



Private Enforcement & State aid: Private practitioner's perspective

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Budapest – 26 September 2025

Private State aid enforcement – challenges

Public vs. private State aid enforcement – complementary but separate

Public enforcement – European Commission

- Public enforcement by the European Commission – exclusive competence to assess compatibility of State aid.
- Specialised authority (European Commission) with extensive knowledge, experience and rule-shaping competences.

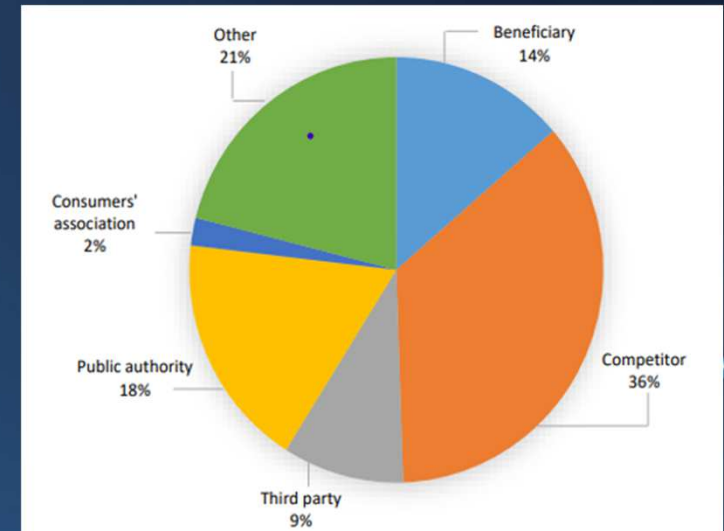
Private enforcement – national courts

- Private enforcement by national courts – enforcing stand-still obligation, recovery, application of GBER, potential damages.
- Courts hearing these matters might not be specialised & may lack sufficient knowledge and experience (European Commission support).

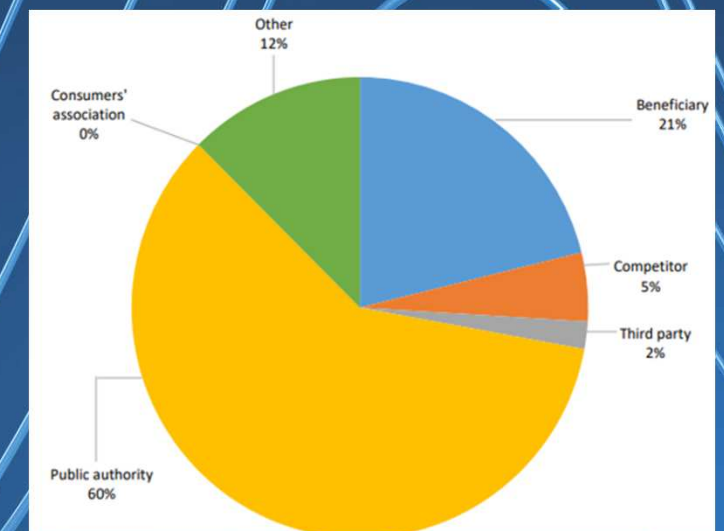
Types of private State aid enforcement

- Various types of private State aid enforcement e.g.
 - Competitor vs EU Member State / Beneficiary
 - Beneficiary vs EU Member State
 - EU Member State vs Beneficiary
- Parallel proceedings possible before the European Commission and national courts.
- The European Commission can support national courts through several mechanisms, but only few *amicus curiae* briefs per year.

Plaintiffs



Defendants



Source: European Commission 2019 Study on the enforcement of state aid rules and decisions by national courts

Plaintiff's perspective

European Commission (EU courts)

- Procedure without clear deadlines. Informal investigations can take years with no certainty for complainants. Proceedings before EU courts also often lengthy (35 months before the General Court and 18 months before the Court of Justice, on average).
- **Pros:** Limited litigation risk; may be the only option (when compatibility assessment is required).
- **Cons:** Plaintiffs have limited impact on the procedure (also political factors) and its duration.

National courts

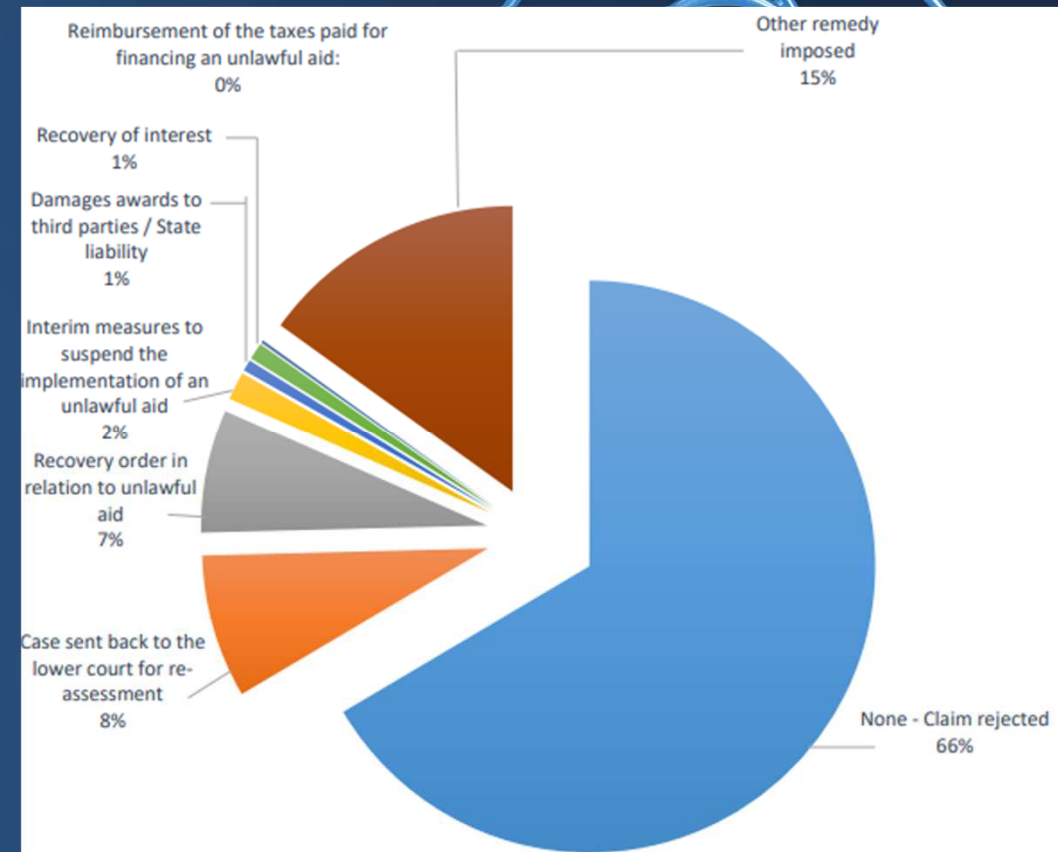
- Both administrative and civil national procedures may be applicable. There can be significant differences from one jurisdiction to another.
- **Pros:** Procedure can be faster with more impact on the outcome; discovery; may be the only option; (damages; beneficiary challenging recovery).
- **Cons:** Higher litigation risk; specificities and less experience in the local jurisdiction.

Defendant's perspective

- EU Member State (and State aid beneficiary) to analyse the risk of private State aid litigation and the basis for the State aid assessment (notification obligation, GBER rules, etc.).
- Gathering and securing evidence underlying the State aid assessment and counterarguments and counterevidence in relation to the potential damages claims.
- Important role of the beneficiary (evidence concerning potential effects of State aid, including market knowledge). Information may be requested from the beneficiary in both public and private State aid enforcement, often looking many years back.
- Successful damages actions are increasing but still relatively rare.

Damages are still rare

- Private enforcement is growing but damages are still relatively rare.
- Statistics for 2007-2017 (Study for the EC 2019):
 - 66% no remedies (claim rejected)
 - 7% recovery order in relation to unlawful aid
 - 2% interim measures
 - 1% damage awards
 - 15% other remedy imposed



Source: European Commission 2019 Study on the enforcement of state aid rules and decisions by national courts

Why State aid damages are still rare?

Potential reasons

Not sufficient familiarity with State aid rules and EU case law by some national courts, the concept of the notion of State aid remains very complex.

Evidence and burden of proof.

Absence of investigation by Commission.

Unclear legal basis and procedures in some Member States, lack of harmonisation.

Potential solutions

- More cooperation with the European Commission
- Careful education and preparation (well structured claims).

- Importance of preparing evidence, including economic evidence.
- Potential learnings from the development of competition law private enforcement.

- Further specialisation of national courts, growing number of cases.
- More cooperation with the European Commission.

- Potential harmonisation of national laws (see EU Damages Directive concerning competition law infringements).