GCR

EUROPE, MIDDLE EAST AND AFRICA
ANTITRUST REVIEW 2024

The 2024 edition of the *Europe, Middle East and Africa Antitrust Review* is part of the Global Competition Review Insight series, which also covers the Americas and Asia-Pacific. Each review delivers specialist intelligence and research designed to help readers – general counsel, government agencies and private practitioners – successfully navigate the world's increasingly complex competition regimes.

GCR works exclusively with leading competition practitioners in each region, and it is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put it into context – that makes this report particularly valuable to anyone doing business in Europe, Africa and the Middle East today.

Visit globalcompetitionreview.com
Follow @GCR_alerts on Twitter
Find us on LinkedIn

Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's *Europe, Middle East and Africa Antitrust Review 2024* is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister publications covering the Americas and the Asia-Pacific region, this review provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this latest edition, we have significantly expanded coverage of the European Union, with a specific focus on competition law enforcement under the new EU digital market regime, a deep dive into trends in cartel enforcement in Germany and an economist's take on the UK's collective proceedings and unfair pricing. This features alongside updates on various aspects of the antitrust landscape in Cyprus, Denmark, Egypt, the European Union, France, Germany, Greece, Israel, Switzerland, Turkey and the United Kingdom.

GCR has worked closely with leading competition lawyers and government officials to prepare this report. Their knowledge and experience – and above all their ability to put law and policy into context – are what give it such special value. We are grateful to all the contributors and their firms for their time and commitment.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

Global Competition Review
London
June 2023

France: an overview of French courts' state aid enforcement and procedure

Jacques Derenne and Dimitris Vallindas
Sheppard, Mullin, Richter & Hampton LLP

In summary

State intervention is a long-standing tradition in France. EU state aid control rules apply to avoid any undue distortion of competition. The European Commission has exclusive powers to examine the compatibility of state aid with the internal market. National courts have a distinct but complementary role to safeguard subjective rights of third parties affected by the granting of aid that does not comply with the EU procedure. This article reviews the granting of state aid in France and the French courts' state aid enforcement and procedure.

Discussion points

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

Referenced in this article

- *Galerie de Lisieux v Caisse organic de recouvrement*
- *Etablissements J Richard Ducros v Société Métallique Finsider Sud*
- *Commission v France (Scott)*
- *Scott SA and Kimberly Clark SAS v Ville d'Orléans*
- *SFEI v La Poste ao*
- *Syndicat national de l'industrie des viandes ao*
- *Commune de Paulhac*
- *CELF* cases
- *SFEI v La Poste ao*
- *Groupe Salmon Arc-en-ciel*
- *Residex*
- *Deutsche Lufthansa*

State intervention in France is common and has resulted in various state aid cases. France has a long-standing tradition of state intervention, and the state regularly intervenes as a provider of subsidies, an investor, a lender, a guarantor and a creditor.

With this experience in state aid, French state organs are familiar with the procedures associated with notifiable aid measures; however, there is still the risk of breaches of state aid rules, and some cases do arise. The French courts are also increasingly aware of their duties and obligations with regard to unlawful non-notified aid.

National state aid granting and control: competent authorities

Authorities in charge of state aid oversight

In France, there is no single person who represents the state in respect of its aid policy in cases or with regard to policy issues with the European Commission (the Commission). All relations with the European Union must go through the Permanent Representation of France to the European Union based in Brussels.

The General Secretariat for European Affairs (SGAE), a department attached to the prime minister's office, centralises all issues that arise in relations with European institutions. It ensures the unity and consistency of any French positions submitted within the European Union. One of its 18 operational offices is responsible for competition and state aid. All state issues and aid notifications are coordinated by the SGAE.

The General Commission for Territorial Equality organises working groups, bringing together ministries, representatives of regional prefects and representatives of local authorities. It harmonises ministerial and local practices to detect the risks of measures being classified as state aid.

The Treasury (also known as 'Bercy' or the Ministry of the Economy and Finance) is generally involved in all state aid matters, in particular with regard to the financial impact these matters have on the state budget. The Inter-Ministerial Committee on Industrial Restructuring, a department of the Ministry, is also often involved in state aid matters relating to rescue or restructuring aid. This organ aims to assist undertakings in difficulty and to develop remedies to ensure the restructuring of those undertakings and, if appropriate, their long-term viability. These measures may give rise to various state aid procedures.

The Ministry of the Economy and Finance usually cooperates and exchanges information with the local authorities or other public bodies (ie, social security institutions), with coordination by the SGAE.

The State Shareholdings Agency (APE) is also involved in state aid measures concerning undertakings in which the French state holds shareholdings or is likely to enter its capital following state aid recapitalisation measures.

The sub-directorate for EU law and international economic law (a team of specialist agents for EU litigation matters) of the Legal Directorate of the Ministry for Europe and Foreign Affairs handles France's representation before the EU courts. This sub-directorate liaises with the SGAE and the relevant ministries, in particular the Ministry of the Economy and Finance. As such, it has a responsibility to draft government briefs and written observations for the EU courts and to plead before them.

Unlike French courts, the French Competition Authority is not competent to apply state aid rules, except for during consultation on competition issues that the legislature or the government can request under Article L462-1 of the French Code of Commerce. Its recommendations help the legislature and the government comply with EU state aid rules.

Council of State in the compliance and implementation of EU law

The Council of State is a special adviser to the government with regard to its legislative and regulatory action. In this advisory role, the Council of State is seized of bills before they are passed by the Council of Ministers. It also has jurisdiction over draft orders, as well as the most important draft decrees, which are referred to as 'decrees of the Council of State'.

The government may refer a matter to the Council of State for an opinion on any other regulatory text or particular legal issue. Since the 2008 constitutional reform, the president of the National Assembly or the Senate may also refer any bill submitted to either of the two parliamentary assemblies to the Council of State for an opinion before the text is examined in the committee. It also has an important role as a filter in the priority ruling on the issue of constitutionality.

Through this specific advisory competence, the Council of State possesses the means to have a key role in avoiding any violation by the French state of EU state aid rules through a kind of national *ex ante* state aid control, even though it does not have a binding advisory role in most cases.

National procedural rules

There are no specific French laws relating to state aid, except administrative circulars on the topic.

The latest applicable administrative circular on state aid is the Prime Minister's Circular of 5 February 2019 on the application of European competition rules on public aid to economic activities. This is the main text providing guidance on the process of granting state aid at the national level. It provides administrations with the information and methodology they need to understand state aid regulations. It also defines the principles that form the basis of French policy in this area.

Concerning the authorities that are competent to grant aid, a distinction must be drawn between the types of aid concerned. Under French law, a fundamental distinction is made between aid governed by public law and aid governed by private law.

Regarding public law, for example, fiscal aid includes all kinds of tax relief, tax exemptions and tax cuts that are not precluded by law and that are granted in accordance with a general economic policy. Article 34 of the Constitution states that fiscal aid must be provided for by a legislative act; therefore, a parliamentary act is necessary to approve the grant of fiscal aid by a public authority. The law can provide that a ministerial decree will specify the conditions of the application of the fiscal aid, but the application rules and the final decision to grant the aid are provided for under administrative law.

Also within the scope of public law, budgetary aid includes grants, loans, capital contributions and guarantees from the state that are financed through the state budget. Pursuant to article 34 of the Constitution, the granting of budgetary aid should be provided for by a parliamentary law. When budgetary aid is directly granted by the state in the form of subsidies, it must be shown in the expenditure section of the general budget. This also applies to aid granted by public bodies that are legally separate from the state but that are financed by its budget.

Aid financed by special funds (eg, the Economic and Social Development Fund, the National Forestry Fund and financial support for the film industry) does not need to be provided for by statute. The types of aid granted directly from the state budget or by public bodies are also governed by administrative law.

The decision to grant budgetary aid is usually an administrative decision, although it can also be granted by an administrative contract. Where loans are granted directly by the state or by public bodies, they will be governed by administrative law and budgetary law. Where the aid is granted by a private body, however, private law must be applied.

Banking aid that is granted by private funds does not need to be based on statute and is generally governed by private law; however, when the aid is granted by a private body controlled by the state, the decision on whether to grant the aid is an administrative one, whereas the contract between the private body and the beneficiary will be concluded under private law – more specifically, credit law.

The state usually exercises its power over the private bodies that grant banking aid by giving instructions in the form of ministerial decrees or letters of instruction; however, when the aid is granted directly by a private body that is only marginally under the control of the state, only private law (banking law) will apply.

The state can also grant aid by the way of a capital contribution that is governed by company law; however, when a beneficiary of this kind of aid is a public undertaking, the capital contribution is called a capital endowment, and public law should be applied.

Regarding services of general economic interest (SGEI), French law does not recognise as such the concept of SGEI, only that of 'public service'. The national legislature defines some activities as activities of general interest, or of public or national interest, but there is no general legal definition of general interest nor a legal definition of public service; therefore, the notion of SGEI refers to the notions of public service obligations and public service compensation, as developed by EU case law.

Furthermore, the organising public authority has broad powers to manage the SGEI. In particular, the authority may decide to carry out the SGEI using its own departments or a separate entity over which it exercises control similar to that exercised over its own departments, or it may entrust the execution of the SGEI to one or more external companies. This can be done in a number of ways:

- by purchasing the provision of SGEI in return for a price (public contracts);
- by transferring the operating risk of the SGEI (public service delegation); and
- by entrusting the mission of SGEI by a unilateral act, in accordance with national and European public procurement law.

The authority may also decide to subsidise an activity of a public service nature, in view of the general interest attached to it.

Role of national courts

Jurisdiction to apply state aid rules by national courts

Both administrative and civil courts have jurisdiction to apply state aid rules. In actions brought before the administrative courts, the competent courts at first instance are the administrative courts, the administrative courts of appeal and the Council of State. The Council of State is competent at first and last instance for actions concerning the validity of decrees or for actions concerning decisions that fall within the scope of its exclusive competence. It is also competent to hear actions concerning administrative decisions applicable throughout the French territory.

Actions may be brought before the civil courts (including the commercial courts and labour courts) regarding litigation between private parties, including claims against state-owned companies and their subsidiaries, governed by private law (this raises cross-subsidy issues).

The civil courts have exclusive jurisdiction for some specific areas, such as indirect taxes.[1] In those cases, the competent courts are the courts of first instance, the courts of appeal and the Supreme Court.

The commercial courts have jurisdiction over litigation between professionals acting in the course of their business and over any litigation between businesses; therefore, the commercial courts are often the relevant courts in which to bring actions for damages against a competitor receiving alleged unlawful aid.[2] If the applicant is not a commercial company, an action can also be brought before the civil courts.

The judgments of a national court can generally be appealed. Before an administrative court, a judgment can be appealed to the administrative court of appeal and further appealed on points of law before the Council of State as the supreme administrative court. A judgment by a civil court can be appealed to the commercial division of the courts of appeal and further appealed on a point of law only to the Court of Cassation. The grounds of appeal can be based on the finding of aid, the amount to be recovered, the identification of beneficiaries and the qualification of unlawful aid, among other things.

In the *Scott I* case,[3] the Court of Justice of the European Union (CJEU) ruled that a French national court should set aside national administrative law providing suspensive effect to an appeal of a national recovery order. The CJEU held, among other things, that a procedure that provided for the suspensory effect of actions brought against demands for payment issued for the recovery of unlawfully received aid does not fulfil the conditions laid down in the EU regulation on state aid procedure and that, accordingly, the rule providing for this suspensory effect should have been left unapplied.

In another *Scott* case,[4] the CJEU ruled that article 14 of Council Regulation (EC) No. 659/1999 (now article 16 of Council Regulation (EU) 2015/1589) is to be interpreted as not precluding, in circumstances in which amounts corresponding to the aid in question have already been recovered, annulment by the national court of assessments issued to recover the unlawful state aid on grounds of there being a procedural defect, in cases where it is possible to rectify the procedural

1 Court of Cassation, 4 July 2006, *Galerie de Lisieux v Caisse organic de recouvrement*, Case No. V-03-12.565.
2 Court of Cassation, 15 June 1999, *Etablissements J Richard Ducros v Société Métallique Finsider Sud*, Case No. B 97-15.684.
3 CJEU, 5 October 2006, *Commission v France*, C-232/05, EU:C:2006:651.
4 CJEU, 20 May 2010, *Scott SA and Kimberly Clark SAS v Ville d'Orléans*, C-210/09, EU:C:2010:294, para. 33.

defect under national law. However, the provision does preclude those amounts being paid once again, even provisionally, to the beneficiary of that aid.

Challenging a government measure on the grounds of unlawful state aid

With regard to the general powers of the French courts concerning the direct effect of article 108(3) of the Treaty on the Functioning of the European Union (TFEU), both the administrative and civil courts are competent to hear claims against unlawful aid.

Although most actions are brought before the administrative courts because state aid measures are usually granted through acts governed by public law, French administrative law distinguishes between two main types of actions. Depending on the object of the dispute, the claimant can either:

- contest the legality of a decision of the administration; or
- bring an action for damages for the harm caused by the decision of the administration (or an action for a cease-and-desist order or a recovery order), whereby the administration's decision or act can also, incidentally, be declared illegal.

For both types of actions, the claimant must submit a preliminary request to the administration before bringing an action in the competent administrative court. This requirement, which may take the form of an administrative action or a *recours hiérarchique* (a non-judicial appeal exercised against an administrative decision), lengthens the procedure if the administration refuses to act, in which case the claimant would be required to challenge the decision of the administration in court.

Before the administrative courts, the claimant can bring an action for annulment of a state decision or state measure involving state aid or an action engaging the liability of the state to obtain damages (in principle, the state can only be sued before administrative courts). For an action for annulment, the claimant must show that it has an interest in challenging the decision (ie, the challenged act must produce legal effects). Various interests have been held to justify the bringing of an action by the claimant, including a purely financial interest. The conditions for admissibility are less strict than those of the latter type of action.

The aim of an action for indemnity or full review is to protect the rights of the natural or legal person who is subject to the administration in the context of state liability or contracts with the state. The claimant must demonstrate that it has a personal interest in the action. This requirement is not difficult to meet when the claimant requests damages from the state.

National requirements for a plaintiff seeking interim measures to prevent the granting of aid

Competing undertakings (or any affected third party) can seek the suspension of a decision granting unlawful state aid. In theory, this type of action can be based on the principle of supremacy of EU law.[5] The judge can also order suspension of a contested decision in the context of an action for annulment. Suspension can only be requested when the administrative decision granting the aid has not yet been fully implemented.[6]

The conditions that must be satisfied for this type of interim measure to be granted are:

- urgency;
- the establishment of a prima facie case; and
- harm to the claimant, if the contested measure comes into effect.

Under French law, the interpretation of the above criteria is generally less strict than under EU law. For example, urgency may be established on the basis of purely financial consequences resulting from the implementation of the contested measure. The Council of State requires that the implementation of the administrative act must affect, in a sufficiently serious and immediate manner, a public interest, the legal situation of the claimants or the interest the latter wishes to defend.[7]

Recovery of unlawful state aid

If a member state has granted unlawful aid (non-notified 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 this recovery cannot be regarded as a penalty; it is merely the logical and proportionate consequence, with regard to the objective of effective competition established by the TFEU, of the infringement found.

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 must 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.[8]

5 CJEU, 11 July 1996, *SFEI v La Poste ao,* CJEU, C-39/94, EU:C:1996:285.
6 See, for example, cases where all actions were dismissed, such as Council of State, 11 February 2004, *Syndicat national de l'industrie des viandes ao,* Case No. 264346.
7 Council of State, 30 July 2003, *Commune de Paulhac*, Case No. 254904.
8 CJEU, 12 February 2008, *CELF I*, C-199/06, EU:C:2008:79, para. 51; and Council of State, 19 December 2008, *CELF*, Case No. 274923. The *CELF* cases gave rise to three ultimate cases at

The recovery of incompatible unlawful aid (non-notified aid declared incompatible by the Commission) is a provision to incite 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. In case of doubt, the court may ask the Commission (the amicus curiae procedure under article 29 of Council Regulation (EU) 2015/1589) or refer a question to the CJEU for a preliminary ruling; however, once the Commission has decided to open the formal investigation procedure under article 108(2) of the TFEU, the national judge is divested of this competence and is obliged to adopt all the necessary measures to draw the consequences of a possible violation of the law following the aid qualification by the Commission.[9]

Unless there are exceptional circumstances where, for example, a recovery order proves inappropriate,[10] the French courts apply the *CELF* case law, thereby only ordering the recovery of unlawful interest instead of full recovery if the state aid is deemed compatible by the Commission.[11] Full recovery is required if the aid is deemed both unlawful and incompatible.

The relevant member states shall take all the measures available under their respective legal systems, including interim measures, without prejudice to EU law. The *Scott I* judgment illustrates the full force of this principle.[12] It follows from the *Scott I* case, which stems from aid granted by the French state, that the national measures chosen to execute a Commission decision must lead to immediate and effective execution. The Court held that a national provision that provided for an automatic suspensory effect of actions brought against recovery orders failed to have regard to the objectives pursued by the EU rules on state aid, in particular the immediate restoration of the previously existing situation on the market. Any delay in the recovery process would go against the effectiveness of recovery itself as the natural consequence flowing from unlawful aid.

The *Scott* saga continued when the Administrative Court of Appeal in Nantes was seized of the question of the regularity of the revenue documents issued for the recovery of unlawful aid on the grounds that they did not indicate the surname and first name of the signatory.[13] Being divided between its obligation to annul the revenue vouchers for that reason and its obligation to ensure the

national level: Council of State, 30 May 2018, *Mandataires judiciaires associés (MJA)*, Case No. 402174 (rejection of the appeal of a company seeking the liability of the state for the recovery of unlawful aid from which it benefited); Council of State, 5 April 2019, *CELF*, Case No. 413712 (there is no absolute impossibility to recover unlawful aid from a company in judicial liquidation); Council of State, 22 July 2020, *SIDE*, Case No. 434446 (order of the state to award €10 million in compensation to the competitor of a beneficiary of unlawful aid).

9 CJEU, 21 November 2013, *Deutsche Lufthansa*, C284/12, EU:C:2013:755.

10 CJEU, 8 December 2011, *Residex*, C-275/10, EU:C:2011:814.

11 Council of State, 19 December 2008, *CELF*, Case No. 274923. For a recent example, see Council of State, 25 June 2020, *Transports Rapides Automobiles,* Case No. 418446.

12 See footnote 3.

13 See footnote 4.

immediate and effective recovery of the unlawful aid, the Administrative Court of Appeal referred the matter to the CJEU for a preliminary ruling.

Although the CJEU acknowledged that 'the annulment of a revenue order is not open to criticism as such' (as it results only from the full exercise of the principle of effective judicial protection), it found that an annulment could, in principle, lead to repayment of the unlawful aid to the beneficiary.

Where the sums corresponding to the aid have already been recovered, the national court is not precluded from annulling, on the ground of a formal defect, revenue cheques issued to recover unlawful state aid, where the possibility of rectifying that formal defect is guaranteed by national law; however, the national courts are precluded from paying back the sums, even provisionally, to the beneficiary of that aid.

The administrative court may be seized by a competitor to enjoin the state to use its power of substitution for a local authority that has failed in its obligation to recover. It would be sufficient for the claimant to establish the absence of recovery and to ask the national court to enjoin the representative of the state to give formal notice to the community in question to recover the aid in order to extend the one-month period from which substitution is possible.

Although it appears that no such action has been brought, it would have a good chance of succeeding, given that article L1511-1-1 of the General Code of Local and Regional Authorities does not leave the state representative any room to manoeuvre in the exercise of the substitution. Substitution appears to be a duty to guarantee the effectiveness of a Commission recovery decision.

State liability for damage caused by state aid

In an action engaging state liability, the claimant must request that the administration adopt a decision permitting the award of damages from the state, prior to bringing an action before the administrative courts (rule of the prior decision). In principle, the administration has two months to react to this request before the claimant can turn to the administrative courts to engage the liability of the granting authority.

When the administration fails to adopt a decision, the claimant has five years from the date of notification of the administration's refusal (if there is one) to file an action before the administrative courts. The action before the administrative courts comprises a request to annul the administrative decision refusing to award damages or compensation.

The conditions for awarding damages in cases of state liability are very strict under French law. Moreover, the court will not automatically award damages, even if it finds that the state is liable. Damages can be awarded only if the rule

breached intended to confer rights on individuals and there is a direct causal link between the damage sustained and the breach of the relevant rule. The main liability regime is liability for fault; although, in specific areas, liability of the state can be triggered without proof of fault by the administration.

The administrative courts have shown a certain reluctance to engage the liability of the legislator for infringement of a provision of EU law. It has been held that the illegality enabling state liability to be engaged should be found at the level of the administrative act implementing the law, even if it was adopted in violation of EU law. The proof of the existence of fault is hard to demonstrate as the courts have recognised a certain margin of appreciation for the legislator.

The liability of the state can also be based on EU law, according to the conditions laid down in the *Francovich* and *Brasserie du Pêcheur* cases:

- the infringed rule (article 108(3) of the TFEU) confers rights on individuals;
- the breach is sufficiently serious (no discretion); and
- the direct causal link between the violation and the loss or damage.[14]

That liability of the state under EU law was relied on, for the first time, in a state aid case brought by a beneficiary of unlawful aid before the Administrative Court of Grenoble in 2003.[15] The claimant argued that the liability of the state for breach of EU law, namely article 108(3) of the TFEU, could be raised without proof of fault on the part of the state and that it concerned all 'emanations' of the state, including the legislator. It was alleged that liability arose both under principles of French liability law and the principles of EU law that derived from the CJEU's *Francovich* case law. The action was dismissed for reasons relating to the conditions of causation.

In other cases in which the direct causal link between the violation of article 108(3) of the TFEU and the damage was recognised, the state was ordered to compensate the damage suffered by the beneficiary. The breach of the obligation to notify the aid constitutes a fault that is likely to engage the responsibility of the state by a competitor of the beneficiary undertaking that has suffered damage,[16] as well as by the beneficiary of the aid itself, in limited circumstances for the latter (*Borotra* case).[17]

The administrative court recognises the duty of diligence of companies receiving aid. In the *Borotra* case, the company could not have been unaware that a formal investigation procedure had been initiated by the Commission, and the court exonerated the state from one-quarter of its liability.

14 CJEU, 19 November 1991, *Andrea Francovich and Danila Bonifaci ao 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.
15 Administrative Court of Grenoble, 15 October 2003, *Société Stéphane Kelian,* Case No. 0102341.
16 See footnote 5.
17 Administrative Court of Appeal of Paris, 23 January 2006, *Groupe Salmon Arc-en-ciel,* Case No. 04 PA01092.

In any event, neither the amount of aid to be repaid nor the corresponding default interest constitutes compensable damages. Only the consequences of recovery, such as the cost of opportunity (delocalisation benefits missed because the aid encourages not to delocalise) and the financial costs arising from the loan taken out to repay the aid, are compensable.

The most recent significant example of a state liability recognised by the French courts, following an action by the competitor of the beneficiary, is the *SNCM* case, in which the Corsica territorial collectivity was ordered to pay €86 million in damages for having granted unlawful and incompatible aid to SNCM.[18] However, the French courts have confirmed that loss of chance to benefit from unlawful state aid cannot be redeemed in damages.[19]

Beneficiary liability for damages caused by state aid

The existence of an action for liability and damages against a beneficiary can be seen as an incentive in national law for private parties to be more cautious when they receive state aid; however, these 'horizontal' litigation cases are still rare.

In several cases, the Court of Cassation has confirmed the principle of extra-contractual liability of the beneficiary of the aid. As the CJEU has ruled that the principle of liability of the beneficiary cannot be derived from EU law, it must also be based on national unfair competition pursuant to article 1240 of the Civil Code (civil liability).[20] The claimant must demonstrate the existence of fault, damage and a causal link between the fault and the damage. If the Commission has already adopted a negative decision, there is a presumption that a fault has been committed.

Actions engaging the liability of the beneficiary of unlawful aid 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.

18 Administrative Court of Appeal of Marseille, 22 February 2021, *Corsica Ferries*, Case Nos. 17MA011582 and 17MA011583, confirmed by the Council of State, 29 September 2021, Case No. 450892.
19 Court of Cassation, 23 June 2021, *Erisay*, 2021:CO00544.
20 See footnote 5.

Jacques Derenne

Sheppard, Mullin, Richter & Hampton LLP

Jacques Derenne is a partner and the head of EU competition and regulatory of the antitrust and competition group at Sheppard Mullin, a member of the Brussels and Paris bars, and a professor at the University of Liège and the Brussels School of Competition (teaching state aid law). Jacques has over 30 years of EU competition law experience across all areas, including mergers, cartels, abuses of dominance and state aid. He has developed particular expertise in EU regulatory and related competition law issues in a number of highly regulated industries, including energy, post, aviation, railways, communications (telecommunications, satellites and audiovisual) and tobacco products.

Jacques publishes widely on various other EU constitutional, competition and regulatory issues. He regularly speaks at competition conferences and is a founding member of the Global Competition Law Centre (College of Europe, Scientific Council and Executive Committee).

Dimitris Vallindas

Sheppard, Mullin, Richter & Hampton LLP

Dimitris Vallindas is a member of the Brussels Bar and counsel in Sheppard Mullin's antitrust and competition group. He is based in the Brussels office. Dimitris advises on all areas of European and Greek competition law. In particular, he has significant experience in all types of state aid matters, including research and development, environmental, rescue and restructuring, risk capital and privatisation cases. Dimitris also has in-depth expertise in handling and coordinating complex multi-jurisdictional cartel and merger cases. 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 at both national and EU levels. Dimitris's expertise covers several industry-specific sectors, including aviation, telecommunications, rail transport and energy. Prior to joining Sheppard Mullin, Dimitris, a French lawyer by education, 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 (European Commission). After DG Competition, he switched to private practice, was admitted to the Brussels Bar and worked for three international law firms specialising in competition law.

SheppardMullin

Sheppard Mullin is a full-service law firm that handles corporate and technology matters, high-stakes litigation and complex financial transactions. With over 1,000 attorneys across 16 offices in North America, Europe and Asia, we offer global solutions to our clients around the world, providing seamless representation in multiple jurisdictions.

Our Brussels office is dedicated to EU and national competition law, EU litigation, EU regulatory law and EU public policy and advocacy, as well as international trade law issues. With more than 30 years of experience in the field of state aid, we assist member states (with notifications to obtain positive decisions from the European Commission and recovery proceedings) and defend beneficiaries (with notifications and litigation), competitors (with complaints, observations and litigation) or investors (due diligence issues).

IT Tower
Avenue Louise 480
1050 Brussels
Belgium
Tel: +32 2 290 7900

www.sheppardmullin.com

Jacques Derenne
jderenne@sheppardmullin.com

Dimitris Vallindas
dvallindas@sheppardmullin.com