have been 12 other media support cases. In most of these cases the disputes arose because media support was refused or was less than the beneficiaries had applied for. Another two judgments concerned the denial of tax benefits for private asset structures (*Privatvermögensstrukturen*). There has been no case before the national courts regarding a breach of the standstill obligation.

Because of the small number of cases, the study could not detect any significant trends or developments over time. However, overall it seems that any kind of state benefits to undertakings are rare in Liechtenstein and that, at least since the tax recovery case[128] from 2013, the authorities pay more attention to state aid rules. This was also confirmed by the various interviews conducted for this study. Hence, it is unlikely that private enforcement cases before Liechtenstein courts will increase in the near future.

The study does not identify any serious obstacles to private enforcement of state aid rules. However, the standstill obligation as set out in Article 1(3) Part I of Protocol 3 SCA[129] has not been implemented into national law. In this study we argue that the standstill obligation can be seen as forming part of the EEA Agreement[130] and that it is sufficiently concrete to be applied directly. However, Liechtenstein's courts have not yet finally decided whether the standstill obligation has indeed direct effect. As a result, the national legal framework for state aid remains vague and does not provide clear and sufficient legal basis for private enforcement. So far, the existing legal ambiguities have not been addressed by the relevant case law. It thus seems plausible that more detailed legislation would be beneficial for private enforcement and recovery of unlawful state aid.

The work conducted in relation to this study shows that the knowledge of state aid in Liechtenstein is relatively low. This is also evident from the fact that most of the

[125] See: annex II.1.
[126] Staatsgerichtshof, StGH 2013/196 K AG v VGH (tax recovery) 27.10.2014.
[127] Verwaltungsgerichtshof, VGH 2008/8 X AG v Regierung des Fürstentums Liechtenstein (recovery of media support) 29.5.2008.
[128] StGH 2013/196.
[129] Article 1(3) Protocol 3 SCA to the Surveillance and Court Agreement, as amended by the Agreements amending Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), signed in Brussels on 21.3.1994, 6.3.1998 and 10.12.2001.
[130] EFTA States Agreement on the European Economic Area (EEA Agreement), OJ L 1, 3.1.1994, p. 3-522.

persons interviewed had never had a state aid case and that the ESA´s guidelines on enforcement has to our knowledge never been applied by the courts in Liechtenstein.

To increase the level of knowledge about state aid, specific training and seminars for judges and legal practitioners would be beneficial.

2 Methodology

This in-depth study on the enforcement of state aid rules[131] and decisions by the Liechtenstein courts is based on standard legal methods.[132] First, existing national law on state aid was examined to ensure that not only the familiar provisions (such as the rules on subvention or media support) would be taken into account. The public legislation database[133] was therefore scanned using the key term 'state aid' and its synonyms.[134] The results were filtered and irrelevant acts such as international treaties and penal law[135] were excluded, as these did not fall within the scope of the study. The remaining results were listed and analysed. Those acts containing provisions serving as a legal basis to confer state aid within the meaning of Article 61(1) EEA Agreement were selected.

Second, the national court's rulings on state aid were collated from both the publicly available database[136] and private one.[137] The latter is only accessible after paying a fee and contains judgments dating back to 1947, whereas the public database contains published judgments from 2000 onwards. As above, the key term 'state aid' and its synonyms,[138] as well as the legal terms contained in the selected legal acts, were used for this research. In addition, a written request was sent to the national courts for non-published judgments in the field of state aid. The courts were contacted beforehand to ensure that they knew what kind of judgments were being sought. This served to inform the courts of the reasons for the request and to clarify the meaning of 'state aid'. It also allowed us to ask for specific judgments that had been referred to in publicly accessible judgments. The data collection covered the period 1994 to 2018, and the decisions were classified in agreement with ESA.[139] Furthermore, the data collection was analysed with regard to the question of enforcement of the standstill obligation and recovery decisions.

It was assumed that there would be few judgments on state aid in Liechtenstein. This assumption was confirmed by our findings.[140] The number of cases[141] selected for the

[131] EFTA Surveillance Authority, Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts, OJ L 115, 5.5.2011, p. 13-30.
[132] *J. M. Smits*, What is legal doctrine? On the aims and methods of legal-dogmatic research (2015), p. 5; *D. Patterson*, Methodology and Theoretical Disagreement, in: Neergaard/Nielsen/Roseberry (Hrsg.), European legal method (2011), 227-241, 233-235.
[133] https://www.gesetze.li/ (09.05.2019).
[134] 'Beihilfe', 'Subvention' and 'Förderung'.
[135] The term 'Beihilfe' can also mean 'aiding and abetting'.
[136] https://www.gerichtsentscheidungen.li/ (09.05.2019).
[137] https://www.rechtportal.li/ (09.05.2019).
[138] E.g. 'Beihilfe', 'Subvention' and 'Förderung'.
[139] E.g. Courts that adopted the decision, the type of action, the subject matter of the action and the outcome.
[140] See: chapter 5.1.
[141] A 'case' can include judgments from one or several instances.

annexes to the study was coordinated with ESA. Upon approval, the judgments were summarised and described as agreed with ESA.[142]

Third, because of our assumption that there would be few cases, interviews were carried out with judges, private practitioners and representatives of the public administration ("stakeholders"). The interviews have been conducted as semi-structured interviews in order to allow new ideas to be brought up during the interviews. Due to the different background of the interviewees and the complexity of the topic semi-structured interviews were preferred to fully structured interviews or an online questionnaire. The purpose of these interviews was to find out the reasons for the small number of cases concerning state aid, and to ensure that no cases regarding the enforcement of state aid law and the recovery of unlawful state aid in Liechtenstein had been missed. The conversations with stakeholders were also intended to discover the difficulties encountered when applying state aid rules, and whether ESA's guidelines[143] were used to identify best practice regarding state aid rules. In total, the Liechtenstein Institute asked thirteen stakeholders for an interview, of whom eight participated. Among the interviewed stakeholders were two judges from different courts, three representatives of the administrative units and three private practitioners.

3 Liechtenstein's legal system and availability of judicial relief

3.1 Direct applicability of the EEA Agreement

Liechtenstein has a monistic tradition. This means that EEA law is part of Liechtenstein's legal system and does not have to be integrated in the form of a national law to become effective.[144] According to the constitutional court (*StGH*) it amends or supplements the constitution.[145] In the hierarchy, EEA law therefore enjoys priority.[146] In the case that EEA law is not directly applicable or contradicts a national provision, Protocol 35 to the EEA Agreement obliges the EEA EFTA States to introduce a provision in the national law allowing for the priority of EEA law in order to achieve a homogeneous EEA through national procedures.[147]

To characterise the relationship between national law and EEA law, Liechtenstein's government held in a 1992 report that 'the principles of primacy and direct applicability of EC law … also be applied to EEA law, but only in the sense of an "obligation de résultat" [obligation of achievement].' Within their national borders, the EEA EFTA States must therefore apply EEA law 'in such a way that it takes precedence as a

[142] See: annex II.1.

[143] EFTA Surveillance Authority, Decision No 3/17/COL of 18 January 2017 amending, for the one-hundred and second time, the procedural and substantive rules in the field of State aid by introducing new Guidelines on the notion of State aid as referred to in Article 61(1) of the Agreement on the European Economic Area, OJ L 342, 21.12.2017, p. 35-84; ESA Decision No 254/09/COL.

[144] *J.-F. Perrin*, Conflits entre le droit interne et le droit international (2018), p. 9–11; *M. Krajewski*, Völkerrecht[1] (2017), 101 et seq.

[145] Staatsgerichtshof, StGH 2011/200 A v K Treuhand AG (vormalige L Treuhand AG) 7.2.2012, p. 25, para 2.1.

[146] *P. M. Schiess Rütimann*, Die Stellung der EMRK in Liechtenstein, Jusletter 4.2.2019, para 6; StGH 2013/196, p. 20, para 2.5.1.

[147] Sole Article EFTA States Protocol 35 to the Agreement on the European Economic Area; StGH 2013/196, para 2.5.1; ESA Decision No 254/09/COL, para 22.

result and is directly applicable where this is also the case in the EC (in particular in the case of regulations).'[148]

Article 61 EEA Agreement prohibits state aid and defines the conditions under which state aid measures are compatible with EEA law. ESA clarifies the notion of state aid in its guidelines.[149] According to Article 1(3) Part I of Protocol 3 SCA, the EEA EFTA States shall not implement state aid measures without prior notification to and approval by ESA (standstill obligation). Article 14(3) Part II of Protocol 3 SCA obliges Liechtenstein to recover unlawful state aid. The standstill obligation[150] has not been integrated into the national law. Liechtenstein's courts have not yet decided on the question whether the standstill obligation has a direct effect, so that a private party could rely on it. We assume that Liechtenstein's courts will have a sufficiently clear basis for the direct application of the standstill obligation and admit a private complaint alleging the violation of the standstill obligation.

This view is supported by the jurisprudence of the constitutional court (*StGH*) which in EEA matters consistently upholds a rather broad concept of direct effect. By properly ratifying an international agreement, its norms automatically become national law. As Liechtenstein courts strictly follow Kelsen's theory of the hierarchy of the legal system, whereby each legislative act must have its legal basis in a higher instrument, direct effect not only applies to the EEA Agreement as such but also to all subsequent or related legal acts. Where the directly applicable text lacks clarity, the national judge is called to fill such lacunae.[151] The same approach applies to the concept of primacy.[152] This also includes following the CJEU's jurisprudence.[153]

The StGH has declared the EEA Agreement to be directly applicable where the four freedoms are concerned.[154] In the tax recovery case mentioned above, it did not have any objections to the direct applicability of EEA law in connection with a negative ESA decision if there was no national legal basis or if the latter was contrary to EEA law.[155] In this case the court did not have to answer the question if the standstill obligation is directly applicable or not. Although as a member of the EEA Agreement, Liechtenstein has an obligation to apply the rules on the notification of state aid measures and does so in practise.[156]

Considering the practice of the StGH, in our view it is likely that Liechtenstein's courts will admit a private complaint for violation of the standstill obligation and as a result affirm the direct applicability of Article 1(3) Part I of Protocol 3 SCA. Nevertheless, a

[148] *Regierung des Fürstentums Liechtenstein*, Bericht und Antrag betreffend das Abkommen über den Europäischen Wirtschaftsraum vom 2.5.1992, BuA Nr. 46/1992, 180.
[149] ESA Decision No 3/17/COL.
[150] Article 1(3) Protocol 3 SCA.
[151] Georges Baur, Kohärente Interpretationsmethode als Instrument europarechtskonformer Rechtsanwendung – eine rechtspolitische Skizze, in: 25 Jahre Liechtenstein-Institut (1986-2011), Schaan 2011, pp. 47-63.
[152] StGH 2013/044 para 3.4.2.
[153] StGH 2011/200 para 3.2.
[154] *P. Bussjäger*, Einführende Bemerkungen zur liechtensteinischen Verfassung, in: Liechtenstein-Institut (Hrsg.), Online-Kommentar zur liechtensteinischen Verfassung, www.verfassung.li (2016), para 143-144.
[155] StGH 2013/196, para 2.3.3; see: annex II.1.
[156] Article 3 EEA Agreement; Protocol 35.

more detailed national legislation and jurisprudence could be beneficial for private enforcement and the recovery of unlawful state aid.

3.2 Competent courts and powers held by Liechtenstein's courts relating to state aid law

3.2.1 Consequences of unlawful state aid

Based on the jurisprudence regarding EEA law of the national courts and their approach regarding the recovery case,[157] we assume that Liechtenstein's courts acknowledge the direct effect of the standstill obligation. Nevertheless, this is for the national courts to be decided in the future.

In the case of unlawful state aid in Liechtenstein, the national courts may have to annul the decision or declare the contract or the law on which the aid was granted void with retroactive effect. It is also possible that the body granting the aid revises its decision or orders the recovery of unlawful state aid due to a negative ESA decision, as in the tax recovery case or based on the national law as happened in the media recovery case.[158] The written national law does not contain a norm giving clear instructions to the authorities on how to proceed in the event of suspicion of unlawful aid.[159]

Competitors and third parties also have the possibility of a supervisory complaint to a national authority.[160] However, until now there were no cases.

What actions competitors or third parties can take depends on the legal basis that was used to grant the state aid in question (e.g. legislative act, decision or private contract[161]). In case that state aid has been granted by a decision, a competitor or third party who considers their rights to be violated must request the authority granting the aid to reconsider its decision, or try to challenge it before the competent administrative body or the administrative court (*VGH*). If state aid has been granted by a private law contract, the competitor or third party must file a complaint to the princely court of justice (*LG*).[162]

If a legislative act entails unlawful state aid, there is no possibility for a competitor or a third party to lodge a complaint.[163] It is only through the decision of the granting authority that a directly affected competitor or third party may challenge the decision and in this context challenge the law on which the decision is based.

The following chapters describe the grounds which actions of a competitor or third party could be based on national law.

[157] See: chapter 3.1.
[158] VGH 2008/8; StGH 2013/196; see: annex II.1.
[159] See: chapter 4.2.
[160] See: chapter 3.2.2.1.2.
[161] It should be noted, that public contracts or mixed contracts exist in Liechtenstein. A public contract must be challenged with the competent administrative body or the VGH. In case of a mixed contract it depends on the respective case.
[162] See: chapters 3.2.2.2.1, 3.2.2.2.2 and 3.2.2.2.3.2 below.
[163] Article 18 Gesetz vom 27.11.2003 über den Staatsgerichtshof (StGHG), LGBl. 2004 Nr. 32, LR 173.10 (constitutional court act).

3.2.2 Rights of competitors or third parties

3.2.2.1 Proceedings before the administrative appeals bodies or court

3.2.2.1.1 Legal standing

According to the code of administrative procedure (*LVG*) a party to an action is anyone who (among others) requests a decision in his or her legal interest from an administrative authority. In case of doubt, the subject matter and the applicable laws must be considered to determine the status of a party.[164]

The provisions of the code of civil procedure (*ZPO*) on the capacity to sue and be sued will apply accordingly. [165] The legal capacity and the material legitimacy have to be determined according to the general civil code (*ABGB*) or other provisions if nothing is stated in the LVG.[166] Article 92 LVG states that every (natural or moral) person is entitled to appeal if their rights are violated, if they show a legitimate interest or if they have participated in the previous instance's procedure.[167]

The right to appeal exceeds the status of a party. This means that an aggrieved person might have the right to appeal but does not necessarily have to be a party to a legal process. This is the case for third parties, for example, who are affected by a decision and ask for a revision (*Wiederaufnahme*).[168] In administrative law proceedings, they can also participate as an intervening party if they consider their rights or legitimate interest to be directly or adversely affected. However, third parties must have a legitimate interest in the legal process itself and thus in conducting the procedure.[169]

A competitor or a third party might have difficulties establishing their legitimate interest as a competitor or third party, as they usually will not have participated in the administrative procedure resulting in the decision granting state aid. They would have to demonstrate why they are affected by the state aid decision or a legal act. It would also be difficult for them to learn of such a decision as it might not be published. If a competitor or third party assumes that it exists, they could submit a written and reasoned request to the deciding authority based on the information act (*Informationsgesetz*)[170] and should therefore receive confirmation of the existence of the decision. However, in such a case the deciding authority would be likely to refuse to transmit the details of the decision or the performance contract (*Leistungsvereinbarung*). The competitor or third party would have to show that their interests prevail over the interests of the authority keeping the details secret.[171] Therefore it is – as confirmed in the interviews – difficult for lawyers to predict whether

[164] Article 31(1) Gesetz vom 21.04.1922 über die allgemeine Landesverwaltungspflege (LVG), LGBl. 1922 Nr. 24, LR 172.020 (code of administrative procedure).
[165] Article 31(4) LVG; Sections 1-39 Gesetz vom 10.12.1912 über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung, ZPO), LGBl. 1912 Nr. 9/1, LR 271.0 (code of civil procedure).
[166] Article 31(3) LVG; e.g.: Sections 19, 20 and 26 Allgemeines bürgerliches Gesetzbuch vom 1.6.1811 (ABGB), LR 210.0 (general civil code).
[167] Article 92(1) LVG; Sections 19, 20 and 26 ABGB.
[168] Cf.: Article 104(3) and (4) LVG.
[169] Verwaltungsgerichtshof, VGH 2018/050 a, A-Aktiengesellschaft / B AG / C / D v Beschwerdekommission der Finanzmarktaufsicht, 10.6.2018 para 10.
[170] Gesetz vom 19.5.1999 über die Information der Bevölkerung (Informationsgesetz), LGBl. 1999 Nr. 159, LR 172.015 (information act).
[171] Articles 1 and 32 Informationsgesetz; see: the arguments of the Administrative Court in: Verwaltungsgerichtshof, VGH 2017/133, A v Regierung des Fürstentums Liechtenstein, 9.5.2018, p. 8-9, para 2.

a complaint would be admitted. As long as there is no clarification by a court, there is an incalculable risk for the outcome of the case.

3.2.2.1.2 Complaint to supervisory body

Another possible legal remedy is a supervisory complaint (*Aufsichtsbeschwerde*)[172] to the supervisory body alleging that the authority granting the state aid violated the standstill obligation as set out in Article 1(3) Part I of Protocol 3 SCA. The government is responsible for the supervision of all subordinate authorities and employees, as well as of the municipalities.[173] For members of the government it is the VGH.[174] The supervisory body can annul the state aid decision.[175] The complainant should be informed of the result of the supervisory procedure.[176] If the supervisory body does not arrive at a decision or decides that there was no unlawful state aid, a complaint to the next instance is possible.[177]

3.2.2.2 Proceedings before the civil courts

3.2.2.2.1 Legal standing

According to the ABGB anyone who considers their rights to have been violated can make a complaint before the competent body.[178] Just as in the procedure before the administrative bodies and courts, a party will have to demonstrate their legitimate interest in a complaint.[179] The complainants would have to prove to which extent they are affected by the private contract granting state aid.

The competitor or third party will also have difficulties demonstrating their legal interest when challenging a state benefit based on a contract between the public authority and the beneficiary. They are not a party to this contract, and it would be quite difficult for them to learn of it. As mentioned above,[180] it is unlikely that the public authority who is party to that contract would give information about its details.

3.2.2.2.2 Rights based on UWG

The objective of the act against unfair competition (*UWG*)[181] is to ensure fair and undistorted competition.[182] Liechtenstein's UWG is primarily based on the Swiss law on unfair competition[183] and the Unfair Commercial Practices Directive

[172] *A. Kley*, Grundriss des liechtensteinischen Verwaltungsrechts (1998), p. 152.
[173] Article 93 Verfassung des Fürstentums Liechtenstein vom 5.10.1921 (LV), LGBl. 1921 Nr. 15, LR 101 (constitution of the Principality of Liechtenstein); Article 23 LVG; Article 78(2) Gesetz vom 23.9.2010 über die Landes- und Gemeindesteuern (SteG), LGBl. 2010 Nr. 340, LR 640.0 (tax act); Article 119 Gemeindegesetz (GemG) vom 20.3.1996, LGBl. 1996 Nr. 76, LR 141.0 (municipality act).
[174] Article 23 LVG.
[175] Article 106 LVG. see: chapter 4.2.
[176] Article 23(6) LVG; Article 43 LV; *Schädler*, Tafeln zum Landesverwaltungspflegegesetz (LVG), https://liechtenstein-institut.li/contortionist/0/contortionistUniverses/397/rsc/Publikation_downloadLink/Sch%C3%A4dler_Emanuel_Tafeln_zum_LVG.pdf.
[177] Article 23(5) LVG; *E. Schädler*, table 4.2.; see: chapter 4.4.
[178] Sections 19, 20 and 26 ABGB.
[179] See: chapter 3.2.2.2.1.
[180] See: chapter 3.2.2.1.1
[181] Gesetz vom 22.10.1992 gegen den unlauteren Wettbewerb (UWG), LGBl. 1992 Nr. 121, LR 240 (act against unfair competition).
[182] Article 1 UWG.
[183] Bundesgesetz gegen den unlauteren Wettbewerb vom 19.12.1986 (UWG-CH), SR 241 (Swiss federal law against unfair competition), in its version of 1992.

(2005/29/EC).[184] According to Swiss case law, public bodies can claim the same protection under competition law as private undertakings for their economic interests involved if they act in the private sector.[185] If a public body can lodge a complaint based on the Swiss UWG, a competitor or third party should have the same right against the former. As Article 9 Liechtenstein's UWG is almost identical to Article 9 of the Swiss UWG, it could be that Liechtenstein's civil courts follow Swiss jurisprudence. If the articles in Liechtenstein's acts are identical to Swiss law or if a legal act is inspired by Swiss law, the courts follow Swiss case-law.

Therefore, even if the standstill obligation would not have direct effect, a competitor or a third party could lodge a complaint with a civil court against the beneficiary based on Article 9 UWG. In the complaint, it would be possible to argue unfair competition by reference to receiving state aid in breach of the standstill obligation as set out in Article 1(3) Part I of Protocol 3 SCA and argue that the aid granted by the authority contravenes the normal course of business. In such a complaint, it would be possible to claim damages and discontinuation of the unlawful behaviour in the future.[186] It should be stated that such claims have yet been tested in Liechtenstein's courts in the unlawful state aid context.

3.2.2.2.3 Damage claims

3.2.2.2.3.1 Claims based on state liability act

The constitution and the state liability act (*AHG*)[187] provide that the state, the municipalities and other public entities are liable for damages unlawfully caused to third parties by persons acting as their organs in the exercise of their official duties.[188] This also includes cases in which Liechtenstein has not or has wrongfully implemented EEA law. Here, a causal liability is accepted.[189] Liability is restricted if the damages could have been prevented by a legal action or by a complaint to the supervisory body.[190]

Regarding the procedure, the aggrieved party will have to submit a written request for compensation to the authority that has caused the harm (*Aufforderungsverfahren*)

[184] European Parliament and Council Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22–39, EEA Supplement No 52, 19.10.2006, p. 27; *Regierung des Fürstentums Liechtenstein*, Bericht und Antrag betreffend die Abänderung des Gesetzes gegen den unlauteren Wettbewerb, BuA Nr. 55/2008; *Regierung des Fürstentums Liechtenstein*, Stellungnahme zu den anlässlich der ersten Lesung betreffend die Abänderung des Gesetzes gegen den unlauteren Wettbewerb aufgeworfenen Fragen, BuA Nr. 93/2008.

[185] Schweizerisches Bundesgericht, BGE 123 III 395 Betriebsaktiengesellschaft Vereinsdruckerei Bern v Einwohnergemeinde der Stadt Bern, para 2(a); *T. Domej*, Kommentar zu Art. 9 UWG, in: Heizmann/Loacker (Hrsg.), Bundesgesetz gegen den unlauteren Wettbewerb (UWG) (2017), para 6.

[186] For more information, see: annexII.4.

[187] Gesetz vom 22.9.1966 über die Amtshaftung (AHG), LGBl. 1966 Nr. 24, LR 170.32 (official liability act).

[188] Article 109(1) LV; Article 3(1) in conjunction with Article 2 AHG; *H. Wille*, Liechtensteinisches Verwaltungsrecht (2004), p. 192; *P. Bussjäger*, Kommentar zu Art. 109 LV, in: Liechtenstein-Institut (Hrsg.), Online-Kommentar zur liechtensteinischen Verfassung, www.verfassung.li (2016), para 4.

[189] *P. Bussjäger*, para 27 et seq.

[190] Article 5(1) AHG.

before going to court.[191] The injured party must show the unlawfulness of the decision.[192]

In the case of damages caused by a decision granting state aid or aid based directly on a legal act, the damaged party would have to demonstrate a violation of the standstill obligation as set out in Article 1(3) Part I of Protocol 3 SCA and prove the damages (or the parameters for calculating them).

3.2.2.2.3.2 Claims based on the general civil code

If the state has acted as an undertaking in the private economy (such as sale or rental agreements), it might be liable for the damages suffered by the beneficiary's competitor as a result of a negligent or intentional breach of the standstill obligation as set out in Article 1(3) Part I of Protocoll 3 SCA based on the ABGB.[193] The competitor or third party will have to prove the intention or negligence of the state (or rather the authority or person acting for it) regarding the breach of a legal obligation and that this was causal to their damage.[194] It will probably not be hard to prove breach of the notification obligation and to demonstrate that the state lacked necessary care when granting the state aid without notifying it to ESA.[195]

In addition, one of the practitioners interviewed alleged that in case of a damage claim, it will be difficult and probably costly for the competitor or third party to prove the damage as well as its causality with the granting of state aid.[196]

3.2.2.2.4 Interim injunctions

In administrative and civil proceedings, the competitor or third party can apply for interim injunctions (*Rechtssicherung*) with the LG based on the execution act (*EO*[197]).[198] In the case of alleged unfair competition, interim injunctions can be requested to preserve evidence or to provisionally enforce the claims under Article 9 UWG.[199] The competitor or third party will have to substantiate the request with a brief and complete statement of the law-enforcing facts (*Antragsprinzip*).[200] However, the conditions regarding the burden of proof in the request are simplified, as the court can reverse the burden of proof. The state will then have to demonstrate the accuracy of factual claims in connection with its business conduct.[201]

3.2.2.2.5 Statute of limitations

According to the AHG and the ABGB, damage claims (*Entschädigungsklagen*) against the state expire within three years of the injured person becoming aware of the

[191] Article 11(2) AHG.
[192] Article 11(3) AHG; *H. Wille*, p. 315.
[193] Sections 1295-1297 ABGB; *R. Reischauer*, § 1295 ABGB, in: Rummel (Hrsg.), Kommentar zum Allgemeinen bürgerlichen Gesetzbuch (2007), 158, 167 et seq.
[194] *R. Reischauer*, 168 et seq.
[195] *R. Reischauer*, §1296, in: Rummel (Hrsg.), Kommentar zum Allgemeinen bürgerlichen Gesetzbuch (2007), 369, 370.
[196] A short summary of the interviews is set out in annex II.3.
[197] Gesetz vom 24.11.1971 über das Exekutions- und Rechtssicherungsverfahren (Exekutionsordnung; EO), LGBl. 1972 Nr. 32/2, LR 281.0.
[198] Article 270 et seq. EO; Articles 120, 124(2) and 125 et seq. LVG; *G. Batliner*, Sicherungsgebot und Amtsbefehl (die einstweilige Verfügung) nach liechtensteinischem Recht (1957), 71 et seq.
[199] Article 12(1) UWG.
[200] Section 405 ZPO; Oberster Gerichtshof, OGH CG 2016.430 AAA Vermögensverwaltung AG v B Bank (Liechtenstein), LES 6.4.2017, 93, p. 14, para 9.1.2.
[201] Article 14 UWG.

damage.[202] Only in civil law matters, there is an absolute period of limitation of 30 years in case that the injured person learns about the damage after the three year limitation period has passed.[203] However, regarding damages in connection with financial services transactions by a financial intermediary licensed by the FMA the absolute limitation period is ten years.[204] In cases where the claim is based on the AHG, this time period will be extended for six months if the injured submits their request for compensation to the authority.[205]

3.2.3 Rights of beneficiaries

A beneficiary who has received unlawful state aid will not have the right to keep the aid, if the law on which the aid was granted states so.[206] We note that even if a particular law does not state so, it does not mean that the beneficiaries would be entitled to keep unlawful aid. That is because the beneficiary will have difficulties to prove that the aid was received in good faith. Good faith is a general legal principle. The beneficiary would have had to check whether the granted aid was notified to ESA, and that the latter approved the aid.[207] One of the interviewees doubted that a beneficiary would check this in practice, before accepting the aid. Most beneficiaries and competitors are not familiar with state aid law and therefore not aware of the GEBR and the national registry in Liechtenstein.

In the case concerning the recovery of media support[208] the VGH stated that there was no prohibition of *reformatio in peius* (change for the worse) in administrative procedures in Liechtenstein.[209] However, the addressee of such decision has the right to be heard.[210]

Where aid has been granted by a civil contract that has been declared null,[211] the beneficiary will most likely not be able to request compensation for damages from the state because, as mentioned above, it will be difficult to prove that state aid had been received in good faith.

4 Procedures concerning recovery of unlawful state aid

4.1 General

There is no procedural provision in national law that could legally support recovery following a negative ESA decision. Article 14(3) of Part II Protocol 3 SCA provides that recovery shall be effected without delay and in accordance with the procedures of the EFTA State concerned.

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[202] Article 9 AHG; Sections 1489 and 1489a ABGB.
[203] Section 1489 ABGB.
[204] Section 1489a ABGB; *J. Walch*, § 1489a ABGB im System des liechtensteinischen Verjährungsrechts[1], p. 25.
[205] Article 9 (3) AHG.
[206] Article 10 Medienförderungsgesetz (MFG) vom 21.9.2006, LGBl. 2006 Nr. 223, LR 440.1 (media support act); Articles 119 - 126 SteG; Article 105 LVG.
[207] CJEU, Judgment of 20 March 1997, C-24/95 Land Rheinland-Pfalz v Alcan Deutschland GmbH, ECLI:EU:C:1997:163, para 41.
[208] See: Annex II.1.
[209] Articles 89(8) and 102(2) LVG; VGH 2008/8, p. 78; Verwaltungsbeschwerdeinstanz, VBI 1995/065, (= LES 1996, 73), reformatio in peius 20.12.1995; *A. Kley*, p. 293 et seq.
[210] This right derives from Article 31 LV; Staatsgerichtshof StGH 1997/039 (= LES 1999, 83) 19.06.1998, p. 89, para 3.2; *A. Kley*, p. 294.
[211] Section 879(1) ABGB.

Nevertheless, a recovery decision of the ESA obliges Liechtenstein to take the necessary steps to recover unlawful state aid. In Liechtenstein's previous recovery case, it was the granting authority that revised its decision after ESA's decision and ordered recovery from the beneficiary. However, the StGH left the question open whether the legal basis for the recovery of the unlawful state aid in the concrete case was Article 119 SteG or whether Article 14(3) Part II of Protocol 3 SCA could be directly applied.[212]

The procedure regarding the recovery of unlawful state aid initiated by the national authorities does not differ from that initiated after a negative ESA decision. In Liechtenstein, this depends on the national legal basis served for granting the state benefit, the competences of the authority that conferred the unlawful aid and the measures that need to be taken for recovery. If a national law has to be amended, the government will initiate the legislative procedure.[213]The actions necessary to recover unlawful aid from the beneficiary can, for example, be taken by the authority granting the state aid, its supervisory body or another competent body. Vis-à-vis the recovery procedure, a distinction must be made between recovery under administrative law and recovery under civil law.

4.2 Recovery under administrative law

If state aid has been granted by an administrative act (e.g. decision or order), the competent authority has the right to revise, reconsider or annul the act.[214] Whether national law requires the granting authority to recover the unlawful aid depends on the legal basis that has served for granting the state aid.[215] The recovering authority can withdraw the suspensive effect (*aufschiebende Wirkung*) of the beneficiary's complaint against the recovery order if, in particular, it is in the public interest.[216] The withdrawal of the suspensive effect will allow the recovery order to be enforced immediately.[217] In the tax recovery case the tax authority had ordered the recovery and withdrawn the suspensive effect of the complaint. Therefore, the beneficiary had to challenge the recovery order immediately and could not wait for the outcome of the EFTA Court's judgment.

In the dispute regarding the recovery of media support,[218] the government ordered the recovery of state aid[219] on the basis of Article 10 MFG.[220] The beneficiary had applied for direct and indirect support for media products based on the MedienG[221] and the MFG. The media commission did not adjudicate the full amount. Therefore, the beneficiary filed a complaint against the decision of the media commission and then against the decision of the government. The complaint was dismissed because the beneficiary could not sufficiently prove their contribution to the formation of opinion in Liechtenstein as required by the applicable law under Article 4(1)(b) MFG, and

[212] StGH 2013/196; see: annex II.1.
[213] See: annex II.4.
[214] Article 10 MFG; Articles 119 - 126 SteG; Article 105 LVG.
[215] See for example: MFG; SteG.
[216] Article 88(2) in conjunction with Article 116(3(a) and (9) LVG.
[217] See: chapter 4.5.
[218] See: annex II.1.
[219] VGH 2008/8, 68, para 21.
[220] VGH 2008/8; See: case summary in annex II.1.
[221] Mediengesetz vom 19.10.2005 (MedienG), LGBl. 2005 Nr. 250, LR 449.1 (media act).

because a medium is only eligible if at least one full-time employee is responsible for its content under Article 4(1)(e) MFG. The case was entirely national.

4.3 Recovery under civil law

If state aid has been granted through a civil contract, the provisions of the ABGB will apply. According to section 879 ABGB, the contract will be void if the principle of good faith or a legal provision has been infringed. This should also be the case where the contract is contrary to a directly applicable provision of EEA law.[222]

4.4 Possible actions for contesting validity of a recovery order or if no recovery is ordered

Depending on the legal basis used for granting the state aid and the measures taken for recovery, the addressee of the decision or judgment can challenge it with the next instance. The stages of appeal are the same as described in the chapter regarding stages of appeal in civil law and administrative matters.[223]

If ESA has found state aid to be incompatible with EEA Agreement and a competent national authority has not ordered recovery, a complaint by the competitor or third party on national level to the supervisory body (either the government or the VGH) is possible.[224] The decision of the latter can be challenged within 14 days with the next instance.[225] If the supervisory body does not come to a decision, a complaint can be lodged with the next instance at any time.[226] The complainant should be informed of the result of the supervisory procedure.[227] If the supervisory body does not decide within three months, the request is deemed to be refused. In this case, a complaint of dilatoriness (*Säumnisbeschwerde*) to the VGH would be the next action to take.[228]

4.5 Enforcement of the recovery order

If the recovery order has entered into legal force and the addressee refuses to comply, the authority will have to enforce its order. In Liechtenstein, the financial assets of the state are subject to private law.[229] Therefore, the laws on the enforcement will, in general, also be applicable.[230] Those laws are:

- The execution code[231]
- The bankruptcy act[232]
- The law on composition agreement[233]
- The legal protection order[234]

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[222] *B. Lurger*, in: Kletečka/Schauer (Hrsg.), ABGB-ON, para 2.
[223] See: annex II.4.
[224] Article 23(1) and (4) LVG; *E. Schädler*, table 4.2; see: chapter 3.2.3.1.2.
[225] Article 23(4) LVG.
[226] Article 23(5) LVG.
[227] Article 23(6) LVG.
[228] Article 90(6a) LVG.
[229] *H. Wille*, p. 354; Article 2 EO.
[230] Article 120 and Article 121 LVG.
[231] EO.
[232] Gesetz vom 17. Juli 1973 über das Konkursverfahren (Konkursordnung; KO), LGBl. 1973 Nr. 45/2, LR 282.0, (bankruptcy act).
[233] Gesetz vom 15.4.1936 betreffend den Nachlassvertrag (NVG), LGBl. 1936 Nr. 8, LR 284.0 (law on composition agreement).
[234] Rechtssicherungs-Ordnung vom 9.2.1923 (RSO), LGBl. 1923 Nr. 8, LR 283.0 (legal protection order); *J. Wagner*, Bankenplatz Liechtenstein^3 (2008), p. 252.

The recovery order will be directly enforceable if the authority withdraws the suspensive effect of a complaint, or in case that the recovery order has been challenged, with the final judgment.[235] A final judgment is usually a judgment of the lower instances which has not been challenged within the time limit or a judgment of the StGH. The recovery order or the judgment will serve as enforcement order (*Zwangsvollstreckungstitel*). [236] If the execution is approved by the LG, the latter – or the bailiff on behalf of the LG – will carry out the execution *ex officio*.[237] An appeal (*Rekurs*) against the decision of the LG is possible within 14 days.[238]

5 Conclusions drawn from cases practice and the interviews

5.1 Introduction and overview of findings

Since 1994 there have not been any cases regarding the enforcement of the standstill obligation. Regarding state aid cases before the courts in Liechtenstein, there were two cases concerning the recovery of state aid.[239] One of these recovery cases concerned the recovery of tax benefits due to a negative ESA decision that was later confirmed by the EFTA Court.[240] The dispute before the national courts arose because the tax authority ordered recovery while the case was still pending before the EFTA Court,[241] and had withdrawn the suspensive effect of a complaint so its order was effective immediately after the addressee had received it. In the case the claimant argued that there was no legal basis in national law for the recovery of state aid because Article 61 EEA Agreement had not been incorporated into a national act. As mentioned above, the LstK has seen the legal basis for the recovery order to be Article 14(3) Part II of Protocol 3 SCA and the VGH to be Article 119 SteG. The StGH did not answer the question regarding the legal basis.[242]

There are also 12 judgments dealing with media support based on the MFG, as well as two cases relating to private asset structures (*PVS*) where Article 64 SteG has been interpreted in accordance with Article 61(1) EEA Agreement.[243]

The enforcement guidelines have not yet been applied by the courts in Liechtenstein, as there were no cases where a party claimed the violation of the standstill obligation. However, the courts dealt with the 12 cases mentioned above by entirely relying on the national law. Regarding the question of cooperation with ESA, one of the representatives of the courts confirmed in the interviews we conducted, that the court had not asked ESA's opinion in the state aid cases they had dealt with. The courts do not seem to oppose the demand for guidance on EEA law, as is evident for example in legal issues regarding EEA asylum law. However, regarding the state aid recovery case, the review of the judgment showed no evidence that the court had encountered obstacles or difficulties in relation to applying state aid law.

[235] *J. Wagner*, p. 255; Article 1 EO.
[236] Article 55 para 2 EO.
[237] Article 12 EO; *J. Wagner*, p. 255.
[238] Article 43 EO.
[239] StGH 2013/196; VGH 2008/8; See annex II.1.
[240] StGH 2013/196; See: annex II.1.
[241] EFTA Court, Joined Cases E-17/10 and E-6/11 The Principality of Liechtenstein and VTM Fundmanagement v EFTA Surveillance Authority, EFTA Court Report 2012 Rep. 114.
[242] See: annex II.1.
[243] See: annex II.2.

Since the EFTA Court's judgment (joined cases E-17/10 and E-6/11) regarding the recovery of tax benefits, awareness for state aid rules has increased. If amendments to existing benefit schemes or new state aid provisions are planned, their compliance with state aid law now seems to be scrutinised before they enter into force. In cases where there is an amendment to an existing law containing state aid rules, an additional provision might be added, stating that the amended state aid rule will only enter into force upon ESA's approval.[244] In our opinion, this study contributes to raising the awareness of the state aid provisions in the EEA law.

5.2 Enforcement of the standstill obligation and of recovery of unlawful state aid

There have been no cases before the courts in Liechtenstein regarding the enforcement of the standstill obligation.

As already mentioned, there has been one recovery case of unlawful state aid,[245] which dealt with the recovery of tax benefits[246] that ESA regarded to be incompatible with the EEA Agreement.[247]

In the case concerning the recovery of media support, the national legal basis for recovery was applied.[248] Regarding the tax recovery case, it seems that the enforcement of state aid rules through Liechtenstein's courts functions. In this case, recovery was possible without a clear legal basis for recovery, because Liechtenstein's authorities followed the negative ESA decision.[249] Based on this, it is our belief that Liechtenstein's courts will enforce the recovery of unlawful state aid (as well as the standstill obligation) in the future if they have to decide on a case. This was also the feedback of the two judges during the interviews.

5.3 Use of ESA's guidelines on enforcement of state aid law by national courts

Except for the representatives from the EEA Coordination Unit, none of the interviewed persons have used ESA's guidelines on the enforcement of state aid law by national courts or the guidelines on the notion of state aid to date. But, the interviewees are aware that these exist and confirmed that they are likely to make use of them when they have a case where these guidelines could be applied. We assume that the interviews conducted have increased the salience of those guidelines among judges, practitioners and members of the authorities, as might do the publication of the study.

5.4 Obstacles and difficulties regarding private enforcement of state aid law

As there have been no cases before the courts in Liechtenstein regarding the private enforcement of state aid rules, we could only speculate about the difficulties they might have with particular state aid elements. Regarding the recovery case mentioned above, the representatives of the courts did not point out any difficulties.

The obstacles identified by the practitioners were the litigation risk and the difficulties to prove the damages due to unlawful state aid. It was also suggested, that a competitor to a state aid beneficiary might fear not to receive future public contracts

[244] E.g.: Article 160(3) SteG.
[245] See: chapter 5.1 above and app annex II.1.
[246] StGH 2013/196.
[247] ESA Decision No 97/10/COL.
[248] VGH 2008/8.
[249] StGH 2013/196; See: chapter 3.1 above.

from the authority whose state aid decision was challenged. Other obstacles mentioned were the difficulty of knowing that state aid was granted or that it was unlawful. The practitioners also pointed to the costs of a lawsuit, in particular the expenses for a lawyer and the expenses for proof of damage due to unlawful state aid, were considered high.

5.5 Cooperation with ESA

In addition to the possibility of requesting a preliminary ruling of the EFTA Court,[250] the national courts of the EEA EFTA States can ask ESA to give its opinion, for example in cases of doubt regarding the qualification of a state benefit as aid within the meaning of Article 61 EEA Agreement. The courts in Liechtenstein have not yet had to decide on the unlawfulness of aid. However, they have not hesitated to make use for a preliminary ruling of the EFTA Court or for an opinion of ESA[251] in the past on different matters. Therefore, there are no indications that Liechtenstein's courts will not do the same in the case concerning state aid. The judges interviewed in relation to this study, see annex II.3 for more information, confirmed this stand.

5.6 Best practice

Best practice was difficult to identify as most of the persons interviewed never had a state aid case. It can also not be predicted whether there will be difficulties in applying the state aid rules (and in particular the standstill obligation) or whether the ESA guidelines will be applied. What can be emphasised is that there is an awareness of the importance of EEA law in this matter.[252] One of the interviewee suggested that best practice could be seen in the fact that since the tax recovery case[253] amendments to existing state aid law or the planning of new aid schemes were scrutinised more carefully taking into account their compatibility with EEA law including state aid law.

5.7 Conclusions and recommendations

In Liechtenstein, private enforcement of state aid rules and recovery decisions in the case of unlawful state aid are very rare. Since 1994, there have been two state aid recovery cases, whereas one of them based on purely national law. It appears that the granting of state aid, let alone the granting of unlawful state aid, is a rare occurrence. Additionally, it seems that the authorities pay more attention to state aid rules after the tax recovery case[254]. Based on this it seems that the authorities are taking the necessary measures to prevent unlawful state aid. As a result, it is unlikely that private enforcement cases before Liechtenstein courts will increase in the near future.

[250] ESA Decision No 254/09/COL paras 10, 74-78.
[251] StGH 2011/104, p. 31, para 4.1; EFTA Court, E-2/18 Concordia Schweizerische Kranken- und Unfallversicherung AG / Landesvertretung Liechtenstein, EFTA Court Report 14 May 2019; EFTA Court, E-9/17 Edmund Falkenhahn AG / The Financial Market Authority (Finanzmarktaufsicht), EFTA Court Report 30 May 2018, 153 et seq.; EFTA Court, E-15/15 and E-16/15 Franz-Josef Hagedorn / Vienna-Life Lebensversicherung AG Vienna Life Insurance Group and Rainer Armbruster / Swiss Life (Liechtenstein) AG, EFTA Court Report 10 May 2016, 347 et seq.; EFTA Court, E-4/11 Arnulf Clauder, EFTA Court Report 26 July 2011, 216 et seq.
[252] See: annex II.3.
[253] StGH 2013/196.
[254] StGH 2013/196.

The study does not identify any serious obstacles to private enforcement of state aid rules. This means that there are neither legislative provisions nor administrative procedures in place that impede private enforcement of state aid rules. However, there is a certain ambiguity because the provision on the standstill obligation has not been implemented into the national law. This creates uncertainty as to the direct applicability. Therefore, a more detailed national legislation and jurisprudence could be beneficial for private enforcement and the recovery of unlawful state aid.

To explain the low number of cases in a wider context, we also have to consider the business-friendly low overall tax rates. This is an essential part of Liechtenstein's economic policy which is overall very liberal. Hence, state aid as such is rare in Liechtenstein.

During the interviews one of the practitioners expressed that it was more likely that a competitor or third party would address the authority granting the aid in order to request the same benefit, rather than to claim the annulment of the state aid decision and the recovery of the aid in question. The reason for this could be, on the one hand, the difficulty of knowing whether a benefit was state aid or that it was unlawful, and on the other hand, the competitor wanting the same benefit, rather than putting the other beneficiary at a disadvantage and ultimately not getting any support himself.

Another uncertainty or difficulty seemed to be the awareness of aid measures (such as decisions of authorities awarding benefits or contracts) among competitors and third parties as the measures are not officially published. As a result, perhaps some aid measures go unnoticed by competitors or third parties. The Liechtenstein state aid transparency register[255] only provides information on notified aid not all the granted benefits.

The guidelines on enforcement of state aid rules by national courts and the guidelines on the notion of state aid are highly complex. As potential competitors of state aid beneficiaries are likely to be laymen, they might face difficulties in understanding the guidelines, how they are affected by them and how they can make use of them in order to contest state aid granted to their competitors. Therefore, it would be useful to have a short version of the guidelines explaining what state aid is, so that laymen would understand it. This would help layman decide, whether to seek further advice regarding a complaint or on the notification of a planned state aid.

Improvements to ensure the enforcement of state aid rules could, for example, be made by:

- Including a more detailed national legislation for private enforcement and recovery of unlawful state aid, or a clarification by a competent authority as to whether Article 1(3) Part I of Protocol 3 SCA is directly applicable.
- A short version of the enforcement and notion of aid guidelines[256] in German.
- Introducing an informal and anonymous complaint system on a national level, as it already exists regarding possible violations of laws falling within the FMA's

[255] https://www.llv.li/inhalt/117606/amtsstellen/staatliche-beihilfen-transparenzregister (accessed 28.06.2019).
[256] ESA Decision No 254/09/COL; ESA Decision No 3/17/COL.

scope of responsibility.[257] Perhaps not everyone would like to lodge a supervisory complaint.[258] Nonetheless, it is likely that anonymous information will be directed to a competent national authority.

Although members of the constitutional and administrative units are already taking part in national seminars on EEA law, there are none with a specific focus on state aid law. It may be advisable for ESA to deepen the knowledge of members of the constitutional and administrative units regarding state aid, including the possibility to cooperate with ESA in state aid cases, possibly through seminars or other events.

[257] https://www.fma-li.li/en/client-protection/whistleblowing.html (accessed 28.06.2019).
[258] See: chapter 3.2.2.1.2.

Chapter 3: Norway

1 EXECUTIVE SUMMARY

Private enforcement of state aid rules, as well as litigation concerning the enforcement of recovery of unlawful aid, is rare in Norway. Leaving aside cases in which state aid rules were used to support a certain interpretation of an act or a contract, the present study ('the Study') has only identified five cases of private enforcement. A breach of the standstill obligation was found in only one single case (*Synnøve Finden*). In addition, there is one case relating to the enforcement of a recovery decision by ESA (*Hydro/Søral*). There are another 13 cases in which arguments pertaining to state aid played a more subordinated role. In a nutshell, this summarises the relevant litigation related to state aid before Norwegian courts in the 25 years since the entry into force of the EEA Agreement.

Given the small sample of relevant cases, the Study could not detect any trends or developments with a sufficient degree of robustness. However, it is worth noting that almost all (final) judgments, and all those of relevance, date from the second part of the EEA Agreement's lifetime (from 2006 onwards), and the most relevant ones – *Hydro/Søral, Synnøve Finden* and *Norfrakalk* – are from the last six years. Perhaps this could be seen as an indication that state aid rules may be more often relied upon before Norwegian courts going forward.

All the same, it seems unlikely that there will be a (significant) increase of private enforcement cases before Norwegian courts going forward. While the Study did not identify any obvious obstacles to the enforcement of state aid rules in Norway, it appears that the national legal framework for state aid, in particular the Act on State Aid,[259] provides at best an unclear, and possibly an insufficient, legal basis for (private) enforcement. Legislative ambiguities, or perhaps even gaps, have to this date not (fully) been compensated for by pertinent case law. It would be entering in the realm of speculation to conclude that the national legal framework is a cause for the low amount of cases, but it would seem plausible that clearer, more detailed legislation would be beneficial for private enforcement, and the enforcement of recovery.

Furthermore, the level of knowledge about state aid in the legal community, including judges and legal practitioners, seems to be rather low. Trainings and seminars for judges on this topic, more prominent guidance on private enforcement on ESA's website, and possibly a slight revision of ESA's guidelines on enforcement of state aid law by national courts ('the enforcement guidelines') could be beneficial to state aid enforcement in Norway.

[259] Lov om offentlig støtte av 1. januar 1994.

2 METHODOLOGY

2.1 Introduction

Following the award of the contract on 8 April 2019, Kluge has undertaken a comprehensive study regarding the enforcement of state aid rules by national courts in Norway.

2.2 Legal research

The focal point of the Study was to identify all relevant judgments pertaining to the enforcement of state aid rules by Norwegian courts.

In order to do so, Kluge used the database www.lovdata.no as a starting point for the research. The database contains all Supreme Court rulings from 1994 onwards, and a selection of judgments from the courts of appeal and the district courts. When a relevant judgment by an appeal court was found through www.lovdata.no,but not the judgment of the district court, access to the judgment was requested directly from the relevant court.

Kluge also sent out requests for access to documents to all the courts of appeal, the largest district courts and the stipendiary magistrate, requesting them to provide all judgments from 1994 until today, which consider questions relating to Article 61(1) of the EEA Agreement, as well as the Act on State Aid[260] and the Regulation on State Aid[261]. All courts replied that they do not have data systems which would enable such a search.

Kluge therefore attempted to identify relevant judgments which are not possible to access at www.lovdata.no through legal research in Norwegian state aid literature. For those, access was requested directly from the relevant court.

Kluge identified 35 individual judgments on state aid matters from Norwegian courts. These include judgments from the Supreme Court, courts of appeal and district courts. Those 35 judgments pertain to 19 different cases.[262] The ten most relevant cases are summarised in Annex III.1 to the Study.

In addition, Kluge has described the national legal framework for the enforcement of state aid. As described in greater detail below, a number of elements in that framework are unclear. This description of the status quo is based on the relevant laws and regulations, the scarce case practice, as well as academic literature.

2.3 Questionnaire

Kluge sent out a questionnaire to specialised state aid lawyers in a number of Norwegian law firms, in public offices and in organisations. In total, 24 such questionnaires were sent out.

Kluge received answers from Heddy Ludvigsen and Dag Sørlie Lund in Advokatfirmaet Hjort DA, Hanne Zimmer in Wikborg Rein Advokatfirma AS, Aksel Joachim Hageler

[260] Lov om offentlig støtte av 1. januar 1994.
[261] Forskrift om offentlig støtte av 1. januar 1994.
[262] A 'case' can include judgments from one or several instances.

and Lennart Garnes in Advokatfirmaet SANDS DA, Katrine Lillerud in Advokatfirma DLA Piper Norway and Johan Henrik Bjørge and Ingeborg Djupvik in the Confederation of Norwegian Enterprise (NHO). The answers to the questionnaire are set out in Annex III.3.

3 NORWAY'S LEGAL SYSTEM AND AVAILABILITY OF JUDICIAL RELIEF

3.1 Introduction

The Norwegian legal order is a dualistic system. This means that international law must be incorporated into the Norwegian legal system in order to apply as Norwegian law. The main part of the EEA Agreement is incorporated through the EEA Act.[263] According to Section 2 of the EEA Act, the EEA Agreement and EEA rules normally have precedence over other Norwegian rules. This means that if a Norwegian law, regulation or other rules are in conflict with the EEA Agreement or other EEA rules, the EEA rules will prevail.

3.2 Legal framework relating to state aid law

As stated above, the material rules on state aid in part IV of the EEA Agreement are incorporated in Norway through the EEA Act.[264] The Act on State Aid contains further regulation on state aid in Norway.[265] It stipulates that aid shall *inter alia* comply with the EEA Agreement and that if unlawful aid has been granted, the unlawful aid may be recovered, see Section 5 of the Act on State Aid.[266]

According to the Regulation on EEA Procedural Rules for State Aid,[267] Section 1 in part II of Protocol 3 to the Surveillance and Court Agreement (the 'SCA') applies as a regulation in Norwegian law.[268] However, the implementation of the standstill obligation in Norwegian law is unclear, as part I of Protocol 3 to the SCA has not been implemented into Norwegian law. It is assumed that the standstill obligation is implemented through Article 3 in part II of Protocol 3 to the SCA, in combination with Section 5 of the Act on State Aid. Nonetheless, it would appear that the standstill obligation has a somewhat ambiguous legal basis in Norwegian law, see further description in section 4 below.

Norway does not have separate rules for state aid falling outside the scope of Article 61(1) of the EEA Agreement, such as for example aid below the *de minimis* threshold or aid that has no effect on trade.

[263] Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven) av 1. januar 1994.
[264] Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven) av 1. januar 1994.
[265] Lov om offentlig støtte av 1. januar 1994.
[266] Lov om offentlig støtte av 1. januar 1994.
[267] Forskrift om EØS-prosedyreregler for offentlig støtte av 30. oktober 2009.
[268] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, OJ L 344, 31.1.1994, p. 3.

3.3 Consequences of unlawful state aid

The consequences of unlawful state aid will depend on the form of the aid and the specific circumstances of the case.

If the aid has been granted through a decision from the national administration, the decision is likely to be considered void under national rules. In such cases, the national administration may have a duty to reverse the decision in accordance with Section 35 of the Public Administration Act.[269]

If the aid has been granted through an agreement, for example a sale of land, the agreement may be fully or partially declared void, depending on the circumstances. Furthermore, the agreement may remain in force if the beneficiary pays the difference between the sales price and the market price, thus removing the state aid element.

If the aid has been granted through a tax exemption in an act, or similar, it is unlikely that the act as such will be declared void, but the act is likely not to have any effect in the specific case.

If ESA has taken a negative decision with recovery, the Norwegian state shall ensure the recovery of the unlawful state aid.

3.4 Competent courts and powers held by Norwegian courts relating to state aid law

3.4.1 General

There are three levels in the Norwegian court hierarchy; the district courts, the courts of appeal and the Supreme Court. In general, the courts handle all matters, meaning that there are no specialised courts in Norway. For each case, the court of first instance is a district court, whose judgment may be appealed to the court of appeal. The Supreme Court will only handle cases that are of principal legal interest, meaning that the Supreme Court's ruling needs to be relevant for other, comparable cases. The Supreme Court decides whether an appeal is admissible. Otherwise, the ruling of the court of appeal will be final.

Actions against unlawful state aid may be enforced through main proceedings or interim measures before the courts, depending on the circumstances and the course of action chosen by the parties, as set out below in section 3.4.3.

3.4.2 Legal standing and rights of beneficiaries, competitors and third parties

Any claimant must demonstrate legal standing to bring a case before a court, pursuant to Section 1-3 of the Dispute Act.[270] To have legal standing, the claimant must demonstrate a genuine need to have the claim decided against the defendant. This is determined based on the overall assessment of the relevance of the claim and the parties' connection to the claim.

Whether a beneficiary, competitor or third party has legal standing, will depend on the specific circumstances of the case. Generally, third parties without any connection to

[269] Lov om behandlingsmåten i forvaltningssaker av 1. januar 1970.
[270] Lov om mekling og rettergang i sivile tvister av 1. januar 2008.

the unlawful aid will not have legal standing, as there is no need for such third parties to have the claim decided against the defendant.

A beneficiary or a competitor will usually have legal standing. However, as set out in section 5 below, there have been cases in Norway where the legal standing of a claimant in state aid cases was questioned.

In private enforcement cases, proceedings must be brought against the granting authority. Usually, a party claiming that a beneficiary has received unlawful aid will bring a case against the granting authority, claiming that illegal aid has been granted and/or that the aid must be recovered.

Sometimes the beneficiary may also have to be party to the proceedings. Case law has yet to provide a definitive answer to this issue.

In the *Synnøve Finden* case, the Norwegian state argued that the action had to be brought against the beneficiary, Q-dairies.[271] The state argued that the legal force of the judgment would be uncertain if the beneficiary was not made party to the proceedings. The Court did not take a position on the legal force of the ruling. The Court rather found that the inclusion of the beneficiary would considerably delay and complicate the proceedings and decided on these grounds that the beneficiary should not be included in the proceedings, see Section 15-2 third paragraph of the Dispute Act.[272]

In *Synnøve Finden* however, the claimant did not seek to obtain a recovery order against the beneficiary.[273] For private enforcement of such claims, it appears likely that proceedings would need to be brought against the beneficiary in addition to the granting authority. This question is yet to be decided upon by the Norwegian courts, but academic literature has taken this position.[274]

3.4.3 Possible remedies

The remedies available for private enforcement of state aid rules will depend on the form of the aid and the course of action chosen by the defendant.

Before aid is granted, a claimant may bring a case before the courts claiming that the aid is unlawful, and that the court must grant interim measures. The same could be the case if a beneficiary receives unlawful aid in contravention of an existing aid scheme. In order to be granted interim measures, the claimant must first demonstrate that it is probable that the aid is unlawful. Furthermore, pursuant to Section 34-1 of the Dispute Act,[275] interim measures may be granted if the defendant's conduct makes it necessary to provisionally secure the claim because the action or execution of the claim would otherwise be considerably impeded, or when it is necessary to make a

[271] See Annex III.1 Summaries of the selected rulings in Norway, for further information on the case.
[272] Lov om mekling og rettergang i sivile tvister av 1. januar 2008.
[273] See Annex III.1 Summaries of the selected rulings in Norway, for further information on the case.
[274] See Alterskjær, Hjelmeng, Lund and Nordby, '*Statsstøtte EØS-avtalens regler om offentlig støtte*' (2008), p. 358-359. Bjørnar Alterskjær and Robert Lund are both partners at Kluge Advokatfirma AS. A similar question was also raised in *Gauselparken*, but the court did not take a final position on the question. *Gauselparken* is summarized in Annex III.1.
[275] Lov om mekling og rettergang i sivile tvister av 1. januar 2008.

temporary arrangement in a disputed legal issue in order to avert considerable loss or inconvenience, or to avoid grave consequences which the conduct of the defendant gives reason to fear. An interim measure cannot be granted if the loss or inconvenience of the defendant is clearly disproportionate to the interests of the claimant in the interim measure being granted.

After aid is granted, a competitor may claim the recovery of the unlawful aid and/or unlawful interest. The court's ruling in the event of unlawful aid having been granted will depend on the course of action chosen by the claimant. In the few cases concerning private enforcement in the Norwegian courts, the statement of claim made by the claimants have been that the aid had been unlawfully granted. If the court finds that the aid was unlawful, the national administration will recover the aid in a subsequent administrative procedure. However, a claimant may also claim that the beneficiary is obliged to repay the unlawful aid.

Furthermore, a competitor may claim damages from the granting authority if unlawful aid has been granted. The competitor must demonstrate that it has suffered an economic loss and that there is a causal link between the unlawful aid and the economic loss. To our knowledge, the only case concerning damages is the *Synnøve Finden* case.[276] In this case, the court found that there were no grounds for damages.

3.4.4 Statute of limitations

In Norway, money claims are subject to limitations of the Act on Limitation Period for Claims, i.e. the Norwegian statute of limitations.[277] Recovery of unlawful state aid is a money claim, according to the act.

According to Section 3 of the Act on Limitation Period for Claims, the general limitation period is three years. The rules on statute of limitations and their relationship to the state aid rules are unclear. According to the Norwegian Supreme Court in the *Hydro/Søral* case,[278] in recovery cases based on a negative decision from ESA, the limitation period starts at the time of an administrative decision ordering recovery of the claim.

The judgment does, however, not clarify issues relating to the application of the limitation period in cases where there is no negative decision from ESA. It is therefore unclear when the limitation period will start when the case is based on an administrative decision or a national court decision.

4 PROCEDURES CONCERNING THE RECOVERY OF UNLAWFUL STATE AID

4.1 National procedures for the recovery of unlawful state aid where ESA has taken a negative decision

In cases where ESA has taken a negative decision, Article 14, paragraph 3, in part II of Protocol 3 to the SCA establishes an obligation on the part of the Norwegian state to recover the state aid from the aid recipient. Recovery shall be effectuated without delay and in accordance with national procedures. The Norwegian state shall take all

[276] See Annex III.1 Summaries of the selected rulings in Norway, for further information on the case.
[277] Lov om foreldelse av fordringer av 1. januar 1980.
[278] See Annex III.1 Summaries of the selected rulings in Norway, for further information on the case.

necessary steps available in its legal system, including provisional measures, without prejudice to EEA law, to recover the aid.

Thus, in cases where ESA has taken a negative decision with recovery, the Norwegian state has a legal obligation to recover the aid under international law. However, ESA's decision does not create an obligation on the part of regional authorities to recover the unlawful state aid, in cases where they have acted as the granting authority. Nor does ESA's decision create an obligation on the part of the beneficiary to repay the unlawful state aid. Thus, the EEA Agreement requires the Norwegian authorities to have a national legal basis, which enables the Norwegian state to (i) order the granting authority to recover unlawful state aid, and (ii) which provides a sufficient legal basis to recover such aid from the beneficiary.

The legal basis for national recovery under Norwegian law is somewhat unclear and has not been resolved by the Norwegian courts. It could be argued that the standstill obligation, set out in Article 3 in part II of Protocol 3 to the SCA, and as implemented into Norwegian law through the Regulation on EEA Procedural Rules for State Aid,[279] in itself creates a legal basis for national recovery of unlawful state aid. However, the extent of the standstill obligation's direct effect under Norwegian law is still unclear.

Alternatively, Section 5 of the Act on State Aid may provide a possible legal basis for national recovery of unlawful state aid.[280] This provision was introduced by the Norwegian authorities in order to fulfil Norway's international obligations.[281]

Section 5 of the Act on State Aid raises a number of interesting questions as regards national recovery of unlawful state aid.[282] It reads as follows:[283]

> *§ 5 Recovery of aid*
>
> *If such aid as set out in Article 61 of the EEA Agreement to which the notification requirement applies, is granted before the EFTA Surveillance Authority has approved the notification, or the EFTA Surveillance Authority finds that the aid is not compatible with the provisions of the EEA Agreement concerning state aid, the state may order the recovery of such aid.*
>
> *Recovery of aid that has been granted may also be ordered if the Ministry finds that the aid is not compatible with other international agreements as mentioned in section 1, or if the aid is found to be incompatible with such agreements in a decision that under international law is binding for Norway.*

[279] Forskrift om EØS-prosedyreregler for offentlig støtte av 30. oktober 2009.
[280] Lov om offentlig støtte av 1. januar 1994.
[281] See the preparatory works to the Act on State Aid (Lov om offentlig støtte av 1. januar 1994): Ot.prp.nr.73 (1991–1992).
[282] Lov om offentlig støtte av 1. januar 1994.
[283] Office translation by Kluge Advokatfirma AS.

The Ministry may prescribe that the amount to be repaid shall include interest. The King may issue further provisions concerning the conditions for and the implementation of such recovery, including special rules on limitation periods.

The provision provides the Norwegian state the right to recover unlawful state aid where ESA has taken a negative decision. As mentioned above, in order to fulfil its obligations under Article 14, paragraph 3, in part II of Protocol 3 to the SCA, the Norwegian state must recover such unlawful state aid from the beneficiary.

The provision gives the Ministry a right to order a granting authority to recover state aid from the beneficiary.[284] It was necessary to introduce a national legal basis that enables the Ministry to order granting authorities, which are not subject to its instructions, to order the recovery of such aid, for example county authorities and municipalities.

The provision provides a legal basis for the granting authority to make a claim for payment against the beneficiary.[285] It is still unclear under Norwegian law whether this claim for payment is an administrative decision creating rights and obligations for the beneficiary. The granting authority may, if the beneficiary does not pay, enforce its decision by lodging an application in court.

It is uncertain whether the Act on State Aid in itself constitutes sufficient legal basis to recover state aid from the beneficiary,[286] or whether the granting authority must seek such legal basis in other national provisions. One could argue that Section 5 of the Act on State Aid, supplemented with the standstill obligation, will constitute a sufficient legal basis for the granting authority's recovery order towards the beneficiary.[287] Other national rules may also provide sufficient or supplementary legal basis for the granting authority's recovery order, for example the Norwegian Public Administration Act.[288]

To sum up, there is, most likely, a sufficient legal basis under Norwegian law to recover unlawful state aid from a beneficiary where ESA has taken a negative decision. However, the legal basis and procedures for claiming repayment of such aid are not yet fully clarified in the Norwegian case law.

[284] The Ministry of Trade, Industry and Fisheries.

[285] It is not clear whether the Act on State Aid (Lov om offentlig støtte of 1 January 1994) also creates a legal basis for a public law decision, obliging the beneficiary to repay the unlawful state aid; the question has not been resolved by the Norwegian courts. The Supreme Court's judgment *Hydro/Søral*has created some uncertainty in this respect, see Hjelmeng '*Tilbakeføring av offentlig Støtte – hva er situasjonen etter Rt-2013-1665 Hydro/Søral*' in Lov og Rett (04/2014) p. 210–228. *Hydro/Søral* is summarized in Annex III.1.

[286] Lov om offentlig støtte av 1. januar 1994.

[287] In the Norwegian Supreme Court's judgment *Hydro/Søral,* the beneficiaries did not contest the legal basis for the recovery order, only the limitation period. Therefore, the question was not considered by the Supreme Court nor the underlying courts. The question is discussed in academic literature; see Hjelmeng, '*Reversering av EF- og EØS-stridig statsstøtte*' (2004), chapter 6.3 and Alterskjær, Hjelmeng, Lund and Nordby, '*Statsstøtte EØS-avtalens regler om offentlig støtte*' (2008), chapter 26.4.3. The case is summarized in Annex III.1.

[288] Lov om behandlingsmåter i forvaltningssaker (forvaltningsloven) av 1. januar 1970.

The following examples illustrate different manners through which a recovery decision can be enforced on the national level[289]:

- If the state aid has been granted by a public authority through an individual decision, the granting authority can recover unlawful state aid by amendment of its decision under Section 35 of the Norwegian Public Administration Act,[290] in combination with Section 5 of the Act on State Aid[291] and ESA's negative decision.[292]

- If state aid has been granted through an agreement between the granting authority and the aid beneficiary, the situation is less clear. It has been argued in academic literature that if the agreement constitutes a breach of the standstill obligation, it may be considered void, and that the parties' contribution must be reversed, e.g. the unlawful state aid.[293] In such a case, the recovery decision could be based on general principles under Norwegian private law, supplemented by the standstill obligation and Section 5 of the Act on State Aid.[294] The question has not been resolved by the Norwegian courts.

- If the state aid has been granted through tax exemptions, the relevant question is whether there is a legal basis to impose the relevant tax on the recipient. The Parliament has the exclusive right to impose taxes and must therefore be considered the granting authority. As a general rule, the Parliament will have to amend the tax decision and claim the aid back. The legal basis for recovery is uncertain and will depend on the circumstances; it could either be found in the original tax decision or in the main rule (e.g. because the exemption is considered void under national rules). It could also be argued that the Act on State Aid[295] is considered sufficient legal basis for recovery alone.[296]

The granting authority's recovery claim shall include the amount to be repaid, including interest, see Section 5(3) of the Act on State Aid.[297] The interest shall be based on market rate and shall run from the day the recipient received the aid until the day the aid has been repaid, see Section 5(1) of the Regulation on State Aid.[298] The decision

[289] Alterskjær, Hjelmeng, Lund and Nordby, '*Statsstøtte EØS-avtalens regler om offentlig støtte*' (2008), chapter 26.4.5.
[290] Lov om behandlingsmåter i forvaltningssaker (forvaltningsloven) av 1. januar 1970.
[291] Lov om offentlig støtte av 1. januar 1994.
[292] The individual decision should normally explicitly set out that the granting authority has a right to claim recovery of unlawful state aid should normally, which in itself will provide sufficient legal basis for the recovery, see section 4 in the Regulation on State Aid (Forskrift om offentlig støtte av 1. januar 1994).
[293] Alterskjær, Hjelmeng, Lund and Nordby, '*Statsstøtte EØS-avtalens regler om offentlig støtte*' (2008), chapter 26.4.5.2.
[294] Lov om offentlig støtte av 1. januar 1994.
[295] Lov om offentlig støtte av 1. januar 1994.
[296] In *Hydro/Søral* the granting authority took a new decision, ordering recovery of the unlawful state aid. See Annex III.1 for further information on the case.
[297] Lov om offentlig støtte av 1. januar 1994.
[298] Forskrift om EØS-prosedyreregler for offentlig støtte av 30. oktober 2009.

can also instruct the granting authority to wind up or amend an aid scheme, see Section 5(2) of the Regulation on State Aid.[299]

It appears likely that in many cases, recovery of state aid occurs without the granting authority having to take a formal recovery decision. It is often in the interest of the granting authority and the beneficiary to resolve the matter amicably, thereby avoiding costly court proceedings and (possible) negative publicity. However, these assumptions are not based on documentation reflecting the existence or extent of such informal recovery procedures, but rather on the absence of a greater number of recovery enforcement cases before Norwegian courts.

4.2 National procedures for the recovery of unlawful state aid where ESA has not taken a negative decision, e.g. where state aid is implemented in breach of the standstill obligation

The national procedures for the recovery of unlawful state aid, where ESA has not taken a negative decision with recovery, are the same as those where ESA has taken a negative decision. Thus, the legal bases for recovery of the unlawful aid will be Section 5 of the Act on State Aid,[300] supplemented by the standstill obligation, as implemented into Norwegian law through the Regulation on EEA Procedural Rules for State Aid.[301] Other national rules may also provide sufficient or supplementary legal basis for the granting authority's recovery order.[302]

Section 5 of the Act on State Aid does not require a negative decision from ESA.[303] According to this rule, if state aid is granted in breach of the standstill obligation, the unlawful state aid can be recovered.

The procedures for recovery of unlawful state aid, where state aid is implemented in breach of the standstill obligation and the procedures are the same as those set out in section 4.1 above.

4.3 Possible actions for contesting the validity of the recovery decisions, or in case no recovery is ordered

4.3.1 Action contesting the validity of ESA's decision to recover unlawful state aid

The Norwegian state cannot bring an action before a Norwegian court, contesting the validity of ESA's decision. The Norwegian state can only challenge ESA's decision before the EFTA Court, and proceedings must be brought within two months of its adoption.[304]

[299] Forskrift om EØS-prosedyreregler for offentlig støtte av 30. oktober 2009.
[300] Lov om offentlig støtte av 1. januar 1994.
[301] Forskrift om EØS-prosedyreregler for offentlig støtte av 30. oktober 2009.
[302] See section 4.1 above.
[303] Lov om offentlig støtte av 1. januar 1994.
[304] Article 36, third paragraph in the SCA, which states that '*The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be*'. In practice, in state aid cases where Norway is the addressee, Norway will receive the decision on the day it is adopted.

The question of whether a beneficiary can bring an action before a Norwegian court, contesting the validity of ESA's decision, has not been resolved by the Norwegian courts.[305] In academic literature, it is argued that a beneficiary is able to contest ESA's decision, particularly where the beneficiary had no other means of contesting ESA's decision, for example where the beneficiary does not have legal standing in the EFTA court.[306] However, in such cases the Norwegian court may have an obligation to request an advisory opinion from the EFTA Court.[307] The Study has not been able to identify an instance where this has happened in practice.

4.3.2 Action in case no recovery is ordered by the Norwegian authorities

If the granting authority does not order the recovery of unlawful state aid, a competitor can bring proceedings in front of a Norwegian court. The assumption under this section is that the unlawful state aid has been granted.

A competitor could bring proceedings in front of a national court, provided that the competitor has legal standing. The competitor could claim that the granting act is in breach of Article 61(1) of the EEA Agreement and that the granting authority must recover the unlawful state aid from the beneficiary. It is, however, uncertain whether such proceedings may be brought against state aid granted in the form of tax measures.[308]

Moreover, arguably, the court cannot order the recovery of the aid when recovery is contrary to a general principle of EEA law, e.g. exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful.[309] The legal bases for such a claim would most likely be the standstill obligation, as implemented into Norwegian law in Article 3 in part II of Protocol 3 to the SCA, supplemented by national public law/contract law.

If the competitor claims the recovery of the state aid, the competitor may have to bring proceedings against the beneficiary as well as the granting authority.[310] The question has not been resolved by the Norwegian courts. If a recovery order is brought by a competitor against the granting authority alone, the court could, most likely, if it found

[305] As far as we are aware, there has been no judgment in the Norwegian courts where an aid recipient has contested the validity of ESA's decision.

[306] Alterskjær, Hjelmeng, Lund and Nordby, '*Statsstøtte – EØS-avtalens regler om offentlig støtte*' (2008), chapter 25.3.4.

[307] Section 51a in the Norwegian Courts Act (Lov om domstolene av 1. juli 1927), does not oblige the Norwegian state to request an advisory opinion from the EFTA Court. However, one could argue, that national courts should not be able to put aside ESA's decisions without referring such questions to the EFTA Court, see Halvard Haukeland Fredriksen and Gjermund Mathisen, '*EØS-rett*' (2018), chapter 4.2, p. 269. See also Alterskjær, Hjelmeng, Lund and Nordby, '*Statsstøtte – EØS-avtalens regler om offentlig Støtte*' (2008), chapter 25.3.4.

[308] Alterskjær, Hjelmeng, Lund og Nordby, '*Statsstøtte – EØS-avtalens regler om offentlig støtte*' (2008), chapter 27.3.

[309] Alterskjær, Hjelmeng, Lund og Nordby, '*Statsstøtte – EØS-avtalens regler om offentlig støtte*' (2008), In chapter 27.3 it is argued that the beneficiary should be granted the same protection as under EEA procedures.

[310] In Oslo District Court's judgment *Synnøve Finden*, the Court found, in a procedural decision, that Synnøve Finden was not obliged to bring proceedings against the beneficiary, where Synnøve Finden claimed that the Norwegian PE Regulation was in breach of Article 61(1) of the EEA Agreement. Synnøve Finden did not, however, claim recovery of the unlawful state aid. See Annex III.1 Summaries of the selected rulings in Norway, for further information on the case.

that the granting act is in breach of Article 61(1) of the EEA Agreement, order the granting authority to bring a claim for recovery against the beneficiary.[311] The granting authority would thereafter have to claim recovery from the beneficiary. If the beneficiary refuses to pay, court proceedings may have to be brought against the beneficiary in order to enforce the claim.

The Study has not revealed an instance in which a competitor has claimed recovery from a beneficiary through proceedings in front of a Norwegian court.

4.3.3 Action contesting the Norwegian public authorities' claim for recovery of unlawful state aid

This section describes possible actions to contest the Norwegian authorities' decision to recover unlawful state aid. Under this section, there are two possible scenarios: (i) the Norwegian authorities have ordered recovery in accordance with a negative ESA decision, or (ii) that Norwegian authorities have ordered recovery on "their own initiative", e.g. without a negative ESA decision. The presumption is that the public authorities have taken a national decision, claiming recovery from the beneficiary.

Under both scenarios, the beneficiary may bring an action before a Norwegian court, contesting the validity of a decision by the Norwegian authorities. The beneficiary could argue that there is no legal basis for recovery of the state aid, for example because the measure does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement. In such a case, neither Section 5 of the Act on State Aid[312] nor the standstill obligation constitutes sufficient legal basis for the recovery claim. The beneficiary could also contest the decision on other grounds, for example because the claim has lapsed under the Norwegian Limitation Act.[313]

As stated above, it is uncertain whether the granting authority's claim is a money claim or an administrative decision. If it is an administrative decision, the decision can be contested under general principles of Norwegian public law, for example nullity of the national decision due to material or procedural errors. Moreover, before bringing the case to court, the beneficiary could challenge the decision by complaint to the relevant supervisory authority.

5 MAIN FINDINGS OF THE STUDY

5.1 Introduction and overview of findings

There has been limited private enforcement of state aid rules in Norway since the EEA Agreement entered into force in 1994.

In total, this Study identified 19 cases[314] of varying relevance for the Study. This figure also includes cases where state aid rules were used in support of a particular

[311] For example, in Oslo District Court's judgment *Synnøve Finden*, Synnøve Finden (the competitor) claimed that the court decided that the Norwegian PE Regulation was in breach of Article 61(1) of the EEA Agreement. See Annex III.1 Summaries of the selected rulings in Norway, for further information on the case.
[312] Lov om offentlig støtte av 1. januar 1994.
[313] Lov om foreldelse av fordringer av 1. januar 1980, 1. august 1988. This was the argument in the Supreme Court's judgment *Hydro/Søral*, summarized in Annex III.1.
[314] A 'case' is considered one case even if judgments by various instances exist.

interpretation, as a defensive instrument by the state or by public undertakings, or where claims for aid were made.

However, the Study identified only five "real" private enforcement cases, i.e. cases in which a claim was based on a breach of the standstill obligation. In addition, there is one landmark ruling of the Supreme Court concerning the implementation on national level of a recovery decision by ESA.[315]

Regarding the identified cases of (attempted) private enforcement, there is one case that stands out: *Synnøve Finden*.[316] To date, this is the only case in which a Norwegian court concluded that the standstill obligation had been breached, and that a measure, in this case a regulation, was invalid as a result of that breach. The related claim for damages was unsuccessful, however.

In addition, the Study identified one other (unsuccessful) action for damages, *Norfrakalk*.[317] Conversely, no case practice regarding interim measures or recovery of illegality interest was found.

One overarching observation that can be drawn from the sample of 19 cases is that while there are few real private enforcement cases, state aid rules are slightly more frequently used in support of another claim, or as a means to convince courts of a certain interpretation of a rule, scheme or contractual clause. The Study identified eleven such cases.[318] Similarly, state aid rules are also used slightly more frequently as 'defensive instrument'[319] by the state, public authorities or publicly owned companies. The Study identified nine such cases.[320] Naturally, there is a large degree

[315] The Norwegian Supreme Court's judgment *Hydro/Søral*, see Annex III.1 for further information on the case.
[316] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[317] See Annex III.1 Summaries of the selected rulings in Norway.
[318] *A/S Norske Shell* (Borgarting Court of Appeal (LB-2017-89692) and Oslo District Court (TOSLO-2016-109103)), *Boreal* (Hålogaland Court of Appeal (LH-2017-56614) and East-Finnmark District Court (TOSFI-2016-4260)), *Havlandet Marinfisk* (Gulating Court of Appeal (LG-2010-147380) and Fjordane District Court (TFJOR-2010-40275)), *Bjølve Bruk AS* (Gulating Court of Appeal (LG-2015-150132) and Hardanger District Court (THARD-2014-145950)), *Saudefaldene* (Supreme Court judgment (HR-2017-1231-A) Gulating Court of Appeal (LG-2015-182482) and Haugaland District Court (THAUG-2014-159852)), *Ventor Sp. Zoo* (Stavanger District Court (TSTAV-2014-5960) and Gulating Court of Appeal (LG-2015-59453)), *Noretyl AS* (Agder Court of Appeal (LA-2010-79659) and Nedre Telemark District Court (TNETE-2009-128197)), *Rem Ship AS* (Borgarting Court of Appeal (LB-2010-189962) and Oslo District Court (TOSLO-2010-41943)), *Østfold Energi AS* (Borgarting Court of Appeal (LB-1998-1805)), *Nettbuss Sør AS* (Aust-Agder District Court (13-176418TVI-AUAG)) and *Vadheim Marin Fisk AS* (Oslo District Court (TOSLO-2010-60850)). Some of the judgments are summarized in Annex III.1 Summaries of the selected rulings in Norway.
[319] Defensive instrument or defensive use of state aid rules is meant to describe a situation in which a potential aid granting authority argues that a certain claim should be dismissed, because confirming that the claim exists (for example the paying of pension costs in the *Boreal* case) would entail the granting of unlawful aid.
[320] *A/S Norske Shell* (Borgarting Court of Appeal (LB-2017-89692) and Oslo District Court (TOSLO-2016-109103)), *Boreal* (Hålogaland Court of Appeal (LH-2017-56614) and East-Finnmark District Court (TOSFI-2016-4260)), *Havlandet Marinfisk* (Gulating Court of Appeal (LG-2010-147380) and Fjordane District Court (TFJOR-2010-40275)), *Bjølve Bruk AS* (Gulating Court of Appeal (LG-2015-150132) and Hardanger District Court (THARD-2014-145950)), *Saudefaldene* (Supreme Court judgment (HR-2017-1231-A) Gulating Court of Appeal (LG-2015-182482) and Haugaland District Court (THAUG-2014-159852)), *Noretyl AS* (Agder Court of Appeal (LA-2010-79659) and Nedre Telemark District Court (TNETE-2009-128197)), *Rem Ship AS* (Borgarting Court of Appeal (LB-2010-189962) and Oslo District

of overlap between cases of defensive use of state aid rules and the use of state aid rules for interpretative purposes. In most defensive cases, it was argued that a certain interpretation of a rule or contract would entail the granting of unlawful aid, and thus must be incorrect.

Finally, the Study also identified a few cases in which actions were brought seeking the granting of aid, based on arguments of discrimination.[321]

Given the small sample of (relevant) cases, it is challenging to draw any robust conclusions as to the solidity and suitability of the national legal order for private enforcement and effective recovery. The conclusions and recommendations of this Study should thus be read with this thin empirical underpinning in mind.

Similarly, the small sample of cases makes it difficult to detect trends. That being said, the following cautious observations can be made:

- The first case in which state aid rules were mentioned in a judgment was *Østfold Energi AS* from 1999.[322] This is an example of a 'defensive instrument' case, and the court did not consider the state aid argument of the defendant.

- The next judgment is *Kattekleiv* from 2006.[323] This means that it took twelve years from the entry into force of the EEA Agreement before a Norwegian court ruled for the first time on the substance of a claim related to state aid. Moreover, during these first twelve years, arguments pertaining to state aid law were only raised twice before a Norwegian court.

- From 2006 onwards, the frequency of litigation revolving around, or featuring claims based on state aid law, has increased. All cases of relevance identified by the Study, and summarised in Annex III.1, date from the period after 2006.

- The most interesting/relevant cases to date on private enforcement of state aid rules and effective enforcement of recovery are all relatively recent. *Hydro/Søral*, *Synnøve Finden* and *Norfrakalk* are arguably the most important cases identified by the Study, and the final judgments in all cases date from the period between 2013 and 2019.[324]

- It can arguably also be observed that the depth of analysis, and to some extent the quality of the assessment, has increased in more recent cases. *Norfrakalk*, for example, contains a very thorough analysis of the standstill obligation, and *Boreal*, for instance, a relatively detailed assessment of the notion of advantage in relation to the payment by the state of historic pension costs.[325]

Court (TOSLO-2010-41943)), "Nettbuss Sør AS" (13-176418TVI-AUAG) and *Vadheim Marin Fisk AS* (Oslo District Court (TOSLO-2010-60850)). Some of the judgments are summarized in Annex III.1 Summaries of the selected rulings in Norway.

[321] These types of cases revolve around claims according to which it would be discriminatory to award aid to one company but not to another (the applicant).

[322] Borgarting Court of Appeal's judgment *Østfold Energi* (LB-1998-1805).

[323] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.

[324] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.

[325] See the judgment of the Court of Appeal in *Boreal*, summarized in Annex III.1 Summaries of the selected rulings in Norway.

Bearing in mind the small sample of cases, it is nonetheless possible to deduce a slight upward trend both in the frequency of private enforcement actions, as well as in the quality of assessment by the Norwegian courts of such claims.

In the following, the Study will provide some additional details on the most interesting cases identified and on some specific topics, before drawing additional conclusions and pointing to some possible recommendations under section 5.7.

5.2 Difficulties with the interpretation and application of the notion of state aid

Some of the cases identified by the Study appear to indicate that courts had, or should have had, from an objective point of view, difficulties regarding the interpretation of the notion of state aid pursuant to Article 61(1) of the EEA Agreement.

In *Synnøve Finden*, it was far from clear whether the regulation in question fulfilled all constitutive elements of state aid.[326] It was also unclear whether the regulation fell within the scope of the EEA Agreement. Oslo District Court acknowledged these difficulties and requested an advisory opinion from the EFTA Court.

Conversely, in at least the following four cases, different courts found that a particular measure did not constitute state aid, without either requesting an advisory opinion from the EFTA Court or seeking ESA's opinion through the cooperation procedure, even though it appears that it was, or should have been, objectively difficult to come to this conclusion.

Kattekleiv, from 2006, is perhaps the most illustrative example.[327] In this case, a Norwegian district court found that subsidies to two kindergartens were not state aid because trade between EEA EFTA States was not affected. This is not to suggest that the conclusion reached by the court was necessarily wrong. However, the considerations underpinning the courts conclusion, namely that an effect on trade was excluded because there was no competition for the children resident in the municipality where the beneficiaries were located, and no kindergartens established elsewhere in the EEA were operating in this municipality, would as such seem insufficient to exclude an effect on trade. This was even more so at that point in time, when the jurisprudence from the European courts and case law from the Commission and ESA was arguably stricter in relation to the effect on trade criterion than it is today. More generally speaking, the judgment of the Court would suggest that the outcome, or at least the assessment of the Court, would have been different had, for example, the Court availed itself of the cooperation procedure.

Saudefaldene is another case where one may argue that the court should have undertaken a more detailed assessment.[328] The key question was if an expropriation in favour of a power company constituted state aid. The Court considered that this was not the case, seemingly because any possible advantage (i.e. too low a compensation to the landowners) could not distort competition. As in *Kattekleiv*, it is not certain that

[326] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[327] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[328] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.

this conclusion was wrong, but particularly due to the scarce case practice pertaining to that constitutive element of state aid, it deserved a more thorough analysis. Furthermore, input from ESA would most certainly have been useful to the Court.[329]

The Court of Appeal's judgment in *Boreal* contains a comparatively detailed assessment of whether the County Authority's payment of a transport company's pension costs constituted state aid.[330] Given the objective difficulty of the assessment (in view of a complicated set of facts and complex state aid case law on historical pension costs) and the fact that the Court's reasoning is not always easy to follow, it would appear that the Court experienced difficulties with the notion of advantage in this instance. Furthermore, the District Court's judgment suggests that the Court may have misunderstood the differences between two constitutive criteria of state aid, namely advantage and distortion of competition.

In those cases, it seems apparent that the different courts had difficulties correctly interpreting and applying the notion of state aid. A more thorough analysis, a cooperation procedure with ESA or a request to the EFTA Court may well have led to different outcomes.

Conversely, in the case of *Norske Shell,* the Court also had to deal with a complex issue, namely the selectivity of a particular interpretation of a tax measure.[331] At first sight, the reasoning of the Court on the state aid aspect may seem too succinct, but this appears justified in light of the non-decisive nature of the state aid claim.

5.3 Cooperation with ESA

The Study could not identify an instance where there has been cooperation with ESA in relation to the cooperation procedure of the enforcement guidelines.[332] The reason for this is unclear. In addition to the fact that there were rather few cases raising issues pertaining to state aid law, and in which the cooperation procedure could have been useful, one possible explanation is that the courts are not aware of the procedure. However, the above cases indicate that cooperation could be, or could have been, beneficial in a limited number of instances.

Further, the Study identified only one reference to ESA's enforcement guidelines[333] – namely in the *Norfrakalk* case.[334]

5.4 Enforcement of the standstill obligation

Private enforcement of state aid rules is intrinsically linked with (alleged) breaches of the standstill obligation. A claim for damages, for (interim) recovery or for having an

[329] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[330] See Annex III.1 Summaries of the selected rulings in Norway, for further information on the case.
[331] See Annex III.1 Summaries of the selected rulings in Norway, for further information on the case.
[332] EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts, OJ C 85, 9.4.2009 p. 1. Cf. responses to questionnaires in Annex III.3.
[333] EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts, OJ C 85, 9.4.2009 p. 1.
[334] See Annex III.1 Summaries of the selected rulings in Norway, for further information on the case.

act declared void, cannot succeed without there being a breach of the abovementioned obligation.

Such private enforcement has only rarely occurred in the 25 years in which the EEA Agreement has been in force in Norway. Overall, a breach of the standstill obligation has been alleged in only five cases[335] (arguably in eight cases, if defensive use of the standstill obligation is included).[336] Accordingly, to date there have been five "real" private enforcement cases in Norway. In addition, given that there has only been one case in which a Norwegian court concluded that the standstill obligation had been breached, there is an inherent limit to the Study's potential findings as to the robustness and suitability of the Norwegian legal system in relation to the enforcement of the standstill obligation and private enforcement in general.

Furthermore, there is no case practice concerning the following remedies: (i) interim measures, including interim recovery, and (ii) recovery of illegality interest.

That being said, as explained in section 3 above, there is little reason to assume that such claims could not successfully be made, provided that the standstill obligation has been breached.

The recent *Synnøve Finden* case, as well as the other cases in which a breach of the standstill obligation has been alleged, indicates that the Norwegian legal system may provide sufficient remedies for an effective enforcement of the standstill obligation.[337] Given, however, the scarce case practice, and the rather unclear legal framework, this conclusion cannot be made with certainty.

As regards legal standing, the case of *Gauselparken* contains some ambiguous statements by the Court as to who can bring private enforcement actions, including against whom.[338] More recent case practice, most importantly *Synnøve Finden* and *Norfrakalk,* would seem to clarify that (even distant) competitors generally have legal standing in private enforcement actions, including those directed against schemes based on a regulation or law.[339]

Synnøve Finden further shows that private enforcement can (successfully) challenge the validity of an act before a Norwegian court.[340] On the other hand, this case also demonstrates the seemingly intrinsic difficulties relating to a successful damages claim based on a breach of the standstill obligation.[341] The Courts concluded that a causal link between the breach of the standstill obligation and the economic loss had not been proven, or that Synnøve Finden had suffered an economic loss at all. Demonstrating

[335] *Synnøve Finden*, *Gauselparken*, *Norfrakalk*, *Kattekleiv* and *Saudefaldene*; all described in Annex III.1 Summaries of the selected rulings in Norway.
[336] *Boreal* and *Norske Shell* are examples of 'defensive use' cases, where the state argues that a certain obligation to act, or a certain interpretation of an act, would amount to state aid (and entail a breach of the standstill obligation. *Kleven Verft* can also arguably be attributed to the private enforcement category. The cases are described in Annex III.1 Summaries of the selected rulings in Norway.
[337] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[338] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[339] See Annex III.1 Summaries of the selected rulings in Norway for further information on the cases.
[340] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[341] The damages claim was made based on Norwegian public law. See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.

that these conditions are met has seemingly been challenging in private enforcement cases all over Europe.[342]

However, one could argue that the judgment *Norfrakalk* indicates that an action for damages can succeed.[343] While the Court concluded in that case that the standstill obligation had not been breached, it found that it could not be excluded that the other conditions for damages were met.

Nonetheless, the aforementioned cases also illustrate that the national legal framework for state aid, including private enforcement, is arguably not sufficiently detailed.

The following difficulties pertaining to private enforcement of the standstill obligation were identified. These could possibly be resolved by a revision of the Norwegian legislation, for example by amendment to the Act on State Aid,[344] as further discussed in section 5.7 below:

- Generally speaking, the Norwegian national legal framework is characterised by being relatively short on detail and lacking in clarity.

- The standstill obligation's implementation in the Norwegian legislation is arguably insufficient or at least unclear, given that only part I of Protocol 3 to the SCA is incorporated into Norwegian law. Whether the standstill obligation can apply as an independent legal basis for the enforcement of state aid claims is still not fully resolved under Norwegian law.

- Legal standing may prove to be an obstacle for state aid enforcement before national courts.

- Knowledge of state aid rules in general, and of private enforcement possibilities, including ESA's enforcement guidelines,[345] remains rather low.

5.5 Enforcement of recovery

The EEA EFTA States are obliged to implement recovery decisions by ESA, however, there are no clear EEA rules as to the manner in which recovery should be enforced. As explained above, ESA's decision is not binding upon the beneficiary, and national measures are therefore required to enforce the recovery of the state aid *vis-a-vis* the beneficiary. Since the entry into force of the EEA agreement, national enforcement of a negative ESA decision has only been contested in one case, *Hydro/Søral*, which

[342] Cf. for example the 2009 update of the 2006 Study on the enforcement of State aid rules at national level, page 4: '*Damages actions remain limited and there have not been any cases in which competitors have actually been awarded monetary compensation […]. Moreover, the requirement to prove causation between a breach of Article 88(3) EC and the economic loss sustained by the claimant remains a major problem, as this requires the claimants to show how its market share would have developed had the aid not been granted to its competitor.*' (http://ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf).
[343] Oslo District Court's judgment "Norfrakalk" (TOSLO-2010-45497).
[344] Lov om offentlig støtte av 1. januar 1994.
[345] EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts, OJ C 85, 9.4.2009 p. 1.

concerned the interaction of the recovery obligation with the Norwegian statute of limitations.[346]

While the reasoning of the courts that dealt with this case, including the reasoning of the Supreme Court, has drawn some criticism in academic literature,[347] the Supreme Court's judgment essentially entails that the Norwegian statute of limitations applies to the national recovery order, but not to ESA recovery decision. This would seem to entail that the statute of limitation is not to be characterised as an obstacle to effective enforcement.

Given that recovery of aid has not been challenged in other cases, it is difficult to draw further conclusions regarding the effectiveness of recovery at national level. Nevertheless, the absence of litigation in recovery cases other than *Hydro/Søral* may be in an indicator that the legal system provides for effective enforcement of recovery.[348] However, and as set out above, the legal basis for the recovery of unlawful state aid is not clear and raises many yet unresolved questions under Norwegian law.

The case practice identified in the Study indicates that the national legal system allows for 'voluntary' recovery, i.e. recovery in the absence of a negative decision with recovery by ESA. The Norwegian authorities for instance recovered aid that was granted in contravention with the rules of an aid scheme, such as in the case of *Kleven Verft*.[349] That being said, the reason for the 'recovery' was not a regular grant of unlawful state aid, but rather disbursement of aid that did not comply with the rules of the respective aid scheme.

Nonetheless, despite the Study not having identified clear-cut obstacles to the enforcement of recovery, the national legal framework could arguably be clearer as regards the procedure for recovery, and as regards the general duty for authorities to recover also in the absence of an ESA decision when it becomes clear that incompatible aid or aid falling outside an (approved) aid scheme has been granted.

The following difficulties pertaining to the enforcement of recovery were identified, which could possibly be resolved by a revision of the Norwegian legislation, for example by amendment to the Act on State Aid,[350] as further discussed below in section 5.7:

- It is not clear whether Section 5 of the Act on State Aid[351] provides a sufficient legal basis for the recovery order, or whether it must be supplemented by the standstill obligation or other general principles under Norwegian public or private law. For tax measures, the recovery procedure raises difficult questions regarding competence and recovery of state aid.

[346] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[347] Hjelmeng '*Tilbakeføring av offentlig Støtte – hva er situasjonen etter Rt-2013-1665 Hydro/Søral*0' in Lov og Rett (04/2014) p. 210–228.
[348] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[349] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[350] Lov om offentlig støtte av 1. januar 1994.
[351] Lov om offentlig støtte av 1. januar 1994.

- *Hydro/Søral* clarified the limitation period in cases where ESA has taken a negative decision.[352] However, it is not clear when and which limitation period applies in cases where ESA has *not* taken a negative decision.

- Although the case of *Synnøve Finden* clarifies certain issues on legal standing, it is not clear whether a competitor would have legal standing to claim recovery of unlawful state aid before a Norwegian court in all cases.[353] It is also unclear whether a competitor, who claims recovery of unlawful state aid, would have to bring proceedings against the beneficiary as well as the granting authority.

5.6 Best practices

Given the limited number of cases, identifying "best practices" is a challenging undertaking.

Cases that raise complex issues pertaining to the notion of aid would benefit from either a request for an advisory opinion from the EFTA Court, or from seeking ESA's input through the cooperation procedure. The fact that Oslo District Court stayed the proceedings in *Synnøve Finden* and requested an advisory opinion, can thus be described as a best practice.[354]

Oslo District Court's assessment of whether the state aid rules had been breached, and whether there were grounds for a damages claim in *Norfrakalk,* suggests that the responsible judge had, or had acquired, a good knowledge of EEA and state aid law.[355] In terms of the use of legal sources, and depth of analysis, this judgment is hardly comparable with judgments identified in the Study.

In view of the above, as regards national courts, an obvious best practice would be to seek the legal advice from ESA or the EFTA Court in cases dealt with by judges who neither have the relevant expertise nor time to acquire that expertise.

In terms of (best) practices when it comes to the claims brought by the parties to the cases analysed in this Study, it would appear that the lack of clarity in the judgment results, at least in part, from unclear claims (the case of *Kattekleiv* being one example).[356] One reason for this may be that state aid arguably remains an 'obscure area of law'.[357] It could also, at least to some extent, be the result of a rather unclear national legal framework for state aid, and for private enforcement of state aid law.

[352] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[353] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[354] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[355] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[356] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[357] See Advokatfirmaet Hjort DA's response to the questionnaire in Annex III.3 Questionnaires for Norway.

5.7 Conclusions and recommendations

5.7.1 Plausible reasons for the small number of private enforcement (and recovery) cases

In the foregoing, it has become apparent that the number of cases relating to the enforcement of state aid law before Norwegian courts has been relatively low since the entry into force of the EEA Agreement 25 years ago.

While the limited empirical results of the Study, including the limited amount of responses to the questionnaire, do not enable the drawing of robust conclusions, the following tentative observations can be made.

First and foremost, it is far from clear if there is – or has been – a vast potential of plausible (private) enforcement cases. To Kluge's knowledge and understanding, breaches, and in particular blatant breaches, of the standstill obligation in Norway are relatively rare. Cases that could potentially be brought before a court may often entail complex assessments under Article 61(1) of the EEA Agreement.

Successfully litigating such a case would require in-depth knowledge of state aid law of both the applicant and the relevant court. There are indications, as seen in the responses to the questionnaire, that such knowledge is not widely spread throughout the Norwegian legal community, including the Norwegian courts.

Having to 'teach' a court the law is a risk factor in any dispute. In addition, the national legal framework, as explained above, is lacking in detail and clarity, adding another layer of risk.

It could even be argued that the unclear legal framework, and the limited amount of case law, are mutually reinforcing factors. In the absence of clear rules, it is risky to bring a case before the courts. The fact that so few cases are brought, results in a situation where case law to this date has not 'filled the gaps' in the legal framework.

There is an, albeit small, possibility that recent judgments, most notably *Synnøve Finden*, have filled some of these gaps, and may trigger a (slight) increase in private enforcement.[358] If that materialises remains to be seen, and it may well be argued that it will likely remain an exceptional event for a Norwegian court to conclude that the standstill obligation has been breached.

The reason for this would seems obvious; a court case will in the majority of cases be costlier, or in any event riskier from an economic perspective, than simply submitting a complaint to ESA.[359] In Kluge's view, unless the imminent or recent granting of aid is an existential economic threat to a potential applicant, a complaint to ESA will often remain the more straightforward and overall preferable option.

5.7.2 Recommendations

It follows from the foregoing that one obvious recommendation would be a revision of the national legal framework for state aid, including the private enforcement of state

[358] See Annex III.1 Summaries of the selected rulings in Norway for further information on the case.
[359] Cf. responses to questionnaires in Annex III.3.

aid rules in the national legal order.[360] As regards the enforcement of recovery, in particular the situation where ESA has not taken a negative decision, such a revision would also facilitate Norway's compliance with relevant EEA/EU case law, such as the judgment of the EU's Court of Justice in Eesti Pagar AS.[361]

It would go beyond the scope of this Study to provide detailed recommendations as to how the legal framework should be revised. Preliminarily, it would appear that the following issues could be addressed in a revision:

- An unequivocal implementation of the standstill obligation in Norwegian law, as well as clear regulation governing the consequences of a breach, including the obligation of national courts to order recovery.

- Clearer and more detailed procedural rules for private enforcement, and enforcement of recovery alike. This could include provisions as to who would need to bring a claim against whom, who and how recovery is to be implemented on a national level, and an obligation to recover even in the absence of a negative decision from ESA when it becomes clear that unlawful aid has been granted.

- A legislative clarification as to the applicability of the Norwegian statute of limitations.

In order to increase the courts' and judges' knowledge of state aid rules, including the possibility to cooperate with ESA in state aid cases, it might be advisable for ESA to offer training to judges or courts, possibly in the context of seminars available to all judges.

ESA could also, on its own website, for example, dedicate a section to private enforcement, where it highlights the possibility of cooperation with national courts. ESA could also more prominently refer to the Norwegian version of the enforcement guidelines.

In terms of content of the enforcement guidelines,[362] the Study indicates that there is one issue that the document does not address directly, namely the use of state aid rules as a means to interpret certain acts, in particular contracts. If similar findings are made for EU Member States, ESA could consider suggesting to the European Commission to assess this topic in a potential future revision of the Commission's enforcement notice, which would then form the basis for ESA's enforcement guidelines.

[360] Respondents to questionnaire appear to share this view. See further in Annex III.3.
[361] Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar AS*, C-349/17, ECLI:EU:C:2019:172.
[362] EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts, OJ C 85, 9.4.2009 p. 1.

Annexes for Chapter 1: Iceland

Annex I.1 – Summaries of selected rulings concerning state aid in Iceland

SUPREME COURT OF ICELAND (HRD 596/2012)

Court	Supreme Court of Iceland
Published	Thursday, 16 May 2013
Procedure	District Court of Reykjavík, 28 June 2012, in case E-8613/2009 Supreme Court of Iceland, 16 May 2013 in case Hrd 596/2012
Parties to the action and relationship to the measure (beneficiaries, competitors, third parties, public authorities)	Deka Bank Deutsche Girozentrale (Deka Bank) Icelandic Government
Sectors in which parties are active (NACE kode)	K.64 - Financial service activities, except insurance and pension funding
Type of action (administrative or civil law action)	Judgment.
Subject-matter of the action	The case concerned a loan of 677.000.000 EUR granted by Deka Bank to Glitnir Bank in 2008. Following the bankruptcy of Glitnir Bank, Deka Bank became a claimant to the bankruptcy estate. It sued the Icelandic Government in tort, claiming the latter's liability due to losses suffered as a result of measures enacted by the authorities in the aftermath of the financial crisis related to division of assets between the bankruptcy estate of Glitnir and the newly established Íslandsbanki. One of the many pleas relied upon by the plaintiff was that the measures amounted to unlawful state aid. The Financial Supervisory Authority of Iceland had split Glitnir bank in two, the old bank which was placed in receivership and the new bank which was fully owned by the state. The split called for the allocation of assets to both the new and the old bank. The claimants of the old bank were not awarded any compensation for the allocation of assets to the new bank. Reykjavík District Court found that the State measures did not constitute state aid under Article 61 of the EEA. *Firstly,* since there was a payment for the assets allocated to the New Glitnir Bank. *Secondly*, Article 61(3) EEA provided that aid to remedy a serious disturbance in the economy of an

	EU Member State or an EFTA State might be considered to be compatible with the functioning of the EEA. The purpose of the legislation in question had been to secure a functioning payment system in Iceland. Were the measure to be considered to constitute state aid it should be considered compatible aid due to serious disturbance in the economy at the time when the aid was granted. The District Court however concurred with the Icelandic State that the plaintiff had not shown how the plea was applicable in the case at hand. The Supreme Court stated that regardless whether Glitnir Bank had been granted state aid, Deka Bank had not shown how this plea in law supported the claim of the tort liability of the Icelandic State in this instance. Judgement is available online at https://www.haestirettur.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=dd9f2493-c892-4000-90fd-8211b9abb40e
Conclusion or measures adopted by the national court	The Supreme Court found that there was not a link between the supposed state aid and the loss suffered by Deka Bank.
Whether ruling is/was challenged	The Supreme Court is Iceland's court of highest instance.
Difficulties in enforcing State aid rules	Not applicable
Date of ruling and timeline from the moment the application was lodged to the adoption of the ruling	The ruling of the District Court of Reykjavík was published on the 28. June 2012. The judgement of the Supreme Court was published on the 16 May 2013.

SUPREME COURT OF ICELAND (HRD 340/2011).

Court	Supreme Court of Iceland
Published	28. October 2011
Procedure	The Reykjavík District Court on 27. Apríl 2011 in case nr. X-36/2010. The Supreme Court of Reykjavík on 28. October 2011 case nr. Hrd 340/201.
Parties to the action and relationship to the measure (beneficiaries, competitors, third parties, public authorities)	Arrowgrass etc, Claimants to the bankruptcy estate of Landsbanki The bankruptcy estate of Landsbanki

Sectors in which parties are active (NACE code)	K.64 - Financial service activities, except insurance and pension funding
Type of action (administrative or civil law action)	Judgement
Subject-matter of the action	The case is one of several cases concerning the actions of the Icelandic state following the financial crisis of 2008, and the alignment and hierarchy of claims in the bankruptcy estate of Landsbanki where all pleas in law related to state aid where identical. The District Court noted that the plaintiff had submitted contested measures that were in breach of the state aid rules. The defendant on the other hand maintained that no state aid had been granted and, in any event, if the presence of aid were to be established, the measures should be considered compatible with Article 61 EEA. The District Court of Reykjavík rejected the arguments pertaining to state aid as irrelevant in the cases which concerned the hierarchy of claims to the bankruptcy estate. The Supreme Court of Iceland did not mention state aid in its judgement. Available online at https://www.haestirettur.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=735dadfb-20d8-4147-bba6-63cf07953838
Conclusion or measures adopted by the national court	The state aid rules were outside the subject matter of the case.
Whether ruling is/was challenged	The Supreme Court is Iceland's court of highest instance.
Difficulties in enforcing state aid rules	The state aid rules were not applicable
Date of ruling and timeline from the moment the application was lodged to the adoption of the ruling	The Reykjavík District Court on 27. Apríl 2011 in case nr. X-36/2010. The Supreme Court of Reykjavík on 28. October 2011 case nr. HRD 340/2011.

SUPREME COURT OF ICELAND (HRD 17/2001)

Court	Supreme Court of Iceland
Published	Thursday 21 June 2001
Procedure	District Court of Reykjavík, 31. October 2000

	Advisory Opinion of the EFTA Court case E-1/00 Supreme Court of Iceland, 21. June 2001, in case Hrd 17/2001
Parties to the action and relationship to the measure (beneficiaries, competitors, third parties, public authorities)	Lánasýsla ríkisins. Íslandsbanki FBA hf.
Sectors in which parties are active (NACE code)	K.64 - Financial service activities, except insurance and pension funding.
Type of action (administrative or civil law action)	Judgement.
Subject-matter of the action	The case concerned whether the Nordic Investment Bank should be considered a foreign entity under the Act on State Guarantees which provided that a higher guarantee fee should be paid for loans from foreign banks. The District Court requested an advisory opinion from the EFTA Court in the case. As the plaintiff had claimed that the guarantee fee constituted illegal state aid, one of the questions submitted to the EFTA Court was whether the collection of a higher state guarantee fee in the case of loans from foreign banks was compatible with Article 61 EEA. The EFTA Court found that an answer to the question related to Article 61 of the EEA Agreement was not of relevance to the District Court since it did not have the competence to rule on whether state aid was compatible with the EEA Agreement. The Opinion of the EFTA Court with regard to the relevance of Article 61 EEA was referred to by the District Court reiterating that Article 61 EEA was not relevant in the case. The Supreme court agreed with Reykjavik District Court concluding that the provisions of the Agreement establishing the Nordic Investment bank provided that the bank should be considered a domestic entity for the purposes of applying the Act on State Guarantee. The Supreme Court did not address the question of state aid. As it had held that the Nordic Investment Bank was to be considered a domestic entity under the Act on State

	Guarantees it was not deemed necessary to address the question of a potential breach of EEA law. Available online at https://www.haestirettur.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=544b20f7-18a4-4338-9034-c322925e3f37 Hyperlink to EFTA Court judgment
Conclusion or measures adopted by the national court	The assessment of state aid was not relevant.
Whether ruling is/was challenged	The Supreme Court is Iceland's court of highest instance.
Difficulties in enforcing state aid rules	Not applicable
Date of ruling and timeline from the moment the application was lodged to the adoption of the ruling	District Court of Reykjavík 31 October 2001. Supreme Court 21 June 2001.

SUPREME COURT OF ICELAND (HRD 166/1998)

Court	Supreme Court of Iceland
Published	Thursday 17 December 1998
Procedure	
Parties to the action and relationship to the measure (beneficiaries, competitors, third parties, public authorities)	Gunnar Pétursson Icelandic State
Sectors in which parties are active (NACE kode)	--
Type of action (administrative or civil law action)	Judgement.
Subject-matter of the action	Gunnar and Kjaran, a partnership (í. sameignarfélag) were under the obligation to pay a special industry fee (í. iðnlánasjóðsgjald & iðnaðarmálagjald) to the Federation of Icelandic Industries (í. Samtök Iðnaðarins) and the industry loan fund (í. Iðnlánasjóður). The District Court of Reykjavík evaluated the supposed state aid granted to the beneficiaries of the industry fee (but only

	regarding the state aid supposedly granted to the Industry Loan Fund). The District Court of Reykjavík found that the aid granted to the Loan Fund was compatible with the EEA agreement under Article 61(3)(b) EEA but noted specifically that it would only examine the industry fee not the activity of the Loan Fund as a whole. The Supreme Court confirmed the ruling of the District Court and found that the payment of the industry fee did not violate Article 74 of the Icelandic Constitution and did not amount to state aid to the Industry Loan Fund or the Federation of Icelandic Industries.
Conclusion or measures adopted by the national court	The Supreme Court found that the payment of the industry fee did not go against Article 74 of the Icelandic Constitution. It confirmed the District court's assessment of the plea related to state aid.
Whether ruling is/was challenged	The Supreme Court is Iceland's court of highest instance.
Difficulties in enforcing state aid rules	Not applicable
Date of ruling and timeline from the moment the application was lodged to the adoption of the ruling	Supreme Court. 17 December 1998. The District Court of Reykjavik. 21 November 1997.

COURT OF APPEAL OF ICELAND (LRD 409/2018)

Court	Court of Appeal of Iceland
Published	Friday, 8. March 2019
Procedure	The District Court of Reykjaness, Tuesday, 17. April 2018 in case E-1040/2018 Court of Appeal of Iceland, 8. March 2019 in case Lrd 409/2018. .
Parties to the action and relationship to the measure (beneficiaries, competitors, third parties, public authorities)	HS Orka hf, the plaintiff HS Veitur hf, the respondent, who asked for an advisory opinion from the EFTA Court.
Sectors in which parties are active (NACE kode)	D.35 - Electricity, gas, steam and air conditioning supply
Type of action (administrative or civil law action)	Judgement

Subject-matter of the action	Orkuveita Suðurnesja was created by law in 1974 to harness geothermal energy in the Southern Peninsula of Iceland. In 2008, the company was demerged into two separate entities. The distribution of electricity and the distribution of hot and cold water was moved into a new company, HS Veitur. The business of Orkuveita Suðurnesja outside those operations was incorporated into the new corporate entity of HS Orka. The case regarded the interpretation of a clause in the demerger agreement related pension payments to the former employees of Orkuveita Suðurnesja. The respondent maintained that the allocation of pension payments could constitute unlawful aid. The District Court of Reykjavík found that the clause on pension payments was binding and not in breach of state aid rules (though there is no assessment of the facts and it's merely mentioned as one of the claims). The Court of Appeal did not mention state aid in its assessment. It found that the agreement between the parties was null and void based on Article 10, 14 and 33 of the Competition Law No 44/2005 as it amounted to concerted practices.
Conclusion or measures adopted by the national court	The Court of Appeal did not mention state aid in its assessment. The District Court of Reykjavík which had reached another decision finding that the clause on pension payments was binding and did in no way breach state aid rules.
Whether ruling is/was challenged	
Difficulties in enforcing state aid rules	The measure was nullified on another basis than state aid provisions.
Date of ruling and timeline from the moment the application was lodged to the adoption of the ruling	District Court of Reykjaness, Tuesday, 17. April 2018. The Court of Appeal, Friday, 8. March 2019.

DISTRICT COURT OF REYKJAVÍK (E-6117/2010)

Court	District Court of Reykjavík
Published	6 June 2011
Procedure	District Court of Reykjavík. 6 June 2011, case E-6117/2010
Parties to the action and relationship to the measure (beneficiaries, competitors, third parties, public authorities)	Bankruptcy estate of Flugfélag Vestmannaeyja ehf. Icelandic State.
Sectors in which parties are active (NACE kode)	H.51.10 - Passenger air transport
Type of action (administrative or civil law action)	Judgement
Subject-matter of the action	Flugfélag Vestmannaeyja was a small airline operating in Iceland, and mainly flying between Bakki airport (2 hour drive from Reykjavík) and Vestmannaeyjar airport. In September 2006, Landsflug stopped flying scheduled flights to Vestmannaeyjar a cluster of islands off the south coast of Iceland. To secure the provision of scheduled flights to the islands the Icelandic State entered into a temporary contract with Flugfélag Íslands on the provision of flights between Reykjavík and Vestmannaeyjar. Flugfélag Vestmannaeyja was not offered a similar arrangement and sued the Icelandic State for damages for loss of revenue from the customers that used the subsidised flights offered by Flugfélag Íslands as the subsidy constituted state aid. The District Court found that the agreement between Flugfélag Íslands and the Icelandic State had not created any loss for Flugfélag Vestmannaeya, and therefore the Icelandic State should not pay damages. *Inter alia* as it had not been established that Bakki and Reykjavík flights were the same market, it was not shown that Flugfélag Vestmannaeyja had fulfilled the qualifications needed to operate flights between Reykjavík and Vestmannaeyjar on such short notice, and Flugfélag Vestmannaeyjar did not prove a causal link between the operating loss it suffered and the deal between the Icelandic State and Flugfélag Íslands.

	Available online at https://www.heradsdomstolar.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=4600467e-52d5-4a13-8ed7-219b18d2addb
Conclusion or measures adopted by the national court	State aid arguments were not considered by the District Court.
Whether ruling is/was challenged	No
Difficulties in enforcing state aid rules	State aid arguments were not considered by the District Court.
Date of ruling and timeline from the moment the application was lodged to the adoption of the ruling	Reykjavík District Court issued its judgment on the 6 June 2011. The case was not appealed.

DISTRICT COURT OF REYKJAVÍK (E-4326/2010)

Court	Reykjavík District Court
Published	Wednesday 1 December 2010
Procedure	Reykjavík District Court (E-4326/2010)
Parties to the action and relationship to the measure (beneficiaries, competitors, third parties, public authorities)	Og fjarskipti ehf. Fjarskiptasjóður Síminn hf. (réttargæsla)
Sectors in which parties are active (NACE kode)	J.61 - Telecommunications
Type of action (administrative or civil law action)	Judgment
Subject-matter of the action	The case concerned the public procurement of a project that aimed at providing high-speed internet connections in the rural areas of Iceland. Following a tender procedure the Icelandic Communications Funds (Fjarskiptasjóður) entered into an agreement with Síminn (Iceland Telecom).

	The plaintiff argued that several changes to the agreement for the benefit of Síminn after the public procurement procedure had been closed entailed that the agreement constituted state aid which had not been notified to the EFTA Surveillance Authority. The plaintiff thus sued for the legal recognition of the illegality of the agreement and the liability of the Icelandic Communications fund. The District Court found that the argument of the plaintiff relating to the presence of aid which had not been notified to the EFTA Surveillance Authority was not adequately addressed in the written submissions to the Court and dismissed the case on procedural grounds. Available online at https://www.heradsdomstolar.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=ec1efa36-bfa2-4cdd-9db9-34e2c94294f5
Conclusion or measures adopted by the national court	The District Court dismissed the case on procedural grounds
Whether ruling is/was challenged	No
Difficulties in enforcing state aid rules	Arguments related to state aid and reference to the state aid Guidelines not assessed by the Court.
Date of ruling and timeline from the moment the application was lodged to the adoption of the ruling	District Court of Reykjavík 1. December 2010.

Annex I.2 – Questionnaire Iceland

1. What is the number of cases you have dealt with where arguments related to the EEA Agreement, in particular Article 61 thereto (state aid), have been raised?

    - Several
    - A few
    - None

2. If you have come across cases where arguments related to the EEA Agreement, in particular Article 61 thereto (state aid), were raised, how significant were they for the outcome of the case?

    - Very significant
    - Somewhat significant
    - Not significant

3. Are you familiar with the State aid Guidelines of the EFTA Surveillance Authority?

    - Yes
    - No

4. Are you familiar with the chapter of the State aid Guidelines on enforcement of state aid rules by national courts?

    - Yes
    - No

5. If the answer to question 4 is yes – would you follow the Guidelines in a case where arguments related to state aid are raised?

    - Yes
    - No

6. Article 30 of the Competition Act No. 44/2005 reads:

„If state aid covered by Article 61 of the EEA Agreement has been notified to the EFTA
Surveillance Authority, Icelandic authorities shall not be competent to decide whether suchaid conforms to allowed financial assistance from public sources until after the EFTA Surveillance Authority has stated its opinion in the matter. The same applies in case of financial assistance granted from municipal funds which may fall within the scope of Article 61 of the Agreement.“

Do you find this provision provides sufficient legal basis to intervene by declaring new aid which has not been notified to the EFTA Surveillance Authority illegal?

- Yes
- No

7. Do you find Article 30 of the Competition Act to provide a sufficient legal basis to order an injuction against aid which has not been notified to the EFTA Surveillance Authority?

   - Yes
   - No

Summary of replies and feedback

A. Judges

ADVEL created an anonymous on-line survey for the questionnaire and solicited the assistance of the Judges'Association in Iceland to pass it on to all its members. The replies to the survey received were in the single digits. ADVEL received informal feedback from a coupe of judges criticising questions 6 and 7 which they felt were inappropriate to ask judges to indicate views on albeit in an anonymous on-line survey. The on-line survey was resubmitted to the Judges'Association after elimination of questions 6 and 7. No replies were received after resubmission. The few answers to the survey received were identical, i.e. that the judge in question had not dealt with a state aid case and were familiar with the State Aid Guidelines.

B. Private Practitioners

ADVEL conducted informal interviews with a group of private practitioners based on the questionnaire above. Very few had litigated cases were arguments relating to the state aid rules had been raised. In the instances the state aid arguments had been raised, it was thought of as an additional argument or supporting plea in law rather than the main subject matter of a dispute. Of the interviewees, only a handful were familiar with the State Aid Guidelines and the role of national courts in the private enforcement of the state aid rules. Asked to consider the appropriateness of Article 30 of the Competition Act as a legal basis for a case to pursue enforcement of the standstill obligation, all were of the view that it was vague, and many considered it highly unlikely that such a case would be successful. Furthermore, all the interviewees raised doubts as to whether it would be practically possible to rely on the Act for Injunction etc. in order to seek standstill or interim relief in a case concerning unlawful aid.

Annex I.3 – List of rulings in Iceland

Judgement (case number)	Court	Other information
Hrd 381/2017	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 484/2013	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 639/2013	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 596/2012	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 177/2012	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 300/2011	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 301/2011	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 310/2011	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 311/2011	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 313/2011	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 314/2011	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 340/2011	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 341/2011	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.

Hrd 266/2010	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 423/2001	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 120/2001	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 218/2000	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 17/2001	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 324/2000	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 69/2000	Supreme Court of Iceland	The judgement of the court of first instance is also found in the link.
Hrd 166/1998	Supreme Court of Iceland	Not available online - pdf attached
Lrd 409/2018	Appeal Court of Iceland	The judgement of the court of first instance is also found in the link.
Héraðsd Rvk E-2942/2014	District Court of Reykjavík	
Héraðsd Suðurl E-359/2013	District Court of South Iceland	
Héraðsd Rvk E-4450/2011	District Court of Reykjavík	
Héraðsd Rvk E-6117/2010	District Court of Reykjavík	
Héraðsd Rvk E-4326/2010	District Court of Reykjavík	
Héraðsd Rvk E-4250/2005	District Court of Reykjavík	

Annexes for Chapter 2: Liechtenstein

Annex II.1 - Summaries of selected rulings concerning state aid in Liechtenstein

SUMMARY OF CASE STGH 2013/196 REGARDING THE RECOVERY OF TAX BENEFITS

Courts	Constitutional court (StGH 2013/196[363]), administrative court (VGH 2013/093[364]), tax commission (LSteK 2011/25[365])
Parties to the action and relationship to the measure	K AG (hereinafter K, beneficiary who was ordered to recover the state aid) / VGH
Sectors in which parties are active	NACE code K 65 - Insurance, reinsurance and pension funding, except compulsory social security
Type of action	Complaint according to Article 15 StGHG[366]
Facts	The case concerns recovery of unlawful state aid from K. Between 6 November 2001 until 31 Dezember 2009 K had benefited from certain tax exemptions and tax reductions for investment companies in Liechtenstein based on (the former) Articles 82a and 88d(3) SteG.[367] The measures concerned business income tax, capital tax and coupon tax on dividends. On 24 March 2010 the EFTA Surveillance Authority (ESA) decided that Articles 82a and 88d(3) SteG were state aid measures incompatible with the EEA Agreement and that the authorities in Liechtenstein should repeal them with effect for the fiscal years 2010 onwards. They should take the necessary measures to recover from the beneficiaries the aid from 6 November 2001 to 31 December 2009.[368] Due to this decision, the tax authority ordered the recovery of the state aid and withdrew the suspensive effect of the complaint on 15 September 2010. K objected immediately. K and others also challenged the ESA decision to the EFTA Court who confirmed ESA's decision

[363] Staatsgerichtshof, StGH 2013/196 K Ltd. v VGH (tax recovery) 27.10.2014.
[364] Verwaltungsgerichtshof, VGH 2013/093 BF AG v Landessteuerkommission des Fürstentums Liechtenstein, LES 2014, 236 08.11.2013.
[365] Landessteuerkommission, LSteK 2011/25 Rückforderung staatlicher Beihilfen.
[366] Gesetz vom 27.11.2003 über den Staatsgerichtshof (StGHG), LGBl. 2004 Nr. 32, LR 173.10 (constitutional court act).
[367] LGBl. 1988 Nr. 36. For the tax act actually in force, see: Gesetz vom 23.9.2010 über die Landes- und Gemeindesteuern (SteG), LGBl. 2010 Nr. 340, LR 640.0 (tax act).
[368] EFTA Surveillance Authority, Decision No 97/10/COL Decision No 97/10/COL of 24 March 2010 regarding the taxation of captive insurance companies under the Liechtenstein Tax Act (Liechtenstein), OJ L 261, 27.9.2012, p. 1-20.

	on 10 May 2011.[369] The tax authority seemed to have waited for the EFTA Court's judgment before upholding the recovery order with its decision of 9 August 2011. Therefore, K logged a complaint with the tax commission (LSteK) on 31 August 2011 that was dismissed with the decision of 27 June 2013. K challenged this decision to the administrative court (VGH) on 31 July 2013. The VGH dismissed the complaint with its judgment of 8 November 2013. On 11 December 2013 K lodged a complaint with the constitutional court (StGH). The latter dismissed the complaint with its judgment of 27 October 2014.
Subject matter of the action to the tax authority	The subject matter was the same as before the LSteK. Please see description below.
Subject matter of the action to the tax commission (LSteK 2011/25)	There were several pleads of the claimant: However, the LSteK did not address the question whether ESA's decision could be executed as it was not final, and it was not addressed to the claimant but to Liechtenstein or the objection of orderly tax assessment and the non-recognition of the suspensive effect of the objection. Nor did it answer the questions whether the recovery order of the tax authority was sufficiently reasoned, whether the behaviour of the tax authority had been contradictory, and whether the procedure had been inappropriate. The LSteK considered them to be unfounded as the legal basis for the recovery order was clearly Article 61 EEA Agreement in conjunction with Article 14(1) Part II of Protocol 3 SCA. In addition, the LSteK cited ESA Decision No 97/10/COL as the source of Liechtenstein's obligation to recover the aid immediately.
Subject matter of the action to the administrative court (VGH 2013/093)	The VGH had to consider whether there was a legal basis for the recovery order and assessed several questions: Regarding the question of direct applicability of Article 61 and Article 61(1) in particular EEA Agreement[370], the VGH did not follow K's argument that the negative ESA decision must have been approved by parliament. It held that in Liechtenstein the monistic theory was relevant concerning the relation between EEA law and national law. According to the legal opinion of the StGH mentioned above, EEA law was directly valid as soon as it becomes effective,

[369] EFTA Court, Joined Cases E-17/10 and E-6/11 Principality of Liechtenstein (Case E-17/10) and VTM Fundmanagement AG (Case E-6/11) / ESA, EFTA Court Report 30.3.2012, 114 et seq.
[370] EFTA States Agreement on the European Economic Area (EEA Agreement), OJ L 1, 3.1.1994, p. 3-522.

	without having to be transformed into the national law. In an individual case it was directly applicable if the provisions were unconditioned and concrete enough to be self-executing. EEA law enjoyed precedence over national laws which meant that in case of a conflict that could not be solved by interpretation in conformity with EU EEA law the national law would be suspended. The VGH used the case law of the Court of Justice of the European Union (CJEU) to interpret Article 61 EEA Agreement, as those provisions are almost identical with the former Article 92 EEC Treaty[371] (now Article 107 TFEU[372]). The VGH cited case C-78/76 of the CJEU according to which Article 92 EEC Treaty as well as the standstill obligation were directly applicable if there had been a negative decision of the Commission of the European Economic Community (EEC, now; the European Union, EU). The VGH held that, as there had been a negative ESA decision considering Articles 82a and 88d(3) SteG to be unlawful state aid in the concrete case, Article 61(1) EEA Agreement enjoyed priority over the national law and the provisions of the SteG[373] were suppressed. The principle of legality had therefore not been violated by the LSteK. Contrary to the LSteK, the VGH found that Article 61 EEA Agreement in conjunction with Article 14 Part II of Protocol 3 SCA could not serve as legal basis for the recovery order because the regulation of the recovery procedure had been left to the EEA EFTA members. However, their competences had been restricted through case law of the CJEU as the prohibition of discrimination and the principle of effectiveness had to be respected. The recovery procedure could therefore not be designed in a way to render the recovery of state aid impossible. Therefore, the VGH found that the recovery of state aid could be based on Article 119 SteG which allowed for the amendment of legally binding tax assessments in accordance with chapter G SteG, even though none of these provisions specified whether an amendment to the disadvantage of a party was possible. Therefore, the decision of the LSteK had not been arbitrary.
Subject matter of the action to the	The StGH had to rule over the question whether the VGH's judgment violated rights guaranteed by the constitution

[371] European Economic Community Treaty establishing the European Economic Community.
[372] European Union Treaty on the Functioning of the European Union (TFEU), OJ C 202, 7.6.2016, p. 1–388.
[373] At the date the tax authority ordered the recovery, Articles 82a and 88d(3) SteG were still in force.

constitutional court (StGH 2013/196)	(LV)[374], especially the principle of legality (Article 92 LV), the principle of equality (Article 31 LV) and the prohibition of arbitrariness because there was no legal basis for the recovery of state aid. The questions raised were similar to the ones of the previous instance. The StGH was of the same opinion as the VGH concerning the direct applicability of Article 61(1) EEA Agreement, that no transposition into the national law was necessary in order to render it directly applicable. The StGH did not object to the fact that the VGH relied on case law of the CJEU to interpret this provision as it was in accordance with Article 61(1) EEA Agreement. Therefore, the StGH did not find that the principle of legality or the prohibition of arbitrariness were infringed by applying Article 61(1) EEA Agreement directly. Regarding K's argument that it was unlawful to base the recovery order of 15 September 2010 on the new SteG because it had entered into force not until 1 January 2011: According to the StGH's opinion, the VGH's assumption that Articles 82a and 88d(3) of the former SteG were legally in force but had materially been suspended through the negative ESA decision, was correct. The ESA Decision was not a treaty and therefore must not be approved by parliament according to Article 8(2) LV, as K brought forward. StGH however agreed with K that ESA's demand of repealing the unlawful provisions of the SteG must be approved by parliament which the latter had done in the meantime. The obligation to amend legal provisions incompatible with the EEA Agreement does not mean that the latter cannot be applied directly. Therefore, it was not arbitrary to apply Article 61 EEA Agreement, even without being concrete enough, in conjunction with ESA's decision instead of the former Articles 82a and 88d(3) SteG nor has this breached principle of legality. The StGH held that it usually does not assess the constitutionality of an ESA decision or an EFTA Court's judgment, as this would be contrary to Article 7 EEA Agreement. This would only be possible if fundamental principles of the constitution, fundamental rights or human rights had been grossly violated. The StGH agreed with K that the current system of state aid control was not conducive to legal certainty. However, the reason for this was that Liechtenstein had omitted to

[374] Verfassung des Fürstentums Liechtenstein vom 5.10.1921 (LV), LGBl. 1921 Nr. 15, LR 101 (constitution of the Principality of Liechtenstein).

	fulfil its notification obligation. In addition, the qualification of the mentioned tax provision as unlawful state aid could allready have been expected when Liechtenstein became a member of the EEA and was not surprising. Latest after ESA's assessment of comparable provisions in Norway K could have known about the unlawfulness of the tax benefits it received. Therefore, K cannot rely on the principle of legitimate expectation. K's claim to have been discriminated, was seen to be clearly unfounded. The StGH concluded that there was a contradiction between EEA law obliging Liechtenstein to recover unlawful state aid effectively and the missing legal basis for recovery in the national law. Therefore, it was not arbitrary to base the recovery order on EEA law, respectively Article 14(3) of Part II of Protocol 3 SCA[375] and thereby guarantee the EEA law's priority over the national law. However, the StGH left the question explicitly open whether the legal basis for the recovery of the unlawful state aid in the concrete case was Article 119 SteG or whether Article 14(3) Part II of Protocol 3 SCA could be directly applied.
Conclusion or measures adopted by the national court	The complaint was dismissed. Conclusion of the court: Article 61 EEA Agreement is directly applicable in conjunction with a negative ESA decision in case that a national provision allowing for state aid is unlawful. The StGH refused to explicitly answer the question whether the legal basis for the recovery of the unlawful state aid in the concrete case was Article 119 SteG or whether Article 14(3) Part II of Protocol 3 SCA could be directly applied.
Whether ruling is/was challenged	No
Difficulties in enforcing state aid rules	-
Date of ruling and timeline from the lodging of the application to the adoption of the ruling	The negative ESA Decision No 97/10/COL of 24 March 2010 was confirmed by EFTA Court confirmed on 10 May 2011 (joined cases E-17/10 and E-6/11). K objected against the tax authority's recovery order of 15 September 2010 that was upheld with the decision of 9 August 2011. On 31 August 2011 K logged a complaint with the tax commission who dismissed the complaint on 27 June 2013.

[375] Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (SCA), OJ L 344, 31.12.1994, p. 1-8.

	On 31 July 2013 K appealed to the VGH, who dismissed the appeal on 8 November 2013. K lodged a complaint with the StGH on 11 December 2013. The latter dismissed the complaint on 27 October 2014.

SUMMARY OF CASE VGH 2008/8 REGARDING THE RECOVERY OF MEDIA SUPPORT

Court	Administrative court
Published	VGH 2008/08 (not published)
Procedure	Media commission (25 September 2007) Government of the Principality of Liechtenstein (RA 2008/197-3831)
Parties to the action and relationship to the measure	X AG (beneficiary) / Media commission
Sectors in which parties are active (NACE code)	J 58.13 - Publishing of newspapers
Type of action	Judgment based on administrative action (Article 2(3) LVG)
Facts	Based on MedienG[376] and the MFG[377], the X AG applied for direct and indirect support for media products (A, B, C, D, E and F) in the amount of CHF 1 463 167. In its decision of 25 September 2007, the Media Commission awarded the complainant the direct media support for the A, B, E and F in the amount of CHF 479 928 and the indirect media support for the distribution of media products A, B, E and F amounting to CHF 242 093 as well as the indirect media support for the training and further education of media employees in the amount of CHF 28,932. The X AG applications for media products C and D, on the other hand, were rejected as not eligible for supporting. X AG filed a complaint against the reduction of the support for media products E and F from 30% to 10% and the complete rejection of support for media products D and C. By decision of 29-30 January 2008, RA 2008/197-3831, the Government rejected the complainant's complaint of 10-12 October 2007 and at the same time amended the

[376] Mediengesetz vom 19.10.2005 (MedienG), LGBl. 2005 Nr. 250, LR 449.1 (media act).
[377] Medienförderungsgesetz (MFG) vom 21.9.2006, LGBl. 2006 Nr. 223, LR 440.1 (media support act).

	contested decision of the Media Commission of 25 September 2007 to the effect that the direct media support of CHF 479 928 by CHF 2 248 to CHF 477 680 and the indirect media support for distribution was reduced by CHF 5 000 from CHF 242 093 to CHF 237 093 (i.e. the media support for the media product F was completely rejected) and at the same time the complainant was obliged to repay this already granted media support totalling CHF 7 248. X AG filed a complaint against the decision of the government. In its decision of 29 May 2008, the court dismissed the complaint of X AG. The Court decided that the appeal by X AG of 11 February 2008 against the decision of the Government of the Principality of Liechtenstein of 29-30 January 2008, RA 2008/197-3831, is dismissed and the contested decision of the Government is amended in paragraphs 1 and 2 as follows. First, the decision of the Media Commission of 25 September 2007 is amended by reducing the already awarded direct media support from CHF 479 928 to CHF 469 944 and the awarded indirect media support for distribution from CHF 242 093 to CHF 229 921. Otherwise, X AG will be forced to repay its already received media support of CHF 22 156 to the treasury, 9490 Vaduz, within 14 days.
Subject matter of the action in the legal procedure before the government	The decision of the media commission states that direct media support for A and B is given at the highest rate of 30%, and for E and F is reduced to the rate of 10% due to the small proportion of political issues and events in relation to Liechtenstein. The complainant's applications for the media products D and C were rejected as ineligible. The reason given by the Media Commission was that the standardised wage costs pursuant to article 6(2) MFG would result from the sum of the employment percentages of the media employees. In the case of media products A and B, the highest possible support rate of 30% had been applied within the meaning of Article 6(1) MFG. In the case of E, due to the low share of political topics and events in Liechtenstein, this highest possible support rate was reduced to 10%. The reason for this was that the analysis of the specimen copies showed that they could not sufficiently prove their contribution to the formation of opinion in Liechtenstein as it was required by the applicable law.
Subject matter of the action in the legal	The government upheld the decision of the media commission, rejected the complaint and amended the contested decision of the media commission to the effect that the direct media support was slightly reduced. In

procedure before the government	addition to the reasons already mentioned, the media support for media product F was completely rejected because a medium is only eligible if at least one full-time employee is responsible for its content under Article 4(1)(e) MFG. The specific aspect regarding the government's decision was that the prohibition of disadvantageous treatment (*reformatio in peius*) does not apply in Liechtenstein administrative complaint procedural law. It was therefore possible, for the government to completely reject the media support for media product F because no full-time employee was responsible for its content as required by the law.
Subject matter of the action in the administrative court (VGH)	The court refers to the statements made in the contested government decision regarding the reduction of the media support of media products D and C as being ineligible and the complete rejection of the media support for media product F. Furthermore, the court states that regarding media product E, the protection of vested rights (*reformatio in peius*) also does not apply in Liechtenstein's administrative complaint proceedings. The court therefore stated that the media product E had to be examined in relation to medium C. In the case of medium C an amount of 12.2% does not represent the "significant number of Liechtenstein-related events and political issues" under Article 4(1)(a) MFG. Therefore, this applies even more to the medium E with an amount of only 6.15%. Consequently, media support for the media product E was completely rejected.
Conclusion or measures adopted by the national court	The complaint was dismissed, and the contested government decision was amended *ex officio* in paragraphs 1 and 2. The complainant was ordered to repay the media support already received in the amount of CHF 22 156 based on national law and procedures. The case raised no questions under EEA (state aid) law.
Whether ruling is/was challenged	No
Difficulties in enforcing state aid rules	No
Date of ruling and timeline from the lodging of the application to the adoption of the ruling	The X AG lodged a complaint against the decision of the media commission on 10/12 October 2007. The government made its decision on 29/30 January 2008 (RA 200/197-3831). On 11/12 February, X AG lodged a complaint with the VGH. The ruling of the VGH was delivered on 29 May 2008.

Annex II.2 – List of rulings in Liechtenstein

Names of parties (if available)	Judgement (date)	Judgment (number)	Court
		-	
K Ltd. v VGH	27/10/2014	StGH 2013/196	Constitutional court
B Stiftung v Landessteuerkommission	13/06/2017	VGH 2017/011	Administrative court
A AG v Regierung des Fürstentums Liechtenstein	19/02/2016	VGH 2015/120	Administrative court
AAG v Regierung des Fürstentums Liechtenstein	19/02/2016	VGH 2015/121	Administrative court
A Stiftung v Steuerverwaltung	10/04/2015	VGH 2015/009	Administrative court
A v Regierung des Fürstentums Liechtenstein	30/01/2015	VGH 2014/106	Administrative court
BF AG v Landessteuerkommission	08/11/2013	VGH 2013/093	Administrative court
Beschwerdeführer v Regierung des Fürstentums Liechtenstein	26/09/2014	VGH 2012/149a (to be published)	Administrative court
X AG v Regierung des Fürstentums Liechtenstein	29/05/2008	VGH 2008/08 (not published)	Administrative court
Beschwerdeführer v Regierung des Fürstentums Liechtenstein	07/02/2008	VGH 2008/001 (not published)	Administrative court
A - Säumnisbeschwerde	25/11/2005	VGH 2005/090	Administrative court
Beschwerdeführer v Regierung des Fürstentums Liechtenstein	16/06/2004	VGH 2004/036 (not published)	Administrative court
Beschwerdeführer - Säumnisbeschwerde	19/05/2004	VGH 2004/014 (not published)	Administrative court

Beschwerdeführer v Regierung des Fürstentums Liechtenstein	14/01/2004	VBI 2003/128 (not published)	Administrative court
Beschwerdeführer - Säumnisbeschwerde	19/11/2003	VBI 2003/101 (not published)	Administrative court
Beschwerdeführer v Regierung des Fürstentums Liechtenstein	04/08/2003	VBI 2003/054 (not published)	Administrative court

Annex II.3 – Questionnaires and Summaries for Liechtenstein

I. Questions to judges, representatives of the administrative units and practitioners

Among the interviewees are representatives of the following institutions:

- Administrative court (Verwaltungsgerichtshof, VGH)
- Constitutional court (Staatsgerichtshof, StGH)
- Appeals commission for administrative matters (Beschwerdekommission für Verwaltungsangelegenheiten)
- National tax commission (Landessteuerkommission, LStK)
- Public administration
- EEA Coordination Unit (EWR Stabsstelle)
- Financial control unit (Finanzkontrolle)
- Municipalities, Lawyers of different law firms specialised in EEA law.

The interviews were conducted as semi-structured interviews, with Different questions to different institutions. Some additional questions have been asked in the follow up to the interviews by email. The different interviews have been translated into English and summarised below in a single questionnaire.

1. **<u>General questions regarding EEA law:</u>**
   a) **How present has EEA law been in your professional life until now?**
   EEA law is present in in the professional life of all the interviewees, although it plays a minor role in the everyday business, with the exception of the representatives of the EEA Coordination Unit.
   b) **If present:**
   - **What areas of EEA law do you (and/or your colleagues) deal with?**
   The areas of EEA law covered by most of the cases were the freedom of movement for persons, competition law, public procurement law, insurance law and asylum law.
   - **If you had any question on EEA law, who would you refer to?**
   The judges interviewed stated that it depends on the question to whom they would turn. They would ask the EFTA Surveillance Authority to give its opinion on a specific legal issue. If the interpretation of the legal issue has not yet been clarified, they would request the EFTA Court to deliver an advisory opinion. They made clear that the judges in Liechtenstein generally do not hesitate to request an advisory opinion of the EFTA Court. In their opinion it is important to make such a request, because then there is a supranational court decision, which is persuasive.
2. **<u>Questions relating to state aid:</u>**
   a) **Have you had any state aid cases in the past?**
   The interviewed judges confirmed that they know only about the cases involving the recovery of State aid concerning the private asset structure (PVS) and media support. In the cases of private asset structures (PVS) the interpretation of Article 64 SteG ('tax act') was based on state aid rules relating to economic activity.

They confirmed that there has not been any other cases concerning state aid in any other sectors, including the telecommunications sector and the energy sector.

None of the practitioners or the representatives of the consulted administrative units interviewed have had a state aid case in which a competitor of a state aid beneficiary submitted a claim.

b) If not: Possible reasons?

The practitioners suggested that competitors may fear that they would no longer receive public contracts if they challenge a state aid decision (of another competitor).

One of the practitioners believes that there would be more information from interested parties concerning potential infringements of the EEA state aid rules to ESA if there was the possibility of doing this anonymously. In this context, reference was made to the compliance system of 'Businesskeeper'.[378] In a small state like Liechtenstein, assumptions as to whom has lodged a complaint could be easily drawn even if the competent body dealing with the matter will not reveal the identity of the complainant. A complaint system that is completely anonymous was also recommended for psychological reasons because it would diminish scruples to give relevant information to the competent authority even if the whistle-blower does not know if this is really a case of unlawful state aid.

Other reasons mentioned regarding the small number of state aid cases in Liechtenstein were the difficulty of knowing that state aid was granted or that it was unlawful and the costs for a lawsuit. Especially the expenses for a lawyer and for establishing the proof for damages due to unlawful state aid were assumed to be high.

- **What difficulties were you confronted with when dealing with state aid?**

  The judges encountered no difficulties. However, some of the other interviewees mentioned that it could be difficult to know whether state aid was unlawful as the competitors do not normally have all the details of the granted benefits. Even though the guidelines on the notion of state aid were extensive they probably would not provide a clear answer to the state aid in question. Moreover, for a layperson, which most of the competitors are, the guidelines would be difficult to understand.

- **Who would you contact if questions arose regarding to the conformity of state benefits with EEA law?**
  - **In which cases would you request the ESA's opinion on questions concerning the application of the state aid rules?**
    See: answer to question 1b)
  - **In which cases would it be another authority, e.g. the EEA Coordination Unit in Liechtenstein?**
    No answers were given to this question.

c) Do you know and use ESA's Guidelines on the notion of State aid?

[378] https://www.business-keeper.com/en/ (accessed: 26.6.2019).

All the interviewees were aware of the existence of the guidelines on the notion, but no one had ever applied them, as no one had had any relevant cases to date.

d) What are the consequences of finding existence of unlawful state aid by a national court in Liechtenstein? E.g. nullity of a contract or an administrative act?

There was no clear answer to this question as it depends on the case and the competences of the deciding authority. One of the practitioners mentioned that Article 106 (3) LVG ('administrative procedure act') provides the VGH with the necessary information how to proceed in the event of the annulment of a public decision.

3. <u>Specific questions depending on the person interviewed:</u>

a) Courts:

- **Do you check the applicability of EEA law beyond the claimant's request?**
  The VGH and the StGH have the competence to check the applicability of EEA law beyond the claimant's request. In practise they will check this if it seems obvious that EEA law could be concerned.
- **When would you refer your questions to the EFTA Court for a preliminary ruling instead of asking the EFTA Surveillance Authority for an opinion**?
  See: answer to question 1b).
- **Do you know and use ESA's <u>Guidelines on enforcement of state aid rules by national courts</u>?**
  The interviewed judges confirmed to know of the guidelines and that they would use them if they would have a relevant case.

b) EEA Coordination Unit of Liechtenstein:

- **Are you invited to comment on draft legislation?**
  The EEA Coordination Unit confirmed that they are usually requested to check whether there is state aid within the meaning of EEA law even before a report and application for a draft legislation is submitted to the parliament. This had been the case, for example, in the media support act and the state guarantee of the Liechtensteinische Landesbank (LLB) or the financial decision of aid to the citizens' co-operative Balzers (CCB) for district heating.
  - **If not: Possible reasons?**
  - **If yes:**
    - **What aspects of the draft do you check/verify?**
      The EEA Coordination Unit will examine whether a new state aid law is compatible with EEA law. They will examine at national level whether it falls under state aid.

- **Are you asked to give your opinion when state benefits are concerned?**
  - If no: Possible reasons?
  - If yes:
    - **Who has asked for your advice (the government / the municipalities / other)**
      A first step is to try to raise awareness that the EEA Coordination Unit should be contacted early enough. The EEA Coordination Unit may advise the government, or the responsible authority, that it is not in compliance with state aid law.

- **Do you check with the EFTA Surveillance Authority whether the state benefits planned are in conformity with EEA law?**
  See answer to question 3b), point 1. Furthermore, the draft law or financial decision will be notified to ESA if necessary. This applies, for example, to the media support act, the provisions on the taxation of private asset structure (PVS) and the state guarantee of the Liechtensteinische Landesbank (LLB) as well as the financial decision of aid to the citizens' co-operative Balzers (CCB) for district heating. The interviewees emphasised that since the tax recovery case (StGH 2013/196) the awareness has risen that tax recovery can be decisive. Therefore, compliance with EEA law of amendments to existing benefit schemes or new state aid provisions seems to be more frequently scrutinised before enter into force.

c) Representative of the financial control unit (Finanzkontrolle):

- **What other (legal) instruments do you have besides reporting when detecting discrepancies with regard to the state aid provisions?**
  The interviewee confirmed that the financial control unit does not have any other legal instruments besides making a report according to Article 16 FinKG when detecting discrepancies regarding the state aid provisions.

d) Municipalities:

- **What measures are taken to protect local companies / the domestic economy?**
  The interviewee mentioned that the municipalities do not have the competence to grant tax relief to legal entities. There is, however, the possibility to support undertakings by transferring land under a building law (or building lease).

e) Practitioners:

- **Have you relied on state aid rules in a case before a Liechtenstein court?**
  None of the interviewed practitioners had relied on state aid rules in a case before a Liechtenstein court.
- **To your knowledge, has a court in a case you were involved in relied on ESA's guidelines on enforcement of state aid rules by national courts?**
  None of the interviewed practitioners had a case regarding state aid and they did not know whether the guidelines on enforcement of state aid rules by national courts were used by the courts in Liechtenstein.
- **Are there any legal obstacles, in your view, for private enforcement of state aid rules by Liechtenstein courts?**
  First, the obstacles identified by the interviewees were the litigation risk and the difficulties to prove the damages due to unlawful state aid. Secondly, it was suggested, that a competitor to a state aid beneficiary might fear not to receive future public contracts from the authority whose state aid decision was challenged. Third, other obstacles mentioned were the difficulty of knowing that state aid was granted or that it was unlawful. Fourthly, there are the costs of a lawsuit. In particular, the expenses for a lawyer and the proof of damage due to unlawful state aid were considered high.
- **Which, if any, changes to the national legal order would facilitate private enforcement of state aid rules by Liechtenstein courts?**
  See: answer to question 2b)
  In addition, one practitioner suggested that the burden of proof for damages caused by unlawful state aid measures should be eased.

- **Are there, in your view, any legal obstacles to the effective enforcement of ESA's recovery decisions stemming from the Liechtenstein legal order?**
  No answers were given to this question.
- **Which, if any, changes to the national legal order would facilitate the enforcement of recovery decisions by ESA, and of 'voluntary recovery'?**[379]
- No answers were given to this question.

[379] Recovery of unlawful aid without there being a final negative decision by ESA – e.g. GBER aid not complying with all conditions of the GBER.

Annex II.4 – Additional Information about the legal system in Liechtenstein

1 LEGISLATIVE PROCEDURE IN LIECHTENSTEIN

The Liechtenstein constitution separates legislative power into two main forces: The reigning prince (*Fürst*) and the people. The legislative process reflects this dualism.[380] Article 64 of the constitution grants the right to initiate constitutional and legislative procedures to the reigning prince in the form of government proposals, to the parliament (*Landtag*) and to Liechtenstein's citizens on their own initiative (citizens' initiative) or through their municipality (municipalities' initiative).[381] In the vast majority of cases, the government initiates legislative procedures.[382]

The procedure is as follows: The competent ministry prepares the draft of a new law. To this end, it may set up a group of experts from the government, the public administration and specific interest groups. If experts are not necessary, the draft law may be circulated for consultation within the public administration. In this context, the EEA Coordination Unit examines whether the draft law is compatible with EEA law while the legal service of the government inspects the compatibility of the draft with the constitution as well as international agreements (in particular the customs union treaty with Switzerland)[383] that Liechtenstein has ratified. In cases where the draft law concerns new state aid schemes or the amendment of existing state aid, the EEA Coordination Unit may also contact ESA for a preliminary examination. If necessary, the draft law will be amended according to the departments' and ESA's statements. For example, the tax provision on PVS[384] the provisions on deductions for income from intellectual property rights (IP-Box)[385] and the media support act (*Medienförderungsgesetz, MFG*)[386] were notified to ESA before they had been approved by parliament.[387] Concerning the PVS a section was added stating that the

[380] *C. Geisselmann*, Direkte Demokratie in der liechtensteinischen Landesverfassung und dem österreichischen Bundes-Verfassungsgesetz, 73 et seq.

[381] Articles 9, 62 and 64 Verfassung des Fürstentums Liechtenstein vom 5.10.1921 (LV), LGBl. 1921 Nr. 15, LR 101 (constitution of the Principality of Liechtenstein); Article 5 Gemeindegesetz (GemG) vom 20.3.1996, LGBl. 1996 Nr. 76, LR 141.0 (municipality act); *P. Bussjäger*, Kommentar zu Art. 65 LV, in: Liechtenstein-Institut (Hrsg.), Online-Kommentar zur liechtensteinischen Verfassung, www.verfassung.li (2016), para 18; *H. Batliner/J. Gasser*, Litigation and arbitration in Liechtenstein[2] (2013), p. 17; *P. Bussjäger*, Kommentar zu Art. 64 LV, in: Liechtenstein-Institut (Hrsg.), Online-Kommentar zur liechtensteinischen Verfassung, www.verfassung.li (2016), para 25 et. seq.

[382] *P. Bussjäger*, para 24.

[383] Zollvertrag Vertrag vom 29.3.1923 zwischen der Schweiz und Liechtenstein über den Anschluss des Fürstentums Liechtenstein an das schweizerische Zollgebiet, LGBl. 1923 Nr. 24, LR 0.631.112 (custom union agreement with Switzerland).

[384] Article 64 SteG Gesetz vom 23.9.2010 über die Landes- und Gemeindesteuern (SteG), LGBl. 2010 Nr. 340, LR 640.0 (tax act).

[385] Article 55 SteG.

[386] Medienförderungsgesetz (MFG) vom 21.9.2006, LGBl. 2006 Nr. 223, LR 440.1 (media support act); EFTA Surveillance Authority Decision No 192/00/COL of 27 September 2000 on the Media Support Act; EFTA Surveillance Authority Decision No 267/06/COL of 20 September 2006 regarding the proposed Liechtenstein Media Support Act. EFTA Surveillance Authority, EFTA Surveillance Authority, Decision No 395/11/COL Decision No 395/11/COL of 14 December 2011 on the prolongation of the aid scheme under the Media Support Act; EFTA Surveillance Authority Decision No 213/17/COL of 14 December 2017 regarding Media Support Act 2018 - 2023.

[387] *Regierung des Fürstentums Liechtenstein*, Bericht und Antrag betreffend die Totalrevision des Medienförderungsgesetzes, BuA Nr. 36/2006, p. 36; *Regierung des Fürstentums Liechtenstein*, Bericht und Antrag betreffend die Abänderung des Steuergesetzes, BuA Nr. 91/2016, p. 11.

provision regarding PVS entered into force under the condition of ESA's approval.[388] All the mentioned provisions have been approved by ESA.[389]

When the government has reached an agreement on the draft law, the draft is published on the website of the government chancellery (*Regierungskanzlei*).[390] Every interested party can comment on the draft. In addition, the municipalities and interested groups (e.g. organisations representing the interests of the affected) are specially invited to participate in the public consultation.

After the expiration of the consultation period, the competent ministry summarises the comments of the public consultation and revises the draft law if necessary. The government then adopts the modified draft and presents it to parliament in a report that also includes explanatory notes. In the parliamentary sessions, an introductory debate on the preliminary acceptance of the draft is held, followed by two readings (on different dates) and a final vote on the bill. Between the two readings, the government may present an additional report to the parliament addressing the questions raised by members of parliament in the first reading. In the second reading, the parliament approves every article of the new law by separate vote before the entire law is subject to a final vote.[391]

For a parliamentary decision to be valid, two-thirds of its members must be present.[392] While a normal law is adopted by simple majority, an amendment of the constitution requires unanimity in one session or a majority of three quarters at two consecutive meetings of parliament.[393] The parliament can decide that the new law will be subject to a popular vote (referendum). A popular vote can also be requested within 30 days by at least 1 000 Liechtenstein citizens eligible to vote (citizens' referendum) or at least three municipalities (municipalities' referendum). The exceptions to this is when the parliament declares the draft law to be urgent.[394] When the constitution is to be amended, the request for a referendum must be signed by at least 1 500 Liechtenstein citizens or four municipalities.[395]

According to Article 65 of the constitution, any law must be sanctioned by the reigning prince, countersigned by the responsible prime minister or deputy prime minister, and promulgated in the Liechtenstein legal gazette (*Landesgesetzblatt*) to attain legal force. If the reigning prince 'does not grant his sanction within six months, it shall be deemed to have been refused.'[396] A new law becomes effective on the date mentioned

[388] E.g.: Article 160(3) SteG; *Regierung des Fürstentums Liechtenstein*, Bericht und Antrag betreffend die Abänderung des Steuergesetzes (Art. 18 Abs. 6, Art. 158 Abs. 6 bis 8), BuA Nr. 12/2011, p. 5.
[389] EFTA Surveillance Authority Decision No 44/11/COL of 15 February 2011 on Private Investment Structures; EFTA Surveillance Authority Decision No 177/11/COL of 1 June 2011 on tax deductions in respect of intellectual property rights; EFTA Surveillance Authority Decision No 480/12/COL of 12 December 2012 on Article 55 of the Liechtenstein tax act.
[390] Article 64(3) LV; Article 30 Geschäftsordnung für den Landtag des Fürstentums Liechtenstein vom 19.12.2012 (GOLT), LGBl. 2013 Nr. 9, LR 171.101.1 (procedural rules of the Parliament); *P. Bussjäger/C. Frommelt*, Europäische Regulierung und nationale Souveränität. Praxisfragen zur Übernahme europäischen Rechts ausserhalb der EU, LJZ 2017, S. 40 ff., 40–41 f.; https://www.llv.li/inhalt/11494/amtsstellen/laufende-vernehmlassungen (accessed: 4.6.2019).
[391] Article 34 GOLT.
[392] Article 58(1) LV.
[393] Article 112(2) LV.
[394] Article 66 LV.
[395] Article 66(2) LV.
[396] Article 65(1) LV.

in the act itself or eight days after its publication.[397] If the new law implements an EU directive that has been incorporated into the EEA Agreement it must be notified to the EFTA Surveillance Authority. In that case, the law will enter into force after the ESA's approval.[398]

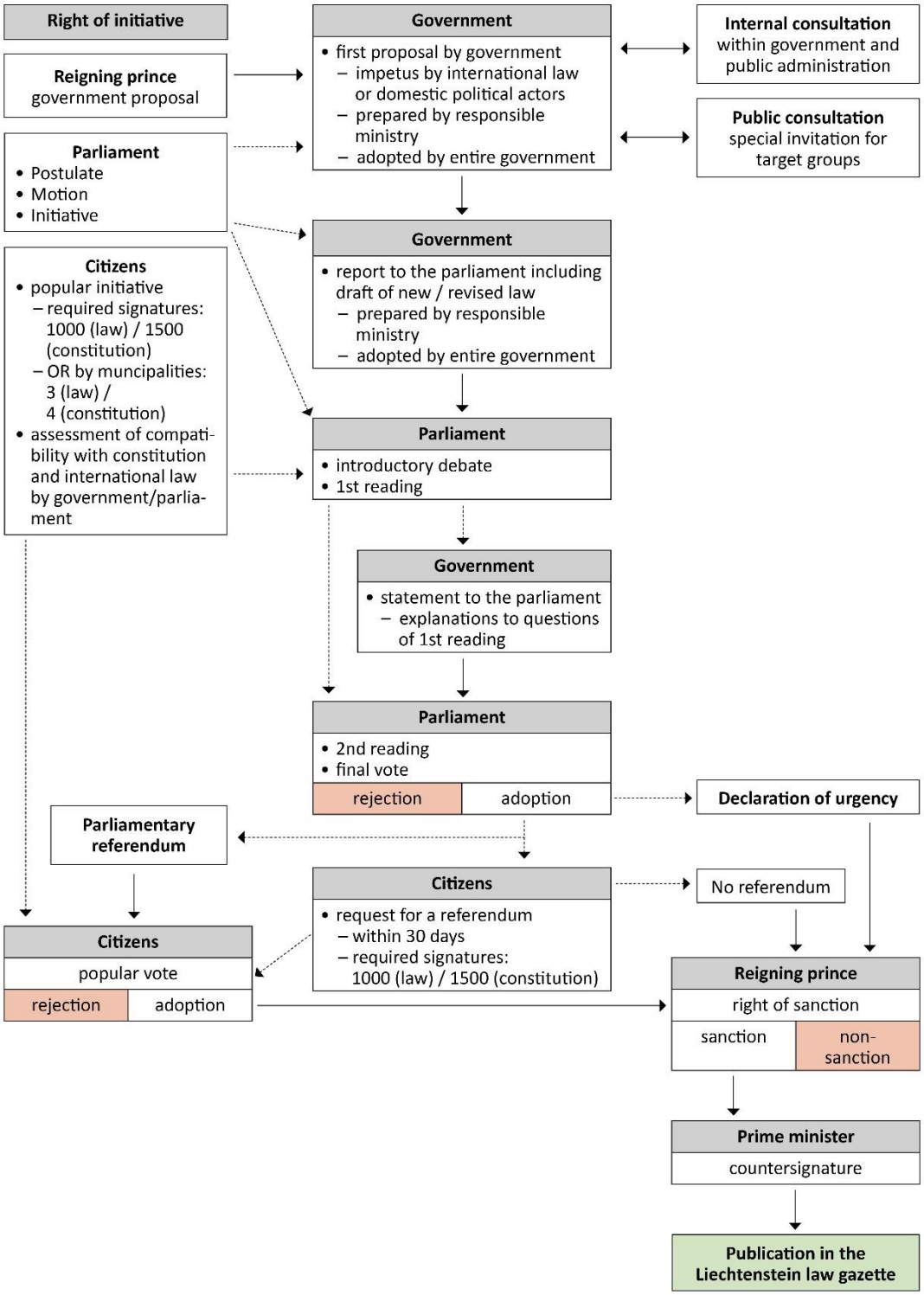
The parliament can begin a legislative process through an initiative, a motion or a postulate. The difference between these parliamentary instruments is their degree of elaboration. By an initiative, members of parliament propose the enactment of a new law or the amendment or repeal of an existing law in the form of a bill. In contrast, through a motion, the parliament instructs the government to draft a new law. The motion only suggests the direction and reasoning for a bill, whilst the government can formulate its own proposal. A postulate invites the government to examine the need for enacting, amending or repealing a law.[399]

Liechtenstein's citizens and its municipalities also have the right to trigger a legislative procedure through an initiative.[400] For a citizens' initiative concerning a new law or the amendment or repeal of an existing law, a written request that has been signed by at least 1 000 voters must be submitted. For a municipalities' initiative, at least three municipal assemblies must have approved such a request. An amendment to the constitution is possible if at least 1500 voters or four municipalities have requested it.[401] It should be noted that the government will examine the validity of the initiative and present its findings to the parliament before the collection of signatures begins.[402] In the case of doubt regarding compatibility with EEA law, the government will invite the EEA Coordination Unit to give its comments. It is therefore highly unlikely that a popular vote will take place on an initiative that is incompatible with EEA law.

An empirical study shows that more than 40% of the laws debated and approved by the parliament are related to Liechtenstein's EEA membership.[403] There are usually two main ways in which EEA membership can trigger a new law in Liechtenstein. First, a new or revised EU directive that has been incorporated into the EEA Agreement must be transposed into national law. Second, an existing law has to be adjusted to become compatible with EEA law. In both cases, the government will initiate the steps necessary to enact or amend the respective law. Reference to EEA law will be made either in the new law or in the report that the government presents to parliament.

[397] Article 67(1) LV.
[398] See for example: Article 160(3) SteG.
[399] *Landtag des Fürstentums Liechtenstein*, Instruments of the Members, https://www.landtag.li/instruments-of-the-members.
[400] Article 64(1) LV.
[401] Article 64(2) and (4) LV.
[402] Article 9a and Article 10 Gesetz vom 12.3.2003 über den Geschäftsverkehr des Landtages mit der Regierung und die Kontrolle der Staatsverwaltung (Geschäftsverkehrs- und Verwaltungskontrollgesetz; GVVKG), LGBl. 2003 Nr. 108, LR 172.012 (law on the course of business between the parliament and the government and the control of the administration).
[403] *C. Frommelt/S. Gstöhl*, Liechtenstein and the EEA (2011), 21 et seq.; *C. Frommelt*, Europäisierung der liechtensteinischen Rechtsordnung, Arbeitspapiere Liechtenstein-Institut Nr. 28, (3.2011), p. 27.

Liechtenstein's legislative procedure



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2 FINANCIAL RESOLUTIONS

2.1 Legal basis in national law for granting benefits

Article 20 of the constitution provides that the state shall enhance business and industry in order to increase employability and foster its economic interest. According to Article 24 of the constitution, the state shall provide for equitable taxation that exempts a minimum subsistence level and draws more heavily on high assets and income through the enactment of legislation.[404] State levies or benefits must be approved by the parliament.[405]

Every year the parliament passes a budget act.[406] Among others, it includes the annual expenses for benefits, such as the support of private organisations or cooperatives (e.g. kindergartens, family support and others), regardless of whether the benefits qualify as state aid or not. With the exception of public undertakings and financial aid to the agriculture sector, most of Liechtenstein's aid schemes favour individuals (e.g. support of childcare, of families and persons in need). In a 1992 report,[407] Liechtenstein's government stated that the basic philosophy for the promotion of the economy was to guarantee favourable conditions for the economy and promote human capital through measures in various fields. Therefore, the promotion measures regarding undertakings occur in particular through low taxation in comparison to international standards.[408] This philosophy does not seem to have changed.[409] However, the granting of benefits to undertakings could be possible according to certain provisions. These are, for example:

- The subvention act (*Subventionsgesetz*)[410] and the subvention ordinance (*Subventionsverordnung*)[411] of 1991 which contains general provisions for earmarked assistance
- The act on financing economic development measures (*Gesetz über die Finanzierung von Massnahmen zur Wirtschaftsförderung*)[412]
- The media support act of 2006 (*Medienförderungsgesetz, MFG*) as well as its 2016 ordinance (*Medienförderungsverordnung, MFV*)[413]

Liechtenstein's tax act (*Steuergesetz, SteG*) used to have special company taxes for holding, domiciliary and captive insurance companies that were incompatible with

[404] Article 24(1) LV.
[405] Article 68(1) LV.
[406] Finanzgesetz vom 8.11.2018 für das Jahr 2019, LGBl. 2018 Nr. 265, LR 612.0 (budget act for the year 2019).
[407] *Regierung des Fürstentums Liechtenstein*, Bericht und Antrag zum Postulat bezüglich einer Überprüfung des Gesetzes vom 26.09.1979 betreffend die Bildung eines Wirtschaftsförderungsfonds, BuA Nr. 97/1992.
[408] *Regierung des Fürstentums Liechtenstein*, p. 4.
[409] *Regierung des Fürstentums Liechtenstein*, Standortstrategie Fürstentum Liechtenstein (November 2014), p. 16; *Regierung des Fürstentums Liechtenstein*, Standortstrategie 2.0 (May 2016), p. 62.
[410] Gesetz vom 3.7.1991 über die Ausrichtung von Landessubventionen (Subventionsgesetz), LGBl. 1991 Nr. 71, LR 617.0 (subvention act).
[411] Verordnung vom 17.12.1991 zum Gesetz über die Ausrichtung von Landessubventionen (Subventionsverordnung), LGBl. 1992 Nr. 8, LR 617.01 (subvention ordinance).
[412] Gesetz vom 18.12.1997 über die Finanzierung von Massnahmen zur Wirtschaftsförderung, LGBl. 1998 Nr. 33, LR 903.1 (Act on financing economic development measures).
[413] Medienförderungsverordnung (MFV) vom 22.3.2016, LGBl. 2016 Nr. 100, LR 440.11 (media support ordinance).

Article 61 EEA Agreement.[414] These tax provisions have since been changed. The tax benefit for private asset structures (*PVS*) is only possible for entities that do not qualify as undertaking within the meaning of Article 61 EEA Agreement.[415]

2.2 The procedure in the parliament

The procedure concerning the making of a financial resolution by the parliament is similar to the legislative procedure (see: chapter 1 above), except that there is no popular consultation (*Vernehmlassung*) and there is only one reading. Members of parliament will discuss every article separately in the first reading. The vote will be on the entire resolution.[416]

Every financial resolution that is not declared urgent by parliament and that results in a new non-recurring expenditure of at least CHF 500 000 or a new annually recurrent expenditure of CHF 250 000 is subject to a popular vote if the parliament decides so or if at least 1 000 citizens or three municipalities request it (*referendum*). The submission must be made within 30 days of the official announcement of the resolution.[417]

Every supplementary credit that exceeds the expenditure amount defined in the budget act needs to be approved by parliament.[418] A financial resolution of the parliament cannot be challenged before a court. Only the parliament can come back on or amend its decision, if for example requested by a parliamentary motion.[419]

The government and its departments have the competence to decide on expenditures up to CHF 250 000 or annually recurring new expenditure up to CHF 100 000[420] that fall within the estimated expenditures approved by the parliament in the budget act. The expenses surpassing this amount must be authorised by parliament.

Financial resolution will usually also be scrutinised taking into account their compatibility with EEA law. If necessary they will be notified to ESA.[421]

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[414] *C. Baudenbacher*, Zur EWR- Verträglichkeit der Besonderen Gesellschaftssteuern für Holdinggesellschaften und Sitzunternehmen im Fürstentum Liechtenstein (9. June 1992), 107 et seq.; *C. Baudenbacher*, Das Fürstentum Liechtenstein vor der EWR-Abstimmung über den Beitritt zum Europäischen Wirtschaftsraum (1995), 107 et seq.; opposing opinion: *W. Kleinmann*, Stellungnahme zum Gutachten von Prof. Dr. Carl Baudenbacher 'Zur EWR-Verträglichkeit der Besonderen Gesellschaftssteuer für Holdinggesellschaften und Sitzunternehmen im Fürstentum Liechtenstein' vom 9.6.1992, 6 et seq.; EFTA Surveillance Authority, Decision No 97/10/COL of 24 March 2010 regarding the taxation of captive insurance companies under the Liechtenstein Tax Act (Liechtenstein), OJ L 261, 27.9.2012, p. 1-20; EFTA Court, joined Cases E-4/10, E-6/10 and E-7/10 Liechtenstein, Reassur AG and Swisscom RE AG, [2011] EFTA Ct. Rep. 16.

[415] Article 64 SteG; see also: Article 160(3) SteG; Verwaltungsgerichtshof, VGH 2015/009 PVS, p. 10, para 3.3; Verwaltungsgerichtshof, VGH 2017/011 PVS-Status, p. 6 et seq., para 1.

[416] Article 34a GOLT.

[417] Article 66(1) in conjunction with Article 64 LV.

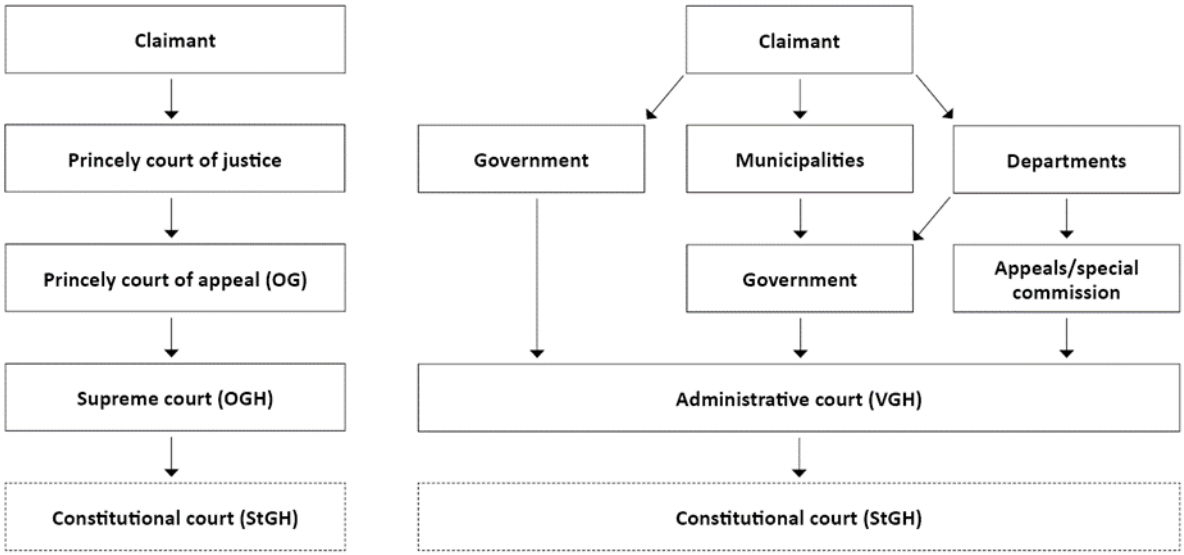
[418] Article 10 FHG Gesetz vom 20.10.2010 über den Finanzhaushalt des Staates (Finanzhaushaltsgesetz; FHG), LGBl. 2010 Nr. 373, LR 611.0 (finance budget act).

[419] Article 42(1) (a) GOLT.

[420] Article 30(1) (a) FHG.

[421] See for example: Finanzbeschluss vom 4.9.2013 über die Ausrichtung von Beiträgen an die Bürgergenossenschaft Balzers für die Reduktion von staatlichen Aufwendungen im Zusammenhang mit dem Betrieb eines Holzheizwerkes, LGBl. 2013 Nr. 325, LR 612.731 (Financial Decision on contributions to the citizens' cooperative Balzers for the reduction of state expenditure in connection with the operation of a wood-fired heating plant); EFTA Surveillance Authority, Decision No 171/14/COL of 24 April 2014 on aid to the citizens' co-operative Balzers ("CCB") for district heating in Balzers.

3 STAGES OF APPEAL IN CIVIL LAW AND ADMINISTRATIVE MATTERS



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3.1 General remarks

Being a microstate characterised by a resident population of about 38 000 inhabitants and a territory of 160 km^2,[422] Liechtenstein only has one judicial district, and all the courts of Liechtenstein have their seat in the capital, Vaduz. [423] In administrative and civil law matters there are usually two stages of appeal after the decision of the first instance.[424]

An administrative proceeding usually starts with a decision of a ministry, a special public body (such as the media commission, *Medienkommission*) or the municipal council, against which the addressee can raise objections. If the decision is upheld, the addressee will have to file a complaint to the appeals commission (*VBK*), a special commission[425] (such as the national tax commission, *Landessteuerkommission, LStK*)

[422] *P. M. Schiess Rütimann/P. Bussjäger/S. Wolf*, Law, small state theory and the case of Liechtenstein, Small States & Territories 2018, S. 183 ff., 185; *C. Frommelt*, Liechtenstein and the EEA, in: Arnesen/Fredriksen/Graver/Mestad/Vedder (Hrsg.), Agreement on the European Economic Area (2018), 35, 35, para 1; *Amt für Statistik des Fürstentums Liechtenstein*, Liechtenstein in Zahlen 2019, https://www.llv.li/files/as/liechtenstein_in_zahlen_2019.pdf.

[423] Article 1(4) Gesetz vom 27.11.2003 über den Staatsgerichtshof (StGHG), LGBl. 2004 Nr. 32, LR 173.10 (constitutional court act); Article 1(2) Gesetz vom 24.10.2007 über die Organisation der ordentlichen Gerichte (Gerichtsorganisationsgesetz; GOG), LGBl. 2007 Nr. 348, LR 173.30 (court organisation act); *Fürstliche Gerichte*, Über die Gerichte, http://www.gerichte.li/ueber-die-gerichte; *W. Ungerank*, Liechtenstein Courts, in: Baudenbacher (Hrsg.), The Handbook of EEA Law (2016), 293, 294.

[424] Article 1 GOG; Articles 1(1) and 2(3) LVG Gesetz vom 21.04.1922 über die allgemeine Landesverwaltungspflege (LVG), LGBl. 1922 Nr. 24, LR 172.020 (code of administrative procedure); Article 120(5); *E. Schädler*, Tafeln zum Landesverwaltungspflegegesetz (LVG), https://liechtenstein-institut.li/contortionist/0/contortionistUniverses/397/rsc/Publikation_downloadLink/Sch%C3%A4dler_Emanuel_Tafeln_zum_LVG.pdf, table 1; *W. Ungerank*, p. 294.

[425] Article 78(3) LV; see: http://www.staatskalender.li/beschwerdekommissionen (accessed: 30.5.2019).

or the government, depending on the subject matter of the case.[426] A complaint against the municipal council's ruling must be addressed to the government.[427] Against the decision of these institutions, a complaint can be lodged with the administrative court (*Verwaltungsgerichtshof, VGH*).[428] The time limit for a complaint to the VGH is 14 days.[429] It has a suspensive effect (*aufschiebende Wirkung*), therefore the judgment cannot be enforced directly.[430] Regarding the requirements for the statement of claim, the competitor or third party must submit a brief and complete statement of the facts and the evidence for the claim to be substantiated.[431] In administrative law procedures, however, the judges can amend or annul the contested decision to the advantage or disadvantage of the complainant, even without the request of a party.[432] The VGH can amend or annul a state aid decision.[433]

In civil law proceedings the court of first instance is the princely court of justice (*Fürstliches Landgericht, LG*)[434]. An appeal against the LG's judgment can be addressed to the princely court of appeal (*Fürstliches Obergericht, OG*) within four weeks.[435] An OG judgment can be challenged to the supreme court (*Fürstlicher Oberster Gerichtshof, OGH*) within four weeks.[436] An appeal against a judgment of the LG and the OG has suspensive effect.[437] The requirements for the statement of claim are laid down in sections 437 and 475 ZPO. The civil courts will not award a party something that has not been applied for (principle of application, *Antragsprinzip*).[438] The LG, OG and OGH can declare a contract on which unlawful state aid is based to be void.[439] They are also competent to decide on damage claims.

3.2 Complaints by the constitutional court

In a case where human rights, EEA law or rights guaranteed by the constitution have been violated, the judgment of the VGH or the OGH can be challenged to the constitutional court (StGH).[440] The time prescription for an appeal with the StGH is 4

[426] Article 81 SteG; Article 35(1) Gesetz vom 18.6.2004 über die Finanzmarktaufsicht (Finanzmarktaufsichtsgesetz; FMAG), LGBl. 2004 Nr. 175, LR 952.3 (law on financial market surveillance); Articles 4 and 5 Beschwerdekommissionsgesetz vom 25.10.2000, LGBl. 2000 Nr. 248, LR 172.022 (Appeals Commission act).
[427] Article 120(2) GemG.
[428] https://www.vgh.li/ (28.5.2019); the VGH was called 'Verwaltungsbeschwerdeinstanz (VBI)' until 2003.
[429] Article 91 LVG; Article 5.
[430] Article 100 LVG.
[431] Article 2(3a) LVG; Article 40 StGHG; Sections 74-86 ZPO Gesetz vom 10.12.1912 über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung, ZPO), LGBl. 1912 Nr. 9/1, LR 271.0 (code of civil procedure).
[432] Article 102(1) LVG.
[433] Articles 102 and 106 LVG; Article 5 Beschwerdekommissionsgesetz.
[434] Article 5 GOG; *Landtag des Fürstentums Liechtenstein*, Protokoll vom 3.5.2018, p. 931; *W. Ungerank*, p. 294.
[435] Sections 431-439 (Berufung); *W. Ungerank*, p. 295.
[436] Sections 471 et seq. (Revision) ZPO.
[437] Sections 436 and 474(3) ZPO.
[438] Sections 405 and 473(1) ZPO.
[439] Section 390 ZPO; Section 879 ABGB Allgemeines bürgerliches Gesetzbuch vom 1.6.1811 (ABGB), LR 210.0 (general civil code).
[440] Article 104(1) LV; Article 15 in conjunction with Article 1(2) StGHG; *T. M. Wille*, Verfassungs- und Grundrechtsauslegung in der Rechtsprechung des Staatsgerichtshofes, in: Liechtenstein-Institut (Hrsg.), Beiträge zum liechtensteinischen Recht aus nationaler und internationaler Perspektive (2014), 131, 131, 136 et seq.

weeks after receiving the judgment of the previous instance.[441] The StGH can examine whether a national provision violates the constitution upon request of the government, the municipalities or a court and *ex officio* if it concerns an individual complaint challenging the decision of a previous instance.[442] However, a competitor or third party to a state aid beneficiary cannot challenge a legal provision by directly appealing to the StGH. They will have to take the ordinary route through the stages of appeal, starting with a complaint addressed to the first instance if they ask for the same benefit and do not get it. Already at this stage, the complainant can assert the unconstitutionality of a provision. The court should then request an opinion of the StGH.[443] The latter can annul a state aid decision and, if appropriate, order the previous instance to decide again on the merits.[444] It can do the same regarding a national law, an ordinance or its provisions allowing for state aid if it considers them to be contrary to the EEA Agreement and therefore unconstitutional, as EEA law is considered to amend or complement the constitution.[445]

3.3 Rights based on UWG

Article 2 UWG defines unfair and therefore unlawful acts as, among others, conduct or business practice that is contrary to the principle of good faith and that affects the relationship between competitors or suppliers and customers.[446] According to Article 9 of this act, anyone who is inter alia either threatened or injured in their business operations, or otherwise in their economic interests, may request the court to prohibit an impending infringement, to remedy an existing infringement or to establish the unlawfulness of an infringement if it continues to have a disruptive effect.[447] These rights of defence exist regardless of fault or damage.[448]

Article 9 UWG states that anyone who is threatened or injured by unfair competition can, among others, claim damages, gratification and the account of profits from the suspected unfair competitor based on the provisions of the ABGB.[449] A claim under the UWG over other claims has the advantage that the burden of proof is reversed.[450] In a complaint to the StGH in 2012, the claimant argued in vain that the OGH had not taken the evidence and assessed its liability claim on the basis of the UWG as requested. The OGH had therefore breached its right to be heard, argued the claimant.[451]

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[441] Article 15(4) StGHG.
[442] Article 104(2) LV; Articles 18, 19 and 22 StGHG.
[443] Articles 18(1)(b), 20(1)(a) and 22(1)(a) StGHG; Staatsgerichtshof, StGH 2017/129 Normenkontrollantrag VGH, p. 22 et seq., para 7.
[444] Article 17(1) StGHG.
[445] Articles 19 et seq. StGHG; Staatsgerichtshof, StGH 2017/129 Normenkontrollantrag VGH p. 22 et seq., para 7 Staatsgerichtshof, StGH 2011/200 A v K Treuhand AG (vormalige L Treuhand AG) 7.2.2012 ;Staatsgerichtshof, StGH 2005/13 Nichtbewilligung von Verfahrenshilfe p. 20 et seq., para 3.3.2; StGHG.
[446] Article 2(1)(a) UWGGesetz vom 22.10.1992 gegen den unlauteren Wettbewerb (UWG), LGBl. 1992 Nr. 121, LR 240 (act against unfair competition).
[447] Article 9(1) UWG.
[448] *T. Domej*, Kommentar zu Art. 9 UWG, in: Heizmann/Loacker (Hrsg.), Bundesgesetz gegen den unlauteren Wettbewerb (UWG) (2017), para 8.
[449] Article 9(3) UWG.
[450] Article 14 UWG.
[451] Staatsgerichtshof, StGH 2012/181 Amtshaftungsklage wegen staatlichem Monitoringverfahren - Investmentunternehmen 30.9.2013.

Liechtenstein's UWG is primarily based on the Swiss law on unfair competition[452] and the Unfair Commercial Practices Directive (2005/29/EC).[453] According to Swiss case law, public bodies can claim the same protection under competition law as private undertakings for their economic interests involved if they act in the private sector.[454] If a public body can lodge a complaint based on the Swiss UWG, a competitor or third party should have the same right against the former. As Article 9 Liechtenstein's UWG is almost identical to Article 9 of the Swiss UWG, it could be that Liechtenstein's civil courts follow Swiss jurisprudence.

3.4 Interim injunctions

In administrative and civil proceedings, the competitor or third party can apply for interim injunctions (*Rechtssicherung*) with the LG based on the execution act (*EO*[455]).[456] Pursuant to Article 270 EO, interim injunctions can be taken upon request both before the commencement of a legal dispute and during the same, as well as during the execution proceedings in order to safeguard the rights of a party. Interim injunctions can secure pecuniary claims (*Sicherungsbot*) or other claims (*Amtsbefehl*).[457] Preventive measures can be taken to avert any damage which, depending on the situation, threatens to occur until the final decision on a claim has been taken.[458]

The requirements for issuing an interim injunction must be made credible. The application should be accompanied by the necessary evidence, if possible in documentary form. Only if this is not possible must the alleged facts be substantiated in another way at the request of the court. The purpose of this simplified procedure is to enable interim measures to be issued for the duration of the proceedings based on prima facie evidence, without further extensive inquiries.[459]

In the case of alleged unfair competition, interim injunctions can be requested to preserve evidence or to provisionally enforce the claims under Article 9 UWG.[460] The competitor or third party will have to substantiate the request with a brief and complete

[452] UWG Bundesgesetz gegen den unlauteren Wettbewerb vom 19.12.1986 (UWG-CH), SR 241 (Swiss federal law against unfair competition), in its version of 1992.
[453] European Parliament and Council Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22–39, EEA Supplement No 52, 19.10.2006, p. 27; *Regierung des Fürstentums Liechtenstein*, Bericht und Antrag betreffend die Abänderung des Gesetzes gegen den unlauteren Wettbewerb, BuA Nr. 55/2008; *Regierung des Fürstentums Liechtenstein*, Stellungnahme zu den anlässlich der ersten Lesung betreffend die Abänderung des Gesetzes gegen den unlauteren Wettbewerb aufgeworfenen Fragen, BuA Nr. 93/2008.
[454] Schweizerisches Bundesgericht, BGE 123 III 395 Betriebsaktiengesellschaft Vereinsdruckerei Bern v Einwohnergemeinde der Stadt Bern, para 2(a); *T. Domej*, para 6.
[455] Gesetz vom 24.11.1971 über das Exekutions- und Rechtssicherungsverfahren (Exekutionsordnung; EO), LGBl. 1972 Nr. 32/2, LR 281.0 (execution act).
[456] Article 270 et seq. EO; Articles 120, 124(2) and 125 et seq. LVG; *G. Batliner*, Sicherungsgebot und Amtsbefehl (die einstweilige Verfügung) nach liechtensteinischem Recht (1957), 71 et seq.
[457] Oberster Gerichtshof, OGH 02 C 271/82-14 (= LES 1984, 36), A v Obergericht 28.10.1982; *G. Batliner*, 15 et seq.
[458] Article 276(1)(a) EO.
[459] Oberster Gerichtshof, OGH 02 C 271/82-14 (= LES 1984, 36).
[460] Article 12(1) UWG.

statement of the law-enforcing facts (*Antragsprinzip*).[461] However, the conditions regarding the burden of proof are simplified, as the court can reverse the burden of proof. The state will then have to demonstrate the accuracy of factual claims in connection with its business conduct.[462]

4 CLAIMS BASED ON STATE LIABILITY ACT

The constitution and the state liability act (*Amtshaftungsgesetz, AHG*)[463] provide that the state, the municipalities and other public entities (and not the civil servants[464]) are liable for damages unlawfully caused to third parties by persons acting as their organs in the exercise of their official duties. The details concerning the jurisdiction and procedure are laid down in the ZPO, unless otherwise provided by the AHG.[465] Liability is restricted if the damages could have been prevented by a legal action or by a complaint to the supervisory body.[466] Damage compensation will be in monetary form.[467]

The AHG is not applicable in cases where the state or its entities have acted in the private economy.[468] However, the government and the public administration are bound to act within the limits of the constitution, the law and international treaties that are directly applicable.[469] In addition, the state cannot be held liable based on the AHG in cases where an enacted provision breaches the constitution.[470] However, the situation is different if Liechtenstein has not or has wrongfully implemented EEA law. Here, a causal liability is accepted.[471]

Regarding the procedure, the aggrieved party will have to submit a written request for compensation to the authority that has caused the harm (*Aufforderungsverfahren*) before going to court.[472] The request must contain the facts, the legal titles and the extent of damage or the parameters and the assessment base for calculating the damage.[473] The injured party does not have to prove any fault of the deciding authority as the burden of proof is reversed. But they must show the unlawfulness of the decision.[474] If the authority does not answer the request or refuses to recognise the

[461] Section 405 ZPO; Oberster Gerichtshof, OGH CG 2016.430 (= LES 2017, 93) AAA Vermögensverwaltung AG v B Bank (Liechtenstein), 6.4.2017, 93, p. 14, para 9.1.2.
[462] Article 14 UWG.
[463] AHG Gesetz vom 22.9.1966 über die Amtshaftung (AHG), LGBl. 1966 Nr. 24, LR 170.32 (official liability act).
[464] Article 109(1) LV; Article 3(1) in conjunction with Article 2 AHG; *H. Wille*, Liechtensteinisches Verwaltungsrecht (2004), p. 192; *P. Bussjäger*, Kommentar zu Art. 109 LV, in: Liechtenstein-Institut (Hrsg.), Online-Kommentar zur liechtensteinischen Verfassung, www.verfassung.li (2016), para 4.
[465] Article 109(3) LV; Article 11(1) AHG.
[466] Article 5(1) AHG.
[467] Article 3(6) AHG.
[468] *H. Wille*, p. 194; *P. Bussjäger*, para 9 et seq.
[469] Article 92(2) and (4) LV; *H. Wille*, S. 194–195 f.; *P. Bussjäger*, Kommentar zu Art. 92 LV, in: Liechtenstein-Institut (Hrsg.), Online-Kommentar zur liechtensteinischen Verfassung, www.verfassung.li (2016), para 26 et seq.
[470] *P. Bussjäger*, para 11.
[471] *P. Bussjäger*, para 27 et seq.
[472] Article 11(2) AHG.
[473] *H. Wille*, p. 312.
[474] Article 11(3) AHG; *H. Wille*, p. 315.

damage claim within three months, the injured party can file a suit with the OG.[475] An appeal to the OG's judgment must be addressed to the OGH.[476]

In the case of damages caused by a decision granting state aid or aid based directly on a legal act, the damaged party would have to demonstrate a violation of the standstill obligation as set out in Article 1(3) of Protocol 3 SCA and prove the damages (or the parameters for calculating them). Although, it might be difficult for a competitor or a third party to succeed in challenging a decision on state aid.

[475] Article 10 and Article 11 AHG.
[476] Article 10 AHG; *H. Wille*, p. 305.

Annex III.1 - Summaries of selected rulings concerning state aid in Norway

1 CASES FROM THE SUPREME COURT

1.1 Hydro/Søral

Courts	The Supreme Court (HR-2013-2623-A), Borgarting Court of Appeal (LB-2011-158922) and Oslo District Court (TOSLO-2010-108577)
Parties to the action and relationship to the measure	Hydro Aluminium AS and Sør-Norge Aluminium AS (beneficiaries) The Norwegian Ministry of Finance (public authority)
Sectors in which parties are active	NACE code D.25.1 – Electric power generation, transmission and distribution
Type of action	Judgment
Facts	Hydro Aluminium AS ('Hydro') and Sør-Norge Aluminium AS ('Søral') were exempt from paying electricity tax when the EEA Agreement entered into force in 1994. In December 2000, the European Commission issued new guidelines on state aid for environmental protection and energy, which restricted Member States' right to make exemptions from environmental taxes for certain companies/sectors. In May 2001, ESA issued identical guidelines for the EEA EFTA States. The Norwegian state accepted ESA's proposed appropriate measures to bring its existing aid schemes in line with the new guidelines. The Norwegian state did not, however, bring its tax on electricity consumption in line with the new guidelines. In July 2002, ESA opened a formal investigation with regard to, *inter alia*, certain derogations from the electricity tax for certain industries and regions in Norway. In June 2004, ESA concluded in a decision that the exemptions constituted unlawful state aid under Article 61(1) of the EEA Agreement, and ordered the Norwegian state to recover the unlawful state aid.[477] The Norwegian state challenged ESA's decision before the EFTA Court, which upheld ESA's decision in its judgment 21 July 2005.[478] In September 2006, the Norwegian Ministry of Government Administration and Reform ordered the Ministry of Finance to

[477] EFTA Surveillance Authority Decision No 148/04/COL of 30 June 2004 regarding environmental tax measures, OJ C 319 E, 23.12.2004, p. 30.

[478] E-5/04, E-6/04, E-7/04 *Fesil and Finnfjord, Pil and others and the Kingdom of Norway* v *EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 117.

	recover the unlawful state aid. The Ministry of Finance ordered the Directorate of Norwegian Customs to recover the unlawful state aid, which in 2007 ordered the recovery of unlawful state aid from approximately 50 undertakings. In September 2007, a recovery order was sent to Hydro and Søral. The companies sent administrative complaints, claiming, *inter alia*, that the recovery claim was statute-barred. The complaint was not upheld, and the companies lodged an application before Oslo District Court in 2009.
Subject-matter of the action in the District Court	The subject-matter was the same as in the Supreme Court. Please see the description below.
Subject-matter of the action in the Court of Appeal	The subject-matter was the same as in the Supreme Court. Please see the description below.
Subject-matter of the action in the Supreme Court	The question considered by the Supreme Court was whether the public authorities' recovery claim was statute-barred. Pursuant to Section 2 of the Norwegian Act on Limitation Period for Claims, the general limitation period for claims is three years.[479] The limitation period starts at the time when the claimant earliest could have claimed payment from the debtor. The case raised several questions. The first question was whether the recovery claim was subject to the three-year limitation period in the Act on Limitation Period for Claims, or the special limitation period of ten years for state aid cases, pursuant to Article 15 in part II of Protocol 3 to the SCA. If the matter was covered by the Act on Limitation Period for Claims, the question was whether the limitation period started when the Norwegian authorities had paid out the unlawful state aid, when ESA had taken its decision or when the Norwegian authorities had taken a recovery decision under Section 5 of the Act on State Aid.[480] The Supreme Court held that the claim was subject to the Act on Limitation Period for Claims. Further, it held that the limitation period started at the time when the Norwegian authorities had taken a recovery decision. This meant that the recovery claim was not statute-barred.
Conclusion or measures	The state's claim for repayment against the beneficiaries was not statute-barred.

[479] Lov om foreldelse av fordringer av 1. januar 1980, 1. august 1988.
[480] Lov om offentlig støtte av 1. januar 1994.

adopted by the courts	
Difficulties in enforcing state aid rules	On the one hand, the case clarifies how to interpret and apply the national legal framework for the enforcement of recovery decisions. It concludes that the limitation period does not start to run before national authorities have taken a recovery decision. However, it is not clear whether this only applies in cases where ESA has taken a recovery decision, or whether it also applies in cases where national authorities recover state aid on their own initiative. On the other hand, the case has been criticised in Norwegian state aid literature, because it could bring into question the direct effect of the standstill obligation under Article 3 in part II of Protocol 3 to the SCA.[481] The case could be understood to mean that a recovery claim cannot be enforced unless the granting authority has taken a national recovery decision.
Date of ruling and timeline from the moment the application was lodged to the adoption of the final judgment	Hydro and Søral lodged an application in front of Oslo District Court on 2 July 2010. The District Court issued its judgment on 20 May 2011. Hydro and Søral appealed the judgment to the Court of Appeal, which issued its judgment on 8 April 2013. Hydro and Søral appealed the judgment to the Supreme Court, which issued its judgment on 17 December 2013.

2 CASES FROM THE COURTS OF APPEAL

2.1 A/S Norske Shell

Courts	Borgarting Court of Appeal (LB-2017-89692) and Oslo District Court (TOSLO-2016-109103)
Parties to the action and relationship to the measure	The Norwegian Ministry of Finance (public authority) A/S Norske Shell (alleged beneficiary)
Sectors in which parties are active	NACE code G.46.7.1 - Wholesale of solid, liquid and gaseous fuels and related products
Type of action	Judgment
Facts	A/S Norske Shell ('Shell') imported a fuel which consisted of a mix of diesel oil and the synthetic fuel Gas To Liquid ('GTL') to Norway from 1 September 2011. These imports were subject to the CO_2 tax and road tax for 'mineral oil'. The Norwegian tax authorities had claimed tax for

[481] Hjelmeng, *"Tilbakeføring av offentlig Støtte – hva er situasjonen etter Rt-2013-1665 Hydro/Søral*" in Lov og Rett (04/2014) p. 210-228.

	the whole amount of fuel, e.g. also the amount consisting of GTL. Shell had paid tax on the whole amount. In 2013, in conjunction with an amendment to the tax regulation, Shell claimed that the tax authorities had not had a legal basis under the former tax regulation to claim CO_2 tax and road tax on GTL. Shell therefore claimed repayment of part of the tax. The question was whether the fuel, which consisted of GTL, could be considered to be 'mineral oil' under the relevant national legislation. If so, Shell was liable for paying the tax. If not, Shell had a claim for repayment of the tax. The case raises several different questions under Norwegian law. The following summary pertains exclusively to the state aid aspects of the case. The Ministry argued that Shell's interpretation of the tax legislation could not be upheld, because it would mean that the legislation was in breach of state aid rules. The argument was that an exemption for GTL from the scope of the tax would constitute unlawful state aid under Article 61(1) of the EEA Agreement. Shell argued that the state aid rules were irrelevant. It argued that in any case, the tax legislation, as interpreted by Shell, was not 'selective' and therefore did not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.
Subject-matter of the action in the District Court	The District Court did not consider the question of whether an exemption from the tax for GTL would constitute unlawful state aid under Article 61(1) of the EEA Agreement. It referred to the fact that state aid questions had not been raised in a previous judgment covering similar legal questions, and that the Ministry had not sufficiently substantiated its state aid claim. The Court found that GTL could not be considered 'mineral oil' and that Shell had a right to repayment of part of the tax, approximately NOK 568 million.
Subject-matter of the action in the Court of Appeal	The Court held that the tax legislation, even if it would exempt GTL from its scope, could not be considered 'selective', because any exemption would be justified by the nature and general scheme of the system. The Court referred to ESA's Guidelines on the Notion of Aid[482] in support of its conclusion. As such, the measure would not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

[482] EFTA Surveillance Authority Decision NO 3/17/COL of 18 January 2017 amending, for the one-hundred and second time, the procedural and substantive rules in the field of state aid by introducing new Guidelines on the notion of state aid as referred to in Article 61(1) of the Agreement on the European Economic Area [2017/2413], OJ L 342, 21.12,2017, p. 35-84.

	The Court held, on other grounds, that GTL was covered by the CO_2 tax and road tax and rejected Shell's claim.
Conclusion or measures adopted by the courts	No aid.
Difficulties in enforcing state aid rules	The case could possibly indicate a reluctance on the part of the District Court to consider state aid questions unless they are well substantiated. According to the Norwegian 'presumption principle', Norwegian acts, including tax legislation, shall be interpreted in accordance with Norway's international agreements, including the EEA Agreement. One could argue, therefore, that the District Court should have considered the state aid question, as it was of direct relevance to the interpretation of the tax legislation.
Date of ruling and timeline from the moment the application was lodged to the adoption of the final judgment	Shell lodged an application on 30 June 2016. Oslo District Court's judgment fell on 22 March 2017. The Norwegian authorities appealed to Borgarting Court of Appeal, whose judgment fell on 17 December 2018. Shell appealed to the Supreme Court, who dismissed the appeal on 8 March 2019.

2.2 Synnøve Finden

Courts	Borgarting Court of Appeal (LB-2017-158720) and Oslo District Court (TOSLO-2015-76450)
Parties to the action and relationship to the measure	Synnøve Finden AS (competitor) The Norwegian Ministry of Agriculture and Food (public authority)
Sectors in which parties are active	NACE code C10.5 – Manufacture of dairy products
Type of action	Judgment. The District Court also took some procedural decisions before the final judgment.
Facts	The case concerns the legality of the Norwegian Regulation of 29 June 2007 No 832 on price equalization system for milk ('the PE Regulation'). The PE Regulation expressly granted Q-Meieriene AS ('Q-dairies') distribution subsidies to cover costs for the collection and distribution of milk.[483] The PE Regulation was introduced to allow competition from independent market operators where the operator Tine SA previously held a monopoly on sales of liquid milk products.

[483] Forskrift om prisutjevningsordningen for melk av 6. juli 2007.

	Synnøve Finden AS ('Synnøve') informed the Norwegian authorities that it was planning to start production of yoghurt and milk for consumption, in order to obtain the view of the authorities on whether it would be eligible for subsidies under the PE Regulation. The Norwegian authorities indicated that Synnøve would not be eligible for the same subsidy as Q-dairies. Synnøve thereafter brought proceedings against the Norwegian state. Before the main proceedings, the District Court requested an advisory opinion from the EFTA Court regarding the PE Regulation's compatibility with Articles 61(1) and 31 of the EEA Agreement. The EFTA Court found that the PE Regulation constituted state aid within the meaning of Article 61(1), and that it had been implemented in breach of the standstill obligation. It found that the PE Regulation was subject to the rules set out in the EEA Agreement, as regards products falling within the scope of Protocol 3 to the EEA Agreement. Initially, Synnøve had claimed that the PE Regulation was null and void, *inter alia,* because it was in breach of the EEA Agreement. After the EFTA Court's advisory opinion, the Ministry of Agriculture and Food amended the PE Regulation, and brought it in line with state aid rules. Synnøve therefore changed its initial claim, and instead submitted a claim for damages, as well as claiming that the Court should find the PE Regulation, as it existed before the amendment, to be in breach of the standstill obligation under Article 61(1) of the EEA Agreement.
Subject-matter of the action in the District Court	The Court took two decisions and one judgment in the case. The first decision and the judgment are relevant for the Study and are described below. In the first decision, the Court dealt with two procedural questions as well as the question regarding whether to request an advisory opinion from the EFTA Court. The state claimed that Synnøve did not have legal standing to submit a claim that the PE Regulation was null and void, and that the Court was obliged to dismiss the case. Alternatively, the state claimed that Synnøve was obliged to bring proceedings against Q-dairies, not only the state. Synnøve claimed that it had legal standing and that the case could be brought against the state alone. The Court held that Synnøve had legal standing. It emphasized that in cases where the subsidy was given in the form of a regulation, as opposed to an administrative decision, Synnøve had no other option but to submit a claim for the nullity of the

	regulation. The Court also held that Synnøve was not obliged to bring proceedings against Q-dairies. The Court decided to request an advisory opinion from the EFTA Court. In the main proceedings, Synnøve submitted two claims. Firstly, it claimed that the state was liable for damages for Synnøve's loss of profit. The basis for the state's liability was not based on a breach of the state aid rules, but arbitrary discrimination under Norwegian public law. Secondly, Synnøve claimed that the PE Regulation, as it existed before the amendment, was in breach of the standstill obligation under Article 61(1) of the EEA Agreement. The state claimed that the measure did not constitute state aid because it did not affect trade between EEA EFTA States, and that Synnøve had not demonstrated that the conditions for damages were fulfilled. Moreover, the state claimed that the Court had a duty to dismiss the second claim *ex officio*, because Synnøve did not have legal standing after the PE Regulation had been amended. The Court considered first the second claim, then the first. The Court held that the PE Regulation, as it existed before its amendment, constituted state aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, it held that the PE Regulation was implemented in breach of the standstill obligation, due to subsidies given to products falling within the scope of the EEA Agreement. The Court found that the measure could have had an effect on trade, even though the Norwegian market was dominated by national actors. It referred to the fact that Synnøve imported yoghurt from Greece as well as the possibility for production under Norwegian trademarks. The Court held that the parts of the PE Regulation that had been in breach of the standstill obligation, were null and void. Moreover, the Court held that Synnøve had legal standing to submit such a claim, even though the PE Regulation had been amended. The Court seemed to place emphasis on the fact that the PE Regulation created a disadvantage for Synnøve versus a potential competitor, and that a breach of the standstill obligation created obligations upon the state towards EFTA. The Court held that Synnøve had not demonstrated a loss caused by the unlawful PE Regulation, because Synnøve had not sufficiently demonstrated that they would have started production of liquid milk products if it had not been for the

	unlawful PE Regulation. The Court therefore rejected the claim for damages.
Subject-matter of the action in the Court of Appeal	The Court rejected Synnøve's appeal on the claim for damages. It held that Synnøve had not demonstrated a loss caused by the unlawful PE Regulation, because Synnøve had not sufficiently demonstrated that they would have started production of liquid milk products if it had not been for the unlawful PE Regulation.
Conclusion or measures adopted by the courts	The PE Regulation, as it existed when the application was lodged, constituted state aid under Article 61(1) of the EEA Agreement, and was implemented in breach of the standstill obligation, as regards products covered by Protocol 3 of the EEA Agreement. Synnøve's claim for damages was rejected in both instances.
Difficulties in enforcing state aid rules	The case demonstrates several procedural difficulties arising in state aid cases which are not sufficiently clarified in the case law. This concerns not least the question of legal standing. In this case, the Court found that Synnøve had legal standing to submit a claim of nullity against a national regulation. However, the reasoning of the Court is specifically linked to the circumstances of this particular case. Therefore, it is not certain that a claimant will have legal standing to submit a claim for nullity of a law or regulation, due to a breach of the standstill obligation, in all cases. Moreover, in an *obiter dictum,* the District Court stated that Synnøve had limited means of enforcing breaches on the EEA Agreement by private enforcement in front of Norwegian courts, *inter alia,* because of the parties involved in the case and because of the division of competence between Norwegian courts on the one side, and ESA and the EFTA Court on the other side. This statement could potentially be understood to mean that Synnøve, in order to bring a *recovery claim* in front of the court, would have to lodge an application against Q-dairies, and not only the grantor of aid. It could also imply that recovery claims should first and foremost be made before ESA, and not national courts. Although the claim for damages was made under Norwegian public law, it exemplifies the difficulties that arise when a competitor must demonstrate a causal link between a loss and the breach on state aid rules.
Date of ruling and timeline from the moment the application was lodged to the adoption of the final judgment	Synnøve lodged an application on 11 May 2015. On 5 November 2015, the District Court took a decision regarding certain procedural questions as well as the question concerning whether to request an advisory opinion from the EFTA Court. On 6 January 2016, the District Court requested a preliminary ruling from the EFTA Court, which issued its decision on 15 December 2016. On 6 June 2017, the District Court took a decision regarding a document request. The District Court issued its judgment on 12 July 2017. The District Court's

	judgment was appealed, and Borgarting Court of Appeal issued its judgment on 15 February 2019.

2.3 Boreal[484]

Courts	Hålogaland Court of Appeal (LH-2017-56614) and East-Finnmark District Court (TOSFI-2016-4260).
Parties to the action and relationship to the measure	Boreal Sjø AS (alleged beneficiary) Finnmark County Authority (public authority)
Sectors in which parties are active	NACE code H.49.3 – Other passenger land transport n.e.c.
Type of action	Judgment
Facts	Boreal Sjø AS ('Boreal') had delivered bus transport services to the Finnmark County Authority ('FFK') for decades. The case concerns pension costs which were incurred during the lifetime of the transport service contracts, and which continued to arise after the contracts were terminated (so-called 'historical' pension costs). The case raises several different questions under Norwegian law. The following summary pertains exclusively to the state aid aspects of the case. FFK claimed that it was not contractually bound to cover the pension costs. Furthermore, it claimed that an interpretation whereby FFK was liable for payment of pension costs could not be upheld, because such payment would constitute state aid under Article 61(1) of the EEA agreement. Payment of such costs by FFK to Boreal would constitute a breach of the standstill obligation. Boreal claimed that FFK was contractually bound under the two contracts to cover its pension costs. Boreal claimed that payment of Boreal's pension costs did not constitute state aid within the meaning of Article 61(1) of the EEA Agreement, because such payment did not constitute an 'advantage' for the company.
Subject-matter of the action in the District Court	The Court held that FFK was not liable for paying Boreal's pension costs under the first contract and did not consider state aid questions as regards this contract. The Court held that FFK was liable for paying Boreal's pension costs under the second contract. However, the Court considered that such payment did not constitute state aid within

[484] Kluge Advokatfirma AS provided legal advice to Finnmark County Authority in this case.

	the meaning of Article 61(1) of the EEA Agreement. Boreal had been awarded the second contract through a public tender and was ordered to cover such pension costs *after* the award of the contract. As a result, payment of these costs did not, according to the Court, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods, and therefore did not constitute state aid.
Subject-matter of the action in the Court of Appeal	The Court held that FFK was contractually bound to cover Boreal's pension costs under the two contracts. Thereafter, the Court considered whether payment of pension costs was state aid within the meaning of Article 61(1) of the EEA Agreement. The salient point was whether payment of pension costs could be considered an 'advantage' for Boreal. Boreal's pension costs, which arose after the termination of the transport contracts, were costs stemming from a public sector pension scheme, which Boreal was contractually bound to have under the agreements. Such costs would not have arisen if Boreal had had a defined contribution pension scheme. The Court noted that the standard pension scheme for transport companies in Norway is the defined contribution pension scheme, not a public sector pension scheme. Boreal's costs resulting from the public sector pension scheme, which arose after the contracts had been terminated, were costs that transport companies usually did not have to bear. Therefore, payment of such costs constituted compensation for a structural disadvantage, not state aid. The Court referred to the General Court's judgment of 14 July 2016 in *Germany v the European Commission (Deutsche Post),* in support of its conclusion.[485] Under the first contract, the claim only covered costs incurred after the contract had been terminated. The Court held that payment of pension costs after the contract had terminated constituted compensation for a structural disadvantage. Boreal did not receive an advantage, and the payment did not constitute state aid within the meaning of Article 61(1) of the EEA Agreement. Under the second contract, the claim for payment covered compensation *during* the contract period, as well as compensation *after* the contract had ended. Payment for pension costs *after* the contract had ended, according to the Court, did not constitute an advantage for Boreal and therefore did not constitute state aid. As regards payment of pension costs during the contract period, the Court stated that FFK could only cover extra costs accrued under the public sector scheme,

[485] Judgment of the General Court of 14 July 2016, *Federal Republic of Germany v the European Commission*, T-143/12, ECLI:EU:T:2016:406.

	which Boreal would not have accrued under a defined contribution pension scheme. Covering costs, which Boreal would have had under a defined contribution pension scheme, would constitute state aid. The Court therefore held that Boreal had to deduct from its claim costs that FFK had paid during the contract period, which Boreal would have had under a defined contribution pension scheme.
Conclusion or measures adopted by the courts	East-Finnmark District Court held that payment of pension costs did not constitute state aid. Hålogaland Court of Appeal held that compensation for pension costs arising after termination of the contract was not state aid, because it constituted compensation for a structural disadvantage. Compensation of pension costs which Boreal would have accrued under a defined contribution scheme, constituted state aid.
Difficulties in enforcing state aid rules	-
Date of ruling and timeline from the moment the application was lodged to the adoption of the final judgment	Boreal Transport Nord AS lodged an application on the 29 December 2015. The Court of First Instance issued its judgment on 10 December 2016. The Company appealed this judgment to the Court of Appeal, that issued its judgment on 11 August 2017. Appeal to the Supreme Court was denied on 1 March 2018.

2.4 Havlandet Marinfisk

Courts	Gulating Court of Appeal (LG-2010-147380) and Fjordane District Court (TFJOR-2010-40275)
Parties to the action and relationship to the measure (beneficiaries, competitors, third parties, public authorities)	Skatt Vest (public authority) Havlandet Marinfisk Russenes AS (alleged beneficiary)
Sectors in which parties are active	NACE code B.5.2 – Operation of fish hatcheries and fish farms.
Type of action (administrative or civil law action)	Judgment
Facts	The question concerns tax refunds for costs of research and development under the Norwegian state aid scheme

	'SkatteFUNN'. The question was whether the tax authorities' tax assessment from 2008 was invalid. The tax authorities had reduced Havlandet Marinfisk Russenes AS' ('Havlandet') tax refunds with NOK 654 000 in 2005 and NOK 754 000 in 2006, in the tax assessment of 2008. The question was which costs could be considered eligible costs under the Norwegian tax regulation. The SkatteFUNN scheme was at the time approved by ESA (it is now notified under Article 25 in the General Block Exemption Regulation ('GBER') (EU) no. 651/2014). The state referred to ESA's guidelines and academic literature on state aid in support of its interpretation of the term 'eligible costs' under the Norwegian tax regulation. The state claimed that the reduction of the tax refund was necessary in order to ensure that the compensation did not constitute unlawful state aid.
Subject-matter of the action in the District Court	The Court did not agree that Havlandet's interpretation of the tax regulation would lead to a breach of Article 61(1) of the EEA Agreement. The Court referred to ESA's guidelines for the interpretation of eligible costs. The Court found that the costs were costs covered by ESA's guidelines and the SkatteFUNN aid scheme, and as such not in breach of the standstill obligation. The Court partially annulled the tax assessment.
Subject-matter of the action in the Court of Appeal	The Court stated that the national rules for SkatteFUNN are presumed to be in line with ESA's guidelines and Article 61(3) c) of the EEA Agreement. It also referred to Norway's applications for approval from ESA in 2001 and 2002 as relevant sources of interpretation. It particularly referred to an amendment from 2007 of ESA's decision 14/07/COL, section 5.1.4 titled 'eligible costs', and the European Commission's 'Community Framework for state aid for research, development and innovation'. The Court interpreted the Norwegian tax regulation in light of the state aid rules, which was in line with what the tax authorities had done.
Conclusion or measures adopted by the national court	The Court partially annulled the tax assessment.
Difficulties in enforcing State aid rules	-
Date of ruling and timeline from the	Havlandet lodged an application on 8 March 2010. Fjordane District Court's judgment fell on 12 July 2012. The Court of

moment the application was lodged to the adoption of the ruling	Appeal's judgment fell on 19 May 2011. Havlandet's appeal to the Supreme Court was dismissed on 31 October 2011.

2.5 Saudefaldene

Courts	Gulating Court of Appeal (LG-2007-176723) and Stavanger District Court (TSTAV-2004-84901)
Parties to the action and relationship to the measure (beneficiaries, competitors, third parties, public authorities)	Aktieselskabet Saudefaldene (alleged beneficiary) Gunnhild Marie Åbø Hallingstad, Sondre Birkeland, Vegard Birkeland Rød, Johannes T Maldal, Bjarte Birkeland, Henrik Birkeland, Olav Oddvar Hårajuvet, Ola Sivert Hårajuvet, Trygve Turtveit, Leif Olav Birkeland, Erik Inge Bakka, Georg Hegerland, Dag Sverre Ekkje, Martinus Seim (third parties)
Sectors in which parties are active	NACE code E.40.10 – Production and distribution of electricity.
Type of action (administrative or civil law action)	Re-trial of an appraisement dispute (in Norwegian: *overskjønn*)
Facts	The case concerns compensation for expropriation, in conjunction with building of a power station in the Sauda mountains. Aktieselskapet Saudefaldene ('Saudefaldene') lodged an application to the Court for determination of compensation, in conjunction with a development project, including building of power stations and water paths. Saudefaldene had been given a concession for this. The third parties had argued that the right to expropriate was in breach of Article 61(1) of the EEA Agreement. Saudefaldene argued that this was not the case, because the concession was given in a closed market, and therefore there was no competition for the building project.
Subject-matter of the action in the District Court	The Court stated that Saudefaldene's right to expropriation did not constitute state aid within the meaning of Article 61(1), because there were no other potential developers. The landowners had never had plans to build smaller power stations and were compensated for what they themselves could have earnt through such activities, with a surplus of 25%.
Subject-matter of the action in the Court of Appeal	The Court of Appeal referred to the District Court's assessment in its ruling.

Conclusion or measures adopted by the national court	No aid.
Difficulties in enforcing State aid rules	The Court's reasoning is difficult to understand. It is unclear whether the reason why the measure did not constitute an advantage is that the beneficiary was not in competition, actual or potential, with any other undertaking. On the other hand, the Court also seems to conclude that the beneficiary did not receive an advantage.
Date of ruling and timeline from the moment the application was lodged to the adoption of the ruling	Saudefaldene lodged an application on 20 July 2004 to Stavanger District Court, whose judgment fell on 18 September 2007. The case was appealed to Gulating Court of Appeal, whose judgment fell on 10 February 2009. The appeal to the Supreme Court was dismissed on 15 June 2009.

2.6 Gauselparken

Courts	Gulating Court of Appeal (LG-2008-16104) and Stavanger District Court (TSTAV-2006-155740)
Parties to the action and relationship to the measure	Gauselparken AS (third party) Municipality of Stavanger (public authority)
Sectors in which parties are active	NACE code F.45.21 – General construction of buildings and civil engineering works
Type of action	Procedural decision
Facts	The case concerned the sale of two real-estate properties from the municipality of Stavanger to A. Idsøe AS ('Idsøe') and Kvaleberg Industri AS ('Kvaleberg'). Gauselparken AS ('Gauselparken') challenged the municipality's sale of property, claiming, *inter alia*, that the sale was in breach of Article 61(1) of the EEA Agreement. Gauselparken's initial claim was that the municipality had entered into a binding agreement with Gauselparken regarding the sale of the two real estate properties, before selling them to Idsøe and Kvaleberg. Gauselparken thus claimed that the municipality had a duty to transfer the properties to Gauselparken. As an alternative argument, Gauselparken claimed that the agreements which the municipality had entered into with Idsøe and Kvaleberg were void, because they were in breach of Article 61(1) of the EEA Agreement and Protocol 3 to the SCA.

Subject-matter of the action in the District Court	The municipality claimed that the Court had to dismiss Gauselparken's claim regarding the validity of the agreements under Article 61(1) of the EEA Agreement, because Gauselparken did not have legal standing. The municipality argued that even if the agreements were in breach of Article 61(1) of the EEA Agreement, this would make no difference to Gauselparken's rights, because Gauselparken would have no further right to the properties than any other potential buyer in Stavanger, and as such Gauselparken had no legal interest in having the Court decide on the question. Gauselparken had simultaneously brought forward the question of the legality of the third-party agreements in a complaint to ESA. At the time of the District Court ruling, ESA had not yet published its decision. The District Court found that, in the event of an ESA decision on illegal state aid, Stavanger would be bound by ESA's decision. This decision is a procedural decision in the case between the parties, and not the final decision. The Court only considered the question of whether Gauselparken had legal interest under Norwegian procedural rules. The Court stated that even if the municipality's sale of the two properties were in breach of Article 61(1) of the EEA Agreement, Gauselparken would neither come in a position to acquire the property from the municipality, nor be given a priority to buy the property. It therefore found that Gauselparken had no legal interest in having the Court decide on whether the agreements were in breach of Article 61(1) of the EEA Agreement. The Court dismissed Gauselparken's claim regarding the validity of the agreements under Article 61(1) of the EEA Agreement.
Subject-matter of the action in the Court of Appeal	The Court of Appeal annulled the District Court's decision. The Court stated that Gauselparken's claim regarding the validity of the agreements under Article 61(1) of the EEA Agreement was a legal argument in support of its principal and alternative claim. Such a legal argument could not be dismissed, but had to be considered in the material assessment of Gauselparken's statement of claims in the main proceedings. The Court of Appeal's annulment meant that the District Court had to consider this argument in the main proceedings. The Court also stated that the District Court's proceedings should be suspended until the EFTA Court[486] had decided on the matter. The Court also stated that one could raise the question whether Gauselparken had legal standing to bring

[486] The Court probably means ESA's decision.

	such claims against the municipality, without bringing proceedings against Idsøe and Kvaleberg. The Court of Appeal asked the District Court to consider this question during the main proceedings.
Difficulties in enforcing State aid rules	The Court seems to imply that Gauselparken may not have had legal standing regarding the question of whether the agreements between Gauselparken and the municipality were invalid due to breach of the standstill obligation, unless Gauselparken lodged an application against Idsøe and Kvaleberg (as well).
Date of ruling and timeline from the moment the application was lodged to the adoption of the ruling	Gauselparken lodged an application on 18 September 2007. The District Court issued its decision on 11 January 2008. The decision was appealed to the Court of Appeal, which issued its decision on 21 February 2008. Following the Court of Appeal's decision, the case was sent back to the District Court. It is unclear what happened with the case, and if the parties settled the case out of court.

2.7 Kleven Verft

Courts	Frostating Court of Appeal (LF-2007-51156) and Sunnmøre District Court (06-062813TVI-SUMO)
Parties to the action and relationship to the measure	Kleven Verft (beneficiary) Samherji hf (beneficiary)
Sectors in which parties are active	NACE code C30.1.1 – shipbuilding
Type of action	Judgment
Facts	The case concerns a claim for damages pertaining to the recovery – in accordance with national rules – of shipbuilding aid that the recipient(s) had received in contravention of national law. The parties to the case are the contractee (Samherji hf) and the contractor (Kleven Verft) to a shipbuilding contract for which the contractor had received shipbuilding aid (approx. NOK 13.7 million in total) in accordance with a scheme for shipbuilding aid. After the award, the national authorities found out that the aid had been awarded in contravention of the aid schemes' rules and considered that Samherji was responsible for the breach of those rules. They brought a recovery claim against Samherji, but not against Kleven for the repayment of aid. Samherji was obliged to repay the aid. Samherji then brought an action against Kleven, in which it sought reimbursement of the amount Samherji had paid back to the state.

Subject-matter of the action in the District Court	The District Court's judgment did not address state aid matters. The District Court found that Kleven was partly responsible for the breach of the rules of the aid scheme and obliged it to pay NOK 6 million to Samherji.
Subject-matter of the action in the Court of Appeal	On appeal, the main claims and arguments also pertained to national tort law, but the contractee claimed that not awarding damages (i.e. not having the contractor repay the aid) would be contrary to EEA (state aid) law. In essence, Samherji appears to have argued that not recovering the aid (also) from Kleven would leave it with an economic advantage constituting illegal and incompatible state aid. The Court did not take a clear position on the state aid argument raised. According to the Court, EEA law did not entail a legal basis pursuant to which Kleven's responsibility for the recovery of the aid could be greater than under national tort law. In the Court's view, the case needed to be decided in accordance with the national rules on solidary obligations for damages.
Conclusion or measures adopted by the courts	The Court reduced Samherji's claim against Kleven to NOK 2 million.
Whether the judgment is/was challenged	No.
Difficulties in enforcing state aid rules	Not directly apparent from the case – the unlawful aid had already been recovered, and the case pertains solely to the distribution of the recovery claim between two beneficiaries. It could be argued, however, that Samherji's claim based on state aid would have deserved a more thorough analysis.
Date of ruling and timeline from the moment the application was lodged to the adoption of the final judgment	Sunnmøre District Court's judgment fell on 2 February 2007. The appeal was lodged in March 2007 and the Court of Appeal's judgment was adopted on 23 November 2007.

3 CASES FROM THE DISTRICT COURTS

3.1 Norfrakalk

Court	Oslo District Court (TOSLO-2010-45497)
Parties to the action and relationship to the measure	Norfrakalk AS (competitor/third party[487]) The Norwegian Ministry of Environment (public authority)
Sectors in which parties are active	NACE code C23.5.2 - Quicklime industry
Type of action	Judgment
Facts	This case pertains to the Norwegian Greenhouse Gas Emission Trading Act, and the implementation of Directive 2003/87/EU.[488] According to Directive 2003/87/EU, establishing a scheme for greenhouse gas emission allowance trading within the Community, the Norwegian state was obliged to notify a 'national allocation plan' ('NAP') to ESA, in accordance with the Directive. The Act and the NAP gave companies established before 2001 a right to free carbon credits. ESA did not approve the plan in its decision 16 July 2008, because the plan discriminated between companies by unduly favouring certain undertakings. The Norwegian state thereafter amended the Act and the NAP. The new act was adopted by the Norwegian government and approved by ESA on the 27 February 2009. The key question as regards state aid in this case was whether the standstill obligation had been breached. The Court in particular had to consider the question of whether aid in the form of free emission trading allowances was granted or could have been granted prior to ESA's approval of the NAP. The case is noteworthy for its detailed assessment of state aid rules. It refers, *inter alia,* to ESA's enforcement guidelines.[489]
Subject-matter of the action in the District Court	Norfrakalk AS ('Norfrakalk') brought a claim for damages against the Norwegian state for losses resulting from an incorrect implementation of the Directive, and a breach of the standstill obligation under Article 3 in part II of Protocol 3 to the SCA. Norfrakalk also claimed damages under Norwegian law.

[487] The parties disagreed about whether Norfrakalk was indeed a competitor of the aid recipients.
[488] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275/32, 25.10.2003, p. 32–46.
[489] EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts, OJ C 85, 9.4.2009 p. 1.

	The Norwegian state claimed that it had not breached the standstill obligation. Alternatively, it claimed that the state's breach was not an apparent and severe breach, and that there was no causal link between the breach and Norfrakalk's loss, and thus the criteria for damages under EEA law were not fulfilled. The state claimed that Norwegian internal law did not provide a legal basis for Norfrakalk's claim for damages. Furthermore, the state argued that Norfrakalk was not a competitor to those undertakings that were entitled to free allocation of allowances under the original (non-approved NAP), and hence did not have legal standing. The Court stated that the standstill obligation gives rise to directly effective individual rights of affected parties, and that such parties can bring a legal action before a Norwegian court. The Court found that Norfrakalk was a (potential) competitor of the aid recipient, and as such an affected party. The Court then considered whether the act was state aid under Article 61(1) of the EEA Agreement, and whether there was an obligation to notify such aid. The Court found that the act was an aid scheme, and not existing aid, and thus was subject to the notification obligation. The Court considered that the scheme was state aid under Article 61(1) of the EEA agreement, and the selective advantage consisted of the free emission allowances to certain companies under the scheme. The Court referred to ESA's decision of 27 February 2009 in support of its conclusions. The Court thereafter considered whether the standstill obligation had been breached, e.g. if state aid had been granted. The Court found that the preparatory works to the Act amount in effect to a suspension obligation for the state, i.e. that the state could not have awarded allowances prior to ESA's approval of the scheme. Thus, the standstill obligation was not breached. The Court also found that the implementation of the Directive in breach of Article 7 and Article 104 of the EEA Agreement (e.g. breach of annex III.3, criteria 5), did not give rise to individual rights. Furthermore, the Court found that the standstill obligation under Directive 2003/87/EU was not breached. Given that there was no breach of EEA law, including the standstill obligation, Norfrakalk could not be awarded damages. The Court nonetheless considered if the other two conditions (causal link and economic loss) for damages were fulfilled. The Courts suggested that the other two conditions were met.
Conclusion or measures	No breach of the standstill obligation under part II of Protocol 3 to the SCA, therefore no damages could be awarded.

adopted by the courts	
Difficulties in enforcing State aid rules	Not apparent from this case.
Date of ruling and timeline from the moment the application was lodged to the adoption of the final judgment	Norfrakalk lodged an application on the 15 March 2010. Norfrakalk withdrew the action on 7 February 2011 and resubmitted it on 4 February 2013. Oslo District Court issued its judgment on the 8 January 2014. The judgment was not appealed.

3.2 Kattekleiv

Court	Tinn and Heddal District Court (05-031989TVI-TINN)
Parties to the action and relationship to the measure	Kattekleiv Barnehage AS (competitor) The Municipality of Notodden (public authority) and the Ministry for Children and Education (public authority)
Sectors in which parties are active	NACE code P85.1.0 – kindergartens
Type of action	Judgment
Facts	The case concerns decisions to award grants and decisions *not* to award grants to kindergartens under the provisions of the Norwegian Kindergarten Act[490]. The Kindergarten Act provides that all kindergartens, regardless of their ownership (i.e. private or public), are entitled to receive public grants, subject to certain conditions being met. Notodden municipality had decided, in 2004, to give grants to two private kindergartens, but not to five others, including Kattekleiv Barnehage AS ('Kattekleiv').
Subject-matter of the action	Kattekleiv's action appears to concern both the validity of awarding grants to two kindergartens, as well as the fact that no grant was given to the applicant. Kattekleiv claimed that these decisions infringed Article 61(1) of the EEA Agreement, because by withholding a grant to Kattekleiv, whilst awarding it to other (private) kindergartens, the Municipality had granted unlawful state aid. The primary objective of the action therefore appeared to have been to also be awarded a grant. Nonetheless, the Court also took a position as regards to whether the two kindergartens had

[490] Lov om barnehager av 1. januar 2006.

	received unlawful aid, and whether the standstill obligation had been breached. The Court based its judgment on the fact that the financing scheme for Norwegian kindergartens had not been notified to (or approved by) ESA. The Court chose only to assess whether the individual grants to two kindergartens in Notodden constituted (unlawful) state aid but did not rule on the (lawfulness) of the scheme itself.
Conclusion or measures adopted by the courts	The Court concluded that no aid had been granted to the two kindergartens in Notodden, because the grants were not liable to affect trade between EEA EFTA States. In coming to this conclusion, the Court considered that the burden of proof fell on Kattekleiv as regards the potential effect on trade, which had not shown that kindergartens established elsewhere in the EEA were active in Notodden, or that the two beneficiaries would offer services to children residing in other EEA EFTA States. Furthermore, the Court concluded that neither the EEA agreement nor national law provided a legal basis for Kattekleiv to be awarded a grant. Therefore, the Court dismissed the action as unfounded.
Difficulties in enforcing state aid rules	One could interpret the judgment as entailing that Kattekleiv had difficulties in challenging the aid scheme as such. However, it would appear that the judgment – which did not take a position on the aid scheme – is rather the result of the applicant's claim, than actual difficulties of challenging the scheme.
Date of ruling and timeline from the moment the application was lodged to the adoption of the final judgment	The action was lodged on 26 May 2005. The judgment was adopted on 27 April 2006. Kattekleiv appealed the judgment, but the appeal was later withdrawn.

Annex III.2 – List of rulings in Norway

Names of parties	Judgement (date)	Judgment (number)	Court
Staten v/Sentralskattekontoret v Aktieselskabet Saudefaldene	22/06/2017	HR-2017-1231-A	Supreme Court
Hydro Aluminium AS and Sør-Norge Aluminium AS v Staten v/Finansdepartementet	17/12/2013	Rt-2013-1665	Supreme Court
Synnøve Finden AS v Staten v/Landbruks- og matdepartementet	15/02/2019	LB-2017-158720	Borgarting Court of Appeal
Staten v/Finansdepartementet v A/S Norske Shell	17/12/2018	LB-2017-89692	Borgarting Court of Appeal
Boreal Sjø AS v Finnmark fylkeskommune	08/11/2017	LH-2017-56614	Hålogaland Court of Appeal
Aktieselskapet Saudefaldene v/Sentralskattekontoret for Storbedrifter. Third party intervener: Statkraft Energi AS	25/08/2016	LG-2015-182482	Gulating Court of Appeal
Ventor Sp. Zoo v/Skatteopprkrever Utland/International Tax Collection Office	17/03/2016	LG-2015-59453	Gulating Court of Appeal
Bjølve Bruk AS v/Statkraft Energi AS	16/06/2016	LG-2015-150132	Gulating Court of Appeal
Hydro Aluminium AS and Sør-Norge Aluminium AS v Staten v/Finansdepartementet	08/04/2013	LB-2011-158922	Borgarting Court of Appeal
Eksportfinans ASA v/Rem Ship AS	29/03/2012	LB-2010-189962	Borgarting Court of Appeal
Noretyl AS v/Finansdepartementet	27/01/2012	LA-2010-79659	Agder Court of Appeal

Skatt Vest v/Havlandet Marinfisk Russenes AS	19/05/2011	LG-2010-147380	Gulating Court of Appeal
Aktieselskapet Saudefaldene v/Gunnhild Marie Åbø Hallingstad and others	10/02/2009	LG-2007-176723	Gulating Court of Appeal
Gauselparken AS v/Stavanger kommune	21/02/2008	LG-2008-16104	Gulating Court of Appeal
Kleven Verft AS v/Samherji hf	23/11/2007	LF-2007-51156	Frostating Court of Appeal
Statkraft SF v/Østfold Energi AS, Skiensfjordens Kommunale Kraftselskap AS, Aust-Agder Kraftverk AS, Akershus Kraft AS, Oslo Energi Produksjon AS, Vestfold Kraft Energi AS, Notodden Energi AS, Kragerø Energi AS.	20/05/1999	LB-1998-1805	Borgarting Court of Appeal
Synnøve Finden AS v Staten v/Landbruks- og matdepartementet	12/02/2017	TOSLO-2015-76450	Oslo District Court
Synnøve Finden AS v Staten v/Landbruks- og matdepartementet	06/06/2017	15-076450TVI-OTIR/07	Oslo District Court
A/S Norske Shell v Staten v/Finansdepartementet	22/03/2017	TOSLO-2016-109103	Oslo District Court
Boreal Transport Nord AS v Finnmark fylkeskommune	10/12/2016	TOSFI-2016-4260	Øst-Finnmark District Court
Synnøve Finden AS v Staten v/Landbruks- og matdepartementet	05/11/2015	15-076450TVI-OTIR/07	Oslo District Court
Aktieselskapet Saudefaldene v/Sentralskattekontoret for Storbedrifter and Statkraft Energi AS	04/09/2015	THAUG-2014-159852	Haugaland District Court

Nettbuss Sør AS v/Aust-Agder fylkeskommune	25/06/2015	13-176418TVI-AUAG	Aust-Agder District Court
Bjelve Bruk AS v Statkraft Energi AS	05/06/2015	14-145950TVI-HARD	Hardanger District Court
Ventor Sp. Zoo v/Skatteopprkrever Utland/International Tax Collection Office	28/01/2015	TSTAV-2014-5960	Stavanger District Court
Norfrakalk AS v/Miljøverndepartementet	08/01/2014	TOSLO-2010-45497	Oslo District Court
Hydro Aluminium AS and Sør-Norge Aluminium AS v Staten v/Finansdepartementet	20/05/2011	TOSLO-2010-108577	Oslo District Court
Vadheim Marin Fisk AS and Vadheim Skjell AS v/Skatt Vest	18/02/2011	TOSLO-2010-60850, TOLSO-2010-62312	Oslo District Court
Norsk Frisør,- Hud- og Stylistskole AS v/Staten v/Skattedirektoratet	09/02/2011	TOSLO-2010-141605	Oslo District Court
Eksportfinans ASA v/Rem Ship AS	20/09/2010	TOSLO-2010-41943	Oslo District Court
Havlandet Marinfisk Russenes AS v/Skatt Vest	12/07/2010	TFJOR-2010-40275	Fjordane District Court
Noretyl AS v/Finansdepartementet	22/02/2010	TNETE-2009-128197	Nedre Telemark District Court
Gauselparken AS v/Stavanger kommune	11/01/2008	TSTAV-2006-155740	Stavanger District Court
Aktieselskapet Saudefaldene v/ Geir Jostein Søndenand and others	18/09/2007	TSTAV-2004-84901	Stavanger District Court
Kleven Verft AS v/Samherji hf	02/02/2007	TSUMO-2006-62813	Sunnmøre District Court
Kattekleiv Barnehage AS v/Notodden kommune. Third party intervener: Private Barnehagers Landsforbund	27/04/2006	05-031989TVI-TINN	Tinn and Heddal District Court

Annex III.3 – Questionnaires for Norway

QUESTIONNAIRE

1. In your opinion, what could be the main reason(s) for the relatively small number of private enforcement cases relating to state aid, before Norwegian courts?

Your experience regarding enforcement of state aid rules and decisions in Norway

2. In the following, please described instances where you have relied on state aid rules in a case before a Norwegian court (please state the case number and the parties involved):

    a. Have you invoked (a breach of) the standstill obligation?

    b. Have you sought an interim injunction or (interim) recovery?

    c. Have you relied on state aid rules in another type of case? If so, to what end?

3. Have you encountered any specific difficulties as regards the application of state aid rules in a case you were involved in?

4. To your knowledge, has a court in a case you were involved in relied on ESA's guidelines *on the enforcement of state aid law by national courts*?

Your views on private enforcement of state aid rules in Norway

5. Are there any legal obstacles, in your view, for private enforcement of state aid rules by Norwegian courts?

6. Which, if any, changes to the national legal order would facilitate private enforcement of state aid rules by Norwegian courts?

Your views on the enforcement of recovery decisions in Norway

7. Are there, in your view, any legal obstacles to the effective enforcement of ESA's recovery decisions stemming from the Norwegian legal order?

8. Which, if any, changes to the national legal order would facilitate the enforcement of recovery decisions by ESA, and of "voluntary recovery[491]"?

[491] Recovery of unlawful aid without there being a final negative decision by ESA – e.g. GBER aid not complying with all conditions of the GBER.

REPLIES

Advokatfirmaet Hjort DA

1. In your opinion, what could be the main reason(s) for the relatively small number of private enforcement cases relating to state aid, before Norwegian courts?

- *The main reason for the small number of private enforcement cases before Norwegian courts, is probably due to the general lack of knowledge of the state aid rules among Norwegian legal practitioners, and thus a lack of knowledge of the possibility of litigating these matters before national courts in the first place. The same is true for most private undertakings, which might otherwise have an interest in bringing such proceedings before national court. State aid law remains a rather obscure and technical area of law in Norway.*

- *Another related reason is the lack of knowledge of the state aid rules among Norwegian judges, making it very hard to plead that a national measure constitutes illegal state aid. As an applicant in such cases, one would have to demonstrate that the contested measure constitutes illegal state aid, which is a demanding task. Combined with the general lack of familiarity with EEA law, and state aid law specifically, an applicant is faced with a difficult challenge in presenting the state aid rules for the national courts. The task of assessing and classifying the measure as state aid, is a task few judges have experience with. Despite the fact that national courts may request the EFTA Surveillance Authority ("ESA") for its opinion on relevant issues concerning the application of the state aid rules, this system is not well-known among Norwegian legal practitioners or judges, and has to our knowledge never been used.*

- *In addition to the challenges mentioned above, there are certain particularities in the EEA system, which makes private action even more challenging than in the EU. First, there is no obligation for national courts to refer a question of whether a national measure constitutes state aid under the Advisory Opinion procedure found in Article 34 of the Surveillance and Court Agreement ("SCA") to the EFTA Court. In the only known example of private enforcement of the State aid rules before Norwegian courts, the so-called Synnøve Finden case, Oslo District Court did refer the case to the EFTA Court, which concluded that the aid in question could constitute State aid, which was later confirmed by the national court. This illustrates the importance of getting guidance on how to interpret the EEA law in these cases, and that without such guidance, a judge might well be reluctant to conclude that a measure constitutes state aid. Second, the EFTA Court has not been empowered to annul state aid decisions from ESA in the Advisory Opinion procedure, as opposed to the Court of Justice of the European Union. This means that if the case concerns a decision by ESA, the only way to get effective judicial review, is to take the case directly to the EFTA Court pursuant to Article 36 SCA.*

- *As for private enforcement by means of claims for damages, a reason for the small number of cases is probably due to the difficulties involved in demonstrating that the requirements for compensation due to illegal state aid are met. In the absence of a decision by ESA concluding that a measure constitutes illegal State aid, it is difficult to convince a national court to classify a measure as illegal State aid, as mentioned above. Furthermore, it is also difficult to access evidence necessary to demonstrate causation between the breach of the state aid rules and the economic loss suffered by a claimant. For the reasons mentioned here, the outcome of a private enforcement case would be uncertain, and private parties are therefore reluctant to litigate such cases before Norwegian courts.*

Your experience regarding enforcement of state aid rules and decisions in Norway

2. In the following, please described instances where you have relied on state aid rules in a case before a Norwegian court (please state the case number and the parties involved):

    a. Have you invoked (a breach of) the standstill obligation?

        - *No, but our firm has been involved in a case concerning compensation for breach of the stand-still obligation, cf. judgment by Oslo District Court in Norfrakalk AS v Staten v/ Miljøverndepartementet TOSLO-2010-45497: https://lovdata.no/pro/#document/TRSIV/avgjorelse/toslo-2010-45497*

    b. Have you sought an interim injunction or (interim) recovery?

        - *No*

    c. Have you relied on state aid rules in another type of case? If so, to what end?

        - *In Norfrakalk AS v Staten v/Miljøverndepartementet TOSLO-2010-45497, cited above, the standstill obligation was invoked as one of three grounds for compensation.*

3. Have you encountered any specific difficulties as regards the application of state aid rules in a case you were involved in?

4. To your knowledge, has a court in a case you were involved in relied on ESA's guidelines *on the enforcement of state aid law by national courts*?

    - *Yes, Oslo District Court relied on the guidelines in Norfrakalk AS v Staten v/ Miljøverndepartementet TOSLO-2010-45497, cited above.*

Your views on private enforcement of state aid rules in Norway

5. Are there any legal obstacles, in your view, for private enforcement of state aid rules by Norwegian courts?

   - *Access to internal documents of the national authorities may be exempted from public access under the Freedom of information Act ("Offentleglova"[492]), thus creating a potential legal obstacle for private enforcement.*

   - *Limitation periods may be an obstacle to bringing damages claims.*

   - *It has been argued that the Norwegian Supreme Court's interpretation of Section 5 of the State aid Act ("Lov om offentlig støtte"[493]) in its judgment HR-2013-2623-A has resulted in a reduced effectiveness of the stand-still obligation in Norwegian law with potential negative consequences for private enforcement, see Hjelmeng, Erling: Tilbakeføring av offentlig støtte – hva er situasjonen etter Rt. 2013 s. 1665 Hydro/Sørdal?, Lov og Rett, vol. 53, 4, 2014, pp. 2010-228, at p. 225:*

     > *"Leses dommen helt bokstavelig, innebærer den at iverksettelsesforbudet ikke har betydning for tilbakeføring, og at det ikke utgjør noe selvstendig grunnlag for en slik rettsvirkning. Dette pga. uttalelsene om at staten ikke hadde rett til å kreve tilbakeføring før vedtaket. En slik tilnærming er imidlertid klart uriktig etter EØS-retten, og vil også kunne utelukke privat håndhevelse av regelverket (for eksempel påstand om stansing av støtteutbetalinger gjennom midlertidig forføyning, søksmål om gyldigheten av avtaler om overdragelse av fast eiendom, og erstatningskrav fra konkurrenter av støttemottager)."*

6. Which, if any, changes to the national legal order would facilitate private enforcement of state aid rules by Norwegian courts?

   - *Obligation to disclose documents.*

   - *Particular limitation periods.*

Your views on the enforcement of recovery decisions in Norway

7. Are there, in your view, any legal obstacles to the effective enforcement of ESA's recovery decisions stemming from the Norwegian legal order?

   - *Not to our knowledge.*

8. Which, if any, changes to the national legal order would facilitate the enforcement of recovery decisions by ESA, and of "voluntary recovery"?

   - *Amendment of the State Aid Act, making it clear that national courts share the competence to order reversal of illegal state aid.*

[492] Lov om rett til innsyn i document i offentleg verksemd av 1. Januar 2009.
[493] Lov om offentlig støtte av 1. januar 1994.

Advokatfirmaet Steenstrup Stordrange DA

1. In your opinion, what could be the main reason(s) for the relatively small number of private enforcement cases relating to state aid, before Norwegian courts?

   As litigation always will imply a certain amount of risk and cost liability exposure, lawyers and clients may rather bring the matter before EFTA Surveillance Authority ("the Authority") via complaints (despite the potential advantages that private enforcement could give, i.e. swifter termination of the aid and compensation for any loss etc). The litigation and cost exposure risks may even be considered particularly uncertain in state aid matters as Norwegian courts are not very familiar with applying state aid rules.

Your experience regarding enforcement of state aid rules and decisions in Norway

2. In the following, please described instances where you have relied on state aid rules in a case before a Norwegian court (please state the case number and the parties involved):

   a. Have you invoked (a breach of) the standstill obligation?

   Due to confidentiality reasons we are not able to state the parties involved. In a dispute where we represented a public body state aid arguments rules played a presumably decisive role in reaching an out-of-court settlement. The dispute concerned the size of the public service compensation. The service provider claimed that it should be paid the full public service compensation foreseen by the contract. However, a part of the compensation foreseen by the contract had not been subject to the public tender competition. The compensation was even increasing year by year due to a specific contract mechanism. On behalf of the public body we invoked that the part of the public service compensation that had not been subject to the public tender competition did not fulfil the Altmark criteria and therefore also amounted to a breach of the standstill obligation. We added that the public body thus would have to submit a notification which in turn could trigger a pay-back obligation for the service provider.

   b. Have you sought an interim injunction or (interim) recovery?

      No

   c. Have you relied on state aid rules in another type of case? If so, to what end?

3. Have you encountered any specific difficulties as regards the application of state aid rules in a case you were involved in?

   No

4. To your knowledge, has a court in a case you were involved in relied on ESA's guidelines *on the enforcement of state aid law by national courts*?

No

Your views on private enforcement of state aid rules in Norway

5. Are there any legal obstacles, in your view, for private enforcement of state aid rules by Norwegian courts?

   This question is answered below together with the answer to question number 6.

6. Which, if any, changes to the national legal order would facilitate private enforcement of state aid rules by Norwegian courts?

   It is considered that Norwegian courts already possess the competence to impose recovery obligations upon undertakings that have received state aid after breaches of the standstill obligation. It may nevertheless serve a clarifying pedagogical purpose if this competence was codified by including it in relevant national statutes, e.g. the State Aid Act or the Disputes Act.[494]

Your views on the enforcement of recovery decisions in Norway

7. Are there, in your view, any legal obstacles to the effective enforcement of ESA's recovery decisions stemming from the Norwegian legal order?

   This question is answered below together with the answer to question number 8.

8. Which, if any, changes to the national legal order would facilitate the enforcement of recovery decisions by ESA, and of "voluntary recovery"?

   The general limitation period under Norwegian civil law is three years. Situations may thus occur where the Authority imposes a recovery obligation within the 10 year deadline, but where a compensation claim before national courts is ruled out due to the three year limitation period. Also in other matters without any prior Authority decision, a state aid based claim may not be identified within the boundaries of the Limitation Act's main rule and exceptions.[495] *Hence, particular rules concerning limitation in state aid based claims may facilitate private enforcement of state aid rules before Norwegian courts.*

[494] Lov om mekling og rettergang i sivile tvister av 1. januar 2008.
[495] Lov om foreldelse av fordringer av 1. januar 1980, 1. august 1980.

Advokatfirmaet Wikborg Rein AS

1. In your opinion, what could be the main reason(s) for the relatively small number of private enforcement cases relating to state aid, before Norwegian courts?

   There is definitely some lack of knowledge among clients and possibly in the legal community. There is a general feeling that state aid rules (and, to a certain extent, general EEA law and competition law) is unknown territory to judges and therefore chances are relatively slim that a state aid argument would prevail.

   However, one major reason for the scarcity of pure state aid cases before national courts is probably also that this option is not really even considered, as a competitor would generally consider a complaint to ESA as "the default option".

   In cases where state aid arguments may be relevant, but not as the main legal basis for the claim (or the defence), state aid arguments may be used but the case is usually decided on a different legal basis. For example, in a contractual dispute involving a public body, if the public body refuses to honour a contract because doing so would allegedly involve state aid, the dispute would usually be solved on a contractual basis alone, which relieves the court of the obligation to take a stance on the state aid question. Often this is for good reasons, although sometimes there may be a feeling that the courts shy away from ruling on such issues.

   Finally, many cases (also outside the context of a formal dispute resolution procedure) where state aid arguments could potentially be raised (or are raised) concern questions of a very local nature, which makes the affectation of trade doubtful.

Your experience regarding enforcement of state aid rules and decisions in Norway

2. In the following, please described instances where you have relied on state aid rules in a case before a Norwegian court (please state the case number and the parties involved):

   a. Have you invoked (a breach of) the standstill obligation?

      In order to rely on state aid arguments before national courts, the standstill obligation would be involved some way or another as otherwise state aid rules cannot be enforced. However, we assume that this question concerns applications for injunctions or other situations where it is argued that a certain amount should not be disbursed as it would amount to a breach of the standstill obligation.

      We have not seen any pure example of such cases

   b. Have you sought an interim injunction or (interim) recovery?

      No

   c. Have you relied on state aid rules in another type of case? If so, to what end?

As indicated above, in our experience, state aid arguments tend to come up in contractual disputes where one of the parties is a public body.

3. Have you encountered any specific difficulties as regards the application of state aid rules in a case you were involved in?

   In general, state aid rules are not well known and must be very carefully explained to the court.

   In some cases, the aid – if any – would most likely constitute existing aid and therefore cannot be enforced by the court.

   The interplay between contract law and State aid rules often gives rise to difficult questions. Some examples:

   - *If aid has been granted by means of a private contract, a public entity would be inclined to recover the difference between the market price and the price paid. However, a private contract is by definition based on rights and obligations for both parties, and if one element of the contract is altered, this might alter the balance of the contract and could, for example, give rise to a right to termination by the private party.*

   - *State aid rules may also act as a trap for a private party if aid that would probably be compatible has been disbursed in breach of the standstill obligation. In such cases, the national court would have to order recovery and stop future payments. At the same time, a notification to ESA would require active cooperation from the public entity. The private party is therefore, in practice, often not in a position to obtain ESA's consent and therefore barred from enforcing its contractual rights vis-à-vis a public entity.*

4. To your knowledge, has a court in a case you were involved in relied on ESA's guidelines *on the enforcement of state aid law by national courts*?

   I do not believe that the guidelines have played a major role in any of the cases we have been involved in.

Your views on private enforcement of state aid rules in Norway

5. Are there any legal obstacles, in your view, for private enforcement of state aid rules by Norwegian courts?

   The basis for a recovery claim is unclear. It is clear that a right to recovery exists and has a legal basis. However, it is not always clear in a particular case whether a recovery claim should be based on the State Aid Act directly, on the standstill obligation, on the sectoral legislation applicable (e.g. taxation rules), on rules on recovery under private law or on contractual mechanisms.

6. Which, if any, changes to the national legal order would facilitate private enforcement of state aid rules by Norwegian courts?

Clarification of the recovery basis would certainly make this type of claims easier. However, giving public entities too wide powers to claim recovery on a unilateral basis could lead to insufficient checks-and-balances, if applicable to cases where ESA has not taken a negative decision. This would effectively leave public entities the possibility to claim recovery on a unilateral basis when involved in dispute that which should otherwise be decided by civil courts.

Your views on the enforcement of recovery decisions in Norway

7. Are there, in your view, any legal obstacles to the effective enforcement of ESA's recovery decisions stemming from the Norwegian legal order?

   Please see questions 5 and 6.
   That said, the situation is unclear in particular where ESA has not taken a decision, and the recovery question is brought up by the aid grantor of its own motion, and probably less so where a negative decision has been taken.

8. Which, if any, changes to the national legal order would facilitate the enforcement of recovery decisions by ESA, and of "voluntary recovery[496]"?

   Please see questions 5 and 6.

   However, stronger recovery powers need to take account of the beneficiary's situation. Aid is often granted on the basis that the aid beneficiary takes on certain obligations. National procedural rules should also ensure that recovery does not disproportionately punish the aid beneficiary. The public entity would often get a double advantage if the aid beneficiary's obligations are left unaltered and (a part of) the payment is recovered. Regulating the impact of recovery on other parts of the relationship between the parties could potentially be considered.

   It should be stressed in particular that any changes to facilitate voluntary recovery should be carefully considered.

[496] Recovery of unlawful aid without there being a final negative decision by ESA – e.g. GBER aid not complying with all conditions of the GBER.

The Confederation of Norwegian Enterprise

The answers are submitted by Ingeborg Djupvik at the Confederation of Norwegian Enterprise

1. In your opinion, what could be the main reason(s) for the relatively small number of private enforcement cases relating to state aid, before Norwegian courts?

   We believe one of the main reasons for the relatively small amount of private enforcements cases pertaining to state aid is due to the limited competence in the field of state aid by national courts.

   In brief, the role of the national courts is limited to enforcement of the standstill obligation pursuant to Article 1(3) of Protocol 3 of the SCA, which has been made part of national legal order (although not entirely clear). In addition, national courts also play a role in the enforcement of recovery decisions, be it challenging the validity of a national recovery order or seeking damages for failure to implement a recovery decision.

   The Authority´s main role in the area is to assess the compatibility of proposed aid measures with the functioning of the EEA Agreement Article 61(2) and (3). This compatibility assessment is within the exclusive remit of the Authority subject to review by the EFTA Court. National courts do not have the power to declare a state aid measure compatible with the said Article.

   Furthermore, procedural rules relating to legal standing before national courts, are sometimes seen as a barrier for numerous NHO Federations in bringing private actions before national court on behalf of their member companies.

   Based on the above, private enforcement is not considered sufficient to ensure full compliance with state aid law.

Your experience regarding enforcement of state aid rules and decisions in Norway

Based on the reply above, not applicable

2. In the following, please described instances where you have relied on state aid rules in a case before a Norwegian court (please state the case number and the parties involved):

   a. Have you invoked (a breach of) the standstill obligation?
   b. Have you sought an interim injunction or (interim) recovery?
   c. Have you relied on state aid rules in another type of case? If so, to what end?

3. Have you encountered any specific difficulties as regards the application of state aid rules in a case you were involved in?

4. To your knowledge, has a court in a case you were involved in relied on ESA's guidelines *on the enforcement of state aid law by national courts*?

Your views on private enforcement of state aid rules in Norway

5. Are there any legal obstacles, in your view, for private enforcement of state aid rules by Norwegian courts?

   See reply to question 1.

6. Which, if any, changes to the national legal order would facilitate private enforcement of state aid rules by Norwegian courts?

   Based on the reply to question 1, national courts will by no means be an adequate alternative to legal processes within the framework of ESA and the EFTA Court. However, a substantive legal provision on state aid in national law, for example based on a model of the Danish competition law, or on a model suggested by the independent expert group on competition neutrality appointed by the Ministry of Trade, Industry and Fisheries (Hjelmengutvalget) would offset some of the disadvantages pertaining to private enforcement of state aid rules.

   Without there being a change to legal order, we also see the need for enhanced competence among national judges in the field of state aid.

Your views on the enforcement of recovery decisions in Norway

7. Are there, in your view, any legal obstacles to the effective enforcement of ESA's recovery decisions stemming from the Norwegian legal order?

8. Which, if any, changes to the national legal order would facilitate the enforcement of recovery decisions by ESA, and of "voluntary recovery[497]"?

   Although not entirely answering the questions above, NHO would like to make the following comments:

   The full recovery amount or the quantification of the price amount is not always calculated by the Authority, although the impression is that the Authority is far more detailed than the Commission. Very often further calculation is needed – and a complex task – and need experts involved. This often results in a lengthy and costly legal dispute – which can take years to solve.

   In addition, the national recovery procedures assume professional parties are being involved. This is very often not the case. On top of this, the question on how the recovery should be carried out in a communal business enterprise, e.g. increased profit, increased return etc., is often a source of complex evaluations and conflicts. This can again create problems as to the enforcement of the recovery.

   We would therefore like to see clearer guidelines from ESA as to the calculation and procedures – or less room for manoeuvring for national authorities as to the recovery. This could again lead to fewer lengthy conflicts in national courts.

[497] Recovery of unlawful aid without there being a final negative decision by ESA – e.g. GBER aid not complying with all conditions of the GBER.

Advokatfirmaet DLA Piper DA

The answers are submitted by senior lawyer Katrine Lillerud in DLA Piper DA.

1. In your opinion, what could be the main reason(s) for the relatively small number of private enforcement cases relating to state aid, before Norwegian courts?

   Expense of national litigation, procedural risk if damage claim against the aid grantor/State, burden of proof, general lack of knowledge of State aid.

Your experience regarding enforcement of state aid rules and decisions in Norway

2. In the following, please described instances where you have relied on state aid rules in a case before a Norwegian court (please state the case number and the parties involved):

   N/A

   a. Have you invoked (a breach of) the standstill obligation?

   N/A

   b. Have you sought an interim injunction or (interim) recovery?

   N/A

   c. Have you relied on state aid rules in another type of case? If so, to what end?

   N/A

3. Have you encountered any specific difficulties as regards the application of state aid rules in a case you were involved in?

   N/A

4. To your knowledge, has a court in a case you were involved in relied on ESA's guidelines on the enforcement of state aid law by national courts?

   N/A

Your views on private enforcement of state aid rules in Norway

5. Are there any legal obstacles, in your view, for private enforcement of state aid rules by Norwegian courts?

   (See Q1 above)

6. Which, if any, changes to the national legal order would facilitate private enforcement of state aid rules by Norwegian courts?

   A more visible/elaborate/better national legislation also with clearer instructions on procedural rights interlinked with the procedural code.

Your views on the enforcement of recovery decisions in Norway

7. Are there, in your view, any legal obstacles to the effective enforcement of ESA's recovery decisions stemming from the Norwegian legal order?

   No.

8. Which, if any, changes to the national legal order would facilitate the enforcement of recovery decisions by ESA, and of "voluntary recovery"?

   More general awareness.

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