Binding Effect of Opening Decisions – *Lufthansa AG v. FFH*

Note on Case C-284/12

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I. The facts of the case

On 21 November 2013 the second chamber of the European Court of Justice (ECJ) handed down its judgment on a request from the *Oberlandesgericht Koblenz* (Germany) for a preliminary ruling regarding the obligation of Member States' courts to abide by the Commission's preliminary assessment in an uncontested opening decision under Article 6 (1) of Regulation No 659/1999[1] classifying measures as State aid.[2] The referring appellate court was concerned with the appeal of a competitor (*Deutsche Lufthansa AG*), who had first brought action before the *Bad Kreuznach* Regional Court on 26 November 2006 seeking an order for the recovery of (alleged) State aid granted to *Ryanair Ltd* by the *Flughafen Frankfurt-Hahn GmbH* (FFH) during 2001 to 2006 and for *FFH*, who is imputable to the Federal Republic of Germany and operator of Frankfurt Hahn Civil Airport[3], to refrain from granting further State aid.

Meanwhile on 17 June 2008, the Commission decided to initiate formal investigation procedures under Article 108 (2) TFEU[4] based on the preliminary assessment of the measures as constituting State aid. The referring court therefore sent the Commission a request for an opinion pursuant to point 3.2 of the Commission Notice on the enforcement of State aid law by national courts.[5] Since in its opinion the Commission deemed an assessment of the appellate court as to the nature of the measures unnecessary and was of the opinion that the court may base its decision on the opening

[1] 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 1999 L 083, p. 1.
[2] Judgment of the ECJ (Second Chamber) of 21 November 2013, Case C-284/12, Deutsche *Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH, intervener Ryanair Ltd.*
[3] Ibid, para. 10: *"FFH, operator of Frankfurt Hahn Civil Airport, was owned, until January 2009, 65% by Fraport AG, 17.5% by the German federal state of Rhineland-Palatinate and 17.5% by the German federal state of Hessen. Fraport AG is a public company listed on a stock exchange and owned, as to the majority of its shares, by the Federal Republic of Germany, the federal state of Hessen and the city of Frankfurt am Main."*
[4] OJ 2009 C 12, p. 6.
[5] Commission Notice on the enforcement of State aid law by national courts, OJ 2009 C 85, p. 1.

decision, the court, having doubts whether the measures at issue classify as State aid, requested a preliminary ruling of the ECJ. The referring court asked whether an appellate court was bound by an uncontested opening decision of the Commission, which deems a measure to classify as State aid under Art. 107 (1) TFEU. The second and third question, which concerned material aspects of the selectivity criterion and were conditional in case of an affirmative answer to the first question, remained unanswered.

II. The contents of the judgment

Based on the settled case-law regarding the complementary but separate roles of the Commission and national courts in the enforcement of Article 107 and 108 TFEU, the ECJ stressed the obligation of national courts – especially towards individuals – to adopt the appropriate measures to remedy an infringement of the standstill obligation of the final sentence of Article 108 (3) and Article 3 of Regulation No 659/1999.[6] According to the ECJ, national courts, when assessing an infringement of the last sentence of Article 108 (3) TFEU, have to examine the aid character of a measure as long as the Commission has not decided to initiate the formal investigation procedure according to Article 4 (4) of Regulation No 659/1999. The ECJ held that, after this *cesura*, the national court must take the appropriate measures and that, though its preliminary nature, the decision does not lack "*legal effect*".[7] It remains unclear about the doctrinal category of the legal effect. Considering the context of this statement it should be understood as merely describing and justifying why a preliminary assessment shall have relevance for national courts and not be disregarded.[8] According to the ECJ, the standstill obligation applies to State measures which may constitute state aid. The Court considers the suspension of implementation, the recovery of benefits or "*provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure*"[9], appropriate measures, regardless *"if in its final decision the Commission were to conclude that there were no aid elements*"[10]. In case the national court disagrees with the preliminary assessment of the measure as constituting state aid in the opening decision it may seek clarification from the Commission pursuant to point 3.2 of the Commission Notice on the enforcement of State aid law

[6] Judgment of the ECJ (Second Chamber) of 21 November 2013, Case C-284/12, Deutsche *Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH, intervener Ryanair Ltd*, para. 30.
[7] Ibid. para. 37.
[8] Ibid. para. 37.
[9] Ibid. para. 42.
[10] Ibid. para. 40.

by national courts[11] or may/must request a preliminary ruling according to the second and third paragraphs of Article 267 TFEU.

III. Comments

It should be noted beforehand, that the recent judgment of the ECJ in *Lufthansa vs. FFH* does not explicitly establish an unconditional binding effect of the decision to initiate the formal investigation procedure under Article 6 (1) of Regulation No 659/1999. However – despite certain ambiguities – the judgment points towards an unconditional binding effect of opening decisions, leading to an obligation of national courts to assume an infringement of the final sentence of Article 108 (3) TFEU and to take the appropriate measures in proceedings brought before them.

1. Binding effect

The ECJ held that national courts are obligated to take the appropriate measures once the Commission decides to initiate a formal investigation procedure according to Article 4 (4) of Regulation No 659/1999.[12] In combination with the finding that the standstill obligation applies to measures which *"may be classified as State aid within the meaning of Article 107(1) TFEU"*[13] this judgment sums up to a binding effect of opening decisions in infringement proceedings brought before national courts by competitors seeking recovery of the aid and suspension of the implementation, and thereby, turning the "*preliminary assessment of the Commission as to the aid character of the proposed measure*"[14] into a constituent element of an injunction ordered by the national court ("Tatbestandswirkung").

The ECJ apparently finds that once the Commission decides to initiate the formal investigation procedure, the measure may constitute aid and since according to this recent judgment the standstill obligation applies to measures which *may* constitute aid, an infringement of the final sentence of Article 108 (3) TFEU is to assume. Whereas, national courts *"entertain doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure"*[15] they may

[11] OJ 2009 C 85, p. 1.
[12] Judgment of the ECJ (Second Chamber) of 21 November 2013, Case C-284/12, Deutsche *Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH, intervener Ryanair Ltd*, para. 42.
[13] Ibid. para. 35.
[14] Article 6 (1) of Regulation No 659/1999.
[15] Ibid. para. 44.

seek clarification from the Commission pursuant to point 3.2 of the Commission Notice on the enforcement of State aid law by national courts[16] or refer a preliminary question to the ECJ, in accordance with the second and third paragraphs of Article 267 TFEU.

a) Scope of the binding effect

To determine the scope of the binding effect one has to bear in mind the preliminary question the *Oberlandesgericht Koblenz* referred to the ECJ or to put it more accurately in this case, the question the ECJ construed:

"*By its first question, the referring court is essentially asking whether, where, in accordance with Article 108(3) TFEU, the Commission has initiated a formal investigation procedure under Article 108(2) TFEU with regard to a State measure which has not been notified and is being implemented, a national court hearing an application for the cessation of the implementation of that measure and the recovery of payments already made is required to draw the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.*"

First, the ECJ accentuated the referred question to address the binding effect of opening decisions in cases in which the aid is being implemented. Due to the German translation of the term "*aids being implemented*"[17] as "*in der Durchführung begriffenen nicht angemeldeten staatlichen Maßnahme*"[18]– German was the case language – a certain unclarity is introduced to the findings of the ECJ.

One might consider this merely caviling, but indeed it is of relevance whether fully implemented State aid is considered aid being implemented because the scope of the binding effect varies depending on the interpretation. Indeed, the facts of the underlying case brought before the appellate court and the opinion of Advocate General Mengozzi[19] point towards already fully implemented aid falling under the term of "*aid being implemented*". In his opinion Advocate General Mengozzi remarks that the standstill obligation "*extends to the entire period during which the prohibition remains in force.*"[20] Hence, the Advocate General puts the process of

[16] OJ 2009 C 85, p. 1.
[17] Judgment of the ECJ (Second Chamber) of 21 November 2013, Case C-284/12, Deutsche *Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH, intervener Ryanair Ltd, para. 24.*
[18] Ibid. para. 24.
[19] Opinion of Advocate General Mengozzi delivered on 27 June 2013, Case C-284/12, *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH*.
[20] Ibid. para. 13.

implementation in relation to the standstill obligation, therefore aid is considered being implemented until the investigation period of Article 108 (3) TFEU ends with a final decision. In addition, *Lufthansa AG* had brought action against (alleged) aid which had already been fully granted to *Ryanair Ltd* during 2001 to 2006 before the Commission decided to initiate the formal investigation procedure on 17 June 2008.

b) Resulting obligations

The ECJ does not explicitly specify the concrete measures to be taken by national courts in case of an infringement of the final sentence of Article 108 (3) TFEU. Albeit, the judgment indicates the objective and the nature of the appropriate measures.[21]

First conclusions can be drawn from following statement: *"To that end, national courts may decide to suspend the implementation of the measure in question and order the recovery of payments already made. They may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure.* [22]

It follows from the foregoing that national courts may choose amongst the final suspension of implementation, the recovery of payments or provisional measures. Staging proceedings until a final decision of the Commission seems not to be an option, underlined by the referral to settled case-law in the beginning of the ruling.[23]

Nevertheless, future cases will show whether the Court of Justice of the European Union will use the obligation of national courts to strike a balance between the interests of the parties concerned and the effectiveness of the Commission´s decision as a starting point to (re)expand the discretion of national courts.

2. Unproportionate application of *effet utile*

[21] Judgment of the ECJ (Second Chamber) of 21 November 2013, Case C-284/12, Deutsche *Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH, intervener Ryanair Ltd*, para. 42.
[22] Ibid. para. 43.
[23] Ibid. paras. 30–32.

Overlooking the possible practical consequences of an unconditional binding effect of opening decisions for (alleged) aid recipients[24], the legal remedies available to them and the proposed approach to dissenting national courts, this recent judgment – though its conclusiveness in regard to *effet utile* – seems unproportionate.

It is questionable whether the competences of the Commission and the rights of (alleged) aid recipients are sufficiently considered or whether they should under certain circumstances outweigh the "absolute practical effect" of the standstill obligation.

a) Proposed approach of the ECJ in case of dissent

The ECJ addressed the issue of conflicting aid assessments proposing a supposed simple solution to ensure a coherent application of 107 (1) TFEU. As mentioned beforehand, the ECJ advised member states´courts to either seek clarification from the Commission pursuant to point 3.2 of the Commission Notice on the enforcement of State aid law by national courts[25] or to refer a preliminary question to the ECJ in accordance with the second and third paragraphs of Article 267 TFEU.

At a first look this approach guarantees the effective enforcement of the standstill obligation whilst reducing the risk for undertakings which did not receive State aid to be subjected to a final or provisional "*appropriate measure*" ordered by a national court. A closer look reveals why – under the current judicial circumstances – this approach is misguided.

aa) Notice to Commission

Obviously, a cooperation between national courts and the Commission pursuant to the Commission Notice on the enforcement of State aid law by national courts[26] is prudent. However, if the national court and the Commission – due to mutual cooperation – come to an agreement regarding the aid character of a measure, there is no conflict.

The binding effect of an opening decision becomes questionable where the Commission and national courts disagree but indeed the opening decision, including its Article 107 (1) TFEU

[24] See *Koenig* in Editorial to this issue and already S*oltesz*, EStAL 2013, p. 643–645.
[25] OJ 2009 C 85, p. 1.
[26] OJ 2009 C 85, p. 1.

assessment has a "*legal effect*"[27]. Therefore, the option to approach the Commission as an *amicus curiae* is hardly a justification to narrow down the national court´s competence and discretion where the Commission and national courts disagree over the aid character of the measure.

bb) Request for preliminary ruling

One might argue with the ECJ, that the option of referring a question to the ECJ for a preliminary ruling is sufficient to address doubts of Member States´ courts as to the aid character of a measure. However, the ECJ did not clearly state what the national court would have to investigate in light of the binding effect of the Commission´s decision. According to this recent ruling the standstill obligation shall apply to aid measures which *may* constitute State aid. It remains unclear whether the national court must either be satisfied with the fact that the measure *may* constitute aid and depending on the case order drastic interim measures or whether it may demand a definite answer of the ECJ as to the aid character. However, the last mentioned option is substantially confined by the ECJ´s jurisdiction under Article 267 (1) TFEU to give preliminary rulings only on "(*a) the interpretation of the Treaties*" and "(*b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*" and not on matters of facts concerning the aid character. Thus, the ECJ could not get ahead of the Commission in preliminary proceedings before the Commission has completed the formal investigation procedure and determine the aid character on the basis of facts, but may merely interpret the legal notions of Article 107 (1) TFEU such as e.g. the selectivity criterion in legal (and not in factual case) terms. Furthermore, the ECJ must not disregard the specific discretion of the Commission in determining the existence of State aid.[28] The rather restricted scope of judicial review in preliminary proceedings under Article 267 TFEU with regard to an effective legal defense of the alleged aid recipient against the State aid´s *basis of facts* raises serious doubts as to a fair judicial (and not only administrative) trial according to Art. 6 ECHR and to an efficient judicial review according to Art. 47 CFR.

cc) Limited effect of legal remedies available to the (alleged) recipient

[27] Judgment of the ECJ (Second Chamber) of 21 November 2013, Case C-284/12, Deutsche *Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH, intervener Ryanair Ltd*, para. 37.
[28] Judgment of the General Court of 17 May 2011, T-1/08, *Buczek Automotive sp. z o.o. v. Commission, para. 82;* Judgment of the General Court of 17 December 2008, Case T-196/04, *Ryanair Ltd. v. Commission, para. 41.*

One might, similar to the thinking of the ECJ, argue that the deficits of the aforementioned procedure are compensated for by the option of the recipient to bring action against the opening decision under Article 263 (4) TFEU.

However, according to the first sentence of Article 278 TFEU actions brought before the General Court by the (alleged) recipient have no suspensory effect. And interim measures ordering the suspensory effect based on apprehended severe damage to the solvency of the (alleged) recipient are merely granted under extremely restrictive conditions and burden of proof.[29] In addition, in the main proceedings, the recipient may merely argue that the Commission, based on the preliminary assessment, *"has made a manifest error of assessment in forming the view that it was unable to resolve all the difficulties on that point during its initial examination of the measure concerned"*.[30] Therefore, if the preliminary assessment is performed correctly but due to its preliminary character completely or partly wrong in substance regarding the aid character of the investigated measure, the (alleged) recipient, who did not have any procedural role in the preliminary examination procedure, may not argue against the wrongful classification of the measure as State aid.[31] If the judgment in Case C-284/12 is to be understood as conferring an unconditional binding effect upon opening decisions, the decision to initiate formal investigation procedures would *de facto* be elevated to a final decision in regard to the Article 108 (3) TFEU infringement without correlating sufficient legal remedies of the recipient before national courts or Courts of the European Union,[32] which would infringe on the right to efficient judicial review[33].

b) Excessive application of effet utile

[29] Order of the President of the General Court of 5 July 2013, Case T-309/12 R, para. 35–40; Order of the President of the General Court of 21 June 2011, Case T-209/11 R, para. 27–35; Order of the Vice-President of the Court, 7 March 2013, Case C-551/12 P(R), para. 53–63.
[30] Judgement of the General Court of 23 October 2002, joined Cases T-269/99, T-271/99 and T-272/99, *Diputación Foral de Guipúzcoa* v. *Commission*, para. 49; see also Judgement of the ECJ of 21 July 2011, Case C-194/09 P, *Alcoa Trasformazioni Srl v. European Commission*, para. 61.
[31] Ibid.
[32] Judgment of the ECJ of 3 October 2013, C-583/11 P, *Inuit Tapiriit Kanatami a.o*., para. 103.
[33] Ibid, para. 97 and 103; Judgment of the General Court of 27 June 1995, Case T-186/94, *Guérin Automobiles v. Commission*, para. 23.

The ECJ based its ruling mainly on the practical effect of the standstill obligation and came to the conclusion that the *effet utile* requires the application of the final sentence of Article 108 (3) TFEU on measures which *may* constitute state aid.[34]

Article 108 (3) TFEU clearly provides the obligation of member states to notify State aid and the competence of the Commission to assess the compatibility of the state measure before it is put into effect by the member state. It is arguable that the standstill obligation would not have any practical effect if not enforced prior to a final decision of the Commission or the Court of Justice of the European Union (though in case of merely potential aid contrary to previous case-law)[35]. Certainly, there is no apparent reason to postpone the enforcement, where the infringement of the standstill obligation is certain and since it is irrespective of the compatibility assessment. Furthermore, the last sentence of Article 108 (3) TFEU requires State aid measures under investigation by the commission not to be put in effect *pro futuro* and for Member States´courts to refrain from any final measures conflicting with the practical effect of the opening and final decision.

Nevertheless, one must ask whether Article 108 (3) TFEU should be enforced on every measure that *may* constitute aid without any exemption and where the (alleged) aid is already put in effect by the member state. Especially, since Article 107 (1) TFEU is subject to highly complex assessments e.g. under the terms of the market economy investor test, which lead to a wide margin of discretion of the Commission in determining the existence of State aid, thus, limiting substantially the depth of judicial review[36]. These deficits in judicial review, especially for alleged aid recipients raise questions about the proportionality of the ruling – a basic principle valid even when determining the requirements of the *effet utile*.[37]

As already shown, the recipient does not have *effective* legal remedies against the opening decision and is not party to the preliminary procedure as opposed to Article 6 (2) of Regulation No 659/1999. Subjecting a recipient to final or provisional recovery of non-aid seems particularly

[34] Judgment of the ECJ (Second Chamber) of 21 November 2013, Case C-284/12, Deutsche *Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH, intervener Ryanair Ltd*, para. 38.
[35] S*oltesz*, EStAL 2013, p. 644.
[36] Judgment of the General Court of 17 May 2011, T-1/08, *Buczek Automotive sp. z o.o. v. Commission, para. 82;* Judgment of the General Court of 17 December 2008, Case T-196/04, *Ryanair Ltd. v. Commission, para. 41.*
[37] About proportionality in judicial context see: *Trstenjak*/*Beysen*,EuR 2012, 265 (267).

unproportionate in light of the fact that there is no grand risk to the practical effect of the standstill obligation.

First, the standstill obligation will regularly be enforced unless the aid character is not questioned by the national court – it shall be noted at this point, questioned not by an interested party but an independent court – and because an action of the recipient has no suspensory effect. Second, if the national court does not apply the appropriate measures until the final decision of the Commission, an infringement will either be fully recovered in case the Commissions deems the aid incompatible and orders the recovery or will at least be compensated by a payment of "*interest in respect of the period of unlawfulness*"[38] once the aid character is uncontested. Also, the incentive to notify and abide by the standstill obligation is regularly given due to the fact that a State aid recipient is exposed to the risk of actions brought by competitors, an order for recovery from a national court and that a recipient must pay "*interest in respect of the period of unlawfulness*"[39]. In addition the recipient will not have reliable answer as to the aid character and the compatibility until a final uncontested decision by the Commission.

To the contrary one might argue why this argument should prevail in the discussed case since it did not in others concerning the obligations of national courts in case of an infringement of the standstill obligation.[40] It should prevail because if the aid character is agreed upon by the national court there is no apparent reason to postpone the enforcement of the final sentence of Article 108 (3) TFEU. However, as long as the aid character is in dispute drastic measures might be enforced on an undertaking based on a preliminary assessment.

c) Measures "capable of constituting State aid"

[38] Judgment of the ECJ (Grand Chamber) of 12 February 2008, Case C-199/06*, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)*, para. 55.
[39] Ibid. para. 55.
[40] Judgment of the ECJ (Grand Chamber) of 12 February 2008, Case C-199/06, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE);* Judgment of the ECJ of 21 November 1991, Case C-354/90, *Federation Nationale du Commerce Extérieur des Produits Alimentaires, Syndicat National des Négociants et Transformateurs de Saumon and French State;* Judgment of the ECJ of 11 Juli 1996, Case C 39/94, Syndicat français de l'Express international (SFEI) and others v. La Poste.

One might argue that the existence of State aid is exactly what is yet to be determined under the investigation procedure of Article 108 (3) TFEU and Regulation No 659/1999. One may also find the probability of the state measure constituting State aid high, simply proven by the fact that the Commission decided to initiate the formal investigation procedures.

However, probability, or as the ECJ puts it, capability of constituting State aid[41] has – until this recent judgment – not been enough to trigger the obligations of national courts resulting from an infringement of the final sentence of Article 108 (3) TFEU.[42] It also seems hardly a justification for virtually driving undertakings which have not received State aid into liquidation because almost every State measure is capable of constituting State aid and to do all that with minor chances of efficient judicial review.[43]

This way, in the context of the last sentence of Article 108 (3) TFEU, the aid assessment in the opening decision would *de facto* be elevated to a final decision despite its preliminary nature (Article 6 (1) of Regulation No 659/1999), although the aid character is in dispute, the infringement uncertain and since it is very common that the law does not get enforced in preemptive obedience immediately and under every circumstance.

d) Consequences for the aid recipient

Otherwise, depending on the national accounting laws, undertakings may have to make provisions for future obligations to repay the aid and interest for the period of unlawfulness. Accounting provisions may, as e.g. Sec. 249 (1), 252 (1) No 4 of the German Commercial Code, provide for the obligation of undertakings to make provisions for most probable foreseeable obligations towards third parties. [44] As already shown, in case of an unconditional binding effect of opening decisions national courts are obliged to order the appropriate final or interim measures (e.g.

[41] Judgment of the ECJ (Second Chamber) of 21 November 2013, Case C-284/12, Deutsche *Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH, intervener Ryanair Ltd*, para. 34.
[42] Judgment of the ECJ of 14 December 2010, Case C-1/09, *Centre d'exportation du livre français (CELF)* and *Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)*, para 36, S*oltesz*, EStAL 2013, p. 644.
[43] Judgment of the General Court of 27 June 1995, Case T-186/94, *Guérin Automobiles v. Commission*, para. 23*;* Similar S*oltesz*, EStAL 2013, p. 643–644.
[44] *Kozikoswki*/*Schubert*, Beck´scher Bilanz-Kommentar, 2012, para. 42–44.

"*ordering that the payments be placed in a blocked account*"[45]) and according to the first sentence of Article 278 TFEU actions brought against opening decisions have no suspensory effect, which makes future obligations of (alleged) recipients highly probable.

Considering the consequences for the aid recipient[46], the legal remedies available to him and the procedural approach of the ECJ in case of a dissent between the aid assessment of the national court and the Commission, an unconditional binding effect seems unproportionate, despite the risk of prolonging (not facilitating) distortions of competition in case the measure does turn out to constitute State aid.

Therefore, ensuring the practical effect of the final sentence of Article 108 (3) TFEU may require the recovery of the aid final or provisional but, due to the current state of judicial review, merely proportionally where the compatibility is at issue and the breach of the standstill obligation is certain or at least exceptions to the rule are introduced.

3. Exceptions to the rule are necessary – *Zuckerfabrik Süderdithmarschen AG*?

To avoid unnecessary hardship to (alleged) State aid recipients and to ensure the practical effect of the preventive State aid control, the binding effect of opening decisions according to Article 6 (1) of Regulation No 659/1999 should allow for restrictively interpreted exceptions.

One might compare *Lufthansa AG* v. *FFH* to *Zuckerfabrik Süderdithmarschen AG*[47]. In *Zuckerfabrik Süderdithmarschen AG* the national court asked whether Community law would allow for national courts to suspend the enforcement of *"a national administrative measure adopted on the basis of a Community regulation"*[48] – a national administrative act which implements final directly applicable secondary substantial law.

On the contrary, Article 6 (1) of Regulation No 659/1999 underlines that an opening decision is not a final administrative act regarding the aid assessment and indeed further assessment is necessary.

[45] Opinion of Advocate General Mengozzi delivered on 27 June 2013, Case C-284/12, *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH*, para. 44.
[46] See *Koenig* in Editorial to this issue and already S*oltesz*, EStAL 2013, p. 643–645.
[47] Judgment of the ECJ of 21 February 1991, C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG*.
[48] Ibid. para. 14.

In *Zuckerfabrik*[49] the ECJ established restrictive conditions[50] which allow for national courts to suspend the enforcement of Community law even though in principle financial damage is not regarded irreparable.[51] This must *a fortiori* be applicable to merely preliminary administrative assessments and allow for proportionate exceptions from the binding effect of opening decisions.

A proportionate solution would be to leave it to the discretion of national courts to stage proceedings until a final decision of the Commission in *exceptional* cases in which they entertain doubt as to the aid character of a measure. First, after giving notice to the Commission, second in case even provisional measures would result in severe damage to the solvency of the recipient and third where there is no serious risk of substantial and irreparable damage to a competitor which outweighs the interests of the (alleged) recipient.[52]

Otherwise, national courts could be obliged to order measures based on preliminary assessments which go beyond what the Commission might find necessary after completion of the formal investigation procedure and might create *a fait accompli* disregarding basic judicial rights established in the European Union such as the right to efficient judicial review and due process.[53] The proposed exception to the rule would make the binding effect of opening decisions under Article 6 (1) of Regulation No 659/1999 at least acceptable, in light of the current state of judicial review, the necessary discretion of the Commission and independent national courts and in the spirit of "Good Justice".

[49] Ibid.
[50] Ibid. para. 33: "*(i) if that court entertains serious doubts as to the validity of the Community measure and, should the question of the validity of the contested measure not already have been brought before the Court, itself refers that question to the Court; (ii) if there is urgency and a threat of serious and irreparable damage to the applicant; (iii) and if the national court takes due account of the Community' s interests*".
[51] Ibid. para. 29.
[52] Similar approach in Article 11 (2) of Regulation (EC) 659/1999.
[53] Judgment of the ECJ of 3 October 2013, C-583/11 P, *Inuit Tapiriit Kanatami a.o.*, para. 90–107; Judgment of the General Court of 27 June 1995, Case T-186/94, *Guérin Automobiles v. Commission*, para. 23.