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Up To Eleven: Limitation Periods for Recovery of Unlawful State Aid

Abstract

This paper revisits the issue of limitation periods with regard to State aid measures that do not comply with the standstill obligation, particularly in the context of their recovery. In light of the adoption of Regulation No. 2015/1589 and the evolving case law of the CJEU, the issue of limitation periods has become more important for those affected. However, the effect of the evolving case law has been to create different limitation periods for the Commission and national courts. Given that there is no longer a single limitation period in the context of state aid, this paper attempts to review applicable scenarios for such limitation periods. The law is stated as it stood on 1 September 2024, with some later developments added.

KEYWORDS: state aid, European Union law, limitation period, irregularity, Regulation No. 2015/1589, Regulation No. 2988/95

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1 | Introduction

The purpose of this paper is to find the applicable limitation period (or periods, for that matter) applicable to the recovery of unlawful State aid, either at the level of the administrative procedure managed by the European Commission, or before the national courts and other national authorities.

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The concept of a limitation period has been associated with the principle of legal certainty in the case-law.[1] The introduction of any such period serves the interests of stakeholders in the sense that after the expiry of a certain period, legal relationships should not be expected to be alterable. This concept has been referred to in a State aid context at least as early as in 1998, in BFM and EFIM/Commission, wherein the then-CFI noted that no such period had been fixed by the then-Community legislature for the recovery of State aid.[2] Nevertheless, since the adoption and the coming into force of the previous Procedural Regulation, that is Regulation No. 659/1999,[3] certain such periods have been fixed. In later case-law, the ECJ has also suggested that limitation periods may be applied by analogy, albeit on condition mandated by the principle of legal certainty that "any application »by analogy« of a limitation period be sufficiently foreseeable for a person".[4] After the replacement of that Regulation by the current Procedural Regulation, that is 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,[5] the limitation periods applicable to the recovery of aid pursuant to a decision by the European Commission and to the exercise of powers of the Commission are governed by that Regulation.

However, the periods to which the Procedural Regulation is applicable are not the only limitation periods that could apply in a State aid context. The ECJ has ruled that it is generally compatible with EU law for the Member States to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty, and that such periods are not by their nature liable to make it virtually impossible or excessively difficult to exercise the

1 See Case C-387/17 Presidenza del Consiglio dei Ministri vs. Fallimento Traghetti del Mediterraneo SpA, EU:C:2019:51, para. 71.

2 Joined cases T-126/96 and C-127/96 *BFM and EFIM/Commission*, EU:T:1998:207, para. 67. Notably, the CFI made no reference to the Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, 23.12.1995, p. 1–4, "Regulation No. 2988/95") where State aid would be granted in the context of ESI Funds.

3 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1–9, in force from 16.04.1999 to 13.10.2015).

4 Joined Cases C-447/20 and C-448/20 Instituto de Financiamento da Agricultura e Pescas IP (IFAP) vs. LM and Others, EU:C:2022:265, para. 116; Case C-387/17 Traghetti del Mediterraneo above, para. 71.

5 OJ L 248, 24.9.2015, p. 9–29 (hereinafter "the Procedural Regulation").

rights conferred by EU law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought, although this is subject to observance of the principles of equivalence and effectiveness, present in EU law.[6] Thus, in certain cases before national courts where there is no applicable rule of EU law, limitation periods governed by the applicable national law would apply to, inter alia, the recovery of unlawful aid.

Beyond the interplay between EU law on State aid and national law, it is also an issue whether the applicable limitation period for the recovery of unlawful State aid could stem not from (or not only from) the Procedural Regulation or the applicable national law, but also from the other rules of Union law, such as the Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests,[7] from the current Financial Regulation,[8] or from the applicable sectoral rules, if any. Thus, discernible rules of priority are within the scope of this paper. This specifically includes the issue of different and competing rules on limitation periods applicable to the same set of facts of the case. The research question being posed here is whether there is a single standard applicable to those periods, and if so, what does it require. Should there be no single standard applicable, the additional question would be whether there are any common rules that frame or limit the limitation periods that could apply in the context of recovery of unlawful State aid.

The law is stated as it stood on 1 September 2024, including the judgment of the Court on 7 December 2023 in Case C-700/22 RegioJet a. s. and STUDENT AGENCY k.s. vs. České dráhy a.s. and Others,[9] with some later developments added.

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6 See Joined cases C-89/10 and C-96/10 *Q-Beef NV* (C-89/10) vs. Belgische Staat and Frans Bosschaert (C-96/10) v Belgische Staat, Vleesgroothandel Georges Goossens en Zonen NV and Slachthuizen Goossens NV, EU:C:2011:555, paras. 34 and 36.

7 OJ L 312, 23.12.1995, p. 1–4, as amended, hereinafter "Regulation No. 2988/95".

8 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193 30.7.2018, p. 1, as amended).

9 EU:C:2023:960.

2 The Limitation Periods in the Procedural Regulation (No. 2015/1589)

The current Procedural Regulation governs three types of limitation periods pursuant to its Chapter IV, appropriately titled "Limitation Periods". These are: the limitation period for the recovery of aid (Article 17), the limitation period for the imposition of fines and periodic penalty payments (applicable to the powers of the Commission, Article 18), and a single limitation period[10] for the enforcement of fines and periodic penalty payments by the Commission (Article 19). The TFEU itself does not contain any limitation periods applicable to the powers of the Commission in the context of Articles 107 and 108 TFEU, making those limitation periods a feature of secondary Union law. The limitation period governed by Article 17 of the Procedural Regulation is of note for the purposes of this paper.

2.1. No Express Rules of Priority in the Procedural Regulation on Different Limitation Periods

The Procedural Regulation itself does not contain any express rules on how those limitation periods are supposed to be applied vis-à-vis various limitation periods that may be set up by other rules of secondary Union law, especially in the scope of the protection of the financial interests of the Union, or in the scope of the EU's ESI Funds (e.g., the European Regional Development Fund). Specifically, the Procedural Regulation does not contain a rule of priority for the limitation periods it governs, as regards other rules of secondary Union law. his includes the absence of a priority rule for the ten-year period under Article 17(1).

It is also worth noting that the current Procedural Regulation does not prescribe any other limitation periods that would have been applicable to powers of the Commission other than those referred to in Articles 17, 18,

10 As of the time of writing, Article 19 of the Procedural Regulation is titled "Limitation *periods* for the enforcement of fines and periodic penalty payments". As of now however, and irrespective of that plural appellation, there is only a single limitation period applicable to the enforcement of those powers of the Commission pursuant to that Article.

or 19 of the Procedural Regulation, such as the power to launch investigations into sectors of the economy and into aid instruments (Article 25 of the Procedural Regulation).

Given the ECJ's approach to limitation periods in that they must (generally) be set up in advance, it follows that those other powers of the Commission are not subject to the limitation periods from the Procedural Regulation, without prejudice to any limitation periods set up elsewhere in Union law, or the underlying general principle of legal certainty. Where national law would attempt to set up limitation periods that govern the Commission's powers referred to in Articles 17, 18, and 19 of the Procedural Regulation, any such attempt would (should) fall victim to the principle of primacy of the European Union law. No such attempt would bind the Commission in the exercise of their powers. The rules contained in Articles 17, 18, and 18 of the Procedural Regulation have direct effect, direct applicability (see Article 36, second sentence of the Procedural Regulation), and should supersede any conflicting rules of national law by virtue of their primacy.[11]

2.2. The Limitation Period for the Recovery of Aid by the Commission, Generally

The limitation period for recovery has been first set up by the Regulation No. 659/1999, since its original coming into force on 16 April 1999. Beyond changing the formal name of the Court of Justice of the European Union, the wording of the rule remained the same since then. The current rule reads, according to Article 17(1) of the Procedural Regulation, that "the powers of the Commission to recover aid shall be subject to a limitation period of ten years". This limitation period of ten years is also referred to in the 26th indent of the statement of reasons for the Procedural Regulation as having been introduced "for reasons of legal certainty". owever, the statement of reasons does not explain why exactly a period of ten years (rather than a period amounting to less than ten years) would be appropriate.

Furthermore, according to Article 17(2) of the Procedural Regulation, "the limitation period shall begin on the day on which the unlawful aid

11 In addition, as the area of State aid is subject to exclusive competence of the EU (Art. 3(1)(b) TFEU), any such attempt would be contrary to division of competences between the EU and its Member States, and to the principle of conferral.

is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union", whereas "any aid with regard to which the limitation period has expired shall be deemed to be existing aid (Article 17(3) of that Regulation)".

At the time of writing, this limitation period could have fully run its course and then expired normally since the adoption of this rule on limitation regardless of the Procedural Regulation being less than ten years old. This is because the former Article 15 of the Regulation No. 659/1999, in force during the entirety of the applicability of that Regulation, is considered to have been replaced by the current Article 17, with the references to the former Article to be read as the reference to the current one (see Article 35, second paragraph of the Procedural Regulation). Thus, limitation periods that began under the former Procedural Regulation continued to run when it came into force.

2.3. The Moment on Which the Limitation Period Begins to Run

The ten-year period is expected to commence running from the day on which the unlawful aid is "awarded to the beneficiary" either as individual aid or as aid under an aid scheme. It might be noted that this rule relates to unlawful aid, i.e. aid granted in breach of the standstill obligation. Thus, lawful aid that became incompatible with the internal market appears to be outside the scope of this rule.[12] The rule in Article 17(2) of the Procedural Regulation does not explicitly say what is supposed to be understood as an "award" of aid. Specifically, the rule does not explicitly refer to a grant of unlawful State aid, or to a payment of such aid.

The moment on which this limitation period begins to run has been first subject to the decision of the ECJ in C-81/10 P France Télécom SA vs.

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12 This view of mine is corroborated by the fact that Chapter V of the Procedural Regulation makes a reference to Article 4(4) and *mutatis mutandis* to Articles no. 6, 9, and 11, but no reference to Article 17 (see article 23(2) of the Procedural Regulation).

European Commission, wherein the ECJ ruled that "the date on which an act forming the legal basis of the aid is adopted and the date on which the undertakings concerned will actually be granted the aid may be a considerable period of time apart", while at the same time, and for the purposes of calculating the limitation period, "the aid must be regarded as not having been awarded to the beneficiary until the date on which it was in fact received by the beneficiary".[13]

This dictum from the Court conflates the moment when the aid is granted and the moment when, on assumption that such aid would have to be actually transferred to the beneficiary, the beneficiary in fact receives such aid. This approach is impractical as not every State aid measure has to be "received" by the beneficiary, either in the sense of receipt of a sum of money or coming into possession of a tangible thing so awarded. Certain State aid measures might not entail, or by their very nature do not entail, any "transfers" for the beneficiary to "receive" them. This is the case as regards *inter alia* guarantees, set-offs, debt relief, stays of enforcement, deferrals of tax due, tax exemptions, waivers of social security contributions, the operation of the rules of the national legal system itself (especially where there is a legal scheme deliberately designed to favour certain undertakings),[14] and State aid measures stemming from discretionary administrative practices[15] not involving an actual transfer of money or goods to the beneficiary. Linking the award of State aid measures to "payments" would also equate those measures to subsidies, to which State aid is not limited.[16]

The ECJ appears to have changed this approach, as in it was held in C-608/19 INAIL that "while the determination of the date on which aid is

13 Case C-81/10 P France Télécom SA vs. European Commission, EU:C:2011:811, para. 82. It is also perhaps worth noting that the Court has also offered obiter dictum, as early as in 2008 and in Case C-408/04 P Commission of the European Communities vs. Salzgitter AG, EU:C:2008:236, para. 102, that "Article 15 of Regulation No 659/1999 provides that recovery of illegal aid is subject to a limitation period of 10 years, beginning on the day it is granted", something that the ECJ did not refer to in France Télécom.

14 As it happened e.g. in Joined cases European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) vs. Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland, EU:C:2011:732, para. 106.

15 Case C-256/97 Déménagements-Manutention Transport SA (DMT), EU:C:1999:332, para. 19 and 30.

16 See Case C-362/19 P Commission v Fútbol Club Barcelona, EU:C:2021:169, para. 59.

granted may vary depending on the nature of the aid in question, as long as aid is not awarded under a multi-annual scheme,[17] it cannot, in accordance with the Court's case-law, be considered to be granted on the date on which it is paid".[18] Thus, to my mind, the decisive moment at which the limitation period begins to run is the moment when a State aid measure is considered "granted" according to the relevant rules of national law, i.e. on the date

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17 Where there is a multi-annual scheme whose effect vis-à-vis a beneficiary is a payment, that payment may constitute a State aid measure granted at the moment of payment, unless there would be an earlier moment on which the right to receive would have been conferred on the beneficiary under the applicable national rules (see Case C129/12 Magdeburger Mühlenwerke GmbH vs. Finanzamt Magdeburg, EU:C:2013:200, para. 40; Case C-245/16 Nerea SpA v Regione Marche, EU:C:2017:521, para. 32).

18 Case C-608/19 Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL) vs. Zennaro Giuseppe Legnami Sas di Zennaro Mauro & C., EU:C:2020:865, para. 34, which "to that effect" specifically mentions C-81/10 P France Télécom. Admittedly, there is a certain set of dicta in the case-law (see Case C-362/19 P European Commission v Fútbol Club Barcelona, EU:C:2021:169, para. 66, Joined Cases C-702/20 and C-17/21 SIA 'DOBELES HES' and Sabiedrisko pakalpojumu regulēšanas komisija, EU:C:2023:1, para. 108-110), which distinguishes the adoption of an aid scheme (which in itself may in my view be a State aid measure), and the payment of State aid out of that scheme to an individual beneficiary. In C-702/20 and C-17/21 SIA 'DOBELES HES', the Court inter alia held at para. 110 that the "purpose of Article 17 of Regulation 2015/1589 is to determine the period within which the Commission may recover unlawfully paid aid. *Consequently, the point from when that period starts to run cannot be fixed as a date prior to the date on which the unlawful aid was paid* [emphasis added – Ł.S.]". Various problems with the decision in C-702/20 and C-17/21 *SIA 'DOBELES HES'* notwithstanding (including the incorrect notion that the national courts' decisions may not, in and of themselves, constitute State aid, and translation issues from the original Latvian language of the case to other languages that confuse "grants" and "payments" of State aid), it is respectfully submitted here that the dictum of the Court in para. 110 of C-702/20 and C-17/21 *SIA 'DOBELES HES'* must be viewed against the background of that case, i.e. a multi-annual aid scheme supplemented with certain actions of a public authority, which resulted in direct payments vis-à-vis its beneficiaries (see para. 21-25 in C-702/20 and C-17/21 *SIA 'DOBELES HES'*), without any clear individual decisions or other individual acts as regards those beneficiaries (apart the payments themselves). Interestingly, the Court at para. 110 seems to ignore the possibility that the national legislation and the corresponding tariff of payments could be viewed as a State aid measure granted vis-à-vis the concerned beneficiaries before any payments, something that the Court briefly considers at para. 95 (a "tariff advantage" allegedly having the same nature as the payments).

when the legal right to receive it is conferred on the beneficiary under the applicable national legal regime, regardless of any subsequent payment.[19]

2.4. Interruptions of the Limitation Period in Article 17 of the Procedural Regulation

The second and third sentence of the rule in Article 17(2) of the Procedural Regulation provide that "any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh". The rule refers to unlawful aid again, so lawful State aid that nonetheless became incompatible with the internal market lies outside its scope.

It might be noted that no part of this rule expressly requires notification of any such "action taken" by the EC or the Member States to the interested beneficiaries. Indeed, the Court in C-276/03 P Scott vs. Commission held that the beneficiaries need not be notified of any "actions taken" by the Commission that would interrupt the running of the limitation period now governed by Article 17 of the Procedural Regulation.[20] Furthermore, the "action taken" referred to in this rule needs not to be a decision, because nothing in the wording of that provision requires it to be a decision by the Commission, or any binding administrative or judicial act by a Member State, for that matter.

Thus, on the face of Article 17 of the Procedural Regulation and without the beneficiary's knowledge of the fact, the Commission might keep sending a simple letter targeting a wide range of measures which might fall under the prohibition of unlawful aid to a Member State, and then plausibly claim before the GC or the Court that the limitation periods applicable to any such measures have been interrupted. The Commission could then repeat such a sending every eight or nine years in order to prevent the limitation period to expire, making the periods at issue restart and run practically infinitely without making the beneficiaries aware of it. Such

19 Case C-128/19 Azienda Sanitaria Provinciale di Catania, EU:C:2021:401, para. 45, Case C-385/18 Arriva Italia, EU:C:2019:1121, para. 36.

20 Case C-276/03 P Scott SA vs. Commission of the European Communities, EU:C:2005:590, para. 36.

a practice, in my opinion, would be contrary to the principle of legal certainty and would then constitute "exceptional circumstances" preventing recovery.[21] This is because the Commission is not authorized to infinitely delay the exercise of their powers due to the principle of legal certainty, and the existence of such a delay should be assessed by the national court seised of that defence, if made by the beneficiary.[22] Thus, the general principle of legal certainty would serve as one underlying standard for any limitation periods specified in Union law, or in national law falling within the scope of Union law.

On the required scope of the "action taken", in C-758/21 P Ryanair vs. Commission,[23] the ECJ confirmed the decision of the GC in T-448/18 Ryanair vs. Commission and ruled on *inter alia* Article 17(2) of the Procedural Regulation.[24] The ECJ held that "only an action taken »with regard to the unlawful aid« was able to constitute an action capable of interrupting the limitation period", but that it is not necessary for the act of the Commission "to identify in a wholly specific manner each of the agreements within the contractual framework that constitutes the aid measure that is the subject of that investigation".[25] The ECJ rejected the appellant's argument to the effect that the Commission was supposed to describe the alleged measure of unlawful State aid in detail and pinpoint the source of the impugned measure, including for the purposes of Article 296 TFEU, as it would constitute a "disproportionate interference with the Commission's powers of investigation and, accordingly, with its ability to ensure, in accordance with the task conferred on it by the FEU Treaty, by means of the review of State aid, the maintenance of undistorted conditions of competition in the internal market".[26]

21 See Case C-672/13 OTP Bank, EU:C:2015:185, para. 72, Joined Cases C630/11 P to C633/11 P HGA and Others, EU:C:2013:387, para. 134.

22 Case C-298/00 P Italy vs. Commission, EU:C:2004:240, para. 90, Case C-372/97 Italy vs. Commission, EU:C:2004:234, para. 111.

23 Case C-758/21 P Ryanair DAC and Airport Marketing Services Ltd vs. European Commission, EU:C:2023:917.

24 Case T-448/18 Ryanair DAC and Others v European Commission, EU:T:2021:626.

25 C-758/21 P Ryanair vs. Commission, paras. 82 and 83.

26 C-758/21 P Ryanair vs. Commission, paras. 88 and 96.

2.5. Article 17(1) of the Procedural Regulation and Recovery Injunctions

The Procedural Regulation normally associates recovery of unlawful aid with its concurrent incompatibility, due to the Commission making a negative decision with an additional (part of that) decision on recovery (see Article 16(1) of the Procedural Regulation). However, the Commission has an additional power to provisionally recover unlawful State aid prior to a finding of incompatibility, by way of Article 13(2) of the Procedural Regulation. Article 13 of the Procedural Regulation does not make an express reference to Article 17, and notes in (2) that the power is applicable to "any" unlawful aid. It is settled case law that even a finding of compatibility does not make aid lawful as regards a period prior to such a finding (although it may affect the scope of recovery).[27] According to the ECJ in Case C-700/22 RegioJet, the expiry of the period from Article 17(1) also does not make an illegal aid measure lawful.[28] However, Article 17(1) of the Procedural Regulation applies generally to "the powers of the Commission to recover aid", a part of which is the power to issue recovery injunctions. The ECJ has also held that (what is now) the Procedural Regulation contains rules of procedural nature applicable to *all* administrative procedures in the matter of State aid that could be pending before the Commission.[29] As a rule on the limitation period from Article 17(1) of that Regulation is arguably procedural, it should apply to all procedures before the Commission in the context of recovery of unlawful aid. It must be then said that the power of the Commission to order recovery injunctions is subject to Article 17(1) of the Procedural Regulation.

27 Case C-220/23 R/Prezes URE, EU:C:2024:34, para. 31, Case C-445/19 Viasat Broadcasting, EU:C:2020:952, para. 25.
28 Case C-700/22 RegioJet above, para. 17.
29 Case C-387/17 Traghetti del Mediterraneo above, para. 66.

3 The Limitation Periods for the Recovery of Aid by the National Courts and other National Authorities

The ECJ in Eesti Pagar has ruled the period (as set out in Regulation No. 659/1999 at the time) as inapplicable “neither directly, nor indirectly, nor by analogy” to the limitation periods present in relevant national laws as regards recovery of unlawful aid pursuant to the direct effect of the standstill obligation.[30] The reason offered for that was that any such application “cannot be regarded as being sufficiently foreseeable by a litigant”.[31] The position that Article 17(1) of Regulation 2015/1589, which provides for a limitation period of ten years, refers only to the powers of the Commission to recover aid, was repeated by the Court in C-627/18 Nelson Antunes da Cunha.[32] Thus, it is left to the relevant national law, subject to the principles of equivalence and effectiveness, to set up limitation periods applicable to the powers of national courts in the context of the recovery of State aid, in particular recovery of unlawful aid. However, there are further dicta from the ECJ on the interplay between the limitation periods enshrined in the relevant national law and the limitation period found in Article 17(1) of the Procedural Regulation.

30 Case C-349/17 Eesti Pagar AS vs. Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium, EU:C:2019:172, para. 110. In my view, this should not be taken to mean that Article 17 of the Procedural Regulation would never be relied on or recalled in national proceedings. It might be that a rule of national law makes an explicit reference to Article 17 of the Procedural Regulation necessitating its interpretation, for instance a rule that a national limitation period shall not expire until the Commission’s powers of recovery cease, or a rule that reproduces the contents of Article 17 for the purposes of the national limitation period without encroaching upon the powers of the Commission. As a side note, before Eesti Pagar, the ECJ at least was not immediately dismissive of what is now Article 17 applying to national limitation periods (see Case C233/16 Asociación Nacional de Grandes Empresas de Distribución (ANGED) vs. Generalitat de Catalunya, EU:C:2018:280, para. 80).

31 Case C-349/17 Eesti Pagar, para. 113. In addition, it is perhaps difficult to see why the application of that same period as enshrined in the former or the current Procedural Regulation would be foreseeable to a person concerned.

32 Case C-627/18 Nelson Antunes da Cunha, EU:C:2020:321, para. 31.

3.1. The Earlier Expiry of the Limitation Periods in the National Law

The ten-year period, as now enshrined in the Procedural Regulation, has been referred to as a "long period".[33] It is possible that the relevant limitation period applicable in the national law for recovery could expire before the Commission would take a decision on recovery, within the time-limit set by the Procedural Regulation. The national court would then be faced with a situation where a national rule on limitation could allow the beneficiary to hinder the execution of the recovery decision. Recovery decisions of the EC are subject to the rule in Article 16(3) of the Procedural Regulation.

According to that rule, and without prejudice to any order of the Court of Justice of the European Union pursuant to Article 278 TFEU, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Union law.

An earlier expiration of the limitation period set up in the relevant national law would make the objective of Article 16(3) of the Procedural Regulation impossible to achieve. The ECJ in C-627/18 Nelson Antunes da Cunha held, where that would be the case, that the national court must then refuse, *ex officio*, to apply a national limitation period, applicable to the recovery of aid that is to be recovered, which expired even before the adoption of the Commission recovery decision.[34]

In my view, the effect of the decision in C-627/18 Nelson Antunes da Cunha is that any limitation periods of shorter duration that the one set up in Article 17(1) of the Procedural Regulation would have to be disapplied by virtue of the principles of effectiveness and primacy of EU law where the Commission would take a decision on recovery, to give effect to Article 16(3)

33 See Joined cases C-442/03 P and C-471/03 P P & O European Ferries (Vizcaya) SA (C-442/03 P) and Diputación Foral de Vizcaya (C-471/03 P) vs. Commission of the European Communities, EU:C:2006:356, para. 35.

34 Case C-627/18 Nelson Antunes da Cunha, para. 52.

of the Procedural Regulation. This would be the case both before national courts and other public authorities.

3.2. The Earlier Expiry of the Limitation Period from the Procedural Regulation

The inverse situation of the expiry of that period and the emergence of a case before a national court seised of a claim by a frustrated competitor of the beneficiary, with that court being called to rule on recovery, was ruled on in C-700/22 RegioJet.[35] There, the Court recalled that the expiry of the limitation period described in Article 17(1) of the Procedural Regulation cannot have the effect of retroactively legalising State aid vitiated by illegality merely because it becomes existing aid,[36] and held that national courts may order the repayment of State aid granted in breach of the obligation of prior notification laid down in that provision, even though the limitation period laid down in Article 17(1) of Regulation 2015/1589 has expired in respect of that aid, such that that aid must be regarded as existing aid pursuant to Article 1(b)(iv) and Article 17(3) of that Regulation.[37]

In my view, this definitively overrules any doubts there might have been after the decision of the ECJ in C233/16 ANGED,[38] and proves that the national courts' powers on the basis of Article 108(3), third sentence TFEU to order recovery are independent of the expiry of limitation period found in Article 17(1) of the Procedural Regulation.

The decision in C-700/22 RegioJet confirms that the national courts, where the measure constitutes unlawful aid and there is no decision not to raise objections or a positive decision from the Commission, are generally empowered to order recovery of that which would be deemed existing aid

35 Case C-700/22 RegioJet a. s. and STUDENT AGENCY k.s. vs. České dráhy a.s. and Others above.

36 C-700/22 RegioJet, para. 17.

37 C-700/22 RegioJet, para. 21 and operative part.

38 Cf. Case C-233/16 Asociación Nacional de Grandes Empresas de Distribución (ANGED), EU:C:2018:280, para. 80, wherein, in the context of expiry of the limitation period from the Procedural Regulation, the ECJ ruled on Article 17(1) of the Procedural Regulation "irrespective of the scope that should be given to that provision when it is relied on before national court". However, that suggested that there could be a scope for that provision before a national court.

for the purposes of the administrative procedure carried out by the Commission (see Article 16(3) of the Procedural Regulation). This is the case even if the ten-year period from the Procedural Regulation expires before the national, longer one. The Court in C-700/22 RegioJet did not say, however, if there would be a maximum limit to the limitation periods present in the relevant national law that would apply to recovery of unlawful aid. Nor did the Court say whether the Member States are free to refrain from setting any such periods. Despite this silence, the Member States' discretion cannot be held to be unlimited. The claim for recovery of unlawful aid falls within the scope of EU law, and thus falls within the scope of application of – *inter alia* – various general principles of Union law. On one hand, this includes the principle of legal certainty, and necessitates that the Member States are, to my mind, not authorized to infinitely delay the exercise of their powers and duties to recover unlawful aid, like the Commission is not. Thus, there should be a period of limitation applicable to recovery of unlawful aid. On the other hand, due to being bound by the general principles of EU law, the Member States *inter alia* may not go beyond what is necessary to achieve their aims, due to the principle of proportionality[39]. It is settled case law that the recovery as such may not be "in principle" deemed contrary to that general rule of Union law.[40] Yet, setting up very long periods of limitation (longer than ten years) allows for long periods of inactivity on part of the national authorities while not providing legal certainty for the persons affected, so it neither motivates the Member States to recover, nor allows for a normal operation of business for the affected person from whom the aid is supposed to be recovered.

3.3. Limitation Periods in National Law in the Absence of the Recovery Decision

While the existence of a recovery decision might be decisive for recovery of unlawful aid (exceptional circumstances notwithstanding), a national court could be seised of an application to recover unlawful aid without

39 See also: Marek Rzotkiewicz, „Pomoc państwa jako narzędzie reakcji Unii Europejskiej na kryzysy gospodarcze" *Prawo i Więź*, nr 6 (2024): 494. https://doi.org/10.36128/PRIW.VI53.1155.

40 C-164/15 P and C-165/15 P Commission/Aer Lingus, EU:C:2016:990, para. 116.

any such decision, due to the direct effect of the standstill obligation. Article 16(3) of the Procedural Regulation would not apply to such a case, as there would be no recovery decision. However, the absence of a recovery decision would not release the national court from its duty to rule on unlawful aid. In particular, the national court should not stay proceedings and await for the Commission to take a decision on the impugned measure. The national courts are expected, by virtue of the standstill obligation, to give a decision on merits, while offering interim relief to the affected parties where relevant.[41] If the applicable national limitation would have already expired, the national court should review the national rule that contains the applicable statute of limitations against the principles of equivalence and effectiveness.[42]

Regarding those two principles, the ECJ held that the applicable national legislation must not be less favourable than that governing similar domestic situations (the 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 EU law (the principle of effectiveness).[43] It was further held that observance of the requirements stemming from the principles of equivalence and effectiveness must be analysed by reference to the role of the rules concerned in the procedure viewed as a whole, to the conduct of that procedure and to the special features of those rules, before the various national instances.[44]

3.3.1. The Principle of Equivalence

As to the principle of equivalence, the national court would be required to identify, in national law, limitation periods which are comparable, having regard to their purpose, causes of action in their proceedings, and essential characteristics as those applicable to the national limitation period applicable to the recovery of unlawful aid.[45] Then, the national court would have to assess whether these similar periods are more favourable.

Due to the exclusivity of the rules on State aid [Article 3(1)(b) TFEU], it could be difficult to find a limitation period applicable to a similar domestic

41 See Case C-1/09 CELF, EU:C:2010:136, para. 39.
42 Case C-387/17 Traghetti del Mediterraneo, para. 73.
43 Case C-349/17 Eesti Pagar, para. 137.
44 Case C-175/17 X vs. Belastingdienst/Toeslagen, EU:C:2018:776, para. 40, Case C93/12 ET Agrokonsulting-04, EU:C:2013:432, para. 38.
45 Case C-347/20 SIA 'Zinātnes parks', EU:C:2022:59, para. 79.

situation for the purposes of the principle of equivalence. However, in my view, the principle at issue might become engaged where there would be a general limitation period applicable to the recovery of unlawful aid, and a longer period applicable to the recovery of public funding paid but not due under national law which would not be explicitly applicable to a claim based on the standstill obligation. It could be the case where there would be a limitation period present in the civil law of a Member State applicable to the recovery of unlawful aid, and a corresponding, longer period applicable to domestic public funds paid in error, e.g. taxes paid and then erroneously returned, or to a domestic subsidy not fulfilling all the criteria of Article 107(1) TFEU paid in error (e.g. public funding paid to a beneficiary who is not an undertaking). If a longer limitation period were applicable to such situations, the national court would, in my view, be obliged to apply that longer limitation period by virtue of the principle of equivalence.

3.3.2. The Principle of Effectiveness

On the principle of effectiveness, the ECJ held in a State aid context that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. According to the Court, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.[46]

As regards the need to disapply a national rule where an expired limitation period would hinder recovery of aid, the reasoning adopted by the Court in C-627/18 Nelson Antunes da Cunha was largely based on Article 16(3) of the Procedural Regulation and the need to give effect to the Commission's recovery decision. Thus, the question remains whether the principle of effectiveness would require a national court to disapply shorter national limitation periods in the absence of such a decision. It was said that restoring the situation prior to the payment of aid which was unlawful or incompatible with the internal market is a necessary requirement for preserving the effectiveness of the provisions of the Treaties

46 Case C-505/14 Klausner Holz Niedersachsen, EU:C:2015:742, para. 41.

concerning State aid.[47] The expiry of a national limitation period could result in unlawful State aid being left in possession of the beneficiary.

It was further held that the application of national law cannot have the consequence of frustrating the application of EU law in making it impossible for the national courts or authorities to satisfy their obligation to ensure compliance with the third sentence of Article 108(3) TFEU, and a national rule that would prevent a national judge or a national authority from taking action to respond to the consequences of an infringement of the third sentence of Article 108(3) TFEU must be regarded as being incompatible with the principle of effectiveness.[48] A national limitation period, by its nature, may have the effect of preventing the recovery of unlawful aid without the Commission's involvement, where the recovery powers of national authorities become time-barred due to their expiry. Thus, the time-barring effect of a limitation period should be seen as a significant impediment to recovery being effected pursuant to the rules of national law.

Having in mind that the existence of a limitation period may be seen as an expression of the principle of legal certainty, it should be added that the ECJ has also held that a "significant obstacle" to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of *res judicata* or by the principle of legal certainty.[49] Were the standstill obligation and the requirement to recover unlawful aid stemming from Article 108(3) TFEU to be counted among the basic rules of State aid control, which they are part of in my view, they should indeed have priority over the effects of limitation periods that are present in national law that could hinder the recovery of unlawful aid.

In my view, where a national court or competent administrative authority grants State aid pursuant to Article 108(3) TFEU and makes an *ex officio* attempt at recovery, and finds that unlawful State aid has been granted, but that the national limitation period has expired in the absence of a Commission decision on recovery, such a court or authority should disregard the national limitation rule by virtue of the principle of effectiveness and the primacy of Article 108(3) TFEU. This should happen unless the period set out in Article 17(1) of the Procedural Regulation has also expired.

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47 Case C-385/18 Arriva Italia, para. 85, Case C-127/16 P SNCF Mobilités/Commission, EU:C:2018:165, para. 104.

48 Case C-349/17 Eesti Pagar above, para. 139 and 140.

49 Case C-505/14 Klausner Holz Niedersachsen above, para. 45.

As the interruptions of that period are not necessarily known to the interested parties, the national court seized could make a request for information to the Commission pursuant to Article 29(1) of the Procedural Regulation on whether the Commission had made "any action" to interrupt such periods, or whether the Commission had requested any Member State to do so. Where there would be a grant of unlawful aid, but the ten-year period from Article 17(1) of the Procedural Regulation would have already expired in addition to the applicable national period, and where there would be no proven interruption thereof, the national court seized could validly dismiss a claim for the recovery of unlawful aid based on Article 108(3) TFEU.

4 | Competing Limitation Periods and Their Priority

Owing to the principle of the primacy of EU law, a national limitation period would not affect the applicability of the Procedural Regulation. As the Procedural Regulation was ruled to be generally inapplicable to national proceedings on recovery[50], it would not normally affect the limitation periods unless the above-mentioned principles of equivalence and effectiveness became involved.

However, it should be noted that beyond the limitation period applicable to recovery under either the Procedural Regulation or the applicable rule of national law, EU law may introduce another limitation period rule that could initially apply to the facts of a case involving the recovery of unlawful state aid. This is because, as the ECJ itself has admitted, the grant of unlawful aid may also breach or engage other rules of Union law, with no clear rules of priority between them.

4.1. Limitation Periods and Regulation No. 2988/95, Generally

Regulation No. 2988/95 introduces self-standing limitation periods applicable to "irregularities" resulting from the acts or omissions of economic operators, which have, or would have, the effect of prejudicing the general

50 Case C-349/17 Eesti Pagar above, para. 109.

budget of the EU or budgets managed by the Union, either by reducing or losing revenue accruing from own resources collected directly on behalf of the EU, or by an unjustified item of expenditure.

As admitted by the ECJ in Eesti Pagar, this concept of 'irregularity' includes the grant of unlawful State aid. However, that Regulation does not expressly specify whether it is supposed to have priority over the limitation period from the Procedural Regulation, and whether it is supposed to apply to recovery of unlawful aid. It should be further noted that Regulation No. 2988/95 would not apply to all State aid measures, but only to those that would involve (or would have involved) the general budget of the Union or budgets managed by the Union. Thus, purely national State aid measures (e.g., national grants, loans, tax measures) would not be caught by the limitation period stipulated in that Regulation.

Where the Regulation is applicable, it states in Article 3(1) that the limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, in the latter part of that rule, it adds that in the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. In the case of multiannual programmes, the limitation period shall in any case run until the programme is definitively terminated. On interruptions, the Regulation further specifies that the limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act. However, limitation shall become effective at the latest on the day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty, except where the administrative procedure has been suspended in accordance with Article 6(1) of the Regulation.

4.1.1. Priority Between Limitation Periods in National Law and in Regulation No. 2988/95

This scenario was present in C-349/17 Eesti Pagar, where the ECJ, in relation to a decision to recover unlawful aid taken by an authority of a Member State, was requested to rule *inter alia* on whether the limitation period from the Procedural Regulation, the period set by the rule of national law, or the period of four years as enshrined in Article 3(1) of Regulation No. 2988/95. The ECJ ruled that the applicable limitation period would be the period of four years from Article 3(1) of Regulation No. 2988/95 "where the financial interests of the Union are at stake" and where there is an "irregularity" as provided in Article 1 of Regulation No. 2988/95.[51]

The ECJ then arrived at a conclusion that where a national authority has granted aid from a structural fund while misapplying Regulation No. 800/2008 (i.e., the previous GBER), the limitation period applicable to the recovery of the unlawful aid is, if the conditions for the application of Regulation No. 2988/95 are satisfied, four years, in accordance with Article 3(1) of that regulation or, if not, the period laid down by the applicable national law".[52] It would then appear that a period set in Article 3(1) of Regulation No. 2988/95 has priority over a shorter period present in the relevant national law. The Court added that the limitation period from the Procedural Regulation does not apply to the recovery of unlawful aid carried out *ex officio* by the granting authority.

4.1.2. Longer Limitation Periods under National Law and Regulation No. 2988/95

Having Article 3(3) of Regulation No. 2988/95 in mind, the decision in C-349/17 Eesti Pagar appears to omit the instances of a national limitation period longer than that of 4 years set out in Article 3(1) of Regulation No. 2988/95. This is perhaps due to the fact that the referring court in C-349/17 Eesti Pagar had not identified any potentially applicable national limitation periods. However, by virtue of Article 3(3) of Regulation No. 2988/95,

51 It is notable that Regulation No. 2988/95 applies to any infringement of a provision of what is now EU law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the EU or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the EU, or by an unjustified item of expenditure (see Article 1(2) of Regulation No. 2988/95). The grant of unlawful aid must be imputable to a Member State, and the ECJ has once ruled that the machinery for reviewing and examining State aid established by what is now Article 108 TFEU does not impose any specific obligation on the recipient of aid (cf. Case C-39/94 *SFEI*, EU:C:1996:285, para. 73). By ruling that a recipient of State aid allegedly covered by GBER was by virtue of Article 108(3) TFEU subject to a *specific* obligation to "ensure that the grant of aid sought satisfies the conditions laid down by the GBER, so that it can qualify for aid that is exempted under that regulation (C-349/17 *Eesti Pagar*, para. 120)", and that failing to meet that obligation would prompt recovery and trigger an irregularity, the ECJ has overruled its previous position in SFEI.

52 C-349/17 Eesti Pagar, paras. 115, 127 and 128.

Member States retain the possibility of applying a period which is longer than that provided for in paragraphs 3(1) and (2), respectively.

Owing to that rule, were a longer period present in national law that would apply to recovery of unlawful aid, that period should generally apply to recovery instead of the period of four years from Article 3(1) of Regulation No. 2988/95. This is without prejudice to the exclusionary effects that the principle of effectiveness may require. The regulation at issue does not set any maximum limits to this rule, nor does it say that the limitation periods present under national law before its adoption are set aside and must be reintroduced. On the other hand, Regulation No. 2988/95 is not capable of precluding the application of the primary law, including the application of the general principles of EU law.

Those issues were put to decision by the Court in C-734/22 Republik Österreich vs. GM, wherein it was stated that the EU legislature did not intend to standardise the periods applicable in this area and, consequently, the entry into force of Regulation No. 2988/95 cannot have the effect of compelling the Member States to reduce to four years the limitation periods which, in the absence of rules of EU law previously in the area, they applied in the past".[53] However, the Court added that the "wide discretion" enjoyed by the Member States under Article 3(3) of Regulation No. 2988/95 is not unlimited, as they are still bound by the general principles of Union law, including that of proportionality.

According to the Court, a limitation period must not go beyond what is necessary to achieve the objective of protecting the European Union's financial interests, and it is apparent that a limitation period of 30 years goes beyond what is necessary for a diligent public service.[54] To my mind, this decision may be generally taken into account for the purposes of determining the extent of discretion available to a Member State while setting up limitation periods applicable to recovery, beyond Regulation No. 2988/95 itself. It hints at the fact that significantly longer limitation periods do not allow for requisite legal certainty.

Thus, owing to the research question of this paper, the principle of proportionality may also serve as a yardstick and a standard to check various

53 Case C-734/22 Republik Österreich vs. GM, EU:C:2024:395, para. 28.
54 C-734/22 Republik Österreich vs. GM, paras. 29 and 30.

limitation periods present in the scope of EU law, and perhaps the repeated interruptions thereof.[55]

The national limitation periods might then plausibly go up to eleven years without being called into question on the grounds of proportionality, but going beyond eleven brings the period at issue away from the already "long" period of ten years. The longer the period, as it closes to twenty years, the greater the possibility of breaching the principle of proportionality.

In the context of Regulation No. 2988/85, the Court has previously deemed the limitation period of 20 years, which might "appear necessary and proportionate, in particular in the context of disputes between private persons, in light of the objective pursued by that rule and defined by the national legislature", to go in practice beyond what is necessary to achieve the objective of protection the European Union's financial interests, without overmuch analysis.[56] Conversely, a period of ten years has been deemed to be in line with the principle of proportionality.[57] In my view, it then follows that a "proportionate" period of limitation could sit between ten years and 20 years exclusive, possibly up to eleven for the "safe" length. Again, the longer it is, the more probable it would be that the Court would deem it disproportionate without provision of clear reasons for any such longer duration.

The consequences of breaching the principle of proportionality by introducing such a period are such that the period from Regulation No. 2988/95

55 The scholarship has also noted that long limitation periods that expire without any complaints on part of affected parties prove that a State aid measure has not caused any "sustainable distortion of competition" – see Thomas Kőster in: *European State Aid Law*, ed. Franz-Jürgen Säcker, Frank Montag (Műnchen: Hart, 2016), 1614. My view is that a sustained distortion of competition is not a prerequisite of a State aid measure. For more on prerequisites, see Bacon Kelyn, *European Union Law of State Aid*, 3rd ed. (Oxford: Oxford University Press, 2017), 67 and ff.; *EU State Aids*, ed. Leigh Hancher, Tom Ottervanger, Piet Jan Slot, 5th ed. (London: Sweet&Maxwell, 2016). (Sweet&Maxwell: London, 2016), p. 61 and ff., Erika Szyszczak in: *State Aid Law of the European Union*, ed. Herwig Hofmann, Claire Micheau (Oxford: Oxford University Press, 2016), 71; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)*, 4th ed. (Oxford: Hart, 2022), 39; Rein Wesseling, Mariekew Bredenoord-Spoek in: *EU State Aid Control- Law and Economics*, ed. Philipp Werner, Vincent Verouden (Aalphen an den Rijn: Kluwer Law International, 2017), 89 and ff.

56 Case C341/13 Cruz & Companhia, EU:C:2014:2230, paras. 60 and 65.

57 C-734/22 Republik Österreich vs. GM, para. 30, C341/13 Cruz & Companhia, para. 60.

applies.[58] Owing to the direct effect and the direct applicability of that Regulation, the period from Article 3(1) would also apply where Member States would not arrive at any form limitation period present in national law.

However, where a Member State would elect to introduce a "positive" rule of national law stating that a claim for recovery is not subject to a limitation period at all, such a rule would have to be disapplied and the period from Article 3(1) of the Regulation No. 2988/95 would apply instead, owing to the principles of primacy, proportionality, and the direct effect of Article 3(1) of Regulation No. 2988/95, to my mind. The principle of legal certainty would also militate against such a rule of national law.

4.2. Limitation Periods from the Financial Regulation

It must be first noted that the Financial Regulation applies to the establishment and the implementation of the general budget of the European Union and of the European Atomic Energy Community and the presentation and auditing of their accounts (Article 1 of the Financial Regulation). The recovery of unlawful State aid presupposes that there is a State aid measure granted in breach of Article 108(3), third sentence TFEU, which in turn requires that there are, or have been, certain State resources subject to a Member State's control. Union resources under the control of the relevant EU institutions are not Member State's resources.[59]

However, where a Member State has the discretion for granting State aid measures finances wholly or partly by EU resources, such measures fall within the scope of Article 107(1) TFEU and could constitute unlawful State

58 C-734/22 Republik Österreich vs. GM, para. 32. On the other hand, this decision leaves out the situation where there are several limitation periods in national law that could be applicable and which are longer than the period from 3(1) Reg. 1988/95, with one of them incompatible with the principle of proportionality. Where there are several longer periods of limitation under national law and one cannot apply due to the principle of proportionality, the period from 3(1) Reg. 1988/95 would only apply if there would not be any other and proportional limitation periods that could apply from the point of view of the relevant national law.

59 Joined cases 213 to 215/81 *BALM*, EU:C:1982:351, paras. 22 and 23. See also Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01, hereinafter "NoA"), para. 60.

aid.[60] From the point of view of the Financial Regulation, the shared management of Union resources pursuant to Article 63 of that Regulation will bring such resources within the scope of Article 107(1) TFEU, unless a Member State has no discretion as to granting such resources in a given case. In addition, there might be instances where Article 107(1) TFEU and the rules on State aid would apply in cases of indirect management (Article 62(1)(c) of the Financial Regulation), to the extent that the authority to which such implementation of the EU budget is entrusted is an authority of a Member State (or a body whose activities are imputable to a Member State), and as far as that authority has discretion as regards granting those funds.[61]

4.2.1. Limitation Period from Article 105 of the Financial Regulation

Article 105(1) of the current Financial Regulation introduces a five-year limitation period applicable to "entitlements of the Union in respect of third parties and entitlements of third parties in respect of the Union", without, however, specifying what constitutes such an entitlement (including situations where there is unlawful State aid involved). According to (2) of that Article, the limitation period for entitlements of the Union in respect of third parties shall begin to run on the expiry of the deadline referred to in point (b) of the first subparagraph of Article 98(4). Article 98(4)(b) refers to "the deadline, as specified in the debit note". Thus, the limitation period from Article 105(1) of the Financial Regulation necessitates that a debit note to be drawn up.

According to the ECJ, the predecessors to the rule enshrined in the previous Financial Regulations could not be relied on alone, without their implementing rules, to establish that recovery of a debt owed to the European Union had expired.[62] The current Financial Regulation does not

60 See also Commission Staff Working Document – Updated Guidance on State Aid in European Structural and Investment (ESI) Funds Financial instruments in the 2014–2020 programming period of 25.3.2021, SWD(2021) 70 final, para. 3.1.6, for the EC's overview.

61 For instance, where there is a financial instrument to which the Union contributes its budget, and there is an authority of a Member State or a body whose actions are attributable to one to implement such an instrument. See e.g. Art. 62(1), last sentence of the Financial Regulation, taken together with Art. 209(2)(c) thereof.

62 Case C-566/14 P Marchiani/European Parliament, EU:C:2016:437, paras. 86 and 88, Case C447/13 P Nencini/European Parliament, EU:C:2014:2372, paras. 43 and 44, on Regulation No. 966/2012 and Delegated Regulation No. 1268/2012, as well

provide for a Delegated Regulation to be adopted. Moreover, and unlike the previous iterations of this rule, Article 105(1)-(2) of the current Financial Regulation does not link the commencement of the limitation period to the communication of the debit note to the debtor, merely making a reference to the deadline specified in the note, regardless of whether it was sent.[63]

4.2.2. Whether Article 105 of the Financial Regulation is Applicable to Recovery of Unlawful Aid

According to the ECJ's position in BALM and the NoA, it is not inconceivable that State aid measures would appear in the scope of application of the Financial Regulation. It is also not inconceivable that, in a given case, an unlawful State aid measure corresponds in part or in full to an entitlement on the part of the Union, which, after having funded it, would require recovery. However, to my mind, Article 105 requires that a debit note be drawn up for the limitation period to commence, which relates to an amount receivable and a debt due to the Union, and not directly to a State aid measure – however that debt may correspond to it, in full or in part. By drawing up a debit note, the Union itself takes up the enforcement of the EU's amount due, with that amount no longer, in itself, constituting resources subject to Article 107(1) TFEU. Thus, to my mind, while the original debt and the State aid measure might coincide with one another (including where Union funding constitutes the budget of an unlawful State aid measure), the amount receivable to which Article 105 applies may not be equated with the unlawful State aid measure during the recovery procedure specified in Articles 101 et seq. of the Financial Regulation.

Thus, while unlawful State aid measures might appear in the context of shared management or indirect management of Union resources, the limitation period from Article 105 would not apply to their recovery as unlawful State aid. Instead, Article 105 would apply if the funding aligned to such

as on Article 73a of Regulation No 1605/2002 and to Article 85b of Regulation No 2342/2002.

63 Although the debit note is supposed to be sent immediately after establishing the amount receivable and at the latest within a period of five years from the time when the Union institution was, in normal circumstances, in a position to claim its debt, unless the authorising officer responsible establishes that, despite the efforts which the Union institution has made, the delay in acting was caused by the debtor's conduct (Article 98(2) of the Financial Regulation).

measures would become entitlements and enforcement would be taken up pursuant to the Financial Regulation.

On the chance that the limitation period from the Financial Regulation would somehow compete with other limitation periods, there is an express rule of priority for Article 105 of the Financial Regulation, in that the limitation period at issue is expected to apply "without prejudice to the provisions of specific regulations and the application of Decision 2014/335/EU". Thus, where there would be a specific limitation period apart from that governed by Article 105 (e.g., where the period set by Article 4(1) of Regulation No. 2988/95 would apply), that specific period should have priority.

5 Conclusions

The above leads to the following observations on the applicability and effect of limitation periods in relation to the recovery of unlawful state aid:

- The ten-years period under Article 17(1) of the Procedural Regulation is unaffected by the expiry of a shorter national limitation period applicable to recovery of unlawful aid before a national court or a national authority;
- The limitation period from Article 17(1) of the Procedural Regulation may not be applied either as it is or by analogy to national proceedings;
- Where there is a national limitation period applicable to recovery that has not expired despite the period under Article 17(1) of the Procedural Regulation having done so, recovery of unlawful aid can still be ordered by the competent national court or a national authority, if doing so would be proportional;
- The limitation period applicable to national proceedings may be extended in practice where it would be shorter than the one from the Procedural Regulation, either due to the principle of equivalence, or due to the principle of effectiveness;
- There are at least two underlying general principles of Union law that somewhat restrict the Commission and the Member States in applying limitation periods to the recovery of unlawful aid, that being the principle of legal certainty (in that the Commission and the Member

States acting in the scope of Union law may not infinitely delay the exercise of their powers and duties, although there is no clear limit of years to such delays) and the principle of proportionality (in that, while recovery is in principle proportional, Member States must not go beyond what is necessary in setting national limitation periods, with limitation periods going beyond ten and possibly eleven years becoming suspect);

- The limitation period of four years from Article 3(1) of the Regulation No. 2988/95 has priority over shorter national periods or a period incompatible with the principle of effectiveness present in national law, although Member States retain a possibility of applying longer periods (Article 3(3) of that Regulation);
- The limitation period of five years from Article 105 of the current Financial Regulation does not apply to the recovery of unlawful State aid, although it could become applicable where an EU authority takes up enforcement of funding that constituted (a part of) an unlawful State aid measure.

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