2024/1181

18.4.2024

EFTA SURVEILLANCE AUTHORITY DECISION No 081/23/COL

of 31 May 2023

amending the procedural and substantive rules in the field of State aid by introducing revised Guidelines on the enforcement of State aid rules by national courts [2024/1181]

THE EFTA SURVEILLANCE AUTHORITY ('ESA'),

Having regard to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 to 63 and Protocol 26,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular to Article 24 and Article 5(2)(b),

Whereas:

Under Article 24 of the Surveillance and Court Agreement, ESA shall give effect to the provisions of the EEA Agreement concerning State aid.

Under Article 5(2)(b) of the Surveillance and Court Agreement, ESA shall issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the Surveillance and Court Agreement expressly so provides or if ESA considers it necessary.

On 10 June 2009, ESA adopted Decision No 254/09/COL, introducing Guidelines on enforcement of State aid law by national courts ('ESA's Guidelines on enforcement'). ([1])

These guidelines correspond to the European Commission's ('the Commission') Notice on the enforcement of EU State aid rules by national courts ('Notice on enforcement'). ([2])

On 23 July 2021, the Commission adopted a revised notice on the enforcement of EU State aid rules by national courts ('Revised Notice on enforcement'). ([3])

The revisions made by the Commission in the Revised Notice on enforcement are also of relevance for the European Economic Area ('the EEA').

Uniform application of the EEA State aid rules is to be ensured throughout the European Economic Area in line with the objective of homogeneity established in Article 1 of the EEA Agreement.

It is appropriate to amend ESA's Guidelines on enforcement in line with the Commission's Revised Notice on enforcement.

The revised Guidelines on enforcement (Doc No 1251068) provide national courts and other interested parties with practical information and guidance on the enforcement of State aid rules at national level. The revised Guidelines also incorporate recent developments in EEA case-law.

According to point II under the heading 'GENERAL' on page 11 of Annex XV to the EEA Agreement, ESA, after consultation with the Commission, is to adopt acts corresponding to those adopted by the European Commission.

Having consulted the European Commission and the EFTA States,

([1]) OJ L 115, 5.5.2011, p. 13.
([2]) OJ C 85, 9.4.2009, p. 1.
([3]) OJ C 305, 30.7.2021, p. 1.

HAS ADOPTED THIS DECISION:

Article 1

The procedural and substantive rules in the field of State aid shall be amended by introducing revised Guidelines on the enforcement of State aid rules by national courts. The revised Guidelines are annexed to this Decision and form an integral part of it.

Article 2

The revised Guidelines on the enforcement of State aid rules by national courts replace ESA's Guidelines on enforcement from 2009.

Article 3

The revised Guidelines on enforcement will take effect from 1 June 2023.

Done in Brussels, 31 May 2023.

For the EFTA Surveillance Authority.

Arne RØKSUND
President
Responsible College Member

Stefan BARRIGA
College Member

Árni Páll ÁRNASON
College Member

Melpo-Menie JOSÉPHIDÈS
Countersigning as Director,
Legal and Executive Affairs

ANNEX

Guidelines on the enforcement of State aid rules by national courts (*)

(*) These Guidelines correspond to the Commission Notice on the enforcement of State aid rules by national courts (OJ C 305, 30.7.2021, p. 1-28). Some text has nevertheless been deleted compared with the Commission Notice. These deletions include text referring to legal instruments and provisions which are not part of, or have no equivalent in, the EEA Agreement, and text where, it is too unclear at this point what the implications of the legal instrument referred to will be in the context of the EEA Agreement. Where text has been deleted, it has been replaced with […] as placeholder.

1. **INTRODUCTION**

(1) Since 2012, the Commission has implemented the State aid modernisation agenda ([1]). Under this agenda, the Commission has adopted a package of legislation, guidelines and notices for assessing State aid measures. In line with this package, ESA has been able to focus its *ex ante* scrutiny on cases with the biggest impact on the functioning of the EEA Agreement, while developing closer cooperation with the EEA EFTA States in State aid enforcement. To that end, more possibilities have been introduced for the EEA States to grant aid without prior Commission or ESA scrutiny by providing additional exemptions from the obligation to notify any planned State aid measure. As a result, the amount of aid granted on the basis of block exemptions has increased ([2]). In this context, the role of national courts in ensuring compliance with State aid rules has become even more prominent.

(2) In 2019, the Commission published a study on the enforcement of State aid rules and decisions by national courts in 28 Member States ([3]) (the 'Enforcement Study') ([4]). The Enforcement Study reviewed over 750 national judgments falling into two categories: 1) cases where national courts are involved in drawing the consequences of the unlawful implementation of aid ('private enforcement') and 2) cases where national courts are involved in implementing Commission decisions ordering recovery ('public enforcement').

(3) The Enforcement Study revealed that the number of State aid cases addressed to national courts increased between 2007 and 2017. Despite this increase, national courts only awarded remedies on rare occasions, and claims for damages represent a small minority of cases. In addition, the means of cooperation between the Commission and national courts, which were introduced in 2009 by the Commission Notice on the enforcement of State aid law by national courts (the '2009 Enforcement Notice') ([5]) and in 2015 by Council Regulation (EU) 2015/1589 (the 'Procedural Regulation') ([6]) have not been widely used.

(3a) In 2019, ESA published a study on the enforcement of State aid rules and decisions by national courts in the three EEA EFTA States (the 'EEA EFTA Enforcement Study') *. The EEA EFTA Enforcement Study identified 45 judgments of varying relevance. The EEA EFTA Enforcement 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. Of the 45 judgments reviewed, six concerned the private enforcement of the standstill obligation and two concerned the recovery of unlawful State aid based on a negative decision with recovery order from ESA. In no cases did the national court initiate the cooperation procedure pursuant to ESA's Guidelines on enforcement of State aid by national courts *.

([1]) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation (SAM), COM/2012/0209 final.

([2]) […]. In 2019, more than 86% of active aid measures in the EU was covered by a block exemption regulation. See http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html. The correspnding number for the EEA EFTA States was 67%. Further information can be found at: https://www.eftasurv.int/state-aid/state-aid-scoreboards.

([3]) The Enforcement Study was conducted before the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community was signed (24 January 2020) and before it entered into force (1 February 2020). All reference to Member States in the Enforcement Study is to be intended as also referring to the United Kingdom.

([4]) See 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxemburg, 2019.

([5]) Commission Notice on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1).

([6]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) (OJ L 248, 24.9.2015, p. 9) (Text with EEA relevance). The Regulation has yet to be incorporated into the EEA Agreement.

(*) Study on private enforcement of state aid rules by national courts in the EEA EFTA States, published in July 2019: https://www.eftasurv.int/state-aid/private-enforcement.

(*) OJ L 115, 5.5.2011, p. 13, and EEA Supplement No 25, 5.5.2011, p. 1.

(4) These Guidelines provide national courts and other interested parties with practical information on the enforcement of State aid rules at national level. They take into account the questions raised by these courts in the context of the EEA EFTA Enforcement Study or in cases referred for preliminary rulings to the Court of Justice of the European Union ('Court of Justice') or advisory opinions from the EFTA Court **. Some examples are the coherence between the procedures before the Commission and national court proceedings, or the questions raised by the incorrect application of block exemption regulations.

(5) These Guidelines are intended to provide guidance to courts and tribunals of the EEA EFTA States within the meaning of Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the 'Surveillance and Court Agreement' or the 'SCA') ([7]) and to encourage closer cooperation between ESA and national courts by laying down all the available tools of cooperation. It does not bind the national courts or affect their independence ([8]). The main focus of this notice is private enforcement. The Commission Notice on the Recovery of unlawful and incompatible State aid ([9]) ('Recovery Notice') addresses the aspects related to public enforcement.

(6) Since the adoption of the Guidelines on enforcement of State aid by national courts from 2009, the case-law of the General Court, the Court of Justice and the EFTA Court (together, the 'EEA Courts') has evolved *. These Guidelines incorporate those developments and replaces the Guidelines on enforcement of State aid by national courts from 2009.

1.1. **The system of State aid control**

(7) State aid is a legal concept defined directly by the EEA Agreement, which must be interpreted on the basis of objective factors ([10]). According to Article 61(1) of the EEA Agreement, 'any aid granted by […] Member State, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by

(**) Judgment of the EFTA Court of 15 December 2016 in Case E-1/16 *Synnøve Finden AS* v *Staten v/Landbruks- og matdepartmentet*, EFTA Ct Rep [2016] p. 931, paragraphs 47 to 48 and of 14 July 2000 in Case E-1/00 *State Debt Management Agency* v *Íslandsbanki-FBA hf*, EFTA Ct. Rep. [2000-2001] p. 8, paragraph 37.

([7]) To determine whether a body is a court or tribunal for the purposes of Article 34 of the Surveillance and Court Agreement (the Article corresponds to Article 267 TFEU), the EFTA Court has repeatedly held that the purpose of Article 34 SCA does not require a strict interpretation of the notion of court or tribunal, which is an autonomous notion of EEA law (see judgment of the EFTA Court of 16 July 2020 in Case E-8/19 *Scanteam AS* v *The Norwegian Government*, *not yet published*, paragraph 41 and case law cited).[…].

([8]) However, even if those guidelines are not intended to produce binding effects, the national courts are required to take them into consideration in order to decide disputes submitted to them. See Judgment of the Court of Justice of 3 September 2014, *Baltlanta*, C-410/13, EU:C:2014:2134, paragraph 64 and Judgment of the Court of Justice of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, paragraph 18; Judgment of the Court of Justice of 13 February 2014, *Mediaset*, C-69/13, EU:C:2014:71, paragraph 31.

([9]) ESA adopts guidelines on the interpretation and application of the State aid rules, either in the form of an EEA EFTA version of the relevant European Commission instrument or by a refrence to that instrument. The European Commission has adopted a Notice on the Recovery of unlawful and incompatible state aid, OJ C 247, 23.7.2019, p.1 which replaced the 2007 Recovery Notice, OJ C 272, 15.11.2007, p.4. The Notice on Recovery of unlawful and incompatible State aid follows, to certain extent, 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 "the Procedural Regulation" which has not yet been incorporated into the EEA Agreement. Thus, ESA refers to its currently applicable Recovery notice from 2008, available here, OJ L 105, 21.4.2011, p. 32.

(*) See for instance judgment of the EFTA Court of 15 December 2016 in Case E-1/16 *Synnøve Finden AS* v *Staten v/Landbruks- og matdepartmentet*, EFTA Ct Rep [2016] p. 931, paragraphs 47 to 48 and of 14 July 2000 in Case E-1/00 *State Debt Management Agency* v *Íslandsbanki-FBA hf*, EFTA Ct. Rep. [2000-2001] p. 8, paragraph 37.

([10]) Judgment of the Court of Justice of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P,EU:C:2008:757, paragraph 111; Judgment of the Court of Justice of 16 May 2000, *France* v *Ladbroke Racing and Commission*, C-83/98 P,EU:C:2000:248, paragraph 25.

favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of [the EEA] Agreement'. ESA has provided guidance on how to interpret the notion of State aid ([11]).

(8) The general prohibition of State aid relies on a double system of *ex ante* and *ex post* control of interventions involving State aid. Pursuant to Article 62 of the EEA Agreement, ESA must keep under constant review all systems of existing aid and assess any plans by an EEA EFTA State to grant new aid or alter existing aid. For ESA to perform this review effectively, EEA EFTA States must cooperate by providing any relevant information and by notifying State aid measures.

(9) EEA EFTA States are under an obligation, first, to notify ESA of any measure intended to grant new aid or alter existing aid and, second, not to put into effect such measure until ESA has assessed its compatibility with the functioning of the EEA Agreement ('standstill obligation') ([12]). The standstill obligation stemming from Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement ('Protocol 3') confers rights on individuals, which they can rely on before national courts ([13]).

(9a) For the EEA EFTA States, the implementation of EEA rules is subject to Protocol 35 to the EEA Agreement ('Protocol 35 EEA'), according to which the EEA EFTA States must ensure that in cases of conflict between implemented EEA rules and other statutory provisions, the implemented EEA rules prevail. Individuals and economic operators must be entitled to invoke and claim at the national level any rights derived from provisions of the EEA Agreement, that have been made part of the national legal order, if they are unconditional and sufficiently precise, * such as the standstill obligation.

(10) It follows that the implementation of the system of State aid control, of which the provision of Article 1(3) of Part I of Protocol 3 constitutes a fundamental feature, is a matter for both ESA and the national courts, their respective roles being complementary but separate. While ESA has exclusive competence for assessing the compatibility of aid measures with the functioning of the EEA Agreement, it is for the national courts to safeguard the rights of individuals faced with a possible breach of Article 1(3) of Part I of Protocol 3 ([14]).

([11]) See, for instance, 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, and EEA Supplement No 82, 21.12.2017, p. 1.); Application of the State aid rules to compensation granted for the provision of services of general economic interest (OJ L 161, 13.6.2013, p. 12 and EEA Supplement No 34, 13.6.2013, p. 1)); Guidelines on State Guarantees (OJ L 105, 21.4.2011, p. 32 and EEA Supplement No 23, 21.4.2011, p. 1)); Guidelines on State aid for research and development and innovation (OJ L 209, 6.8.2015, p. 17 and EEA Supplement No 44, 6.8.2015, p. 1).

([12]) Judgment of the Court of Justice of 14 November 2019, *Dilly's Wellnesshotel*, C-585/17, EU:C:2019:969, paragraph 54.

([13]) The standstill obligation stemming from Article 108(3) TFEU, which is mirrored by Article 1(3) of Part I of Protocol 3, has direct effect in the EU Member States. Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 88; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 22; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 29.

(*) Judgment in Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 77, Case E-2/12 *HOB-vín ehf* v *Áfengis- og tóbaksverslun ríkisins*[2012] EFTA Ct. R. 1092, paragraph 122 and Case E-6/17 *Fjarskipti hf.* v *síminn hf.* [2018] EFTA Ct. R. 78, paragraphs 27 and 28.

([14]) Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 38; Judgment of the Court of Justice of 11 March 2010, *CELF et ministre de la Culture et de la Communication*, C-1/09, EU:C:2010:136, paragraph 26; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 21; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 21.

1.2. **The standstill obligation**

(11) The enforceability of Article 1(3) of Part I of Protocol 3 implies that national courts must take all appropriate actions, in accordance with their national law, to address the consequences of an infringement of that provision ([15]).

(12) For a measure to be subject to the standstill requirement of Article 1(3) of Part I of Protocol 3, two conditions need to be satisfied: first, the measure qualifies as new aid, including alterations of an existing aid ([16]). and second, the measure must be subject to the prior notification obligation of Article 1(3) of Part I of Protocol.

(13) Therefore, where a measure does not constitute new aid, EEA EFTA States can implement it without prior notification to ESA. Moreover, EEA EFTA States may implement aid measures that fulfil all the conditions to benefit from an exemption from the notification obligation.

(14) The *de minimis* regulations ([17]), set conditions according to which aid is deemed not to affect trade between EEA States and not to distort or threaten to distort competition. ([18]) If an aid measure fulfils all the relevant conditions provided for in the *de minimis* regulations, the EEA EFTA State concerned is exempted from its obligation to notify ESA of the measure.

(15) Block exemption regulations – such as the General Block Exemption Regulation ([19]) – set out conditions according to which aid measures must or can be considered compatible with the functioning of the EEA Agreement under Article 61(2) or (3) ([20]). If an aid measure fulfils all the relevant conditions provided for in these regulations, the EEA EFTA State concerned is exempted from its obligation to notify ESA of the aid.

([15]) Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 88 to 89; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraphs 22 to 23. Judgment of the EFTA Court of 15 December 2016 in Case E-1/16 *Synnøve Finden AS* v *Staten v/Landbruks- og matdepartmentet*, EFTA Ct Rep [2016] p. 931, paragraph 48.

([16]) By virtue of Article 1(c) of the Part II of Protocol 3, 'new aid' is defined as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. Since that provision is established in broad terms, it is capable of covering not only the alteration itself, but also the aid concerned by that alteration. In addition, according to Article 1(b)(ii) of the Part II of Protocol 3, 'existing aid' is understood as being, *inter alia*, 'authorised aid, that is to say, aid schemes and individual aid which have been authorised by the EFTA Surveillance Authority or, by common accord as laid down in Part I, Article 1(2) subparagraph 3, by the EFTA States'. Thus, aid which was the subject of an authorisation decision and which, as a result of an alteration that did not satisfy a condition laid down by that decision in order to ensure the compatibility of that aid with the internal market, is no longer covered by the decision which authorised it, may constitute new aid. See Judgment of the Court of Justice of 25 October 2017, C-467/15 P, *Commission* v *Italy*, EU:C:2017:799, paragraphs 46 and 47. See also Section 4.2.2.2. of these Guidelines.

([17]) 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). The regulation has been incorporated into the EEA Agreement in point 1ea of Annex XV by EEA Joint Committee Decision No 98/2014 of 16 May 2014 (OJ L 310, 30.10.2014, p. 65–66, and EEA Supplement No 63, 30.10.2014, p. 56); Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8). The regulation has been incorporated into the EEA Agreement in point 1ha of Annex XV by the EEA Joint Committee Decision No 225/2012 of 7 December 2012 (OJ L 81, 21.3.2013, p. 27, and EEA Supplement No 18, 21.3.2013, p. 32).

([18]) Such regulations are adopted on the basis of the enabling Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1).

([19]) 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). The regulation has been incorporated into the EEA Agreement in point 1j of Annex XV by EEA Joint Committee Decision No 152/2014 of 27 June 2014 (OJ L 342, 27.11.2014, p. 63, and EEA Supplement No 71, 27.11.2014, p. 61).

([20]) Pursuant to Article 109 TFEU, the Council of the European Union may adopt regulations for the application of Articles 107 and 108 TFEU and determine categories of aid that are exempted from the notification obligation. As provided for in Article 108(4) TFEU, the Commission may then adopt regulations relating to the categories of State aid that the Council has determined, pursuant to Article 109 TFEU.

(16) Moreover, Commission Decision 2012/21/EU ([21]), with regard to State aid for Services of General Economic Interest in general, and Regulation (EC) No 1370/2007 of the European Parliament and of the Council ([22]), with particular regard to public passenger transport services by rail and by road, set conditions according to which the compensations for public service obligations are considered compatible with the internal market pursuant to Articles 106(2) * and 93 TFEU ** Also in these cases, the measures concerned are not subject to the standstill obligation.

2. GENERAL PRINCIPLES OF THE ENFORCEMENT OF STATE AID RULES

2.1. The principle of sincere cooperation

(17) Article 3 of the EEA Agreement, which is modelled on Article 4(3) of the Treaty on European Union ([23]) ('TEU'), requires the Contracting Parties to take all appropriate measures to ensure fulfilment of the obligations arising out of the EEA Agreement and to facilitate cooperation within its framework. Pursuant to the principle of sincere cooperation enshrined in this Article, ESA and the EEA EFTA States, acting within the scope of their jurisdiction, must assist each other in carrying out those tasks. Article 2 SCA requires that the EFTA States take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the SCA. Furthermore, the EFTA States are to abstain from any measure which could jeopardise the attainment of the objectives of the EEA Agreement and the SCA.

(18) The obligation of mutual assistance stemming from Article 3 of the EEA Agreement and Article 2 SCA also applies to national courts ([24]). This means that ESA assists national courts when they apply EEA law ([25]), and that, conversely, national courts assist ESA in the fulfillment of its tasks. National courts must, therefore, take all the necessary measures to ensure fulfillment of their obligations arising out of the EEA Agreement and refrain from taking decisions which may jeopardise the attainment of the objectives of the EEA Agreement ([26]).

([21]) Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380) (OJ L 7, 11.1.2012, p. 3). The decision has been incorporated into the EEA Agreement in point 1h of Annex XV by EEA Joint Committee Decision No 66/2012 of 30 March 2012 (OJ L 207, 2.8.2012, p. 46, and EEA Supplement No 43, 2.8.2012, p. 56).

([22]) Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road (OJ L 315, 3.12.2007, p. 1). The regulation has been incorporated into the EEA Agreement in point 4a of Annex XIII by EEA Joint Committee Decision No 85/2008 of 4 July 2008 (OJ L 280, 23.10.2008, p. 20 and EEA Supplement No 64, 23.10.2008, p. 13).

(*) Article 106(2) TFEU corresponds to Article 59(2) of the EEA Agreement.

(**) Article 93 TFEU corresponds to Article 49 of the EEA Agreement

([23]) OJ C 202, 7.6.2016, p. 13.

([24]) Judgment of the Court of Justice of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 31 and judgment of the EFTA Court of 28 September 2012 in Case E-18/11 *Irish Bank Resolution Corporation Ltd* v *Kaupþing* hf EFTA Ct. R. [2012] p. 592, paragraphs 58 and 123.

([25]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 50; Judgment of the Court of Justice of 28 February 1991, *Delimitis* v *Henninger Bräu*, C-234/89, EU:C:1991:91, paragraph 53.

([26]) Judgment of the Court of Justice of 11 September 2014, *Commission* v *Germany*, C-527/12, EU:C:2014:2193, paragraph 56; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 41 and judgment of the EFTA Court of 17 October 2014 in Case E-28/13 *LBI hf* v *Merril Lynch Int Ltd*, EFTA Ct. R. [2014] p. 970, paragraph 40.

2.2. **The principles of equivalence and effectiveness applied to national procedures**

(19) The Court of Justice has consistently recognised the principle of procedural autonomy in the enforcement of State aid rules ([27]). According to this principle, in the absence of EEA law on the subject, EEA EFTA States are free to choose how they fulfil their obligations stemming from the EEA Agreement, provided that the means they use do not adversely affect the scope and effectiveness of EEA law.

(20) In accordance with the EEA Courts' case-law, the applicable national legislation must not be less favorable when applying Article 1(3) of Part I of Protocol 3 than the one governing similar domestic situations ('principle of equivalence') and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EEA law ('principle of effectiveness') ([28]). Sections 2.2.1., 2.2.2. and 2.2.3. explain the interplay between the principle of procedural autonomy on the one hand, and the principles of equivalence and effectiveness, on the other, in relation to legal standing, the national courts' jurisdiction and the principle of res judicata ([29]).

2.2.1. *Legal standing*

(21) In application of the principle of procedural autonomy, EEA States apply their national rules on legal standing to national litigation concerning State aid, provided that they respect the principles of equivalence and effectiveness.

(22) Pursuant to the principle of effectiveness, national rules on individuals' legal standing and interest in bringing proceedings should not undermine their right to effective judicial protection of the rights conferred on them by EEA law ([30]).

(23) The Enforcement Study showed that national courts rule mostly on cases brought by competitors of the aid beneficiary, which are directly affected by the distortion of competition arising from the implementation of the unlawful aid ([31]).

([27]) Judgment of the Court of Justice of 21 September 1983, *Deutsche Milchkontor GmbH*, C-205/82, EU:C:1983:233, paragraphs 22 to 23; Judgment of the Court of Justice of 13 June 2002, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraph 90; Judgment of the Court of Justice of 11 September 2014, *Commission* v *Germany*, C-527/12, EU:C:2014:2193, paragraphs 39 to 42; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 72; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraphs 40 to 41; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 135.

([28]) Compliance with the principle of effectiveness must be addressed by analysing the particular features of that provision and its role in the relevant procedure. In that sense, see Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 40; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 138 to 140. Judgment of the EFTA Court of 17 September 2018 in Case E-10/17, *Nye Kystlink AS* v *Color Group AS and Color Line AS*, EFTA Ct. Rep. [2018] p. 292, paragraphs 73 – 75 and 110-111, and the case law cited.

([29]) The compliance of applicable domestic procedural rules with the principles of equivalence and effectiveness can, however, relate to any other aspects of the national legislation, including, for instance, the level of costs associated with the private enforcement of State aid before national courts.

([30]) Judgment of the Court of Justice of 13 January 2005, *Streekgewest*, C-174/02, EU:C:2005:10, paragraph 18 and Judgment of the EFTA Court of 13 June 2013 in Case E-11/12, *Beatrix Koch, Dipl. Kfm. Lothar Hummel and Stefan Muller* v *Swiss Life AG*, EFTA Ct. R. [2013] p. 272, paragraph 117.

([31]) For example, in Romania, any person who is affected by an unlawful State aid measure has legal standing in court. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxemburg, 2019, p. 404. Also, in Latvia, legal standing is directly based on Article 108(3) TFEU and thus national courts may rely on the definition of 'interested party' of the Procedural Regulation to determine whether a person has legal standing in a case. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxemburg, 2019, p. 300.

(24) However, when applying the national rules on standing, national courts have to take into account their duty to protect the interest of any parties having a sufficient legal interest in initiating proceedings ('third parties'), irrespective of whether they have been directly affected by the distortion of competition arising from the unlawful implementation of the aid measure.

(25) National courts have to consider further elements when assessing third parties' legal standing in cases concerning State aid granted through fiscal measures. Third party taxpayers may be regarded as having an interest in bringing an action to obtain the refund of the amount levied in breach of the standstill obligation only where the tax or levy to which they are subject forms part of the financing of the unlawful State aid ([32]). Their legal standing does not rely on the existence of a competitive relationship with the aid beneficiary ([33]).

(26) Conversely, third party taxpayers cannot rely on the unlawfulness of an aid measure exempting from taxation certain undertakings or sectors to avoid payment of that tax or levy or to obtain its reimbursement, unless the tax revenue is reserved exclusively for funding the unlawful State aid as indicated in paragraph (25). This is also the case where they operate in competition with the beneficiaries ([34]). Such a solution would result in increasing the anticompetitive effects of the State aid as it would enlarge the number of undertakings benefitting from a tax exemption constituting unlawful State aid ([35]).

(27) Where questions in relation to the EEA Agreement, the SCA, or ESA's State aid decisions appear in the context of national proceedings, the parties in those proceedings may apply to the national courts to request an advisory opinion from the EFTA Court. Pursuant to Article 34 SCA, the EFTA Court has jurisdiction to give advisory opinions on the interpretation of the EEA Agreement, which includes, *inter alia*, Article 61 of the EEA Agreement. However, in order to seek the annulment of a State aid decision adopted by the ESA, an application for anulment must be brought under Article 36 SCA. […] ([36]).[…] ([37]).

2.2.2. *Jurisdiction*

(28) The principle of procedural autonomy implies that it is for the national legal system of each EEA State to designate the courts that have jurisdiction in proceedings concerning the granting of unlawful aid. It also implies that EEA States determine the detailed procedural rules governing these legal actions, provided that the principles of equivalence and effectiveness are complied with ([38]).

([32]) Reference is made, for instance, to cases where the unlawful aid is financed by a levy to which the plaintiff is subject. The position is, however, different where the dispute concerns not an application to be exempted from the contested tax, but the legality of the rules relating to that tax. See in that sense Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 25 and Judgment of the Court of Justice of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 26.

([33]) Judgment of the Court of Justice of 13 January 2005, *Streekgewest*, C-174/02, EU:C:2005:10, paragraph 19.

([34]) Judgment of the Court of Justice of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraphs 81 to 82; Judgment of the Court of Justice of 21 December 2016, *Commission* v *Aer Lingus*, C-164/15 P, EU:C:2016:990, paragraph 121; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraphs 24 to 28.

([35]) Judgment of the Court of Justice of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04, EU:C:2006:403, paragraph 45.

([36]) […].

([37]) […].

([38]) Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 72.

(29) In the absence of specific rules under EEA law, the structure of the EEA States' judicial systems varies widely. While a few EEA States have set up specialised courts for State aid matters, others have assigned exclusive jurisdiction to chambers of existing courts or adopted procedural rules clarifying the courts' jurisdiction in public and private enforcement cases ([39]). In the majority of the EEA States, civil and administrative courts are competent in the application of State aid rules ([40]).

2.2.3. The principle of *res judicata*

(30) The principle of *res judicata* states that judgments that have become definitive cannot be called into question anymore. This is the case where all rights of appeal have been exhausted or where the time limits to exercise those rights have expired. The principle of *res judicata* aims to guarantee the stability of law and legal relations, as well as the sound administration of justice, and it is enshrined both in the EEA legal order and in national legal systems ([41]). According to case-law, in the absence of EEA legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the EEA States. However, such procedural rules must abide by the principles of equivalence and effectiveness ([42]).

(31) […] ([43]). National courts are under a duty to give full effect to the provisions of EEA law. According to Protocol 35 of the EEA Agreement, in cases of conflict between impemented EEA rules and other statutory provisions, the EEA EFTA States must ensure that the implemented EEA rules prevail. * This also applies to national rules enshrining the principle of *res judicata* ([44]).

(32) The case-law of the EEA Courts has limited the force of the principle of *res judicata* in the field of State aid. The application of the principle of *res judicata* must not limit the exclusive competence conferred on ESA by the EEA Agreement to assess State aid compatibility ([45]). Further, the circumstance that a national court has ruled out the existence of State aid in relation to a measure cannot prevent ESA from finding later that the measure at stake

([39]) For example, Ireland has attributed exclusive jurisdiction to the Competition List of the High Court to hear competition law disputes, including State aid cases. Also, in Italy, the administrative courts of the country have been attributed nearly exclusive competence to hear cases concerning public and private enforcement of State aid rules from 19 January 2013. Civil courts have kept their competence regarding certain types of proceedings and actions. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxemburg, 2019, pp. 253 and 263 to 264. See, also, 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', pp. 103 to 104.

([40]) In particular, in most EU Member States, administrative courts are competent when the plaintiff challenges an act of the public authority, such as the order implementing the recovery or awarding the aid, while civil courts are competent for issues related to the recovery of State aid in the context of insolvency proceedings or to the award of damages. See 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxemburg, 2019, p. 64. In Norway and Iceland, there are no specialised courts, the national courts handle all matters. In Liecthenstein, the national courts are competent to annul or declare the contract or law on which the aid was granted void with retroactive effect. The aid granting authoritiy can revise its own decision or order recovery of unlawful State aid due to a negative decision from ESA, supervisory complaints can be loged to a national authority.

([41]) Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 38.

([42]) Judgment of the Court of Justice of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 24. Judgment of the Court of Justice of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 54; Judgment of the Court of Justice of 4 May 2020, *Telecom Italia*, C-34/19; EU:C:2020:148, paragraph 58.

([43]) […].

(*) Judgment of the EFTA Court of 22 February 2022 in Case E-1/01, *Hörður Einarsson* v *The Icelandic State*, EFTA Ct. R. [2002], p. 1, paragraphs 52-53.

([44]) Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraphs 60 and 61.

([45]) Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraph 61 to 63; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14,EU:C:2015:742, paragraph 44; Judgment of the Court of Justice of 4 March 2020, *Buonotourist* v *Commission*, C-586/18 P, EU:C:2020:152, paragraphs 92 to 96; Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità* v *Commission*, C-587/18 P, EU:C:2020:150, paragraphs 92 to 96; Judgment of the Court of Justice of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraphs 22 to 25

constitutes unlawful and incompatible State aid ([46]). This holds even in case of a judgment by a national court adjudicating at last instance ([47]).This applies also where national rules on *res judicata* extend to pleas in law that could have been, but were not, invoked in court proceedings ([48]).

3. **THE ROLE OF ESA**

(33) The aim of the system of prior control established by Article 1(3) of Part I of Protocol 3 is to ensure that only compatible aid can be implemented ([49]). In order to achieve that aim, the implementation of planned aid that is not block exempted is to be deferred until ESA adopts a decision on its compatibility with the functioning of the EEA Agreement ([50]).

3.1. **The exclusive competence of ESA**

(34) ESA generally exercises its competence to assess the compatibility of an aid measure in two steps. First, ESA assesses whether the measure qualifies as State aid under Article 61(1) of the EEA Agreement ([51]). Second, it examines whether the measure is compatible with the functioning of the EEA Agreement. The first step, consisting of the assessment of the existence of aid, is a competence exercised by both ESA and national courts, as the latter may have to establish if a measure is subject to the standstill obligation ([52]). (see Sections 4.2.1 and 4.2.2). The second step, consisting of the compatibility assessment, falls within ESA's exclusive responsibility. The compatibility assessment must be included in a decision ([53]), which is subject to review by the EFTA Court ([54]).

(35) ESA can conclude on a measure's compatibility with the functioning of the EEA Agreement either following a preliminary examination (where it has no doubts as to the measure's compatibility with the functioning of the EEA Agreement) ([55]) or following a formal investigation (where, in the context of the preliminary examination it had doubts as to the measure's compatibility with the functioning of the EEA Agreement) ([56]). When it initiates a formal

([46]) "A national rule which prevents the national court from drawing all the consequences of a breach of the third sentence of Article 108(3) TFEU [Article 1(3) of Part I of Protocol 3] because of a decision of a national court, which is res judicata, given in a dispute which does not have the same subject-matter and which did not concern the State aid characteristics of the contracts at issue must be regarded as being incompatible with the principle of effectiveness", Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 45.

([47]) Judgment of the Court of Justice of 4 March 2020, *Buonotourist* v *Commission*, C-586/18 P, EU:C:2020:152, paragraphs 92 to 96.

([48]) Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraphs 30 and 42 to 43.

([49]) Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 19.

([50]) Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 25 to 26; Judgment of the Court of Justice of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 40; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 84.

([51]) [...]. 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 and EEA Supplement No 82, 21.12.2017, p. 1).

([52]) Judgment of the Court of Justice of 4 March 2020, *Buonotourist* v *Commission*, C-586/18 P, EU:C:2020:152, paragraph 90.

([53]) See Articles 4 and 7 of Part II of Protocol 3.

([54]) Judgment of the Court of Justice of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 37.

([55]) Decision not to raise objection, Article 4(3) of Part II of Protocol 3.

([56]) See the notions of 'positive decision' and 'negative decision' respectively in Article 7(3) and (5) of the Part II of Protocol 3.

investigation, ESA adopts a decision in which it sets out its preliminary assessment as to the aid character of the measure and its doubts as to the measure's compatibility with the functioning of the EEA Agreement ('opening decision') ([57]).

(36) ESA's exclusive power to assess State aid compatibility can limit national courts in the exercise of their competence of applying Articles 61(1) and Article 1(3) of Part I of Protocol 3 (see Section 4.1) ([58]). This is true of opening decisions, which, pending the assessment of the measure's compatibility, have certain legal consequences on the proceedings before national courts (see Section 4.1.1.2)

(37) Within the framework of the EEA Agreement, national courts are to abide by ESA's assessment on the existence of aid, as set out in a final ESA decision taken prior to the national court's decision ([59]). Conversely, if a national court rules prior to any ESA decision, this ruling, even if having the force of *res judicata*, cannot prevent ESA from exercising at some point in time the exclusive competence conferred on it by the EEA Agreement (see Section 2.2.3) ([60]).

3.2. **ESA's powers to enforce State aid rules**

(38) As a general rule, in order to impose remedies for the violation of State aid rules, when it concludes that the measure examined constitutes unlawful and incompatible State aid, ESA needs to adopt a final decision which concludes the formal investigation and orders the recovery of this aid ('recovery decision') ([61]).

(39) The rules of procedure in the field of State aid codify ESA's enforcement powers ([62]). Pursuant to Article 14(1) of Part II of Protocol 3, ESA must order the recovery of unlawful and incompatible aid by adopting a decision. When it establishes in a decision that an aid measure is unlawful and incompatible with the functioning of the EEA Agreement, ESA has no discretion and must order its recovery ([63]), unless that would be contrary to a general principle of EEA law ([64]). In addition, ESA's powers to order recovery are subject to a limitation period of 10 years from the day on which the unlawful aid was awarded to the beneficiary ([65]).

([57]) See Article 4(3) and (4) of the Part II of Protocol 3.

([58]) See Judgment of the Court of Justice of 4 March 2020, *Buonotourist* v *Commission*, C-586/18 P, EU:C:2020:152, paragraphs 93 to 94 "the exercise of such a power implies that the Commission may examine, pursuant to Article 108 TFEU, whether a measure constitutes State aid which should have been notified to it, in accordance with paragraph 3 of that article, in a situation where the authorities of a Member State have taken the view that that measure did not satisfy the conditions laid down in Article 107(1) TFEU, including where those authorities have complied, in that regard, with the assessment of a national court. That conclusion cannot be invalidated by the fact that that court has adopted a decision having the force of *res judicata*. It should be emphasised that the rule of exclusive competence of the Commission is necessary in the internal legal order as a consequence of the principle of the primacy of Union law".

([59]) Judgment of the Court of Justice of 15 September 2016, *PGE*, C-574/14, EU:C:2016:686, paragraphs 33 and 36 to 37.

([60]) Judgment of the Court of Justice of 4 March 2020, *Buonotourist* v *Commission*, C-586/18 P, EU:C:2020:152, paragraphs 92 to 96; Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità* v *Commission*, C-587/18 P, EU:C:2020:150, paragraphs 92 to 96.

([61]) Judgment of the Court of Justice of 14 February 1990, *France* v *Commission* ('*Boussac*'), C-301/87, EU:C:1990:67, paragraphs 9 to 22. This does not preclude the possibility for ESA to issue a recovery injunction before it has completed the compatibility assessment, in specific cases provided for under Article 11(1) of Part II of Protocol 3.

([62]) Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 66; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 110. In both instances, the Court of Justice was referring to the (revised) Procedural Regulation which, in so far as it contains rules of a procedural nature which apply to all administrative procedures in the matter of State aid pending before the Commission, it codifies and reinforces the Commission's practice in reviewing State aid. The revised Procedural Regulation (Regulation (EU) 2105/1589) is not yet incorporated into the EEA Agreement.

([63]) Judgment of the Court of Justice of 7 March 2002, *Italy* v *Commission*, C-310/99, EU:C:2002:143, paragraph 99.

([64]) See Article 14(1) of Part II of Protocol 3.

([65]) See Article 15(1) of Part II of Protocol 3.

(40) In some instances, pursuant to Article 11 of Part II of Protocol 3, ESA could, at its discretion, adopt provisional measures while it completes the compatibility assessment. In particular, ESA may issue suspension or recovery injunctions, provided that a number of conditions are fulfilled ([66]). These measures seek to limit the damage associated with the implementation of the aid in breach of the notification and standstill obligations ([67]).

4. THE ROLE OF NATIONAL COURTS

(41) While ESA must examine the compatibility of an aid measure with the functioning of the EEA Agreement, even where it has established its implementation in breach of Article 1(3) of Part I of Protocol 3, the primary role of national courts is to preserve the rights of individuals faced with that breach ([68]).

(42) National courts have the responsibility to offer effective legal protection to third parties ([69]). Their contribution to the State aid control system is especially necessary in cases where unlawful aid is granted, in the absence of a final ESA decision on the same measure or until the adoption of such decision, as well as in cases where a possibly compatible aid has been granted in violation of the standstill obligation ([70]).

4.1. Delimitation of the competences of national courts in the application of State aid rules

(43) National courts have the power to interpret and apply Article 61(1) of the EEA Agreement and Article 1(3) of Part I of Protocol 3. In particular, in the absence of an ESA decision regarding the same measure ([71]), national courts are bound only by the objective notion of State aid when exercising their competence to assess the existence of State aid ([72]).

([66]) Judgment of the Court of Justice of 14 February 1990, *France* v *Commission*, C-301/87, EU:C:1990:67, paragraphs 19 to 20; Judgment of the Court of Justice of 21 March 1991, *Italy* v *Commission*, C-303/88,EU:C:1991:136, paragraph 46. If the Member State fails to comply with a suspension or a recovery injunction, ESA is entitled, while carrying out the examination on the substance of the matter, to bring the matter directly before the EFTA Court by applying for a declaration that such failure constitutes an infringement of the EEA Agreement, pursuant to Article 12 of the Procedural Regulation.

([67]) See Article 11(1) and (2) of the Part II of Protocol 3.

([68]) Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 38; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others* v *France*, C-354/90, EU:C:1991:440, paragraphs 11 to 12.

([69]) Judgment of the Court of Justice of 11 December 1973, *Lorenz GmbH* v *Bundesrepublik Deutschland and Others*, C-120/73, EU:C:1973:152, paragraph 8; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others* v *France*, C-354/90, EU:C:1991:440, paragraph 11; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 39.

([70]) For the role of national courts in the public enforcement of State aid, see the Recovery Notice (OJ C 247, 23.7.2019, p. 1). ESA adopts guidelines on the interpretation and application of the State aid rules, either in the form of an EEA EFTA version of the relevant European Commission instrument or by a refrence to that instrument. The European Commission has adopted a Notice on the Recovery of unlawful and incompatible State aid, OJ C 247, 23.7.2019, p.1 which replaced the 2007 Recovery Notice, OJ C 272, 15.11.2007, p.4. The Notice on Recovery of unlawful and incompatible State aid is, to certain extent, based on 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 "the Procedural Regulation" which has not yet been incorporated into the EEA Agreement. For this reason. ESA has not been able to adopt a meaningful EEA EFTA version of the Notice on the Recovery and unlawful and incompatible State aid and therefore refers to its currently applicable Recovery notice from 2008, available here, OJ L 105, 21.4.2011, p. 32.

([71]) See also Judgment of the General Court of 20 June 2019, *A&O hostel and hotel Berlin* v *Commission*, T-578/17, EU:T:2019:437, paragraph 72.

([72]) To that effect, see Judgment of the Court of 22 March 1977, *Steineke e Weinlig*, 78/76, EU:C:1977:52, paragraph 14.

(44) ESA also assesses the existence of State aid, which is normally a first step before assessing its compatibility. Therefore, any proceedings before ESA, prior or subsequent to those before national courts, could affect the latter ([73]), as explained in Section 4.1.1.

4.1.1. *Following a decision by ESA*

(45) National courts must refrain from taking decisions which conflict with a decision of ESA ([74]), in order to not breach the EEA Agreement, and must therefore abide by ESA's assessment on the existence of State aid. National courts also have no jurisdiction to declare ESA decisions invalid ([75]). The EFTA Court alone has that jurisdiction pursuant to Article 36 of the SCA. ([76])

(46) If a national court has doubts about the interpretation or the validity of an ESA decision, that court may seek clarification from ESA (see Section 5.1). If a question of interpretation of the EEA Agreement arises, the national court may ([77]) refer a question to the EFTA Court for an advisory opinion, in accordance with Article 34 SCA ([78]).

4.1.1.1. Following a decision by ESA declaring the aid compatible

(47) A final ESA decision recognising the compatibility of unlawful aid after it has been granted does not have the effect of regularising *ex post facto* the implementing measures which had been adopted in breach of the standstill obligation provided for in Protocol 3 ([79]).

(48) In this context, national courts must offer individuals the certain prospect that all appropriate conclusions will be drawn ([80]) from the infringement of the standstill obligation, including by ordering the recovery of the interest in respect of the period of unlawfulness, in accordance with their national law ([81]).

([73]) Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità* v *Commission*, C-587/18 P, EU:C:2020:150, paragraphs 92 to 93; Judgment of the Court of Justice of 4 March 2020, *Buonotourist* v *Commission*, C-586/18 P, EU:C:2020:152, paragraph 96.

([74]) Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 41.

([75]) Judgment of the Court of Justice of 22 October 1987, *Foto-Frost* v *Hauptzollamt Lübeck-Ost*, C-314/85, EU:C:1987:452, paragraph 20.

([76]) Judgment of the Court of Justice of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* v *Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, C-143/88 and C-92/89, EU:C:1991:65, paragraph 23; Judgment of the Court of Justice of 9 November 1995, *Atlanta Fruchthandelsgesellschaft and Others (I)* v *Bundesamt für Ernährung und Forstwirtschaft*, C-465/93, EU:C:1995:369, paragraph 51; Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraph 53.

([77]) […] According to Article 34 SCA, the EFTA Court shall have jurisdiction to give advisory opinion on the interpretation of the EEA Agreement. Where such a question is raised before any court or tribunal in an EEA EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

([78]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 50 to 51; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 44.

([79]) Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 40; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 76; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 59.

([80]) Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 30; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 89; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 23; Judgment of the Court of Justice of 13 December 2018, *Rittinger and Others*, C-492/17, EU:C:2018:1019, paragraph 42.

([81]) Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraphs 52 to 55. Within the framework of its domestic law, the national court may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the EEA State's right to reimplement it subsequently. It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid (*Ibid.*, paragraph 53).

(49) It follows that, where a third party seeks before a national court the elimination of advantages linked to the premature implementation of the aid, the court should uphold its action even if ESA has already declared the aid in question compatible. Any other interpretation would have the effect of allowing the EEA EFTA States to disregard the provisions of Protocol 3 and thus deprive them of their effectiveness ([82]).

4.1.1.2. Following an opening decision by ESA

(50) The situation is different when ESA has merely initiated, pursuant to Article 4(4) of Part II of Protocol 3, an investigation procedure regarding an aid measure brought before a national court. In the opening decision, ESA, in principle, expresses doubts as to whether an aid measure is compatible with the functioning of the EEA Agreement. While these doubts generally concern the compatibility of the aid, the assessment of the existence of aid is preliminary in nature and is drawn from an initial examination of the measure in question ([83]).

(51) In accordance with Article 3 of the EEA Agreement and Article 2 SCA, national courts must take into account the legal situation resulting from the ongoing procedures before ESA, even if it is provisional.

(52) This means that, while the investigation procedure is ongoing, national courts must draw legal consequences from the opening decision itself. If, following an opening decision, a national court holds that this measure does not constitute aid within the meaning of Article 61(1) EEA Agreement, the effectiveness of Article 1(3) of Part I of Protocol 3 would be compromised ([84]).

(53) To that end, it is the responsibility of national courts to take all appropriate action to address the potential breach of the standstill obligation. National courts may decide to suspend the implementation of the measure in question and order the recovery of payments already made. They may also decide to order other provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of ESA's opening decision ([85]).

(54) In addition, the national courts cannot simply stay their proceedings until ESA has reached a final decision ([86]), as this would amount to maintaining the advantage on the market in spite of the potential breach of the standstill obligation.

(55) The same constraints may apply to national courts when a final ESA decision ([87]) has been annulled by the EFTA Court, as ESA is not required to recommence the procedure from the start but can resume from the point at which the illegality occurred ([88]).The opening decision may therefore stand until ESA takes a new final decision. In those circumstances, national courts are therefore bound to ensure compliance with the stand-still obligation resulting from the opening of the formal procedure, for instance preventing the recovered aid from being paid back.

([82]) See, to that effect, Judgment of the Court of Justice of 19 December 2019, *Arriva Italia and Others*, C-385/18, EU:C:2019:1121, paragraph 85.
([83]) Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 37 to 40.
([84]) *Ibid*, paragraph 38.
([85]) *Ibid*, paragraphs 41 to 43.
([86]) Judgment of the Court of Justice of 11 March 2010, *CELF et ministre de la Culture et de la Communication*, C-1/09, EU:C:2010:136, paragraphs 31 *et seq*.; Order of the Court of Justice of 4 April 2014, *Flughafen Lübeck*, C-27/13, EU:C:2014:240, paragraph 30.
([87]) I.e. a decision closing the formal investigation based on Aricle 7 of Part II of Protocol 3.
([88]) See, to that effect, Judgment of the Court of Justice of 12 November 1998, *Spain* v *Commission*, C-415/96, EU:C:1998:533, paragraph 31; Judgment of the Court of Justice of 3 October 2000, *Industrie des poudres sphériques* v *Council*, C-458/98 P, EU:C:2000:531, paragraph 82; Judgment of the Court of Justice of 9 July 2008, *Alitalia* v *Commission*, T-301/01, EU:T:2008:262, paragraphs 99 and 142.

4.2. **The competences of national courts**

(56) As stated in paragraphs (11) to (13), national courts must establish whether State aid has been granted in accordance with Article 1(3) of Part I of Protocol 3 within the limits set by ESA's exclusive competence to assess the aid's compatibility and any pre-existing ESA decision on the same measure.

(57) National courts carry out their assessment in two steps: first, they assess the nature of the measure to establish whether it qualifies as State aid under Article 61(1) of the EEA Agreement; second, if the national courts find that the measure constitutes State aid, they have to conclude whether the measure is subject to the standstill obligation. Where national courts find a breach of the standstill obligation, they must adopt appropriate remedies to safeguard the rights of individuals affected by such breach.

4.2.1. *Assessing the existence of aid*

(58) The EEA Courts have confirmed that, as is the case for ESA, national courts have jurisdiction to interpret the notion of State aid ([89]).

(59) To ascertain the existence of State aid, a series of complex issues often needs to be assessed (see paragraph (14)). In its notice on the notion of State aid, as referred to in Article 61(1) of the EEA Agreement ([90]), ESA issued detailed guidance that can provide assistance to national courts.

(60) Where doubts arise as to the existence of State aid elements, national courts may ask ESA to provide its opinion (see Section 5.1.1.2). National courts also have the possibility to refer the matter to the EFTA Court for an advisory opinion under Article 34 SCA.

4.2.2. *Assessing whether there is a breach of the standstill obligation*

(61) In the context of assessing whether an aid measure is subject to the standstill obligation, national courts must consider whether the measure falls under one of the exceptions from the notification obligation (see Section 1.2). In particular, national courts evaluate whether the measure concerned fulfils the criteria set out in a block exemption regulation or constitutes existing aid.

(62) If an aid measure fulfils all of the relevant conditions provided in a block exemption regulation, it is exempted from prior notification to ESA and it is deemed to be compatible with the functioning of the EEA Agreement.

(63) Existing aid is not subject to the notification obligation of EEA EFTA States under Article 1(3) of Part I of Protocol 3, but is subject to a different system of review by ESA under Article 62(1)(b) of the EEA Agreement. However, alterations to existing aid within the meaning of Article 1(c) of Part II of Protocol 3 do not fall within the notion of existing aid.

4.2.2.1. Applying the conditions of block exemption regulations

(64) EFTA States may rely on a measure being exempted from the notification requirement if it fulfils the general and specific conditions provided for in block exemption regulations. However, if an EEA EFTA State implements an aid measure that does not meet all of the relevant conditions of the applicable block exemption without prior notification to ESA, the implementation of that aid is unlawful.

([89]) Judgment of the Court of Justice of 22 March 1977, *Steinike & Weinlig*, C-78/76, EU:C:1977:52, paragraph 14; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 49; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others* v *France*, C-354/90, EU:C:1991:440, paragraph 10; Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraph 50; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 39.

([90]) OJ C 262, 19.7.2016, p. 1.

(65) The notification and standstill obligations stemming from Protocol 3 are binding not merely on national courts but also on all administrative bodies of the EEA EFTA States ([91]).

(66) When national courts assess if a State aid measure has been lawfully implemented, they must verify whether the conditions of a block exemption regulation were complied with to establish that the measure was exempt from the notification obligation. The Court of Justice has defined the scope of the competences of national courts when they establish whether the conditions of the General Block Exemption Regulation were correctly applied ([92]), that is to say, the extent to which national courts can interpret its provisions.

(67) The adoption of block exemption regulations does not intend to transfer to EEA EFTA States the assessment of State aid compatibility with the functioning of the EEA Agreement, which remains the exclusive competence of ESA ([93]). It is, however, the duty of national courts to ascertain whether national authorities have granted aid that fully complies with the general and specific conditions of the applicable block exemption regulation, strictly interpreted ([94]).

(68) Where aid has been implemented under a block exemption regulation without satisfying all applicable conditions, the recipient of this aid cannot have at that time a legitimate expectation that the granting of the aid was lawful ([95]). This is because national authorities are not vested with the power to adopt final decisions finding that there is no obligation to notify the aid ([96]).

4.2.2.2. Existing aid

(69) As stated in paragraph (63), contrary to new aid, existing aid is not subject to the notification obligation. It is exclusively for ESA to assess whether an existing aid is still compatible with the functioning of the EEA Agreement and propose appropriate measures where it considers that a scheme is no longer compatible. When implementing State aid rules, the role of the national courts is limited to assessing whether an aid measure constitutes existing aid within the meaning of Article 1(1) of Part I of Protocol 3. If the measure is existing aid, there is no question of breach of Article 1(3) of Part I of Protocol 3 to be remedied by the national court.

([91]) Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 90 to 92.

([92]) *Ibid*, paragraph 101; Judgment of the Court of Justice of 29 July 2019, *BMW* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 151.

([93]) Judgment of the Court of Justice of 29 July 2019, *BMW* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 132 and 133; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 67.

([94]) Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 60. In this respect, the Court has clarified that the criteria for the application of the exemption must be clear and easily enforceable and their verification by national courts should not necessitate complex economic assessments on a case-by-case basis (*Ibid*. paragraphs 61 and 68).

([95]) Judgment of the Court of Justice of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 104; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 77; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 104.

([96]) Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 101; Judgment of the Court of Justice of 29 July 2019, *BMW* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 151.

(70) The EEA Agreement does not provide any guidance on the classification of an aid measure as existing aid. It is in the provisions of the Article 1(b) of Part II of Protocol 3 where the circumstances under which aid is to be considered as existing are defined ([97]). However, Protocol 3 does not contain any provision relating to the powers and obligations of national courts ([98]).

4.2.3. *Safeguarding the rights of individuals faced with the breach of the standstill obligation*

(71) To safeguard the rights of individuals against the unlawful implementation of State aid, national courts can adopt different types of remedies, depending on the situation. For instance, they may decide to suspend or terminate the implementation of the measure (Section 4.2.3.1), order the recovery of the sums already disbursed (Section 4.2.3.2) or adopt different provisional measures to otherwise safeguard the interests of the parties concerned (Section 4.2.3.3) ([99]). Finally, they may be asked to rule on compensation for damages suffered by third parties as a consequence of the unlawful implementation of the State aid (Section 4.2.3.4). In any event, national courts must offer to individuals the certainty that all appropriate action will be taken, in accordance with their national law, to address the consequences of the infringement of Article 1(3) of Part I of Protocol 3 ([100]).

4.2.3.1 Suspension or termination of the implementation of the measure

(72) Where a State authority has not yet implemented a State aid measure granted in violation of Article 1(3) of Part I of Protocol 3, national courts must prevent that implementation, either by suspending it or by terminating it. Such remedy might also be appropriate in cases where the State aid measure has entered into force, but the aid has not yet been disbursed (fully or partly), notwithstanding the need for additional remedies for the part of the aid that has already been paid.

(73) EEA law does not impose any specific conclusion that the national courts must necessarily draw about the validity of the act granting the unlawful State aid. It solely requires that they take effective measures to prevent the disbursement of the unlawful aid to the beneficiary. However, there may be situations under national law where the unlawful implementation of the measure can be suspended by annulling the granting act ([101]).

(74) Accordingly, national courts may declare the contract by which the aid is granted null and void, annul the decision of the EEA EFTA State's authorities granting the aid, or suspend its implementation (for instance, in cases where the aid is granted in the form of access to a facility or service).

(75) When the aid is granted in instalments, national courts should order the suspension of future payments.

([97]) Articles 1(b) and 15(3) of Part II of Protocol 3.

([98]) Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 66; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 110. For instance, Article 15(1) of Part II of Protocol 3, which establishes that the powers of ESA to recover aid are subject to a limitation period of 10 years, and paragraph 3 of that Article, which provides that "any aid with regard to which the limitation period has expired shall be deemed to be existing aid", do not lay down a general principle that is applicable to national courts (see paragraph (82) below).

([99]) Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 43; Judgment of the Court of Justice of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 29.

([100]) Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 23; Judgment of the Court of Justice of 19 December 2019, *Arriva Italia and Others*, C-385/18, EU:C:2019:1121, paragraph 84.

([101]) Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraphs 44-47

4.2.3.2 Recovery

(76) When the unlawful aid has already been paid to the beneficiary, national courts must, in principle, and in the absence of an ESA decision declaring the aid compatible, order the full recovery of the unlawfully paid amount ([102]). Removal of the aid by means of recovery is the logical consequence of its unlawfulness ([103]).

(77) To restore the situation existing before the aid was granted, national courts must abolish completely the advantage unlawfully conferred on the beneficiary. Such advantage encompasses the aid (the 'aid principal') as well as the non-payment of the interest that the undertaking would have paid had it had to borrow the amount of the aid on the market during the period of the unlawfulness, which results in the improvement of its competitive position over that period ('illegality interest') ([104]). Therefore, national courts must order the recovery of both the aid principal and the illegality interest.

(78) If there are parallel procedures before a national court and before ESA, and if ESA declares the aid incompatible, the national court should draw the appropriate consequences from it, according to national rules governing the execution of recovery decisions ([105]).

(79) As indicated in paragraph (48), if ESA declares the aid compatible, EEA law only requires EEA EFTA States to recover the illegality interest in respect of the period of unlawfulness ([106]), which runs from the aid's payment until the declaration of its compatibility.

(80) If an ESA decision declaring the measure compatible is annulled, this measure cannot be considered cleared by ESA, and its implementation is considered unlawful ([107]). In that case, the recipient is not entitled to invoke any legitimate expectation that the aid was lawful, given that an action for the annulment of the positive decision had been brought ([108]).

([102]) Judgment of the Court of Justice of 21 July 2005, *Xunta de Galicia*, C-71/04, EU:C:2005:493, paragraph 49; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 40 and 68; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others* v *France*, C-354/90, EU:C:1991:440, paragraph 12; Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 43.

([103]) Judgment of the Court of Justice of 21 December 2016, *Commission* v *Aer Lingus*, C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 116; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 70; Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 33. Judgment of the EFTA Court of 8 April 2013, *Hurtigruten ASA, The Kingdom of Norway v EFTA Surveillance Authority*, Case E-10/11, E-11/11, EFTA Ct. Rep. [2012] p.758, paragraph 283 and 284; Judgment of the EFTA Court of 21 July 2005, *Fesil ASA and Finnfjord Smelteverk AS (Case E-5/04), Prosessindustriens Landsforening and others (Case E-6/04), The Kingdom of Norway (Case E-7/04)* v *EFTA Surveillance Authority*, EFTA [2005] Ct. Rep. p.117, paragraph 178. Judgment of the EFTA Court of 29 July 2016, *EFTA Surveillance Authority v Iceland*, Case E-25/15, EFTA Ct.Rep [2016] p.631, paragraph 43.

([104]) Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 132; Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 39.

([105]) […].

([106]) Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 134.

([107]) Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 63.

([108]) *Ibid*, paragraph 68.

(81) For calculating the illegality interest, neither Article 14(2) of Part II of Protocol 3 nor Articles 9 and 11 of Decision No 195/04/COL) ([109]) apply to the recovery of unlawful aid by an EEA EFTA State in the absence of an ESA recovery decision. Therefore, in such cases, the authorities of the EEA EFTA State concerned must calculate the illegality interest in accordance with the applicable rules of national law, provided that two conditions are fulfilled. First, these rules must respect the principles of equivalence and effectiveness (see Section 2.2); and, second, the illegality interest must be calculated, at the minimum, at a rate equivalent to that which would have been applied if the beneficiary had had to borrow the amount of the aid at issue on the market within that period ([110]).

(82) With regard to the prescription period applied to national courts' powers to order recovery, the EEA Courts have ruled that the ten-year limitation period provided for by the Procedural Regulation and Part II of Protocol 3 applies solely to the Commission and ESA ([111]). As long as national procedures provide for a longer prescription period, a national judge must order the recovery of aid granted in violation of the standstill obligation, even after the limitation period provided for ESA has expired. National prescription periods shorter than 10 years also bind national courts, unless there is an ESA recovery decision ([112]). Where ESA adopts a recovery decision, EEA EFTA States cannot justify their failure to implement that decision on the basis of requirements of national law, such as national prescription periods ([113]).

4.2.3.3 Interim measures

(83) As part of their obligations under Article 1(3) of Part I of Protocol 3, national courts are required to take interim measures where this is appropriate to safeguard the rights of individuals and the effect of Article 1(3) of Part I of Protocol 3 as implemented into national law ([114]). National courts adopt these measures, which aim to eliminate the anti-competitive effects of the aid on a provisional basis ([115]), in accordance with their national law, provided that the conditions of equivalence and effectiveness are fulfilled (see Section 2.2).

([109]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1). The Regulation has been incorporated into the EEA Agreement in point 2 of Annex II by EEA Joint Committee Decision No 123/2005 of 30 September 2005 (OJ L 339, 22.12.2005, p. 32 and EEA Supplement No 66, 22.12.2005, p. 18).

([110]) Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 141.

([111]) Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 61.

([112]) *Ibid*, paragraphs 71 to 75.

([113]) Judgment of the Court of Justice of 20 March 1997, *Land Rheinland-Pfalz* v *Alcan Deutschland*, C-24/95, EU:C:1997:163, paragraphs 34 to 37; Judgment of the Court of Justice of 29 March 2012, *Commission* v *Italy*, C-243/10, EU:C:2012:182, paragraph 35; Judgment of the Court of Justice of 30 April 2020, *Nelson Antunes da Cunha*, C-627/18, EU:C:2020:321, paragraph 60.

([114]) Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others* v *France*, C-354/90, EU:C:1991:440, paragraph 12; Judgment of the Court of Justice of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 29; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 52; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 46.

([115]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 52; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 46.

(84) National courts may choose to take interim measures where presumably unlawful aid has already been paid ([116]) or is about to be paid. In the first case, national courts may order either the repayment of the aid with illegality interest or the provisional transfer of the aid, including interest for the period between the implementation of the aid and its transfer, on a blocked account. These options ensure that the advantage linked to the presumably unlawful aid does not remain further at the disposal of the beneficiary. Where there is a risk of imminent payment of the aid, the court may issue an interim order preventing the disbursement of the presumably unlawful aid until the substance of the matter is resolved ([117]).

(85) An ongoing ESA investigation does not release the national court from its obligation to protect rights of individuals under Article 1(3) of Part I of Protocol 3 ([118]). The national court may therefore adopt appropriate interim measures as a way to address the consequences of a potential infringement of the standstill obligation.

(86) National courts have an obligation to adopt interim measures if the following conditions are satisfied: (a) there is no doubt regarding the existence of State aid; (b) the aid is about to be, or has been, implemented; and (c) no exceptional circumstances have been found, which would make recovery inappropriate ([119]).

4.2.3.4 Action for damages

(87) As part of their role under Article 1(3) of Part I of Protocol 3, national courts may also be required to adjudicate on claims for compensation for damages caused to third parties by unlawful State aid. If successful, such claims provide the claimants with direct financial compensation for the loss suffered.

(88) The Court of Justice has repeatedly held that affected third parties can bring such actions for compensation for damages before national courts, in accordance with national law ([120]). which should comply with the principles of equivalence and effectiveness (see Section 2.2).

([116]) An interesting French court order following a negative decision of the Commission was reported in the Enforcement Study: in order to compensate for the automatic suspensory effect of an appeal against the recovery order, the national court ordered the beneficiary to pay the sums due on a blocked account. In doing so, the court used a provision of French law by which provisional payment is possible in cases where the obligation to pay cannot be seriously called into question. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxemburg, 2019, p. 156, Case Summary FR8: *Cour administrative d'appel de Bordeaux*, 10 December 2015.

([117]) Judgment of the Court of Justice of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797, paragraph 101. The EEA EFTA Enforcement study revelead that there is no case practice regarding interim measures in the EEA EFTA States.

([118]) National courts may also choose to take provisional measures while awaiting an opinion or information from the ESA, or a judgment from a higher national court or from the EFTA Court.

([119]) Judgment of the Court of Justice of 11 March 2010, *CELF et ministre de la Culture et de la Communication*, C-1/09, EU:C:2010:136, paragraph 36; Order of the General Court of 3 March 2015, *Gemeente Nijmegen* v *Commission*, T-251/13, EU:T:2015:142, paragraph 45.

([120]) Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 55; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 56; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 75; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 56.

(89) […] ([121]) […] ([122]). Based on the '*Sveinbjörnsdóttir*' case-law of the EFTA Court ([123]), EEA EFTA States are required to compensate for loss and damage caused to individuals as a result of breaches of EEA law for which the State is responsible ([124]). Such liability exists where the following requirements are met: (a) the rule of law infringed is intended to confer rights on individuals; (b) the breach is sufficiently serious; and (c) there is a direct causal link between the breach of the EEA EFTA State's obligation and the damage suffered by the injured parties ([125]).

(90) The first two requirements set out in paragraph (89) will generally be met in relation to violations of Article 1(3) of Part I of Protocol 3. The Court of Justice has confirmed the existence of rights of individuals under this provision and clarified that the protection of these rights is the genuine role of national courts ([126]).

(91) Similarly, as EEA EFTA State authorities are, in principle, under an obligation to notify State aid measures prior to their implementation, the infringement of Article 1(3) of Part I of Protocol 3 will in most cases be sufficient to establish the existence of a serious breach under the case-law of the EEA Courts. In the presence of State aid, EEA EFTA State authorities cannot normally argue that they were not aware of the standstill obligation, as there is sufficient case-law and ESA guidance on the application of Articles 61(1) and Article 1(3) of Part I of Protocol 3. In case of doubt and for reasons of legal certainty, EEA EFTA States can always notify the measure to ESA prior to its implementation ([127]).

(92) The third requirement set out in paragraph (89), that the breach of EEA law must have caused actual and certain financial damage to the claimant, can be met in various ways. The Enforcement Study pointed out that national courts have rarely awarded damages, specifying that the damage quantification and the establishment of the causal link between the harm and the unlawful aid represent major obstacles for claimants ([128]).The EEA EFTA Enforcement Study has revealed that, so far, national courts in the EEA EFTA States have never awarded damages.

([121]) […].
([122]) […].
([123]) Judgment of the Court of Justice of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391, paragraph 41. […].
([124]) […]. Judgments of the EFTA Court of 10 December 1998 in Case E-9/97 *Erla María Sveinbjörnsdóttir* EFTA Ct. R. [1998] p. 95, paragraphs 62-63, of 30 May 2002 in Case E-4/01 *Karl K.Karlsson* v *The Icelandic State* [2002] EFTA Ct. R. 240, paragraph 25, of 20 June 2008 in Case E-8/07 *Celina Ngyen* v *Staten v/Justis-og politidepartementet* [2008] EFTA Ct. R. 224, paragraph 31 and of 11 December 2012 in Case E-2/12 *HOB vín ehf.* v *Áfengis-og tóbaksverslun ríkisins* [2012] EFTA Ct. R. 1092, paragraph 119.
([125]) Judgment of the Court of Justice of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391, paragraph 45 and judgment of the EFTA Court of 10 December 1998 in Case E-9/97, *Erla María Sveinbjörnsdóttir*, EFTA Ct. R. [1998] p. 95, paragraph 66.
([126]) Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others* v *France*, C-354/90, EU:C:1991:440, paragraphs 12 to 14; Judgment of the Court of Justice of 21 October 2003, *van Calster and Cleeren*, C-261/01 and C-262/01, EU:C:2003:571, paragraph 53; Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 38.
([127]) In some cases, however, the EEA Courts have taken the view that, in order to determine whether a mere infringement of EEA law by an EEA State constitutes a sufficiently serious breach, national courts must take account of several factors, such as the excusability of the relevant breach or the fact that the position taken by an EEA institution may have contributed to that breach. In that sense, see Judgment of the Court of Justice of 25 January 2007, *Robins and Others*, C-278/05, EU:C:2007:56, paragraph 71; Judgment of the Court of Justice of 4 July 2000, *Haim*, C-424/97, EU:C:2000:357, paragraph 38; Judgment of the Court of Justice of 23 May 1996, *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)*, C-5/94, EU:C:1996:205, paragraph 28.
([128]) In some cases, however, the national courts accepted the principle of responsibility of the State. In that sense, see Administrative Court of Appeal of Marseille, *CTC* v *Corsica Ferries France*, 12 February 2018; Rapport d'expertise, *CTC* v *Corsica Ferries France*, 28 February 2019, N/REF: 500060, Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxemburg, 2019, p. 152.

(93) Claimants will often argue that the aid directly caused a loss of profit. When confronted with such claims, national courts should take into account the following considerations:

(a) by virtue of EEA legal requirements of equivalence and effectiveness, national rules may not exclude an EEA EFTA Member State's liability for loss of profit ([129]). Should national law contain such an exclusion, the national court should leave that provision unapplied as regards damage claims for breach of Article 1(3) of Part I of Protocol 3;

(b) determining the actual amount of lost profit will be easier where the unlawful aid enabled the beneficiary to win over a contract or a specific business opportunity from the claimant and the latter has already been executed by the beneficiary;

(c) more complicated damage quantifications are required where the aid merely leads to a loss of market share. One possible way for dealing with such cases could be to compare the claimant's actual income situation (based on the profit and loss account) with the hypothetical income situation had the unlawful aid not been granted ([130]).

(d) there may be circumstances where the damage suffered by the claimant exceeds the lost profit. This could be the case where, as a consequence of the unlawful aid, the claimant is forced out of business.

(94) National procedural rules will sometimes allow national courts to seek the advice of experts for the purpose of determining the actual amount of damage compensation. Where that is the case, and provided the principle of effectiveness ([131]) is respected, the use of such estimates would also be possible for claims for damages arising under Article 1(3) Part I of Protocol 3 as implemented in national law.

(95) The possibility to claim damages is, in principle, independent of any parallel ESA investigation concerning the same aid measure. Any ongoing investigation by ESA does not release national courts from their obligation to safeguard rights of individuals under Article 1(3) of Part I of Protocol 3 ([132]). Since claimants may be able to demonstrate that they suffered a loss due to the aid's premature implementation and, more specifically, as a result of the beneficiary's illegal time advantage, successful damage claims are also not ruled out where ESA has already declared the aid compatible by the time the national court decides ([133]).

([129]) Judgment of the Court of Justice of 5 March 1996, *Brasserie du pêcheur* v *Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, C-46/93 and C-48/93, EU:C:1991:428, paragraphs 87 and 90.

([130]) An interesting case was reported in the Enforcement Study where a French administrative court, following a Commission decision ordering recovery of incompatible aid, decided to award damages for loss of market share to the main competitor of the beneficiary. The court of appeal partially quashed the previous judgement on the estimation of damages and consequently appointed an independent expert to calculate the exact amount of compensation. The expert assessed the number of customers that had shifted from the complainant to the beneficiary because of the incompatible aid and quantified the amount of income subsequently lost. Such quantification is often complex and will depend on the characteristics of the market and the number of competitors. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxemburg, 2019, p. 152, Case Summary FR6: Tribunal administratif de Bastia, 23 February 2017. See also, Court of Appeal of Marseille, *CTC* v *Corsica Ferries France*, 12 February 2018; Rapport d'expertise, *CTC* v *Corsica Ferries France,* 28 February 2019, N/REF: 500060.

([131]) See Section 2.2.

([132]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 44; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraphs 57 to 58.

([133]) Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraphs 53 and 55; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 60.

(96) The Court of Justice recalled that State aid is fundamentally different in its legal nature from damages that national authorities may be ordered to pay to individuals in compensation for the damage they have caused (*Asteris* case-law) ([134]). However, when ruling on the compensation to third parties for the costs incurred as a direct result of an unlawful aid, national courts must be careful not to adopt decisions having the effect of granting an aid ([135]) or enlarging the circle of beneficiaries ([136]).

(97) While individuals may request national courts to order the payment of damages which they consider to be entitled to, such actions cannot have the effect of circumventing the effective application of EEA State aid rules ([137]). In particular, individuals who might be entitled under national law to receive aid which has not been notified to and approved by ESA, but who have not received such aid, cannot claim as compensation for damages the equivalent of the sum of the non-received aid, since this would constitute an indirect grant of unlawful aid ([138]). It follows that the *Asteris* case-law does not concern cases where the applicant requests a national court to award to it previous State aid, which the applicant has not received for whatever reason ([139]).

(98) Beneficiaries of unlawful aid sometimes try to claim damages from the State after having been ordered to reimburse the amount. Usually, these beneficiaries put forward arguments concerning the alleged breach of their legitimate expectations. Nevertheless, the Court of Justice held that an unlawfully granted measure could not generate any legitimate expectation for the beneficiary, which should be able to determine whether the correct procedure for the granting of the aid has been followed ([140]). Their claims should therefore be rejected.

(99) While the case-law has recognised an EEA right to seek damages against the EEA State concerned by third parties that suffered losses because of the unlawful implementation of an aid, actions for damages against beneficiaries of aid are allowed but not required as a matter of EEA State aid law, since Articles 61 of the EEA Agreement and Article 1(3) of Part I of Protocol 3 do not impose any direct obligations on beneficiaries. In the '*SFEI*' judgment,

([134]) Judgment of the Court of Justice of 27 September 1988, *Asteris and Others* v *Greece and EEC*, C-106 to 120/87, EU:C:1988:457, paragraph 23; Judgment of the Court of Justice of 21 December 2016, *Commission* v *Aer Lingus*, C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 72.

([135]) See Commission Decision 2014/201/EU of 2 October 2013 on compensation to be paid to SIMET SpA for public transport services provided between 1987 and 2003 (State aid measure SA.33037 (2012/C) Italy) (OJ L 114, 16.4.2014, p. 67), upheld on this point by Judgment of the General Court of 3 March 2016, *Simet* v *Commission*, Case T-15/14, EU:T:2016:124, paragraphs 102 to 104. See also Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013 (OJ L 232, 4.9.2015, p. 43), annulled by Judgmentof the General Court of 18 June 2019, *European Food and Others v Commission*, T-624/15, EU:T:2019:423, currently under review by the Court of Justice in Case C-638/19 P, *Commission* v *European Food and Others*.

([136]) Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 57.

([137]) Judgment of the Court of Justice of 29 June 2004, *Commission* v *Council*, C-110/02, EU:C:2004:395, paragraph 43; Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraphs 59 to 63; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraphs 42 to 44.

([138]) See also, in this respect, the opinion of Advocate General Ruiz-Jarabo Colomer of 28 April 2005 in Joined Cases C-346/03 and C-529/03 *Atzeni and Others*, EU:C:2005:256, paragraph 198.

([139]) Instead, the *Asteris* case-law covers cases where the applicant simply requests compensation (e.g. rectification of damage caused unlawfully by public authorities) that any other person in a similar situation would be entitled to in that EEA State. In that latter case, the mere fact that the defendant is a public entity does not transform into State aid the compensation that any litigant would have received in a similar situation, such as in similar litigation between two private entities.

([140]) Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 98 to 104; Judgment of the Court of Justice of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 104; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 77.

the Court of Justice concluded that, because Article 108(3) TFEU (Article 1(3) of Part I of Protocol 3) does not impose any direct obligations on the beneficiary, the breach of that Article is not a sufficient basis for the recipient to incur liability ([141]). This is without prejudice to the possibility of bringing an action for damages against the beneficiary in accordance with national law, for instance on the basis of national provisions governing non-contractual liability ([142]).

5. **COOPERATION BETWEEN ESA AND NATIONAL COURTS**

(100) ESA must support national courts in fulfilling their key role in the enforcement of State aid rules, pursuant to Article 3 of the EEA Agreement and Article 2 SCA. Conversely, national courts can request ESA's assistance when applying these rules in the context of a pending case. Close cooperation between the national courts and ESA contributes to an increased level of consistency ([143]) and effectiveness in the application of State aid rules across the EEA.

5.1. **ESA's assistance to national courts**

(101) When supporting national courts, ESA must respect its duty of professional secrecy and safeguard its own functioning and independence ([144]). In fulfilling its duty under Article 3 of the EEA Agreement and Article 2 SCA towards national courts, ESA is committed to remaining neutral and objective. ESA may ask national courts to transmit the information and documents necessary to provide the requested assistance. When ESA assists national courts, it will not serve the private interests of the parties. ESA's contribution is, indeed, part of its duty to ensure that State aid rules are correctly implemented and to defend the public interest ([145]). ESA will, therefore, not hear any of the parties involved in the national proceedings.

(102) The support offered to national courts by virtue of Article 3 of the EEA Agreement and Article 2 SCA is without prejudice to the possibility ([146]) for national courts to ask the EFTA Court for an advisory opinion ([147]) on the interpretation of EEA law in accordance with Article 34 SCA ([148]). […] ([149]).

5.1.1. *The means of cooperation*

(103) Article 3 of the EEA Agreement, which is modelled on Article 4(3) TEU, places an obligation on the Contracting Parties to take all appropriate measures to ensure fulfilment of the obligations arising out of the EEA Agreement, to abstain from any measure which could jeopardise the attainment of the objectives of the EEA Agreement, and to facilitate co-operation within its framework. Further, Article 2 SCA places an obligation on the EEA EFTA States

([141]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 72 to 74.
([142]) […].
([143]) […].
([144]) Order of the Court of Justice of 6 December 1990, *Zwartveld and Others*, C-2/88 Imm., EU:C:1990:440, paragraphs 10 and 11; Judgment of the General Court of 18 September 1996, *Postbank* v *Commission*, T-353/94, EU:T:1996:119, paragraph 93.
([145]) […].
([146]) See Judgment of the Court of Justice of 6 October 1982, *CILFIT* v *Ministero della Sanità*, C-283/81, EU:C:1982:335, paragraphs 14 to 20; Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de la Rioja*, C-428/06 to C-434/06, EU:C:2008:488, paragraphs 42 to 43; Judgment of the Court of Justice of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraphs 47 to 50; Judgment of the Court of Justice of 15 September 2016, *PGE*, C-574/14, EU:C:2016:686, paragraph 40; Judgment of the Court of Justice of 4 October 2018, *Commission* v *France (Advance Payment)*, C-416/17, EU:C:2018:811, paragraphs 108 *et seq*.
([147]) Requests for information or an opinion have the advantage of being less formalistic, and can always be complemented by a request for an advisory opinion – see, in that respect, Judgement of the Court of Justice of 28 October 2020, *INAIL*, C-608/19, EU:C:2020:865, where both possibilities have been used.
([148]) Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 44; Judgment of the Court of Justice of 15 September 2016, *PGE*, C-574/14, EU:C:2016:686, paragraph 40.
([149]) […].

to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the SCA and to abstain from any measure which could jeopardise the attainment of the objectives of the SCA. * ** *** Sections 5.1.1.1, 5.1.1.2 and 5.1.1.3 of these Guidelines explain in further detail the differentmeans of cooperation.

5.1.1.1. Transmission of information to national courts

(104) National courts may ask ESA to transmit to them information in its possession ([150]).

(105) National courts may ask ESA to provide information on State aid procedures before it. This includes, for instance, information on: (a) whether a procedure regarding a State aid measure is pending before ESA; (b) whether an EEA EFTA State has duly notified a certain aid measure in accordance with Article 1(3) of Part I of Protocol 3; (c) whether ESA has initiated a formal investigation; and (d) whether ESA has already adopted a decision ([151]).

(106) In addition, national courts may request that ESA transmits documents in its possession. This can include copies of existing ESA decisions if these decisions have not already been published on ESA's website, factual data, statistics, market studies and economic analyses.

(107) The duty of sincere cooperation enshrined in Article 3 of the EEA Agreement and Article 2 SCA requires ESA to provide national courts with whatever information they may seek ([152]). That also includes information covered by the obligation of professional secrecy.

(108) In transmitting information to national courts, ESA must uphold the guarantees given to natural and legal persons under Article 122 of the EEA Agreement and Article 14 of the SCA ([153]). Article 14 of the SCA prevents members, officials and other servants of ESA from disclosing information that is covered by the obligation of professional secrecy. That can include confidential information and business secrets.

(109) Where ESA intends to transmit information covered by professional secrecy to a national court, it will ask the national court to confirm that it will guarantee the protection of such confidential information and business secrets. Where the national court offers such a guarantee (e.g. by referring to the national legal basis for it), ESA will transmit the information requested, indicating those parts that are covered by professional secrecy and should therefore not be disclosed. Where, on the other hand, the national court cannot offer such a guarantee, ESA will refrain from transmitting the information concerned ([154]).

(*) The three means of cooperation between the European Commission and the EU Member States, has now been codified in Article 29 of the revised Procedural Regulation (2015/1589) which has not yet been incorporated into the EEA Agreement.

(**) Case C-39/94 SFEI and Others, paragraph 50; Order of 13 July 1990 in Case C-2/88 Imm. Zwartveld and Others [1990] ECR I-3365, paragraphs 16 to 22; and Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 53.

(***) Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 31.

([150]) […].

([151]) Upon receipt of this information, the requesting national court may ask for regular updates on the state of play.

([152]) Judgment of the General Court of 18 September 1996, *Postbank* v *Commission,* T-353/94, EU:T:1996:119, paragraph 64; Order of the Court of Justice of 13 July 1990, *Zwartveld and Others,* C-2/88 Imm., EU:C:1990:315, paragraphs 16 to 22.

([153]) Judgment of the Court of Justice of 28 February 1991, *Delimitis* v *Henninger Bräu,* C-234/89, EU:C:1991:91, paragraph 53; Judgment of the General Court of 18 September 1996, *Postbank* v *Commission,* T-353/94, EU:T:1996:119, paragraph 90.

([154]) Judgment of the General Court of 18 September 1996, *Postbank* v *Commission,* T-353/94, EU:T:1996:119, paragraph 93; Order of the Court of Justice of 6 December 1990, *Zwartveld and Others,* C-2/88 Imm., EU:C:1990:440, paragraphs 10 and 11.

(110) ESA may also not be able to disclose information to national courts in other situations. In particular, ESA may refuse to transmit information to a court of an EEA EFTA State where such transmission would interfere with the functioning and independence of ESA. This would be the case where disclosure would jeopardise the accomplishment of the tasks entrusted to ESA ([155]) (for example, information concerning the ESA's internal decision-making process).

(111) To ensure efficiency in its cooperation with national courts, ESA endeavours to provide national courts with the requested information within one month from the date of the request. Where ESA needs to ask national courts for further clarifications on their initial requests or to consult third parties directly affected by the transmission of the information, the one-month period starts to run afresh from the moment the clarification is received or the consultation concluded ([156]).

5.1.1.2. Transmission of opinions on the application of State aid rules

(112) Under Article 3 of the EEA Agreeement and Article 2 SCA national courts have the possibility to ask ESA to provide its opinion on questions concerning the application of State aid rules ([157]).

(113) When applying State aid rules to a case pending before them, national courts must respect the relevant EEA rules and case-law of the EEA Courts. Without prejudice to the ultimate interpretation of the EEA Agreement by the EEA Courts, national courts may find guidance on the application of State aid rules in ESA's decision-making practice, as well as in the relevant ESA notices and guidelines. National courts may also find guidance on previous ESA opinions published on the ESA's website, when the issues at stake present elements of analogy with those faced by other national courts ([158]).

(114) However, there may be circumstances in which previous ESA decisions or opinions and ESA notices and guidelines do not provide sufficient guidance to the national courts. In accordance with the principle of sincere cooperation enshrined in Article 3 of the EEA Agreement and Article 2 SCA, and given the essential role played by national courts in State aid enforcement, ESA offers the national courts the opportunity to request ESA's opinion on relevant issues concerning the application of State aid rules ([159]).

(115) Requests for an opinion from ESA may, in principle, cover all economic, factual or legal matters relating to State aid that arise in the context of the national proceedings. The national courts may ask ESA, among other things:

(a) Whether a certain measure has aid elements within the meaning of Article 61(1) of the EEA Agreement and, if so, request guidance on how to quantify the amount of the aid. Such requests can relate to a specific State aid element under Article 61(1) of the EEA Agreement (namely, notion of undertaking, existence of a selective advantage, imputability of the measure to the EEA EFTA State and involvement of State resources, possible distortion of competition and effect on trade between Contracting Parties).

(b) Whether a certain aid measure fulfils a requirement of a block exemption regulation or a requirement of a *de minimis* regulation, which would mean that prior notification to ESA is not necessary and the standstill obligation provided in Article 1(3) of Part I of Protocol 3 does not apply.

([155]) Order of the Court of Justice of 6 December 1990, *Zwartveld and Others*, C-2/88 Imm., EU:C:1990:440, paragraph 11; Judgment of the Court of Justice of 26 November 2002, *First and Franex*, C-275/00, EU:C:2002:711, paragraph 49; Judgment of the General Court of 18 September 1996, *Postbank* v *Commission*, T-353/94, EU:T:1996:119, paragraph 93.

([156]) This could be the case, for example, for certain types of information submitted by a private person, or where information submitted by one EEA EFTA State is being requested by a court of a different EEA EFTA State

([157]) […].

([158]) See Section 5.1.2.

([159]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 50.

(c) Whether an individual aid falls under an aid scheme notified to ESA and declared compatible with the functioning of the EEA Agreement by an ESA decision, or otherwise qualifies as existing aid, and hence the standstill obligation under Article 1(3) in Part I of Protocol 3 does not apply.

(d) Whether exceptional circumstances ([160]), which would prevent the national court from ordering full recovery under EEA law, exist.

(e) What the legal prerequisites are for damage claims under EEA law and guidance on how to quantify the damage incurred.

(f) How to calculate the amount of the aid to be recovered and how to calculate the recovery interest.

(116) National courts do not have jurisdiction to assess the compatibility of an aid measure on the basis of Article 61(2), Article 61(3), Article 59(2) and Article 49 of the EEA Agreement ([161]). Therefore, they cannot ask ESA to provide its opinion on the compatibility of a certain aid measure with the functioning of the EEA agreement. National courts can, however, ask ESA whether it is already assessing the compatibility of a certain aid measure, as explained in Section 5.1.1.1.

(117) When giving its opinion, ESA, in line with the principle of sincere co-operation of Article 3 of the EEA Agreement and Article 2 SCA, will provide the national court with the factual information or economic or legal clarification sought. ESA's opinion does not legally bind the national court.

(118) ESA will provide its opinion to national courts in accordance with their procedural rules and practices. To ensure effective cooperation with the national courts, ESA will endeavour to provide the national court with the requested opinion within 4 months from the date of the request. Where ESA needs to ask the national court for further clarifications concerning its request, this four-month period may be extended.

(119) National courts must protect rights of individuals under Article 1(3) of Part I of Protocol 3 also during the period in which ESA prepares the requested opinion. As set out above ([162]) the national court′s obligation to protect rights of individuals under Article 1(3) of Part I of Protocol 3, including by way of interim measures, applies irrespective of an outstanding ESA opinion.

5.1.1.3 Submission of written observations

(120) Pursuant to the EEA law principle of sincere cooperation (Article 3 of the EEA Agreement and Article 2 SCA), ESA may assist the national courts of the EEA EFTA States applying State aid rules.

(121) In accordance with national law of the EEA EFTA States, ESA may submit written observations in the context of national judicial proceedings with the objective of contributing to a coherent application of the State aid rules of the EEA Agreement.

(122) The decision to submit written observations in accordance with national law falls entirely within the discretion of ESA ([163]). To evaluate the necessity and appropriateness of its contribution, ESA may consider, among other things:

(a) whether the case is expected to have a significance beyond the specific case at hand (for example, where the case involves a general question of State aid);

(b) whether the observations from ESA may contribute to the effectiveness of the enforcement of State aid rules by the concerned national courts;

([160]) To that effect, see Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 68 to 71.
([161]) Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità* v *Commission*, C-587/18 P, EU:C:2020:150, paragraph 90; Judgment of the Court of Justice of 19 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraphs 50 to 52.
([162]) See *supra*, Section 4.2.3.3
([163]) […].

(c) if the case involves a novel question of substance, which is not covered by ESA decision-making practice or notices and guidelines; or

(d) whether the case is pending before a court whose judgment cannot be subject to further appeals.

(123) [...].

(124) In order to be able to submit useful observations, ESA may invite the relevant national court to transmit documents at its disposal that are necessary for ESA's assessment of the matter. ESA will only use those documents for the purpose of preparing its observations.

(125) ESA fully respects the independence and functioning of national courts. ESA submits its observations in accordance with the EEA EFTA States' procedural rules and practices, including those safeguarding the rights of the parties.

(126) […].

(127) National courts can address all requests for support under sections 5.1.1.1, 5.1.1.2 and 5.1.1.3 of the present Guidelines, and any other written (preferably by email) or oral questions about State aid policy that may arise in their daily work to:

EFTA Surveillance Authority
Competition and State Aid Directorate
Avenue des Arts 19H
1000 Brussels
Belgium

Telephone: +32 2 286 18 11

E-mail: registry@eftasurv.int

(128) […] ([164]).

(129) […].

(130) When submitting opinons or written observations, ESA asks national courts to authorise their publication. This allows ESA to publish on its website the opinions and written observations of submitted by ESA, and when available, the judgments rendered by the national courts concerned.

5.2. **National courts' assistance to ESA**

(131) […].

(132) Article 3 of the EEA Agreement, which is modelled on Article 4(3) of the Treaty on European Union ('TEU'), requires the Contracting Parties to take all appropriate measures to ensure fulfilment of the obligations arising out of the EEA Agreement and to facilitate cooperation within its framework. Pursuant to the principle of sincere cooperation enshrined in this Article, ESA and the EEA EFTA States, including their judicial authorities, acting within the scope of their jurisdiction, must assist each other in carrying out those tasks. Article 2 SCA provides a further basis for such cooperation.

([164]) […].

(133) To ensure the effective enforcement of State aid rules, national courts are invited to forward to ESA without delay a copy of any written judgment they have issued following the provision by ESA of information or an opinion or its submission of written observations. This enables ESA to become aware in a timely fashion of cases for which it might be appropriate to submit written observations, should one of the parties lodge an appeal against the judgment. When sending a judgment, national courts indicate to ESA whether they give their authorisation for that judgment to be published on ESA's website.

(134) For a more effective and consistent application of State aid rules, ESA encourages the EEA ETFA States to set up coordination points for national judges dealing with State aid issues. These coordination points should match with the administrative structure of the EEA EFTA States and respect the independence of the judicial authority. ESA also takes the view that the creation of formal or informal networks of judges dealing with State aid matters, either at national or European level, may be particularly important for knowledge sharing. Central coordination points and networks of judges may allow national judges to share best practices in the field of State aid and facilitate the conveyance of information by ESA on any recent developments in State aid policy by way of, for instance, training courses and newsletters […].

6. **CONSEQUENCES OF THE FAILURE TO IMPLEMENT STATE AID RULES AND DECISIONS**

(135) As indicated in Sections 4.2.1 and 4.2.2 of these Guidelines, national courts may be called upon to apply directly in their national legal systems the provisions of Articles 61(1) and Article 1(3) of Part I of Protocol 3, as implemented in the national legal order. Where national courts, by their judgments, grant new aid in breach of the standstill obligation, ESA may initiate an investigation procedure pursuant to Article 1(2) of Part I of Protocol 3 to assess the compatibility of the unlawful State aid with the functioning of the EEA Agreement. In addition, where the national courts fail to ensure compliance with the obligations stemming from a recovery decision by ESA or the EEA Agreement ([165]). ESA may initiate infringement proceedings against the EEA EFTA States concerned.

(136) As organs of the EEA EFTA States, national courts are called upon to take appropriate measures to ensure that recovery decisions are effectively implemented. The consequences of an EEA EFTA States' failure to implement ESA's recovery decisions are outlined in the Recovery Notice ([166]).

(137) National courts must also safeguard the rights of individuals faced with a possible breach of the standstill obligation ([167]). As indicated in Section 6.2 of these Guidelines, EEA EFTA States, including their national courts, which fail to safeguard these rights fail to fulfil their obligations under EEA law ([168]).

([165]) Judgment of the Court of Justice of 11 September 2014, *Commission* v *Germany*, C-527/12, ECLI:EU:C:2014:2193, paragraph 56.

([166]) […] ESA adopts guidelines on the interpretation and application of the State aid rules, either in the form of an EEA EFTA version of the relevant European Commission instrument or by a refrence to that instrument. The European Commission has adopted a Notice on the Recovery of unlawful and incompatible State aid, OJ C 247, 23.7.2019, p.1 which replaced the 2007 Recovery Notice, OJ C 272, 15.11.2007, p.4. The Notice on Recovery of unlawful and incompatible State aid is, to certain extent, based on 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 "the Procedural Regulation" which has not yet been incorporated into the EEA Agreement. For this reason. ESA has not been able to adopt a meaningful EEA EFTA version of the Notice on the Recovery and unlawful and incompatible State aid and therefore refers to its currently applicable Recovery notice from 2008, available here, OJ L 105, 21.4.2011, p. 32.

([167]) Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 38; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 28.

([168]) Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 66; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 110.

6.1. **Procedures before ESA regarding unlawful aid**

(138) National courts may infringe directly Article 1(3) of Part I of Protocol 3 by granting new aid in the context of their proceedings. This can occur where a national court issues a judgment affecting the implementation of an act granting State aid. This is the case for instance, where the interpretation of a contract or an aid-granting decision has the effect of prolonging the original duration of an aid measure ([169]).

(139) As a result, national courts have to comply with Article 1(3) of Part I of Protocol and accordingly make sure that any of their decisions that results in amending or prolonging an act granting State aid, for instance by way of interpretation ([170]), is notified before its implementation, in accordance with applicable administrative rules in force in the EEA EFTA State.

(140) If the national court does not ensure compliance with the standstill obligation and the new aid is not notified, subject to ESA's review, ESA may initiate an investigation concerning the unlawful State aid on its own initiative or after receipt of a complaint from any interested party pursuant to Article 20 of the Part II of Protocol 3.

6.2. **Infringement proceedings**

(141) Pursuant to Article 31 SCA, if ESA considers that an EEA EFTA State has failed to fulfil an obligation under the EEA Agreement, it may launch an infringement procedure. The purpose of the procedure is to end the infringement. ESA may refer the matter to the EFTA Court following a pre-litigation phase where it delivers a reasoned opinion after a formal exchange of views with the EEA EFTA State concerned ([171]).

(142) When national courts do not draw the appropriate consequences from the breach of Article 1(3) of Part I of Protocol 3, they infringe their obligations under the EEA Agreement. This may be the case where national courts do not prevent an unlawful measure from being implemented or do not order its recovery ([172]).

(143) Failure by national courts to safeguard the rights of individuals in violation of their obligations stemming from Article 1(3) of Part I of Protocol 3 may also give rise to liability on the part of the EEA EFTA State. The Court of Justice has held that EEA States are liable for damage resulting from infringements of EEA law, including infringements stemming from a decision of a national court adjudicating at last instance ([173]).

7. **FINAL PROVISIONS**

(144) These Guidelines replaces the existing ESA's State Aid Guidelines on enforcement of state aid law by national courts.

(145) These Guidelines aim to provide guidance to national courts in the application of the State aid rules. It does not bind the national courts or affect their independence.

([169]) Whether the national court delivers its judgment in the context of interlocutory proceedings or substantive procedures is irrelevant, as in both cases the judgment may be liable to affect the aid measure, even if only temporarily.

([170]) Judgment of the Court of Justice of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797, paragraphs 107 and 108.

([171]) If ESA considers that an EEA EFTA State has failed to fulfil the obligations established in a judgment pursuant to Article 31(2) SCA, ESA may bring the matter to the EFTA Court.

([172]) Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others* v *France*, C-354/90, EU:C:1991:440, paragraph 12; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 70.

([173]) Judgment of the Court of Justice of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 50.

(146) ESA may review these Guidelines, when it considers it appropriate, *inter alia,* on the basis of modifications of the applicable EEA rules or future developments in the case-law.