

# **National State aid recovery procedures: how to guarantee an effective and immediate enforcement of the Commission's decisions. The role of national judges. Analysis of the case law of the EU courts. Belgian and Austrian Procedures (Part 2)**

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## **Austrian recovery procedures in general**

As regards State aid recovery procedures, national procedural rules apply when State aid recovery is ordered by the European Commission. The application of national law, in these circumstances, is subject to three essential conditions. First, the principle of equivalence requires that the application of national procedural legislation, when enforcing State aid rules or recovery, must not be less favourable under EU law than under national law. Furthermore, according to the principle of effectiveness, national procedural rules may not render excessively difficult or practically impossible the exercise of the rights conferred by European Union legislation. Given the supremacy of EU law, national courts must leave national procedural rules unapplied should these otherwise violate those two aforementioned principles. Therefore, these conditions must be taken into account when assessing Austrian State aid recovery procedures.

It is worth noting that under Austrian law, there is no uniform, nor a special procedure for State aid recovery. Civil procedures apply both when a legal act concerns private law, e.g. contracts that are concluded between two private individuals. In such cases, the recovery order should be given effect by a civil court. By means of an example, if an inadequate bid is accepted in a public tender, which should not have been accepted if the rules of a public tendering procedure were correctly applied, the private contract concluded between the State and a private enterprise constitutes State aid. Consequently, the State aid granted should be recovered in a civil law procedure (mostly based on enrichment law provisions) before the civil courts. In line with this, if the unlawful State aid is granted within the course of an administrative procedure based on an administrative act, then the recovery has to be pursued by means of an administrative procedure. Recovery shall be ordered by administrative authorities or the administrative courts. This may be the case of a subsidy granted by the State authority through an assessment. With regard to tax law, taxes can only be assessed via tax assessment by the tax authority. In principle, the procedure which applies to tax law is the fiscal procedure. Therefore, neither the civil, nor the administrative procedure can be applied. Due to the fact that the tax assessment is issued on the basis of the fiscal procedure, recovery has to be made within a fiscal procedure as well. As regards fiscal State aid, it has to be noted that in Austria yet there have been no recovery cases. Therefore, the following analysis will be based on hypothetical assumptions and discussions taking place in doctrine. The following will address inter alia recovery procedures applicable to fiscal State aid.

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## **Fiscal procedure in general**

In tax law, there are special procedural rules in relation to taxes and other levies contained in the Austrian Federal Fiscal Code (FFC). As said, fiscal State aid can only be granted in tax procedures, hence, the Austrian FFC will apply also with regard to these. Due to the length of the Federal Fiscal Code, the scope of the present paper is to address only those sections pertinent to fiscal procedures. Whenever a tax claim arises, the tax authority typically issues a tax assessment. However, in the event that the tax authority issues a tax assessment, the latter can be reviewed by a tax court. In order to challenge a tax assessment, the taxpayer has to file a complaint within one month. The complaint has to be brought before the tax authority, which is competent to decide a second time or it can choose to transfer the decision to the tax court instead. If the tax court issues, for example, a decision on the complaint, approving the tax assessment of the tax authority, the decision can again be reviewed under certain circumstances (there must be a relevant legal question which is not answered in any case before or is already addressed in jurisprudence but is not entirely clear) before the Supreme Administrative Court. However, if an infringement of constitutional rights by the decision of the tax court is found to exist, action can be brought before the Constitutional Court. The period of complaint is 6 weeks following the day when the decision is made.

## **Recovery based on a negative EC decision**

In the context of national recovery procedures, it is relevant to address the recovery to be effected on the basis of a negative EC decision. This shall apply in all those cases where the EC has decided that the fiscal State aid constitutes unlawful aid and that the amount of aid granted has to be recovered.

In the field of taxation, a distinction has to be made between two means of how State aid can be granted. Based on that, a further differentiation has to be made between two means of how fiscal State aid can be recovered. First, fiscal State aid can be granted through the non-issuance of a tax assessment. This is the case where a certain legal provision exempts a legal fact from its scope and because of this exemption, a certain situation does not fall under the scope of the income tax act. Also, this may be the case where income is not taxable because it merely is not covered by a provision which is contradictory to State aid. Hence, no tax assessment is issued by the tax authority in those cases and State aid is granted through non-issuance of a tax assessment. The other means would be to issue a tax assessment on the basis of a provision which is contrary to State aid law. Since a taxable event is realized, a tax assessment is issued and therefore State aid is granted via tax assessment.

## **Recovery of fiscal State aid granted through non-issuance of tax assessments**

Fiscal state aid granted through non-issuance of tax assessments refers to a legal provision or exception on which basis no tax assessment is issued because the legal prerequisites are not fulfilled, and it therefore does not trigger a taxable event.

Assuming that the exception to a legal provision contradicts Art 108 (3) TFEU and the EC issues a negative decision including a recovery order, due to supremacy of EU law and the direct application of Art 108 (3) TFEU as well as the negative EC decision, the conflicting legal provision would not be applicable any longer. This means that the exception from the scope is not applied and the ordinary rule which would trigger a taxable event applies instead. In such case, EU law just takes priority over domestic law and derogates the conflicting exception. Therefore, the ordinary rule shall apply and the event which was not taxable should instead be subject to taxation. Section 4 FFC states that a tax claim arises as soon as the conditions of a legal provision are fulfilled. This provision could be invoked to recover aid granted through non-issuance of tax assessments.

## **Recovery of fiscal State aid granted through issuance of tax assessment**

In Austria, there was no case of recovery of fiscal State aid up until now. Therefore, it may be difficult to predict how recovery procedures would apply to cases in practice. However, looking back to previous ECJ and EC decisions, it is possible to find some decisions which concern fiscal State aid in Austria. The first case at hand was decided by the ECJ upon a preliminary reference by the Austrian Constitutional Court. According to the law on the tax on electricity, there was a tax levied on each kilowatt hour of electricity consumed. The law on the tax on natural gas laid down similar rules for the supply and the consumption of natural gas. Eventually, the law on the rebate of energy taxes provided for a rebate of the energy taxes charged on supplies of natural gas and electricity. However, only undertakings whose activity is shown to consist primarily in the production of goods were entitled to the rebate of energy taxes. Applications for a rebate from undertakings not satisfying this criterion were rejected, as in the case of *Adria Wien Pipeline GmbH*, whose principal activity is the construction and operation of oil pipelines. In its preliminary ruling, the ECJ held that national measures which provide for a rebate of energy taxes on natural gas and electricity do not constitute State aid where they apply to all undertakings in national territory, regardless of their activity. Measures, however, which provide for a rebate only in the case of undertakings whose activity is shown to consist primarily in the manufacture of goods must be regarded as State aid. Indeed, the ECJ decided that the Austrian provision constitutes State aid and the aid has not been previously notified to the EC. Therefore, the aid granted should have been recovered. However, no recovery took place because the Austrian federal government requested an authorization by the EC through a subsequent notification and the EC actually authorized the Austrian aid retroactively.

After the decision, in order to comply with the preliminary ruling of the ECJ, the Austrian Constitutional Court held that this part of the national provision that limited the rebate to undertakings producing goods was no longer applicable. In its ruling, the ECJ held that this part, i.e. the limitation, was not compatible with State aid law. The partial annulment of the provision by the Constitutional Court extended the scope of the provision to all undertakings. In 2002, the law on rebate was amended and provided that all undertakings exceeding a particular threshold may claim a rebate – so there was no limitation to manufacturing undertakings anymore. The EC started an investigation and came to the conclusion that the threshold would constitute State aid because it would grant a selective advantage for energy-intensive companies and it issued a negative decision. However, even though recovery should be ordered in this event, the EC did not order recovery by the reason of the principle of protection of legitimate expectations. The EC stated that it was conceivable that the wording of the ECJ's ruling in *Adria-Wien* may have led some beneficiaries to believe in good faith that the measures at issue would cease to be selective and therefore cease to constitute State aid if their benefit was extended to sectors other than the manufacture of goods. In addition, the EC took into consideration that the Austrian authorities promised that Austria will take all necessary measures to modify the provision retroactively.

After the EC decision regarding the retroactive authorization, the Austrian authorities were doubtful about the application of the provision. Indeed, the ECJ qualified the measure as selective while the EC authorized the aid scheme as such. As a result, many cases reached the Austrian Supreme Administrative Court. The Court referred to the ECJ for a preliminary ruling questioning the legal consequences of retroactive authorizations of the EC. On that basis, in the case *Transalpine Ölleitung*, the ECJ held that a retroactive authorization does not heal the infringement of the standstill clause and that the aid granted still remains unlawful. The fact that the standstill obligation was disregarded leads to an advantage in terms of interest. If the aid had been notified on time, Austria should have waited until the authorization was granted. However, due to the fact that it awarded the aid earlier, the advantage so obtained improved the competitive situation of particular undertakings in the market.

In *Dilly's Wellnesshotel*, the ECJ decided that Austria did not comply with formal requirements regarding the general block exemption regulation (GBER). Thus, even though the aid in question had fallen under the GBER, the formal requirements have not been met properly in the implementation of the measure.

In both cases, no interest has been recovered yet even though the ECJ held that an advantage in the interest existed and that this advantage was contrary to State aid law. The reason that no recovery of interest took place was due to the fact that neither the ECJ nor the EC ordered the recovery of interest. Furthermore, the safeguard of individual's rights and as such in particular the safeguard of the rights of competitors fell within the competence of the national courts. In principle, in Austrian literature it was discussed that no recovery of interest can be pursued due to the lack of respective legal bases in national law. In the author's opinion, in cases in which the ECJ has previously confirmed the existence of an advantage in interest, EU law should prevail and the interest should also be recovered because the breach of the standstill obligation is not healed through a subsequent and retroactive authorization by the EC.

As already mentioned, Austria had no experience in recovery so far. This is the reason why, up to date, it is not possible to rely on case law when addressing the Austrian fiscal State aid recovery procedure. However, in Austrian academic literature, three possible legal bases were discussed based on which recovery of fiscal State aid could be achieved, accordingly, Sec 295a, Sec 299 and Sec 303 of the FFC. These three provisions have in common that they all can be inferred after the tax assessment enters into legal force. Nevertheless, the tax authorities must adhere to the principle of legal certainty on which the taxpayer can rely. For this reason, breach of legal force only may be justified in cases when there are sufficient reasons to substantiate that the principle of legal correctness has to prevail over the principle of legal certainty.

In order to provide a general overview, Sec 295a FFC provides for the possibility of an amendment of tax assessments in an event with retroactive effect. Sec 299 FFC provides for the repeal of incorrect tax assessments. Sec 303 determines a possibility for a retrial, according to which a procedure which has been closed may be reopened. Before assessing these three legal options in detail, it should be mentioned that retrial under Sec 303 FFC can be used as a legal basis together with Sec 295a or Sec 299 FFC. Therefore, it is always possible to rely on Sec 303 FFC in parallel to the other provisions (according to a decision of the Austrian Supreme Administrative Court). As regards Sec 295a and Sec 299 FFC, these cannot be invoked in parallel inasmuch as they exclude each other.

### **Recovery based on Sec 295a FFC**

Section 295a FFC provides the possibility to amend a tax assessment at the request of a party or ex officio in case of an event which has effect on the existence or the amount of tax in the past. The decision on whether the tax assessment shall be amended or not rests with the tax authority which was in charge of the issuance of the tax assessment previously. As stated, the national institution responsible for the amendment is not the tax court but rather the tax authority itself. Therefore, questions may arise as to when the authority is actually allowed to act in that sense. For example, this may be the case where an event occurs after a tax assessment is issued, but this event has an effect on the past. The right to advance a request is given to any party to which a tax assessment was addressed or to which respect the tax assessment has legal relevance. If a request is made, the tax authority has the power to decide. If all the requirements of Sec 295a are fulfilled, the tax authority has to decide on its own discretion taking into consideration the principle of legal correctness, whereby, the decision may be in favor, but also in the detriment of the taxpayer.

Whether an event has an effect on the past with regard to taxation or the amount of tax due, is derived from the particular (material) tax provision. In other words, if such an event occurs before the tax assessment is issued, then the authority has to consider it accordingly. On the contrary, if the event occurs after the tax assessment is issued, Sec 295a FFC represents the relevant procedural legal basis to make an amendment afterwards.

An event may be described as an occurrence which affects real or legal facts whereby those facts have influence on tax provisions in so far as it results in a different tax claim. It is worth noting that Sec 295a FFC may be used in different contexts. For example, where an income tax assessment is issued on the basis of a double tax treaty crediting the foreign taxes in Austria and subsequently the foreign taxes are credited abroad as well. Providing another example, it is possible to refer to an income tax assessment issued where special expenses, i.e. medical fees, are initially taken into account, and afterwards reimbursed to the taxpayer by its insurance. These examples refer to cases where the event occurs at a later stage, but is taken into consideration before the tax authority was aware of its occurrence. In principle, the legal assessment should have been amended because if, for instance, the authority had known earlier that the foreign tax will be credited abroad or that the medical fees will be reimbursed, it would have reached a different result.

However, issues may arise from the fact that according to Austrian jurisprudence a judgement or decision do not constitute an event within the meaning of Sec 295a FFC. Thus, the question which was discussed with regard to negative EC decisions is whether such a decision can be interpreted as being an event and requires the tax assessment to be amended on the basis of Sec 295a FFC. There are opinions in literature in the sense that the decision of the EC is merely declaratory and that the aid-character existed also before the EC has decided. That is why the decision itself does not constitute an event that has effect on the past. Other opinions claim that the word event does not cover decisions (pursuant to domestic jurisprudence) as it is also not covered by the true meaning of the word. The prevailing opinion is, however, that negative EC decisions perhaps are not covered at first sight, but the word could be interpreted more broadly in accordance with EU law as to fall under this term. Those scholars who take this position admit that even if such an interpretation is not possible and assuming that the term “event” simply cannot cover EC decisions, then the provision contradicts EU law and every time there is a conflict, EU law should prevail. That means that due to the supremacy of EU law, the directly applicable EC decisions will prevail and the rule would hence be applicable. In conclusion, there are those academics that argue for a strict application based on the wording, but the prevailing opinion holds that an EC decision requires an amendment and even if an interpretation is not possible, it is necessary to apply it in order to comply with EU law.

The limitation period pursuant to Sec 295a FFC, starts with the expiry of the year in which the retroactive event occurs and takes 5 years. Moreover, the absolute limitation period is 10 years starting with the date on which the tax claim arises. The tax claim arises typically at the end of each calendar year. Again, there could be cases in which the absolute limitation period of 10 years, as it is in Art 17 of the Procedural Regulation, does not match with the domestic absolute limitation period. In cases of conflict, Art 17 of the Procedural Regulation prevails.

### **Recovery based on Sec 299 FFC**

As regards the next potential legal basis, Sec 299 FFC, para. 1 leg cit states that the tax authority may repeal a tax assessment at the request of a party or ex officio, if the verdict of the decision has proven to be incorrect. The tax authority, rather than the court, is in charge of the repeal of the tax assessment. Paragraph 2 leg cit explains that the tax assessment to be repealed needs to be combined with a replacing tax assessment.

The first condition of this provision is the incorrectness of the verdict. Both, legal and factual incorrectness are covered by the rule, hence, the scope of application of Sec 299 FFC is very broad. As regards the content of the verdict, it is incorrect if it is based on a wrongful interpretation of the law or the wrongful application of provisions. Also, when there is a breach of EU law, the verdict is incorrect within the sense of Sec 299 FFC. Breach of EU law occurs when provisions of primary law are neglected or wrongly applied, but also if secondary legal acts are misapplied. Therefore, an incorrect verdict may stem from the non-compliance with regulations, directives, decisions as well as negative EC decisions.

As was also the case with Sec 295a, Sec 299 FFC offers a discretionary margin which means that the tax authority has to decide whether the realization of the principle of legal correctness is stronger and more decisive than the fulfilment of the principle of legal certainty in a specific case. Within this framework, the tax authority has to balance those two principles and take into consideration certain criteria like fairness and appropriateness of the breach of legal certainty.

As regards negative EC decisions, it is quite clear that the margin of discretion should be restricted or no margin should be left as soon as the EC issues a recovery order. That means that every time there is any requirement from EU law perspective – e.g. a negative EC decision – the margin has to be interpreted more strictly and reduced accordingly. Most scholars argue that this legal basis is the most suitable one as it fits best with the requirements regarding EC decisions and the implementation of a recovery order.

When considering the limitation period relating to Sec 299 FFC, it is possible to see that this is much shorter than how provided by other provisions. Indeed, the term is only one year starting with the disclosure of the tax assessment. The reason for this short limitation period is that the scope of the provision is extremely broad. Therefore, the legislator on the one hand has foreseen the possibility to repeal any tax assessment containing a wrongful verdict, but only in a limited period of time. However also in this case, with regard to negative EC decisions there could be a conflict with Art 17 of the Procedural Regulation. Thus, most scholars argue that the limitation period of one year needs to be extended because of the direct application of Art 17 of the Procedural Regulation.

### **Recovery based on Sec 303 FFC**

Regarding the Austrian recovery procedures, it is relevant to address the retrial. This instrument constitutes a third potential legal basis for recovery. The provision states that a procedure which is closed by a tax assessment may be reopened at the request of a party or ex officio if the tax assessment is obtained by means of an act which is subject to criminal sanctions. This condition is satisfied if, for example, an assessment is based on falsified documents. Also, a procedure may be reopened if new facts or evidence have emerged. This condition implies that new facts emerged after the tax assessment was issued but these facts were actually not new at the time the assessment was made. Accordingly, they were existing already at the time before the procedure was closed but they emerged afterwards. This situation is also defined as *nova reperta* and has to be distinguished from *nova producta*. *Nova producta* indicates the opposite situation referring to the case where the fact occurs after the tax procedure was closed. A further case in which a procedure may be reopened is when the tax assessment was depending on a preliminary question which was decided after the tax assessment was issued and the information of those – now different - circumstances, i.e. the result of the preliminary question, would have led to a different verdict. In conclusion, in order to fulfil all criteria of Sec 303 FFC, at least one of the conditions indicated must be met and the knowledge of those circumstances that are different than expected would have led to a different verdict. Indeed, in Sec 305 FFC it is stated that the tax authority is in charge of reopening the procedure and has to issue a new tax assessment in such cases.

In literature, there were discussions on which of those conditions is fulfilled if a negative EC decision is issued. As regards the new fact or evidence criterion, which means that the fact roots in the past but was detected after the tax assessment was issued, it was argued that an EC decision as such could not be understood as a new fact or evidence. The reasons brought forward were that this ground for retrial is applicable with regard to circumstances or to a particular factual situation and not to a legal opinion or decision.

Preliminary questions are questions which outcome is relevant or rather conditional for taxation (e.g., a legal provision is only applicable provided that a court in another procedure decides in a particular way). If the preliminary question which is conditional for taxation is decided differently than expected, the

conditions of the material provision will therefore not be fulfilled any longer and the tax claim does not arise in the end. In such case, the procedure needs to be reopened in order to take the amended decision into account. According to the Austrian Supreme Administrative Court, a preliminary ruling by the ECJ, shall not be regarded as a preliminary question within the meaning of Sec 303 FFC. In the view of the Court, the decision does not concern one specific party so that the ruling is just applied when interpreting provisions. In principle, there is no identity between the party which asked for the preliminary ruling and other taxpayers. Therefore, this argument may well explain why one opinion that exists among Austrian scholars is that also negative EC decisions, not concerning particular taxpayers, do not offer ground for retrial.

However, there is also one further argument raised by a line of thought of scholars according to which it is not possible to apply one of the existing grounds for retrial. Nevertheless, they consider that there has to be the possibility to reopen the procedure and this should be done on the ground of a “sui generis qua Union law”. In principle, this ground is not written, but as domestic law would otherwise contradict EU law, the latter prevailing would create a new ground for retrial. By contrast, there are also opinions under which this approach would contradict constitutional law (or the rule of law) because a written legal basis is required and a tax claim cannot arise without a written legal norm in national legislation. That is why, according to the author, “new facts or evidence” should be the most plausible and persuasive grounds for retrial. Its wording offers the chance for a broader interpretation. Thus, it should not be deemed too abstract to hold that an EC decision constitutes a new fact that should be taken into consideration.

Regarding the limitation period under Sec 303 FFC, it starts in the year in which the tax claim arises and takes five years. It is worth nothing that an extension of one year is possible every time the tax authority takes administrative measures. In this case indeed the authority acts have to show initiative in pursuit of assessing the tax. Therefore, if after one year the tax authority takes further initiative by performing administrative acts, this period may be accordingly extended for one additional year. In principle, the tax authority can act in this sense in as long as the absolute limitation period of 10 years is not reached. As mentioned, however, in case of any conflict with the limitation period of Art 17 of the Procedural Regulation, the limitation period of Art 17 will prevail.

### **Interim measures**

In the context of Austrian recovery procedures, two issues are of particular relevance. These are accordingly, interim measures and interest. As regards interim measures, the matter is regulated by Secs 212 and 212a of the Austrian FFC.

On the one hand, Sec 212 FFC governs the postponement of payment, stating that “upon request of the taxpayer the tax authority may postpone the date on which the payment of the taxes shall be made or may permit a payment in instalments if the immediate payment involves serious hardship for the taxpayer and does not threaten the collectability of taxes.” Under this provision the tax authority has discretionary power to grant a postponement to the taxpayer if he or she faces the impossibility to repay the outstanding amount at once due to serious hardship.

On the other, Sec 212a FFC determines the suspension of payment. This norm provides that “the collection of taxes is to be suspended if the exact amount depends on the decision on an appeal or complaint”. In contrast to Sec 212 FFC, this provision is not a discretionary provision. Hence, as soon as all its prerequisites are fulfilled, the tax authority has to suspend the payment. However, this is maximally possible up to the amount which is requested in the appeal.

Considering the Procedural Regulation, Art 16 states that recovery of the full amount is to be effected without delay, which means that the amount is to be recovered effective immediately. As said, in case of

conflict between national and EU legislation, the former should remain unapplied. Therefore, also in this case, Austrian national rules being in conflict with EU law, should not find application.

Thus, although interim measures to the taxpayers shall not be granted, these are allowed according to ECJ jurisprudence in limited circumstances. For example, interim measures may be invoked if the taxpayer files for an action for annulment at the level of ECJ. In general, however, this means that if the EC issues a negative decision, the Austrian judges are not permitted to apply Sec 212 and Sec 212a FFC.

### **Interest**

As regards interest, the Austrian FFC provides a rule on interest on underpayment of tax. Sec 205 para 1 FFC stipulates that interest has to be paid on the differential amount concerning income tax and corporate income tax which results after comparison of the amount determined starting from 1 October of the year following the year of emergence of the tax claim until the moment of disclosure of the corrected tax assessment. The provision further states that the annual interest rate is two per cent above the basic interest rate and the interest shall be levied for a period of a maximum of 48 months. The basic interest rate is a rate that is oriented towards the key interest rate of the European Central Bank and which is adjusted regularly by the Ministry of Finance (currently at -0,88%). The Procedural Regulation, however, requires that the aid to be recovered shall include interest at the rate fixed by the EC for a period which starts from the date on which the unlawful aid was at the disposal of the beneficiary until the date of actual recovery (data from 1 July 2016: -0,01 for Austria). In principle, in case of a discrepancy between the Austrian and the EC's rate, whereby the latter is higher, the EC rate should be applied due to the direct effect of the EC decision and the implementing regulation.

In addition to the rates, there are other issues that could be conflicting. Indeed, the Austrian provision is only applicable to income tax, whereas other taxes are not covered by the rule (e.g., energy tax).

### **Recovery without negative EC decision**

As a relevant aspect of State aid recovery, it should be said that if the EC delivers a negative decision which is directly applicable, Member States have the obligation to implement it effective immediately. Indeed, if such a decision is issued, the Member State in concern has to apply its national procedural law, whereby the Procedural Regulation which specifies how the recovery order needs to be implemented has to be regarded.

However, the question may arise whether recovery of unlawful aid is also possible without a negative decision from the EC. In other words, it may be relevant to verify whether an aid implemented in breach of the requirement as to notification and standstill clause may create an obligation upon the MS to recover the unlawful aid also in the absence of an EC negative decision.

In literature, it was discussed whether in this case there may be an obligation to recover aid ex officio and whether the Austrian authorities should be obliged to order recovery if unlawful aid is detected within a national procedure. In the doctrinal discussion, one argument brought forward in favor of this view is that if no consequences are attached to these breaches, the standstill provision and the notification obligation would be ineffective. A counterargument to this view may be in the sense that considering the principle of legal certainty and other economic reasons, national institutions cannot be expected to review each single decision made for a period of up to 10 years in the past. Another argument may be that the ECJ has never explicitly held for the existence of such an ex officio obligation to recover aid. In addition, as regards the fundamental freedoms, the ECJ also does not require Member States to reopen any procedure made in the past on the basis of its contradiction with the freedoms themselves. In principle, this may be only possible under very restricted circumstances due to legal certainty reasons.



Another question that should be addressed agreeing on the existence of an obligation to recovery of the aid by the Member State, refers to what provisions should be ultimately applied. Indeed, in principle, either the provisions as they are in the Procedural Regulation could be applied in analogy or the national ones may be applicable.

Despite the discussions raised in literature, the reactions to the decisions *Alpe Adria* and *Dilly's Wellnesshotel* show that Austria takes the view that there is no obligation to recover ex officio without an EC decision stating otherwise.

Another aspect frequently discussed in Austrian literature refers to whether recovery may be possible at the request of a competitor. The underlying idea is that a competitor is in a better position to detect irregularities regarding the grant of any aid. For example, a competitor may be much more aware of cases where another competitor receives aids. In this case indeed, a direct competitive disadvantage is faced. This may well be the case where the EC would ultimately decide on the lawfulness of the aid, even though the notification and standstill obligation were breached, and the competitor had benefitted from the advantage in interest.

The ECJ held in several decisions that national institutions are obliged to safeguard the rights of individuals and the rights of competitors should also fall under this category. In this respect, the question which raised a several discussions was whether national institutions can be obliged to recover aid at the request of the competitor and if so, what kind of rules should or could apply. As shown by the Austrian example on energy taxation previously addressed, this issue is of major practical relevance. In that case, supplying undertakings did not receive a refund whereas manufacturing undertakings did. Even though the aid was subsequently approved by the EC, it would be interesting to know whether the competitors, i.e. supplying undertakings, could request recovery of interest due to the non-compliance with the notification and standstill obligation.

It should be noted that the ECJ yet did not express its view regarding State aid recovery without a negative EC decision. Some authors and the EC argue that Art 108 (3) TFEU obliges the Member States to recover the aid and that the Procedural Regulation is to be applied. However, the Procedural Regulation only covers cases where there is a negative EC decision in place.

Therefore, assuming that the Member States have to recover the aid at the request of competitors, the Austrian national provisions should be applied. However, the EU law supremacy, in case of conflict with national law, cannot apply in this context due to the absence of a directly applicable negative EC decision (at least according to the prevailing opinion in the Austrian doctrine).

Moreover, the possibility to initiate a recovery procedure based on a competitor's complaint would bring substantial difficulties. The first issue at hand may be to identify who may qualify as competitor. According to Sec 299 FFC, for example, the complaint may be brought "upon request of a party". A party is defined as any person to whom the tax assessment is addressed or to whom the tax assessment has legal effect. In both cases, the competitor is neither the person to whom the beneficial tax assessment is addressed nor the person to whom the assessment has legal effect. On the contrary, the competitor does not have any legal effect caused by the tax assessment. The next question would be, if it is possible to interpret this term in light of EU State aid law and to understand the term party in a broader fashion as to cover also competitors which are no addressees of the tax assessment. In doctrine, some authors hold for this possibility, while other disagree. It should be said, however, that on the one hand, competitors have a substantial legal interest in changing the tax assessment of its competitor; on the other, this interest may not allow them to be regarded as being a party.

Another point of discussion would be Sec 303 FFC which provides three grounds for retrial. As said, preliminary decisions would not apply in case of negative EC decisions. However, in this case, due to the absence of any EC decisions this retrial ground would not be applicable. Nevertheless, questions may arise with respect to new facts or evidence. In principle, in the absence of a negative EC decision there can be no new fact. This is because the tax authority did not assess that the rule in question contradicts State aid law and should not be applied. The tax authorities' mistake therefore shall not be considered as new fact or evidence. Furthermore, an interpretation in the light of EU State aid law would also not be possible because of the lack of any reaction from the EC or any other directly applicable and concrete provision.

However, assuming these difficulties can be ignored, recovery without negative EC decisions would rise several issues. It should be pointed out, that Austria has not solved these issues yet; therefore, comments may be advanced on the basis of arguments resulting from academic discussions.

First, potential issues could occur in the event, that the national institution would be obliged to recover aid at the request of a competitor, since the national institution would have to assess the potential breach of State aid rules by itself. In principle, the national institutions should have to verify whether there is an aid within the meaning of Art 107 TFEU and whether this aid should have been notified to the EC. It is evident that this would represent a substantial workload for Member States.

Another issue would be the interest rates applicable. As previously said, the Member States' non-compliance with the notification obligation would qualify the aid as unlawful, placing on the Member State the obligation to also recover interest. However, the Austrian provision on interest only covers interest on underpayment of taxes, which applies if a tax assessment is amended or if a new one is issued. Therefore, at present Austria has no appropriate legal basis for this purpose.

The last point to be debated refers to the possibility by the EC to approve the aid after delayed notification by the Member State. In this respect, the question is whether a preliminary recovery of the aid is possible and, in case of a following EC positive decision, whether this has to be paid back. The Supreme Administrative Court ruled several times that if a decision is pending at a higher Court, then this is not uncertain enough to justify a preliminary collection of taxes. In other words, to be preliminarily recoverable, a case has to exceed a certain level of uncertainty and this level is not reached in case of a pending Court decision. Scholars argue that EC decisions and ECJ decisions are therefore also not "uncertain" enough and that this threshold is not passed. But it could of course be an issue if aid is recovered upon request of the competitor because the tax authority is persuaded that the aid is unlawful and in the end the EC decides in the other direction.

## **Conclusion**

There is no special recovery procedure for all kinds of State aid, and therefore also not for fiscal State aid. Moreover, there is also no uniform recovery procedure which means that in case of recovery, it is necessary to apply the provisions regarding civil procedures, administrative procedures and fiscal procedures respectively. Austria has no cases so far where recovery was effected, therefore, current discussions are only seeking for potential answers in case Austria should come to such a situation to recover.

Summarizing, Austria offers three potential legal bases, namely Sec 295a on the amendment of a tax assessment in case of an event that has effect on the past, Sec 299 FFC which applies if the verdict of a decision is incorrect and leads to a repeal of the tax assessment and Sec 303 FFC which enables the authorities to reopen the procedure if the grounds for retrial are fulfilled.

It has been discussed that those provisions, although generally applicable, may be in certain points in conflict with Art 108 (3) TFEU or the Procedural Regulation. Therefore, each time a mismatch emerges, EU law would prevail and the issue will be resolved by direct application or supremacy of EU law.

Recovery without negative EC decisions was highly disputed whereby it is very controversial whether there is an ex officio obligation to recover the aid if a tax authority detects irregularities. It is also disputed whether competitors are able to start a procedure and request a decision on recovery. Despite all those discussions, there was no suggestion to introduce new provisions on recovery of fiscal State aid – in Austrian academia there were only discussions of how the existing provisions can be used to comply with the requirements of EU law.