

State Aid

in 17 jurisdictions worldwide

2014

Contributing editor: Ulrich Soltész



Published by
Getting the Deal Through
in association with:

A&L Goodbody

bnt attorneys-at-law

Cederquist

Chiomenti Studio Legale

Cuatrecasas, Gonçalves Pereira

Divjak, Topić & Bahtijarević Law Firm

Gide Loyrette Nouel AARPI

Gleiss Lutz

Hammarström Puhakka Partners, Attorneys Ltd

Heuking Kühn Lüer Wojtek

Koutalidis Law Firm

Law Firm Glikman, Alvin & Partnerid

Loyens & Loeff NV

Nielsen Nørager Law Firm LLP

Slaughter and May

Vejmelka & Wünsch, sro

State Aid 2014

Contributing editor:
Ulrich Soltész
Gleiss Lutz

Getting the Deal Through is delighted to publish the first edition of *State Aid*, a new volume in our series of annual reports, which provide international analysis in key areas of law and policy.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 17 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are always referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. *Getting the Deal Through* would also like to extend special thanks to contributing editor Ulrich Soltész of Gleiss Lutz for his assistance in devising and editing this volume.

Getting the Deal Through

London
July 2014

Overview	3	Italy	48
Ulrich Soltész Gleiss Lutz		Stefania Bariatti and Cristoforo Osti	
Isabel Taylor Slaughter and May		Chiomenti Studio Legale	
Croatia	7	Netherlands	54
Mario Krka and Mate Lovrić		Maurice JJM Essers	
Divjak, Topić & Bahtijarević Law Firm		and Marc GAM Custers	
Czech Republic	12	Loyens & Loeff NV	
Tomáš Fiala		Portugal	60
Vejmelka & Wünsch, sro		Rita Leandro Vasconcelos,	
Denmark	17	Ana Isabel Marques and Stéphanie Sá Silva	
Henrik Peytz, Thomas Mygind		Cuatrecasas, Gonçalves Pereira	
and Katrine Lapp		Slovakia	66
Nielsen Nørager Law Firm LLP		Zuzana Chudáčková and Ivana Kováčová	
Estonia	21	bnt attorneys-at-law	
Reesa Paatsi		Spain	71
Law Firm Glikman, Alvin & Partnerid		Javier Arana Rodríguez,	
Finland	25	Pablo González Pérez,	
Anu Aaltonen and Maarika Joutsimo		Irene Moreno-Tapia Rivas,	
Hammarström Puhakka Partners,		Luis Murillo Jaso,	
Attorneys Ltd		María Isabel Roy Enfedaque	
France	31	and Javier Torrecilla Pérez	
Stéphane Hautbourg and Sophie Qesson		Cuatrecasas, Gonçalves Pereira	
Gide Loyrette Nouel AARPI		Sweden	76
Germany	37	Olle Rislund and Kristoffer Molin	
Ulrich Soltész		Cederquist	
Gleiss Lutz		Switzerland	82
Greece		Simon Hirsbrunner	
Koutalidis Law Firm		Heuking Kühn Lüer Wojtek	
Please see www.gettingthedealthrough.com		United Kingdom	87
Ireland	43	Isabel Taylor and Nele Dhondt	
Vincent JG Power		Slaughter and May	
A&L Goodbody			

Publisher

Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions

Rachel Nurse
subscriptions@gettingthedealthrough.com

Business development managers

George Ingledew
george.ingledew@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com



Published by
Law Business Research Ltd

87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188

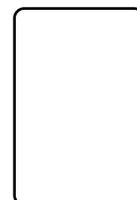
Fax: +44 20 7229 6910

© Law Business Research Ltd 2014

No photocopying: copyright licences do not apply.
ISSN 2056-4155

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of July 2014, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



France

Stéphane Hautbourg and Sophie Quesson

Gide Loyrette Nouel AARPI

Overview

- 1 Outline your jurisdiction's state aid policy and track record of compliance and enforcement.

France is an important player in terms of state aid, and the issues and cases dealt with by the French administration are extremely diverse.

With regard to the intervention of the state shareholder, the question that most frequently arises relates to the application of the criterion of the private market economy investor. Compliance with market conditions can usually be presumed when the public investor takes risks in a way that is concomitant with one or more private operators. This can be illustrated by the French state's recent purchase of capital in Peugeot alongside the Chinese company Dongfeng. In this case, the Commission confirmed that the investment by the French state did not contain any elements of state aid. In other scenarios, compliance with the private market economy investor criterion may be such as to raise complex questions. The decision adopted by the Commission in 2004, classifying the French state's declarations of support and a shareholder loan in favour of France Télécom as state aid, provides a perfect illustration of this complexity (see Case T-444-04).

Intervention by the French state also regularly takes the form of rescue and restructuring aid. In this respect, the Alstom case represents a successful example of a company's return to profitability following the rescue and restructuring aid granted by the French state. The recent rescue and restructuring aid in favour of Peugeot should also be mentioned.

Among the other recurring questions that arise, we can mention the ones relating to the financing of public services.

The French authorities have become aware of the need for complying with the rules relating to state aid and for integrating the constraints that could ensue at the very early stages. This increasing awareness can be explained by several factors.

Firstly, several illustrative cases have given rise to important discussions with the European Commission (Commission) at the beginning of the noughties. These cases have shown that the economic intervention of the French administration had to incorporate EU requirements.

Secondly, the risks in the event of breach of the state aid rules are high. Indeed, French courts are applying state aid law increasingly faithfully, and have no hesitation in sanctioning the illegality of non-notified aid. This risk is all the higher as the recovery of unlawful aid often proves extremely complicated.

Lastly, the Commission's activism has been felt at a national level, in particular with regard to the monitoring of the recovery of the aid and the implementation of the commitments subscribed to by the French authorities. The Commission has thus prosecuted France on several occasions before the Court of Justice (CJEU) and is now applying the *Deggendorf* jurisprudence on a quasi-systematic basis.

This growing awareness has led the French authorities to implement a number of measures in order to make sure that, at each level, state aid rules are taken into account.

- 2 Which national authorities monitor compliance with state aid rules and have primary responsibility for dealing with the European Commission on state aid matters?

The General Secretariat for European Affairs (SGAE) coordinates all of the state aid notifications to the Commission that are proposed to it by the competent Ministries, including those for aid implemented at local level. Each Ministry has a person in charge of state aid matters in its field of competence.

The Permanent Representation of France in Brussels also plays a significant coordination role between France and the Commission with regard to state aid.

- 3 Which bodies are primarily in charge of granting aid and receiving aid applications?

Aid can be granted at the level of the state, which has a general power of economic intervention, or at below-state level.

For the state level, the paramount role of the Interministerial Delegation for Territorial Planning and Regional Attractiveness (DATAR), placed under the supervision of the Prime Minister, should be noted. DATAR is, in particular, in charge of granting the regional employment premium, the most important company-oriented investment aid system.

Within the Ministry of Economy, the General Directorate for Competitiveness, Industry and Services plays a significant role in the granting of aid through the network of Regional Department of Enterprise, Competition, Consumer Affairs, Labour and Employment, placed with the prefect of the region. The Directorate-General of the Treasury, which contributes to the development and the implementation of policies for businesses and to the regulation of investment companies, should also be mentioned. The Treasury also fulfils the function of General Secretariat of the Interministerial Committee on Industrial Restructuring, which has the role of helping companies in difficulty to formulate and implement solutions ensuring their sustainability and development.

The Ministry of Economy also grants a large amount of aid via public corporations placed under its supervision, such as BpiFrance-Financing (in charge of financing and supporting SME innovation and growth in particular).

As regards fiscal aid, this concerns the General Directorate of Public Finance, placed under the authority of the Minister of Budget, Public Accounts and the Civil Service, and which encompasses the former Department of Revenue and the General Directorate of Public Accounting.

Environmental aid for its part concerns the General Directorate for Energy and Climate, placed under the authority of the Ministry of Ecology, Sustainable Development and Energy. Within this Ministry, the Agency for Environment and Energy Management (ADEME) is

more particularly in charge of the implementation of public policies in the environmental, energy and sustainable development fields.

Transport sector aid concerns the Directorate General of Civil Aviation and the General Directorate of Infrastructure, Transport and the Sea, which are also placed under the authority of the Ministry of Ecology, Sustainable Development and Energy.

Lastly, within the Ministry of Culture and Communication, the French Cinematography Centre (CNC) and the General Directorate of Media and Cultural Industries are more particularly in charge of the question of state aid in this sector.

Furthermore, the French state has adopted a policy of transferring its powers to the local authorities and to the different branches of its organisation. Thus, a considerable amount of aid is granted directly by the district, departments or regions.

4 Describe the general procedural and substantive framework.

As state aid measures are usually granted either by the state, which has the responsibility for conducting economic and social policy as well as the defence of employment, or by local authorities, which have been led to intervene increasingly actively in economic and social domains, they are mainly governed by public law.

5 Identify and describe the main national legislation implementing European state aid rules.

There are many texts in French law referring to EU state aid law: decrees, articles of the General Code of Local Authorities (CGCT), exempted framework schemes, notified schemes, circulars, etc.

A vade mecum on state aid, prepared by the Ministry of the Economy and Finances and published in the *Documentation française*, provides the public officials concerned with every useful element for management of the state aid files.

At the normative level, the responsibilities of the state and those of the local authorities with regard to EU law were introduced in article L. 1511-1-1 of the CGCT. This article:

- expressly establishes the state's responsibility for successfully submitting the notification to the Commission of the aid or the aid schemes which the local authorities would like to implement;
- entrusts the local authorities with the responsibility for recovering the aid which they had granted in non-compliance with the prior notification obligation envisaged or which has been declared incompatible with the Common Market;
- places the financial consequences that could result for the state from belated or incomplete execution of the recovery decisions on those local authorities; and
- highlights the obligations to which the local authorities are subject when they institute their own aid schemes.

In addition, most regulations applicable to aid from local authorities to the companies refer expressly to the EU block exemption regulation (BER).

Lastly, a circular of 26 January 2006 relating to the application at the local level of the EU competition rules relating to state aid to companies reproduces the framework laid down by the Treaty, the rules to be applied for the allocation of aid as well as the procedural rules (notifications, reports and complaints).

Programmes

6 What are the most significant national schemes in place that have been approved by the Commission or are block-exempted?

The forms of public intervention laid down by the BER 800/2008 have been spelt out in France in nine exempted framework schemes published on the DATAR website. Any aid granted on the basis of one of these schemes must meet all of the conditions that are set forth therein, and must contain an express reference to the scheme concerned.

These nine exempted framework schemes will have to be adapted and altered in order to incorporate the changes introduced by the Commission in the new BER, which came into effect on 30 June 2014.

Furthermore, there are also a number of schemes which have been notified to the Commission for the implementation of aid for regional purposes, aid in favour of SMEs, environmental or employment aid, or aid in favour of research and innovation.

For example, the OSEO programme was authorised by the Commission by a decision of 17 January 2008. It noted that the programme met the EU criteria concerning R&D and innovation programmes. The Commission authorised the extension of the programme until 30 June 2014.

Also notable is the renewable energies aid system (the ADEME Programme), which contributes to the objective of supporting production projects on the basis of renewable energy or the intervention system of the CNC in favour of film production.

Lastly, there are many national schemes adopted pursuant to the EU de minimis Regulation.

Public ownership and SGEI

7 Do state aid implications concerning public undertakings, public holdings in company capital and public-private partnerships play a significant role in your country?

The French state has always held stakes in companies in widely differing branches of industry. These state holdings are managed by the Agency for State Holdings, which represents the state shareholder.

Although limited companies represent a great majority within the state shareholder portfolio, other forms of legal statuses exist, with six state-owned industrial and commercial establishments (including SNCF, RATP, RFF and Monnaie de Paris), three state-owned administrative establishments (CNA, EPFR, EPRD), 12 public institutions (mainly harbours) and two semi-public limited companies (Semmaris and La Française des Jeux). These state holdings can be minority interests (including Orange, EADS, Dexia and GDF Suez) or majority interests (Electricité de France (EDF) or Aéroport de Paris).

During the last 10 years, the role played by the state through its holdings has raised some important questions in terms of state aid on a wide number of subjects.

Of particular interest are cases in which the state has had to justify the private market economy investor nature of its behaviour with regard to measures of a fiscal nature (see for example the *EDF* case), loans or equity investments (see for example the decisions of the *Caisse des Dépôts et Consignations* or the *FSI*) or public statements of support (in the case of *France Télécom*).

The *La Poste* case is also worth mentioning. In this case, the Commission noted the existence of an unlimited guarantee from the French state in favour of La Poste because of certain characteristics related to its special status as a public body. The CJEU (Case C-559/12P) recently confirmed that the unlimited guarantee granted to La Poste constituted incompatible state aid.

Lastly, it is interesting to note that the French government has recently specified the objectives of the new state shareholder doctrine. Thus, the French government intends to involve the state shareholder to a greater extent in the industrial strategy of France thanks to a more active management of its holdings. However, on this occasion, the French government has recalled France's commitment to act in accordance with the state aid rules, particularly with the private market economy investor criterion.

The use by the state of a public undertaking as a means of conveying an advantage to other operators is also likely to raise difficulties with regard to the state aid rules. The Commission has, for example, opened proceedings against the regulated electricity tariffs in France. It considered that these tariffs involved resources

under the control of the state, whether these were EDF resources, under state control, or specific contributions under the control of an entity, the Caisse des Dépôts et des Consignations, designated by the state. The Commission nevertheless considered that the aid had not harmed trade to an extent contrary to the common interest in view of the fact that this aid was of a transitory nature and was accompanied by commitments to an in-depth reform of the conditions of competition in the French electricity supply market.

8 Are there any specific national rules on services of general economic interest (SGEI)?

In France, an SGEI occupies an important place at all levels. Public service delegation (a contract by which a legal body governed by public law entrusts the management of a public service for which it has the responsibility to a public or private-sector delegatee) is envisaged in article L.1411-1 of the CGCT.

The French authorities have used the *Altmark* approach to defend several cases of financing of public service obligations at a national level (financing of high-speed and very high-speed trains, financing of airport infrastructures, financing of connections between Corsica and the continent, etc). Although the *Monti* package and the *Almunia* package are of direct application in the member states, they have decided to disseminate this framework at the level of the local authorities by means of a circular (Circular of 4 July 2008, relating to the application by the local authorities of the EU competition rules relating to the management of a SGEI). Moreover, in September 2013, the SGAE published online a guide relating to the management of the SGEI, which develops rules relating to the determination of the SGEI, their management mode and their financing.

Considerations for aid recipients

9 Is there a legal right for businesses to obtain state aid or is the granting of aid completely within the authorities' discretion?

In France, there is no unified procedure for the allocation of state aid. Nor is there any general principle explicitly laying down a right to receive aid.

However, such a right is implicit in cases where the public authority in charge of the allocation of aid has a circumscribed power. Thus, if precise and detailed conditions are foreseen, the authority responsible for allocation of the aid will have a limited power to award aid to operators which meet the required conditions (such as frequently the case in fiscal matters). On the other hand, if no detailed conditions are laid down, or if a discretionary power for the body dispensing the aid is explicitly recognised (as is often the case with regard to financial measures other than subventions), a right to such aid cannot be considered.

10 What are the main criteria the national authorities will consider before making an award?

Whether for aid falling under the BER, aid falling under the schemes notified by the French authorities or individual aid, the French state takes a wide-ranging set of criteria into account: innovation, job creation or job saving, restructuring of companies in difficulty, support for SMEs, accompaniment for the development of companies, regional economic development, environmental protection, etc.

State aids are less frequently granted on the basis of sectorial criteria, but are increasingly pursuing objectives with broader horizontal objectives.

11 What are the main strategic considerations and best practices for successful applications for aid?

Support for businesses, not only in their development projects but also when they are in difficulty, is a priority of the public authorities.

In this context, there is a wide range of public support tools for companies, both from the state and from local authorities.

In order to improve the relations between the companies and the public authorities, a reference database on aid schemes and support for companies has been set up by the Ministry of Economy. Its objective is to collect in a single place the aids for companies and project initiators that are available throughout a company's life, its creation, its development, its investments and recruitment projects.

12 How may unsuccessful applicants challenge national authorities' refusal to grant aid?

The procedure for granting state aid is subject to the control of the judge who examines the legality of the refusal decisions to grant aid.

As these decisions are usually administrative ones, an action for annulment should be lodged before the administrative judge. Such an appeal is lodged before the administrative court of first instance, then on appeal before an Administrative Court of Appeal, and finally it can be taken to the Council of State.

In French administrative law, a preliminary request either before the decision-maker or before his superior is usually required to be submitted first.

13 To what extent is the aid recipient involved in the EU investigation and notification process?

In theory, the lead ministry is required to make an initial analysis of the compatibility of the measure under consideration with state aid rules. This first assessment is then supplemented by the SGAE. This centralisation enables the files to be assessed with uniformity. In the event of doubt as to the legal qualification of the scheme, the SGAE usually recommends that it be notified.

The aid beneficiary is closely associated with the preparation of the notification of aid by the ministry concerned. It usually has access to the entire file, and can even attend meetings between the national authorities and the Commission.

Strategic considerations for competitors

14 To which national bodies should competitors address complaints about state aid?

In France, there is no specific entity for hearing complaints from competitors of a state aid beneficiary. Only the French courts are competent to hear competitor claims contesting the grant of state aid.

15 How can competitors find out about possible illegal or incompatible aid from official sources? What publicity is given to the granting of aid?

At this time, there is no public report listing the aid granted by the French state or the local authorities.

Information on all state aid expenditure, at state and local level, is collected by the French state in the context of the annual reporting exercise pursuant to Regulation 794/2004. It is then transmitted to the Commission for publication through the annual state aid scoreboard and on the Eurostat website.

16 Give details of any legislation that gives competitors access to documents on state aid granted to beneficiaries.

Act 78-753 of 17 July 1978 recognises any person's right to obtain communication of the documents held by an authority in the context of its public service mission, whatever their form or their medium. This right is exercised with regard to all public entities and with regard to private organisations entrusted with a public service mission.

In this context, the Commission for Access to Administrative Documents (CADA) was created in 1978 in order to ensure proper

application of this right of access. It gives opinions which constitute a pre-contentious path of appeal. Any person who is refused access to an administrative document, or who fails to obtain an answer within a period of one month, can refer the matter to the CADA so that the latter can rule on the disclosure, or otherwise, of that document.

Thus, a competitor can turn to the CADA to obtain access to the documents which led to the grant of the measure that it contests (deliberations, contracts, etc), in order to check if they contain any possible elements of state aid.

17 What other publicly available sources can help competitors obtain information about possible illegal or incompatible aid?

Not applicable.

18 Apart from complaints to the national authorities and petitions to national and EU courts, how else may complainants counter illegal or incompatible aid?

Competitors of a company which has potentially benefitted from state aid may raise the illegality of the measure granting the aid before any interested third parties, or threaten to bring an action against such a measure at EU (complaint before the Commission) or national level.

Such measures could only potentially qualify as unfair competition practices if it was found that the allegations made were manifestly unfounded and resulted in lasting damages for the company.

Private enforcement in national courts

19 Which courts will hear private complaints against the award of state aid? Who has standing to bring an action?

Competitors of a beneficiary of unlawful aid can first bring actions against the beneficiary before the judicial judge (unfair competition). The court of cassation has, indeed, recognised in its *Ducros* judgment the possibility for competitors of unlawful aid beneficiaries to bring an extra-contractual civil liability action against those beneficiaries on the basis of article 1382 of the Civil Code. This action seeks to obtain compensation for the harm suffered if the unlawful aid is at the origin of unfair competition practices on the part of the beneficiaries.

In addition, competitors can bring actions against the public authorities that have granted the unlawful aid before the administrative judge. Depending on the specific circumstances, two types of actions can be contemplated.

A competitor can first request the annulment of the administrative act granting the aid. In such a case, the judge will be able to impose injunctions in connection with its decision to cancel the administrative act concerned, and therefore order the recovery of the unlawful aid, possibly with per diem penalties.

The competitor can then lodge a request for full remedy action. In this context, it can request that the judge order the suspension, recovery or both of the unlawful aid. The action can also request that the public authorities be sentenced to damages.

For both types of action, it is usually necessary to first submit a preliminary request to the administration before bringing the action before the competent administrative court.

20 What are the available grounds for bringing a private enforcement action?

In the hypothesis of an unfair competition action before a judicial judge, the legal basis is article 1382 of the Civil Code. The fault in this instance will be characterised by an act of unfair competition.

Before an administrative judge, an appeal for an annulment on grounds of ultra vires or a full remedy action will usually be founded on a breach of article 108(3) of the Treaty on the Functioning of the European Union (TFEU), which is of direct effect.

21 Who defends an action challenging the legality of state aid? How may defendants defeat a challenge?

The natural defendant of actions calling the legality of aid into question is the state. Indeed, when the purpose of an action is that a measure be qualified as unlawful aid, the dispute is usually brought before an administrative judge as full litigation.

However, it is usually the beneficiary who will have to defend the legality of the measure granting the aid before the judicial judge.

22 Have the national courts been petitioned to enforce compliance with EU state aid rules or the standstill obligation under article 108(3) TFEU? What is the national courts' track record for enforcement?

The administrative courts regularly have to hear litigations lodged by one or more competitors of a company which they consider to be beneficiary of an unlawful state aid.

In the context of these litigations, the administrative judge is competent to rule on the qualification of state aid within the meaning of article 107(1) TFEU. The judge is moreover competent to draw any conclusions from an absence of notification of a measure qualified as state aid.

As an example, in the *Ryanair* case, the Administrative Court of Strasbourg (24 July 2003), then the Administrative Court of Appeal of Nancy (18 December 2003), qualified as unlawful aid the advantages granted to Ryanair by the Chamber of Commerce and Industry managing Strasbourg Airport, and consequently annulled the deliberation of the Chamber of Commerce and Industry for breach of article 108(3) TFEU.

23 Is there a mechanism under your jurisdiction's rules of procedure that allows national courts to refer a question on state aid to the Commission and to stay proceedings?

As stated by the Commission in its Notice on the enforcement of state aid law by national courts, French courts may send a request for information to the Commission. French courts may also ask the Commission for its opinion on economic, factual and legal matters concerning the application of state aid rules.

The right of a national court to request an opinion from the Commission is without prejudice to the possibility or the obligation of the national court to ask the CJEU for a preliminary ruling under article 267 TFEU. The authoritative interpretation of EU law by the CJEU is binding on the national court, in contrast to the opinion of the Commission.

Five preliminary rulings on state aid were referred to the CJEU by the French courts between 2009 and 2014. The French courts have recourse to such a mechanism only when they believe that the answer to the question is decisive for the solution of the litigation, and that this question presents a serious difficulty for the court concerned.

For example, in the *Vent de Colère!* case, the Council of State asked the CJEU whether the new financing mechanism put in place by the French legislation regarding undertakings that produce wind-generated electricity must be regarded as an intervention by the state or through state resources. In its judgment (Case C-262/12), the court considered that the French mechanism for offsetting the additional costs arising from the obligation to purchase the electricity generated by wind turbines fell within the concept of an intervention by the state through state resources.

24 Which party bears the burden of proof? How easy is it to discharge?

In administrative matters, in theory the burden of proof falls on the applicant. It is therefore the party which pleads the illegality of aid which must, on the one hand, show that the criteria making it possible to establish the existence of state aid are met and, on the other, provide evidence of the illegality of said aid.

When serious allegations exist that are not contradicted by elements produced by the administration in defence, the judge will usually implement his general powers of investigation and take every appropriate measure for procuring the elements that could form his conviction.

In civil law, according to article 1315 of the Civil Code, 'A person who claims the performance of an obligation must prove it.' In addition, in French law, proof of the legal facts is free. Thus, in the context of an 'unfair competition' action brought by a competitor of the aid beneficiary, proof can be provided by any means.

25 What is the role of economic evidence in the decision-making process?

The French judge takes evidence of an economic nature into account in the context of his analysis of the qualification of the measure under discussion. Such is, for example, the case when he is required to apply the concept of 'private market economy investor' in order to decide if the measure was adopted under conditions which would be acceptable to a private investor operating under normal market economy conditions.

26 What is the usual time frame for court proceedings at first instance and on appeal?

The time frame for court proceedings at first instance and on appeal may vary significantly depending on the specific circumstances of each case.

That being said, the average time between the filing of a petition and the judgment before an administrative court is about 18 months. Before an administrative court of appeal, the average time is somewhere between one and two years. Before the Council of State, it is around one year.

Before a judicial judge, the average time is seven months in first instance and 11 months before the Court of Appeal.

27 What are the conditions and procedures for grant of interim relief against unlawfully granted aid?

The most suitable recourse is the lodging of an application for interim measures before the administrative judge asking the decision granting the unlawful aid to be suspended pursuant to article L521-1 of the Administrative Justice Code.

As regards the form of the petition, it must refer to a decision granting aid and must be ancillary to an application for the annulment of the decision or a modification of the decision. The conditions of substance that have to be met are:

- the urgency (characterised by serious and immediate injury); and
- a serious doubt as to the legality of the decision.

This suspension is only possible if the decision has not yet been completely implemented. It should nevertheless be specified that French judges adopt a restrictive approach to the conditions laid down for obtaining the suspension of the decision.

There is no principle according to which a compensation must be granted in the hypothesis where the judgment on the merits would contradict the interim order. The decision adopted by the interim relief judge is, by nature, provisional.

28 What are the conditions for competitors to obtain damages for award of unlawful state aid or a breach of the standstill obligation in article 108(3) TFEU? How do national courts calculate damages?

An action for damages against the aid beneficiary is possible on the basis of article 1,382 of the Civil Code.

Three conditions must then be met: the existence of a fault, an injury and a causal link. Acceptance by a company of unlawful aid constitutes a fault since the company will be placed in an abnormally

favourable situation with respect to its competitors, which are complying with the regulations in force.

Before the administrative judge, the competitor of a company that has benefited from an unlawful aid can exercise a full remedy action against the administrative authority that has granted that aid in order to obtain damages. The compensation granted in such a case supposes that the injury suffered by the competitor presents a direct causal link with the fault imputed to the public authority.

The administrative judges adopt a restrictive approach in this respect. By a judgment of 12 May 2014, the Council of State refused the claim of the international distribution and publishing company (SIDE) tending to the sentencing of the French state to compensate it for the injury that it had suffered due to the grant of unlawful aid to the French book exportation cooperative (CELF). The High Court concluded that a causal link between the granting of the aid and the injury could not be established.

State actions to recover incompatible aid

29 What is the relevant legislation for the recovery of incompatible aid and who enforces it?

In France, the recovery of public debts is organised by Decree 2012-1246 of 7 November 2012, relating to the auditing of public budgets and accounts.

Pursuant to this text, the authority responsible for recovering aid granted at the national level is, in theory, the Ministry of the Economy and Finances (the Treasury). Nevertheless, in certain cases other ministries can be responsible for recovery.

In cases where the aid has been granted by a local authority, the latter has the obligation, under the terms of article L.1511-1-1 of the CGCT, to effect the recovery. In the absence of recovery, after a notice has remained without effect for a month from notification, the state representative will proceed to the recovery of its own motion and by any means.

30 What is the legal basis for recovery? Are there any grounds for recovery that are purely based on national law?

The legal basis for recovery is usually the Commission's decision declaring the aid unlawful and incompatible, and ordering its recovery by the state.

In certain circumstances, however, the granting of aid is subject to compliance with certain conditions, especially in terms of employment or environmental objectives. Non-compliance with those conditions could serve as a basis for the granting authority to demand the recovery of said aid.

31 How is recovery effected?

The recovery procedure is put in place by the administration, in the same way as the state would proceed to obtain the repayment of a debt. Thus, the recovery is effected by means of a recovery order usually established by a legal agent of the Treasury then delivered to the beneficiary of the unlawful aid. This document requires that the latter repays the unlawful aid to the public authority concerned.

If the aid has to be recovered by a local authority, the state usually asks the prefect to set up the action for recovering the unlawful aid. Recovery can also be ordered by any other local authority.

32 How may beneficiaries of aid challenge recovery actions by the state?

When there is a dispute before the General Court of the European Union (GCEU) or the CJEU about the validity of the Commission's decision to order the recovery of an unlawful aid, the aid beneficiary can prevent the adoption of a recovery order or its execution by sequestering the amount of the aid until the outcome of the EU procedures.

Update and trends

Various subjects will be important to monitor in the coming months:

- existing information systems in France will have to be further developed in order to comply with the new transparency obligations adopted by the Commission. In particular, a dedicated website will need to be created disclosing information on aid measures within six months of their grant;
- the French authorities will also have to adapt the French regulatory and legislative environment applicable to state aid following the adoption of the new BER; and
- lastly, it will be interesting to see the consequences that will be drawn by the Commission from the judgment of the CJEU of 3 April 2014, by which the court confirmed that the unlimited guarantee in favour of La Poste resulting from its special status as a public body indeed constituted state aid incompatible with the internal market. This is all the more interesting as several other member states, such as Germany, are likely to be concerned by this question.

This has been applied in the case concerning France Télécom's business tax regime, where France Télécom sequestered the minimum amount of the aid declared incompatible and unlawful following the judgment of the CJEU, concluding that France failed to fulfil its obligation to recover the aid in question. The recourse to this mechanism has enabled the adoption of a recovery to be prevented until the judgment of the court confirming the Commission's decision. Following that judgment, the sequestered amount was automatically paid to the state.

In the event that a recovery order is issued, the aid beneficiary can dispute its enforcement before the administrative judge. Such recourse must be preceded by an administrative preliminary request before the litigation process is initiated.

Lastly, in the above mentioned case concerning the particular system of business tax imposed on France Télécom, the Advocate-General considered that 'the unconditional obligation of recovery encumbering the member state could not automatically entail any corresponding obligation of repayment in the case of private

individuals'. Thus, according to the Advocate-General, the beneficiary must be able to dispute before a national judge not only its repayment obligation but also the extent of that obligation, in particular when the rights guaranteed by the Charter of Fundamental Rights, such as the protection of the right of property, could be affected by the recovery of the unlawful aid. It remains to be seen whether beneficiaries of incompatible and unlawful aid could invoke these principles before an administrative judge so as to dispute the enforcement of a recovery order, or even claim repayment of all or part of the sums recovered by the state.

33 Is there a possibility to obtain interim relief against a recovery order? How may aid recipients receive damages for recovery of incompatible aid?

The action of a recipient which disputes the recovery has a suspensory effect. As a result, in theory, the state cannot proceed with the recovery of the aid. This suspensory effect was, however, called into question by the CJEU in the *Scott* judgment. The court stressed that this automatic suspensory effect does not fulfil the obligation of 'immediate and effective' execution of the Commission's decision, and is therefore contrary to the principle of effectiveness of EU law. Furthermore, beneficiaries of unlawful aid can try to call the responsibility of the state into question in the context of an action for damages, introduced before the administrative courts.

In this respect, in the context of the *Fontanille* case, the administrative judge has allowed for the possibility of prosecuting the state for fault of legislator in the event of the latter's breach of the obligation of prior notification of any aid project. The judge, however, considered that the beneficiaries should have shown due diligence and checked the conformity of the aid themselves and therefore decided to reduce the right to compensation by a quarter.

Miscellaneous

34 Are there any notable major points relating to state aid control in your jurisdiction that are not covered above?

Not applicable.

GIDE

GIDE LOYRETTE NOUEL

Stéphane Hautbourg
Sophie Quesson

hautbourg@gide.com
quesson@gide.com

Rue de l'Industrie, 26-38
1040 Brussels
Belgium

Tel: +32 2 231 11 40
Fax: +32 2 231 11 77
www.gide.com

GETTING THE DEAL THROUGH

Annual volumes published on:

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Foreign Investment Review
Franchise
Gas Regulation
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Shipbuilding
Shipping
Tax Controversy
Tax on Inbound Investment
Telecoms and Media
Trade & Customs
Trademarks
Vertical Agreements



**For more information or to
purchase books, please visit:**
www.gettingthedealthrough.com



Strategic Research Partner of the
ABA Section of International Law



Official Partner of the Latin American
Corporate Counsel Association