Greece: a closer look at state aid

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IN SUMMARY

This article provides an overview of the mechanisms and tendencies of the granting of state aid in Greece, and its national control. The notion of aid under article 107(1) of the TFEU implies the granting of an advantage to the beneficiary of the aid. To avoid any distortion of competition in the internal market, EU law determines the conditions of granting state aid to European undertakings. State aid regulations strictly limit the granting of such state contributions to a few scenarios.

DISCUSSION POINTS

- National state aid control
- National substantive and procedural rules
- Role of national courts

REFERENCED IN THIS ARTICLE

- *Zuckerfabrik Süderdithmarschen ao*
- *Atlanta*
- *Alcan*
- *Italy v Commission*
- *Commission v Greece*
- *Andrea Francovich and Danila Bonifaci and others v Italian Republic*
- *Brasserie du Pêcheur SA*
- *SFEI v La Poste ao*
- *CELF*

National state aid control

Greek authorities in charge of state aid

Law 4152/2013 established the Central State Aid Unit (CSAU), a directorate of the Ministry of Finance, which is the main Greek authority responsible for state aid matters. Its main competences and powers are:

- notification of aid measures by Greece to the European Commission;
- provision of an opinion on all drafts entailing a transfer of state resources to operators that have an economic activity;
- role as the national sole contact point for state aid issues with the European Commission and with other European and international bodies;
- monitoring of compliance of national measures with EU state aid rules and the processing of cases under examination by the European Commission, in particular the recovery of incompatible aid;
- assistance with the preparation of any responses to questions raised by the European Commission in relation to state aid matters;
- participation in the advisory bodies of DG COMP contributing to the adoption of new rules;
- provision of training, know-how and any supporting material to decentralised state aid units (DSAUs); and
- annual reporting obligation.

By virtue of its constituent law, the CSAU is not competent to liaise with private undertakings (whether a beneficiary or a third party); therefore, it has no investigatory or enforcement powers. That said, in principle, a measure that may possibly contain state aid cannot be implemented without the prior consent of the CSAU.

The CSAU is assisted in its tasks by DSAUs. DSAUs operate as offices within ministries and other bodies dealing with state aid issues. DSAUs are in charge of identifying state aid measures in legislation and other administrative decisions and of approving those that do not require notification to the European Commission, under the guidance of the CSAU. All other identified aid measures are forwarded to the CSAU.

In the case of disagreement between competent bodies regarding a specific state aid case or in the case of state aid with particular importance for Greece's economy, a special inter-ministerial committee for state aid will meet to discuss and resolve the issue. The committee comprises the Minister of Finance as the chair, the Minister of Foreign Affairs, the Minister of Development, Infrastructure and Transportation, any minister competent for the matter in question and a public servant working for the CSAU.

Law 4152/2013 provided for the establishment of the Central Information System of State Aid (CISSA), which contains every Greek state aid measure approved by the European Commission or granted in accordance with the EU De Minimis Regulation or the General Block Exemption Regulation (GBER).

The CISSA is monitored by the CSAU, and each DSAU system is connected to it. The CSAU also manages at the national level the transparency award web page, on which brief information regarding awarded state aid is uploaded. The page contains information such as the beneficiary's name, amount and type of aid.

Administratively, relations with the European Union go through the Permanent Representation of Greece to the European Union (RP). The RP remains a source of information and advice – participating in all multilateral meetings and bilateral contacts with the Commission on those subjects, it has at its disposal a comprehensive and up-to-date view of the Commission's practice.

Ex ante control of potential aid measures

All drafts that may entail a transfer of state resources to operators that have economic activities must be assessed in respect of the possible existence of state aid.

The granting authority must submit its draft to the competent DSAU. The DSAU has 20 working days to conduct a preliminary analysis on the existence of state aid. Drafts of a legislative or administrative nature that may contain state aid must be submitted to the CSAU for an opinion before their adoption by Parliament or the competent body. In the absence of aid, the CSAU issues a positive opinion, and the draft is adopted.

If the draft entails any state aid, the CSAU opines on the necessary changes to make it compliant with the applicable state aid rules, and, if necessary, the draft is notified to the European Commission. If a measure that may entail state aid is not submitted to the CSAU, the CSAU must inform the granting authority, and the latter must not implement the measure until the CSAU issues its opinion.

In principle, a measure that may contain state aid cannot be implemented without the prior consent of a DSAU or the CSAU; that said, as in all member states, unlawful state aid is granted from time to time in Greece, despite the existence of this safeguard.

National representation before EU courts

Greece's representation before the EU courts is handled either by the Legal Council of the State, supervised by the Minister of Finance, or the Special Legal Department (the EU law section of the Ministry of Foreign Affairs). The CSAU assists them in the representation of Greece before the EU courts.

National substantive and procedural rules

There are no specific Greek laws relating to state aid, apart from administrative circulars on state aid and procedural rules on the recovery of aid. The CSAU has issued a cursory circular on the existence of aid, one on the publication of aid schemes and measures on the Transparency Award Module, and one on de minimis and GBER aid, as well as a checklist on the existence of aid.

EU law is directly applicable, and Greek aid schemes refer explicitly to EU rules. There are no specific provisions regarding the application or enforcement of EU state aid rules, with the exception of procedural rules for the recovery of aid, which are described in article 22 of Law 4002/2011 and sub-paragraph B.10 of Law 4152/2013.

Role of national courts

Jurisdiction to apply state aid rules by national courts

The main principles are governed directly by EU state aid law. Against this EU state aid law background, any competent court will have to hear private complaints against the award of state aid, namely unlawful aid (ie, not notified to the European Commission or implemented before the latter's approval) and unlawful and incompatible aid following a negative decision by the European Commission.

There is no specific national rule describing in detail who has legal standing to bring an action against the award of state aid. The direct effect of article 107(1) of the Treaty on the Functioning of the European Union (TFEU) (on the existence of aid) and of article 108(3) of the TFEU (on the notification and standstill obligations) allows affected parties such as competitors of the beneficiary to bring an action before the competent court. Under general administrative law, the most important element to be demonstrated is the causal link between the administrative act and the alleged damage.

Administrative courts

In most cases, the Greek administrative courts are competent to hear state aid matters. According to article 1(4)(f) of Law 1406/1983, the administrative courts have jurisdiction regarding disputes that derive from the issuance of administrative acts relating to the award of European or national aid, subsidies and similar benefits, as well as the administrative acts that impose a relevant measure or sanction.

State aid cases are introduced before the Greek administrative courts of first instance; however, if the aid is linked to a tax measure of an amount exceeding €150,000 or a contract awarded after a public procurement procedure, the case is introduced to an administrative court of appeal as the court of first instance.

If the measure is part of an investment scheme, the Supreme Administrative Court is competent, pursuant to article 110 paragraph 14 of Law 4055/2012.

Civil courts

If aid is granted through a contract between the beneficiary and an administrative body under the provisions of private law, the civil courts are competent to examine the case.

Appeal of a Greek national court judgment on a state aid matter

The judgment of a national court can generally be appealed. Decisions of the administrative courts of first instance can be appealed before the administrative courts of appeal where the total amount of the dispute exceeds €5,000, within 60 days of the day the decision of the court was served to the parties. An appeal does not have a suspensory effect, but suspension can be requested if there is a risk of irreparable damage. Decisions of the administrative courts of appeal can be appealed solely on points of law before the Council of State, which is Greece's supreme administrative court.

Judgments of civil courts can be appealed within 30 days if the party lives in Greece and 60 days if the party lives abroad or does not have a known residence. An appeal in principle suspends the execution of the first instance judgment, unless the judge has decided it is provisionally enforceable.

National procedural rules to challenge a government measure owing to unlawful state aid

Any person with a legitimate interest can request the review of an administrative act by the same body that issued the act or by its superior or supervising body; however, this is not a prerequisite to directly challenge a government measure before a court in state aid matters. The only exception is that, in the case of rejection of an application for aid in accordance with Law 4399/2016 (aid schemes under the GBER), the applicant must first file an objection against this decision before being able to challenge the rejection before the competent court.

Greek national courts have been petitioned to enforce compliance with state aid rules or the standstill obligation under article 108(3) of the TFEU, although such actions are still not very frequent. An action by a competitor does not automatically have a suspensory effect, but the competitor can request the suspension or even the provisional recovery of the aid granted in violation of the standstill obligation.

Pursuant to article 202 of the Code of Administrative Procedure, the applicant can request for the suspension of the execution of the administrative act granting the aid. The suspensory effect of the decision expires with the issuance of the final judgment of the administrative court on the legality of the administrative act in question.

Suspension can be granted if the measure would lead to irreparable damage for the applicant or when the main action for the annulment of the administrative measure is very likely to be accepted. The applicant bears the burden of proof.

In any case, the suspension request is denied if the action for annulment is obviously unfounded or inadmissible (even if the damage is considered to be irreparable). The suspension request is also denied if the negative effects of the suspension on the public or a third-party interest exceeds the benefit for the applicant.

Regarding the recovery of aid found incompatible by a European Commission decision, a specific process is provided for in article 202, paragraph 4 of the Code of Administrative Procedure. According to this procedure, if the beneficiary wants to request the suspension of the act implementing the recovery, the following cumulative conditions must be satisfied (in line with the case law[1] of the Court of Justice of the European Union (CJEU)):

1 CJEU, 21 February 1991, *Zuckerfabrik Süderdithmarschen ao*, C-143/88 and C-92/89, EU:C:1991:65; and CJEU, 9 November 1995, *Atlanta*, C-465/93, EU:C:1995:369.

- apart from the action before the national court, he or she must have filed an action for annulment before the General Court, and where such action has not been filed, the national court must send a relevant preliminary question to the CJEU;
- there is serious doubt about the validity of the European Commission's decision or the national act implementing it; and
- the plaintiff demonstrates that the immediate execution of the act will cause him or her irreparable damage.

Unfortunately, there seems to still be some confusion or reluctance to apply the direct effect of article 108(3). For instance, in its Decision A3016/2014, in which the applicants had raised the violation of article 108(3) TFEU, the Council of State rejected the argument on the basis that it was not competent to rule on the compatibility of the alleged aid. But this is a separate question, which indeed falls under the exclusive competence of the Commission, independent from the obligation to notify state aid measures and only implement them after their approval from the Commission. The Council of State should have assessed whether the measure constituted aid that had to be notified to the Commission, without examining its possible compatibility or incompatibility.

National requirements for plaintiffs seeking interim measures to prevent grant of aid

Competing undertakings can request the suspension of a decision granting unlawful state aid or that a contract (concession, sale, etc) entailing state aid not be signed. In theory, this type of action could be based on the principle of supremacy of EU law, but to our knowledge there has been only one such case. In that case, the Court of Auditors accepted a request for revision of the state's decision to conclude a public service obligation contract with a company.

In civil matters, general jurisdiction to order such measures lies with the single-member court of first instance. The court will order provisional remedies if:

- there is an urgent need or imminent danger to protect or preserve a legitimate interest or to regulate a situation; and
- there are reasonable grounds for believing that the right in respect of which the provisional remedy is sought exists.

Preliminary evidence must be presented showing that there are reasonable grounds for the measure. Full proof is not needed; incomplete proof that provides a lesser degree of certainty regarding the facts that need to be established is sufficient. The court can grant protection once it considers that the facts alleged are probable.

The court will grant protection only where there is an urgent need or an imminent danger that the debtor may be separated from the attachable property belonging to him or her in such a way that it will be impossible to enforce the claim at a later stage if the creditor is awarded an enforceable title at the conclusion of the main proceedings.

Interim regulation of relationships and freezing orders would be the most appropriate interim measures in those cases. The main case would need to be lodged, at the latest, at the same time as the application for interim measures.

Interim measures are not ordinarily open to appeal, the only exception being those imposing a provisional regulation of rights of possession and use, which may be appealed before the competent multi-member court of first instance within 10 days of service.

In administrative matters, the single-member or the three-member administrative court of first instance is competent for interim measures. Administrative acts can be suspended in the case of risk of irreparable harm. In those cases, the applicant must first file its main action against the administrative act in question.

Recovery of state aid

Where a member state has granted unlawful aid to an economic operator, it is, in principle, incumbent on the member state to recover the aid to restore the economic situation as it existed prior to the payment of the aid. EU case law considers that such recovery cannot be regarded as a penalty; it is merely the logical and proportionate consequence, having regard to the objective of effective competition established by the TFEU, of the identified infringement.

Failure to notify the aid measure to the Commission automatically renders the aid unlawful. Aid that is unlawful because it has not been notified but has been declared compatible by the Commission is not subject to recovery; however, the national court may require the aid beneficiary to reimburse the equivalent of the interest that it should have paid on the banking market between the payment of the aid and the declaration of compatibility by the Commission.

The recovery of incompatible unlawful aid is an obligation instituted by the Commission to encourage member states to comply with the obligation, laid down in article 108(3) of the TFEU, to notify the Commission of planned aid.

Before doing so, the national court must first determine whether the measure constitutes state aid. If there is any doubt, the court may ask the European Commission for its opinion or refer a question to the Court for a preliminary ruling.

However, once the Commission has decided to open the formal investigation procedure, the national judge is in a way divested of this competence and is obliged to adopt all necessary measures to draw the consequences of a possible violation of the law.

Council Regulation (EU) No. 734/2013 added a new article 29 to the rules of procedure concerning cooperation with national courts. It is foreseen that the courts of the member states may request the Commission to provide them with information in its possession or with an opinion on questions relating to the application of state aid rules. For example, The Athens Court of First Instance requested the Commission's opinion in the *Hellenic Shipyards* case (SA.15526, Commission decision of 2 July 2008, confirmed by the General Court in Cases T-384/98, T-391/08 and by the CJEU in Case C-246/12 P), which the Commission provided on 29 July 2009.

The Commission, acting on its own initiative, may submit written observations to the courts of the member states responsible for the application of the state aid rules. With the permission of the court concerned, it may also submit oral observations. Before formally submitting its observations, the Commission must inform the member state concerned of its intention to do so. As an example, the Commission submitted such observations to the Athens Administrative First Instance Court again concerning the *Hellenic Shipyards* case, but this time in the context of a request to suspend the acts implementing the Commission's decision ordering the recovery of the aid found incompatible.

For the sole purpose of drawing up its observations, the Commission may request the competent court or tribunal of the member state to forward any documents available to the court or tribunal that are necessary for the Commission's assessment of the case.

The above possibilities are, of course, without prejudice to the possibility or obligation for the national court to ask the CJEU for a preliminary ruling regarding the interpretation or the validity of EU law in accordance with article 267 TFEU. Greek courts have used the procedure under article 267 TFEU, although not very frequently: see, for example, cases C-262/19 *Agrotiki Trapeza Ellados*; C-690/13 *Trapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE) and Pavlos Sidiropoulos*; C-134/91 *Kerafina-Keramische v Greece*; and C-106/87 *Asteris and Others v Greece and EEC*.

Where the national court is satisfied that a measure constitutes prima facie unlawful aid, it is for the national court to assess the need to order interim measures, pending its judgment on the merits, for example, where it has requested clarification from the Commission. In that case, if the aid has been paid out, the Commission considers that the most appropriate solution is to order that the aid and interest be deposited in a blocked account until the national court has ruled on the merits of the case. If the aid has not been paid, the court may suspend its payment by interim order.

Where unlawful aid is about to be paid, the national court must, after finding that the granting is invalid on the grounds of infringement of article 108(3) of the TFEU, prevent the payment of the aid.

Where a court finds that a measure constituting state aid has not been notified or has been put into effect before obtaining the Commission's approval, it must, in principle, order the full recovery of the aid, together with compound interest.

If the undertaking concerned does not repay the aid, the state can turn to a third party that holds the undertaking's funds to recover the aid directly by seizing the funds deposited in a bank account. Once insolvency proceedings have been opened, the state must register its claim with the creditors' representative.

A finding that aid has been granted in breach of article 108(3) of the TFEU must, in principle, lead to its recovery. In Greece, we are not aware of any case where a competitor has sought to obtain the recovery of unlawful and incompatible aid.

While the national courts' recovery obligation is not absolute, the EU courts' case law demonstrates that it is only in exceptional circumstances that the recovery of unlawful state aid would not be appropriate. The legal standard to be applied in this context is similar to the one applicable under articles 16 and 17 of the EU Procedural Regulation. In other words, circumstances that did not stand in the way of a recovery order by the Commission cannot justify a national court refraining from ordering full recovery on the basis of the Commission's decision.

The standard that the EU courts apply in this respect is very strict. In particular, the CJEU has consistently held that, in principle, a beneficiary of unlawful aid cannot plead legitimate expectations against a Commission recovery order. This is because a diligent business person would have been able to verify whether the aid received was notified.

The only exception that has been accepted by the EU courts is the absolute impossibility to implement the recovery decision; however, this must be, in principle, argued by the member state before the Commission and eventually the EU courts – and even this concept has been interpreted in a very restrictive manner. For instance, one cannot plead requirements of national law, such as national prescription rules[2] or the absence of a recovery title under national law.[3]

Moreover, the CJEU has consistently held that the obligation to recover is not affected by circumstances linked to the economic situation of the beneficiary; in other words, a company in financial difficulty does not constitute proof that recovery is impossible.[4] For the Court, the only way to demonstrate an absolute impossibility of recovering the aid is to show the absence of any recoverable assets.

2 CJEU, 20 March 1997, *Alcan*, C-24/95, EU:C:1997:163.
3 CJEU, 21 March 1991, *Italy v Commission*, C-303/88, EU:C:1991:136.
4 CJEU, 15 January 1986, *Commission v Greece*, C-52/84, EU:C:1986:3.

The exception to recover state aid that breached the standstill obligation

Since the reversal of case law by the *CELF* judgment in 2008, the national court is no longer required to order the reimbursement of aid that has not been the subject of prior notification but that has been recognised as compatible by the Commission. The CJEU considers that 'exceptional circumstances may arise in which it would be inappropriate to order repayment of the aid'.

The national court is, therefore, not required to order the recovery of aid implemented in failure to comply with article 108(3) of the TFEU, when the Commission has adopted a final decision establishing the compatibility of the aid with the internal market. Although the aid was paid in breach of a procedural rule laid down by the TFEU, its recovery is not required, the decision of the Commission having declared it compatible; however, the aid remains unlawful until the compatibility decision.

The CJEU requires, however, that the interest that the aid beneficiary would have had to pay had it had to borrow the sum in question on the capital market be repaid, pending a declaration of compatibility by the Commission. During this period, the person concerned benefited from unlawful aid. The undue advantage thus comprises, on the one hand, the non-payment of the interest that he or she would have paid on the relevant amount of compatible aid had he or she had to borrow that amount on the market pending the Commission's decision and, on the other hand, the improvement of his or her competitive position in respect of other market operators during the period of illegality. The national court is, therefore, obliged to order the aid recipient to pay interest for the period of illegality.

The CJEU states that the national court has the choice of whether to order repayment, without prejudice to the member state's right to put the aid declared compatible into effect again at a later date.

On the other hand, where proceedings are brought before a national court in parallel with an examination procedure conducted by the Commission, the national court is not relieved of its obligation to safeguard the rights of individuals under article 108(3) of the TFEU. In another judgment in the *CELF* case, the court clarified that the national court could not, in that case, stay the proceedings until the Commission had ruled on the compatibility of the aid with the internal market, even where the Commission had already adopted a first decision of compatibility that had been annulled by the CJEU.

The Court clarified that this obligation to rule only requires the court to actually adopt safeguard measures if the conditions justifying those measures are met: there is no doubt that the aid is classified as state aid, the aid is about to be or has been put into effect, and there are no exceptional circumstances that make recovery inappropriate.

When deciding on such a request, the national judge may order the aid to be repaid with interest or the funds to be paid into a blocked account, as suggested by the Commission in its 2009 notice on the enforcement of state aid law by national courts. On the other hand, a simple order to pay interest on sums that would remain in the company's accounts would not allow the obligations laid down in article 108(3) of the TFEU to be complied with; however, judges would likely be reluctant to order a complete recovery before the Commission's decision, even if, in theory, they do not have to wait for it.

State liability for the damages caused by a state aid

Damages can be sought against the Greek state for non-compliance with EU law in two ways. The first way is that, under national liability law, the Greek state and its organs can also be held liable for fault or negligence under articles 104 to 106 of the Introductory Law to the Civil Code. Before administrative courts, the general procedural rules are described in articles 71 to 78 of the Code of Administrative Procedure. It is necessary to prove a fault, the resulting damage and a causal link. These provisions can, therefore, be used to engage the state's responsibility (including the legislator and even the judiciary in certain circumstances) for adopting an act that breaches EU law.

The second way is that damages can be sought from the Greek state under EU law liability principles directly, in line with the principles set out in CJEU cases.[5] Under this case law, the liability of the state will be engaged where:

- the rule of law infringed is intended to confer rights on individuals;
- the breach is sufficiently serious; and
- there is a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

With regard to the condition in point (2), where the state has a large margin of discretion in implementing a policy, the CJEU has considered that the state's liability can only be engaged where the state has manifestly and gravely disregarded the limits at its discretion; however, in the field of state aid, no margin of discretion is left to the member states on the application of article 108(3) of the TFEU. By definition, therefore, a violation of article 108(3) of the TFEU should always be regarded as a serious breach that is likely to engage the state's liability within the meaning of the case law mentioned above.

5 CJEU, 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, C-6/90 and C-9/90, EU:C:1991:428; and CJEU, 5 March 1996, *Brasserie du Pêcheur SA*, C-46/93 and C-48/93, EU:C:1996:79.

Damages claims by the beneficiary (against the granting authority) before the national courts are based on the same principles; however, the damage for the beneficiary cannot be the aid recovery. This is not damage; it is only the logical consequence of the restoration of undistorted competition following the granting of unlawful aid. The damage must be inherently different in nature and in scope. The beneficiary should show specific damage (eg, that it would have invested its money differently in the absence of the annulled aid measure).

In both types of claims described above, damages are calculated according to methodologies similar to antitrust cases (loss of revenue, reduction of turnover, etc); however, as explained above, it cannot include the aid and interest to be recovered.

Existence of an action for liability and damages against the beneficiary

Actions engaging the liability of the beneficiary of unlawful aid are rare. They must be brought before the civil courts. The court first determines whether the beneficiary benefited from the unlawful state aid and whether he or she knew or could have known that the aid received was unlawful (ie, granted in violation of article 108(3) of the TFEU). It then evaluates the amount of damages to be granted to its competitors.

Under EU case law, the beneficiary, by claiming any benefit from the violation of article 108(3) of the TFEU, commits an act of unfair competition under national legislation.[6] The competitor of such a beneficiary has the right to stop this act of unfair competition by having recourse to an efficient litigation procedure that leads to a definitive decision.

In Greece, there is no specific national law providing explicitly for damages actions by a third party against the beneficiary of a state aid measure. Any person who considers that he or she has suffered damage by any action of the aid beneficiary, which can be directly linked to the aid received, can claim compensation before the civil courts under the general reparative provisions of article 914 of the Civil Code or, eventually, under the unjustified enrichment provisions, in particular article 904 of the Civil Code; however, under the latter legal basis, the causal link would be particularly difficult to demonstrate.

Damages are calculated according to methodologies similar to antitrust cases (loss of revenue, reduction of turnover, etc); however, as explained above, it cannot include the aid and interest to be recovered.

6 CJEU, 11 July 1996, *SFEI v La Poste ao*, C-39/94, EU:C:1996:285.

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Having frequently worked with top-quality local counsel, he knows how to navigate the complex issues that arise in such situations. He has been frequently involved in litigation both at the national and EU levels. Dimitris' expertise covers several industry-specific sectors, including aviation, telecommunications, rail transport and energy.

Prior to joining Sheppard Mullin, Dimitris was an academic assistant in EU law at the University of Aix en Provence in France. He then moved to Brussels, where he spent some time in a state aid unit of DG Competition (the European Commission). After DG Competition, he switched to private practice and worked for three international law firms specialising in competition law before joining Sheppard Mullin.

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