

State Aid

Contributing editor
Ulrich Soltész



2016

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

State Aid 2016

Contributing editor
Ulrich Soltész
Gleiss Lutz

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016
No photocopying without a CLA licence.
First published 2014
Third edition
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 2016, be advised that this is a developing area.

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



CONTENTS

Overview	5	Netherlands	43
Ulrich Soltész Gleiss Lutz Isabel Taylor Slaughter and May		Maurice Essers, Marc Custers and Boyd Wolfers Loyens & Loeff NV	
Austria	9	Portugal	48
Bernt Elsner, Florian Kromer and Marlene Wimmer CMS Reich-Rohrwig Hainz		Rita Leandro Vasconcelos, Ana Isabel Marques and Stéphanie Sá Silva Cuatrecasas, Gonçalves Pereira	
Denmark	13	Serbia	53
Henrik Peytz, Thomas Mygind and Mia Anne Gantzhorn Nielsen Nørager Law Firm LLP		Bisera Andrijašević BDK Advokati/Attorneys at Law	
France	17	Spain	58
Stéphane Hautbourg and Sophie Quesson Gide Loyrette Nouel AARPI		Irene Moreno-Tapia Rivas, Javier Arana Rodríguez and Candela Sotés Macaya Cuatrecasas, Gonçalves Pereira	
Germany	23	Switzerland	63
Ulrich Soltész Gleiss Lutz		Simon Hirsbrunner Steptoe & Johnson LLP	
Ireland	28	Ukraine	68
Vincent JG Power A&L Goodbody		Igor Svechkar and Sergiy Glushchenko Asters	
Italy	33	United Kingdom	72
Stefania Bariatti and Cristoforo Osti Chiomenti Studio Legale		Isabel Taylor and Nele Dhondt Slaughter and May	
Montenegro	38		
Bisera Andrijašević BDK Advokati/Attorneys at Law			

Montenegro

Bisera Andrijašević

BDK Advokati/Attorneys at Law

Overview

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

As a candidate for EU membership, Montenegro has committed itself by signing the Stabilisation and Association Agreement (SAA) to align its legislation with the *acquis communautaire*, including the rules on competition and state aid. Alignment in the area of state aid is regulated by articles 73 and 74 of the SAA and Protocol V covering state aid rules in the steel sector. Montenegro is obliged to apply the criteria for assessment of state aid procedures, which are in line with articles 106 and 107 of the Treaty on the Functioning of the European Union (TFEU) and the relevant EU instruments for implementation and interpretation of these rules. Montenegro has, to a large extent, aligned its legislative framework on state aid with the *acquis*, and the process of harmonisation with the state aid soft law is still under way.

Montenegro submits to the European Commission regular annual reports prepared on the basis of the methodology of the EU state aid overview. The national state aid authorities and the European Commission regularly exchange information on state aid cases to strengthen the enforcement track record. The European Commission assesses the progress in this area regularly in its annual progress reports.

Since the concept of the general prohibition of state aid was introduced in Montenegro only with the start of the European integration process, state aid grantors and beneficiaries are still learning about the notion and rules on state aid. That is why the advocacy of the importance of state aid control is still an important task for the government.

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 competent authority in the area of state aid is the State Aid Control Commission (SACC). The SACC monitors the implementation of the State Aid Control Act and decides on the compatibility of state aid schemes and individual aids with the state aid rules.

The State Aid Preparation Unit (the Unit), an organisational unit within the Ministry of Finance, performs administrative and technical tasks for the SACC. The Unit, *inter alia*, prepares the basis for the Commission's decision-making in communication with grantors, keeps state aid records and prepares annual reports on state aid.

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

State aid may be granted on both national and local levels. Grantors of state aid are state authorities, local self-government authorities and legal entities in charge of the management of state resources.

The main grantors are the ministries of economy, sustainable development and tourism, maritime and transport, culture and science. The Investment Development Fund of Montenegro (IDF), established by the government to encourage and facilitate the economic development in Montenegro, is also a state aid grantor. The national Employment Office of Montenegro grants aid through diverse employment schemes that encourage employment of vulnerable groups. Local self-government authorities grant aid with the aim of encouraging economic development on local levels.

4 Describe the general procedural and substantive framework.

State aid measures are mainly governed by public law. The general substantive and procedural framework for provision of state aid is defined in the State Aid Control Act, with the exception of the sectors of agriculture and fisheries, for which special rules apply. Detailed criteria and conditions for the granting of state aid are stipulated in a decree adopted for the implementation of the State Aid Control Act, as well as in other by-laws.

State aid may be granted on the basis of a law or a by-law, such as the Energy Act, the Culture Act, the Act on Professional Rehabilitation and Employment of Persons with Disabilities, the Act on Postal Services, the Companies' Profit Tax Act, the Personal Income Tax Act and the Decree on Business Zones. Specific aid measures may also be adopted on the basis of schemes defined in various programmes adopted by the competent authorities, or on the basis of a public contract for the provision of a certain service of general economic interest.

The General Administrative Procedures Act applies to all procedural matters that are not regulated by the State Aid Control Act or by any other statute regulating a particular state aid scheme.

Private law is applicable to state aid granted through specific aid instruments such as guarantees, loans and capital injections, which are governed by private law provisions.

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

Montenegro does not have the obligation to directly implement the European state aid rules. However, in accordance with its obligations pursuant to the SAA, it has almost completely harmonised its legislative framework with the EU state aid rules.

The State Aid Control Act (Official Gazette of Montenegro (OGM) 074/09 and 057/11) contains a general substantive and procedural framework for granting state aid.

The State Aid Decree (OGM 27/10, 34/11, 16/14) regulates in detail the criteria, conditions and manner of granting state aid.

The Rulebook on the List of State Aid Rules (OGM 35/14, 02/15, 38/15 and 20/16), adopted by the Ministry of Finance on the basis of the State Aid Decree, contains published translations of the EU secondary state aid legislation. The Rulebook is amended from time to time to include more EU secondary state aid rules, in the order of priority agreed with the European Commission. In this manner, 25 of the EU horizontal rules, sector-specific rules, specific aid instruments, as well as *de minimis* and other state aid rules, were directly implemented into the Montenegrin legal system.

The Decision on the Regional Aid Map (OGM 22/12, 06/14, 31/14) provides the basis for granting regional aid. With the GDP per capita being 42 per cent of the EU average, Montenegro as a whole is eligible for regional aid.

Programmes

6 What are the most significant national schemes in place that have been approved by the Commission or that qualify for block exemptions?

Given that Montenegro is not yet a member state of the EU, the European Commission has no competence to approve state aid schemes. The SACC assesses and approves state aid schemes and individual exemptions, and in that process it regularly consults the European Commission in line with the SAA's aid transparency principle.

Several schemes are managed by the Ministry of Economy, including the Programme for Promotion of Development of Competitiveness of Micro, Small and Medium Enterprises in the North of Montenegro and the Underdeveloped Municipalities; the Programme for Promotion of Clusters Development in the North of Montenegro and the Underdeveloped Municipalities; and the Programme for Increasing the Regional and Local Competitiveness through Compliance with the International Business Standards 2014-2016.

The IDF manages annual schemes for the realisation of its credit lines. The Employment Office implements its state aid programmes approved annually, such as the professional training and development programmes for work with employers and for self-employment, and the innovated programme for continuous stimulation of employment and entrepreneurship in Montenegro.

The Ministry of Culture manages several programmes for which it grants state aid, such as cultural and artistic creative works, cultural development in the north of Montenegro, cultural heritage, support for development of media pluralism, public broadcasting services in Montenegro, transmission of broadcasting signals in the Territory of Montenegro through broadcasting transmitters and self-regulatory bodies of journalists.

The Ministry of Science operates programmes for promotion of research and development, usually as part of wider international programmes, such as the EUREKA, ELDORO and WINEREST projects, as well as the programme for co-financing of national R&D projects.

There are several schemes approved on the level of municipalities, mainly aimed at support for entrepreneurship, tourism and agriculture.

7 Are there any specific rules in place on the implementation of the General Block Exemption Regulation (GBER)?

The General Block Exemption Regulation was published in the List of State Aid Rules adopted by the Ministry of Finance and has become a part of the Montenegrin legislative framework. There are no other rules in place for its implementation. However, the State Aid Control Act stipulates that all aid schemes or individual aids must be notified to the SACC, including those in line with GBER or de minimis rules. In this manner, the pre-accession period will be used by the state aid authorities to monitor the enforcement of state aid rules and to help the grantors comply with those rules.

Public ownership and SGEI

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

Public ownership and government intervention have a strong tradition in Montenegro because of the country's history as a state-run economy. With the transition to a market economy, state influence has declined because of privatisation processes. However, not all privatisation has been successful, and some large undertakings continue to receive state aid.

The most problematic case has been the state aid to the Aluminium Company Podgorica (KAP), which received large amounts of rescue and restructuring aid after being privatised in 2005. In 2012, the SACC adopted a decision ordering the recovery of the incompatible aid (in Montenegro, state aid that is not in line with the state aid rules) from KAP that resulted from the payment under the sovereign guarantees. The state was not able to recover this aid because of the illiquidity of the undertaking and KAP's assets were finally sold in bankruptcy proceedings.

Another notable case of state aid was *Steel Mill Nikšić*. Its privatisation in 2006 resulted in large losses for the company, and the government provided aid through a rescue and restructuring plan. The restructuring was unsuccessful and the company was again sold in bankruptcy proceedings.

The state still has majority ownership of the energy company Elektroprivreda Crne Gore and undertakings tasked with energy transmission and market operation, the ports of Bar and Kotor, the airports of Montenegro, national airline Montenegro Airlines, the Montenegro Post, national radio and TV broadcaster RTCG, the public undertaking for the management of national parks, the broadcasting centre of Montenegro, as well as the water suppliers and utility companies at local and regional levels. Many of these companies have provisions of services of general economic interest (SGEI), and hold a dominant position in the respective markets.

Currently the largest state-owned state aid beneficiary is Montenegro Airlines, which continues to mark losses despite the aid provided through its rescue and restructuring plan. This plan was approved by the SACC,

however, it is not being implemented as planned and the company has requested its prolongation.

9 Are there any specific national rules on services of general economic interest?

State compensation for provision of SGEI in Montenegro is very important, both on the national and local levels. However, the concept of SGEI and the *Altmark* criteria have been introduced only recently within the scope of the harmonisation process. State aid may be approved for performing SGEI through economic activities that are entrusted to legal persons, in the amount necessary for performing those services. Rules for implementation of this provision were adopted in the List of State Aid Rules, including:

- Commission Decision of 20 December 2011 on application of article 106(2) of the TFEU to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest;
- European Union framework for state aid in the form of public service compensation;
- Communication from the Commission on the application of state aid rules to public service broadcasting; and
- Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between member states and public undertakings, as well as on financial transparency within certain undertakings.

SGEI in Montenegro may be awarded either by legislation conferring the obligation to perform SGEI on a public undertaking, or by a public contract on the basis of the Concessions Act or the Act on Participation of Private Sector in Provision of Services in Public Interest.

The government has amended the laws regulating ports, theatres and sports to align them with the rules on compensation for the SGEI. Further alignment through amendments of laws on public broadcasting services, utility services and postal services is under way.

Considerations for aid recipients

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

Generally, businesses do not have a legal right to obtain state aid, unless they meet the requirements set out in an aid scheme defined in a law or other legislation. The relevant legislation often defines the level of the authority's discretion in granting the aid. By way of example, the IDF, in its Decision on financial support for 2016, stipulated that there is no right to a loan, but the IDF will decide on the basis of each individual request. On the other hand, the conditions the beneficiaries must fulfil to receive fiscal aids are set out in the relevant statutes and the authorities do not have any discretion if the beneficiary qualifies to receive aid.

The authorities have wide discretion in deciding to grant individual aid, with the obligation to respect the provisions of the State Aid Control Act and the relevant implementing legislation, including the principles of transparency and equal treatment.

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

The criteria the authorities will consider before making an award depend on the nature and objectives of the aid. The State Aid Decree and the relevant provisions from the List of State Aid Rules define conditions and criteria for granting particular types of aid.

The government is aiming to increase the share of horizontal aids in the overall amount of state aid granted. Particularly important objectives are job creation and safeguarding, protection of the environment and investment in production of energy from renewable sources. Investments in the northern region, the most underdeveloped region in Montenegro, are especially encouraged and supported.

Authorities will also, where applicable, pay attention to the contribution of the project to R&D and innovation, particularly with regard to small and medium-sized enterprises. Advantages are usually given to undertakings applying for state aid for the first time.

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

Applicants for state aid should, primarily, carefully consider the legal framework and the conditions set in the regulations relevant to the area in

which they wish to apply for aid. The best strategy is to subsume the application within one of the existing aid schemes, or to show in the application that the aid is in line with the conditions set out in the State Aid Decree or the List of State Aid Rules for particular types of aid or sectors of industry.

When applying for an individual aid, applicants should submit a complete, realistic and clear application and demonstrate the alignment of the project with a certain national or regional strategy or a defined policy objective. State aid grantors are obliged to submit to the SACC the analysis of effects of aids they notify, with the description of the expected effects and the parameters for their monitoring. Therefore, an economically well-founded analysis of expected effects of the project would help to obtain a positive decision of the SACC.

Aid applicants should communicate with the granting authority to collect as much information as possible, and may also consult the state aid inventory available on the SACC website to gain insight into the type of projects and sectors that have been funded.

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

Remedy mechanisms in cases of refusal to grant aid are available when there is a legally defined obligation of an authority to grant aid, and the respective beneficiary fulfils all the statutory eligibility conditions. Refusal to grant aid may be challenged in the administrative procedure. An appeal to the administrative act of the authority by which the granting of aid was refused may be submitted to the hierarchically higher administrative body. If there is no such body or the appeal is not allowed in accordance with the special law regulating the particular administrative area, then the unsuccessful applicant may file a claim before the Administrative Court in line with the rules governing judicial review of administrative decisions.

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

Montenegro does not yet have the obligation to notify the European Commission.

In the procedure before the SACC, the State Aid Control Act stipulates that the aid grantor and the recipient have the right to participate in the assessment procedure, without the right to vote. The Unit often communicates closely with the aid grantors and potential recipients to remove the evident irregularities before the decision-making of the SACC. This has particularly been the case in complex state aid cases such as those involving rescue and restructuring plans.

Strategic considerations for competitors

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

Any natural or a legal person or their association whose interests may be affected by the granted state aid may initiate proceedings before the SACC.

The interested party may initiate the proceedings by submitting to the SACC information and supporting documents showing that the granted state aid is unlawful, incompatible or implemented outside the purpose for which it was granted. The SACC will forward the information and documents to the aid grantor with the request to respond within 30 days. The SACC has to adopt a decision within 60 days from receiving the grantor's opinion, or within 60 days from the expiration of the 30-day time limit if the grantor fails to respond.

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

The transparency of the state aid granting process has been significantly improved by the requirements of the EU accession process. The SACC publishes all of its decisions, including the reasoning behind them, on its website. The Unit within the Ministry of Finance has a statutory obligation to keep state aid records in the form of an inventory that is published on the SACC's website. The inventory contains information on the grantor and legal basis for granting aid, the programme or project and its duration, the amount and duration of aid, the primary objective of aid, the type and form of aid, as well as the sector in which it was granted.

However, since the inventory is updated on an annual basis, these data are not always available in a timely manner. The inventory also does not contain information regarding aid granted on the basis of approved

schemes. This information is published by the grantors, although it is often difficult to find the information on their websites.

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

The Free Access to Information Act (OGM 44/12) stipulates the right of any national or foreign natural or legal person to access the information in possession of public authorities, and regulates the procedure for such access. Access to information may be limited or prohibited on the grounds of prevailing public interest in exceptional cases for the purpose of protection of information on the basis of the Personal Data Protection Act (excluding the information on funds granted from the public resources, except for the purposes of social benefits, health protection and protection from unemployment). Access to information may also be denied on the grounds of national security, protection of criminal investigations, protection of professional duty and protection of commercial and other economic interests regarding the protection of competition and intellectual property rights.

In practice, public authorities often widely interpret these exceptions to deny information on the grounds of public interest, or do not respond to requests timely or at all. The refusal to grant the request or the failure to respond may be challenged before the Administrative Court.

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

Information about unlawful or incompatible aid may be obtained from the financial statements and annual work reports of those aid grantors or beneficiaries that are obliged to publish those reports. Depending on the form and type of aid, information on illegal aid (ie, aid that is both unlawful and incompatible; see questions 8 and 31) may be difficult to infer from those statements.

Financial statements of public authorities, including public undertakings, are subject to audit of the State Audit Institution, and information on unlawful or incompatible aid may sometimes be obtained from the audit reports.

Media may be a useful source of information on unlawful state aid and there have been cases where the SACC initiated the procedure on the basis of information obtained from media reports.

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

We are not aware of any cases where complainants addressed third parties to point out illegal aid. Since the interested parties may initiate the procedure before the SACC, it may be possible for a complainant to approach such other interested parties to exert more pressure on the SACC.

Furthermore, members of parliament from opposition parties have raised the issues of unlawful, incompatible and, in their opinion, inefficient state aid several times within the scope of parliamentary questions.

Private enforcement in national courts

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

Private enforcement of state aid rules has not yet been developed in Montenegro and there is no case law on this topic.

Generally, the competence of a court would depend on the nature of the act by which the disputed aid was granted. If the aid was granted in by an administrative act in the exercise of the public authority's powers, such administrative act can be challenged before the Administrative Court. Any natural or legal person whose right or legal interest was infringed by an administrative act has the right to challenge such administrative decision in court. The challenge can also be mounted by a public prosecutor or a state authority for the protection of public interest.

If the aid was granted by virtue of a contract in cases where the authority does not exercise its public powers, a claim for declaration of the contract's nullity can be brought by any interested party before basic civil courts.

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

A private enforcement action may be brought on the grounds of the administrative law in the procedure of judicial review of the administrative act by which the challenged state aid was awarded.

The right to claim damages is not regulated in the State Aid Control Act. Thus, a private enforcement action could arguably be brought only on the basis of the general rules on tort liability found in the Obligations Act following the adoption of a final and enforceable decision by the SACC or the Administrative Court. If the plaintiff files a stand-alone action without prior application to the SACC or the Administrative Court, the civil court would have discretion to either resolve the preliminary issue itself or suspend the proceedings until the issue is resolved before the competent authority. Bearing in mind the lack of experience of the courts in Montenegro with state aid issues, a civil court is more likely to refer the plaintiff to the SACC to resolve the preliminary issue.

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

In the judicial procedure before the Administrative Court, the state authority that adopted the challenged act defends the action on its legality. The aid recipient, as the party that would suffer damage from the annulment of the challenged act, also has the right to participate as a party to the judicial proceedings.

In a private action for declaration of nullity of a contract representing state aid, both contractual parties (the aid grantor and the aid recipient) would be in the role of defendants. In a civil law action for damages, the defendant could be either the grantor or the state aid beneficiary. Any third party that demonstrates its legal interest has the right to intervene.

23 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 EU state aid rules or the standstill obligation within the meaning of article 108(3) TFEU may not be invoked directly before the national courts. We are not aware of any private actions where such requests were filed before the national courts on the basis of the State Aid Control Act.

24 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?

There is no official mechanism for referring a state aid question to the Commission since Montenegro is not yet an EU member state.

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

As there are no special procedural rules for private enforcement of state aid rules, general rules of procedure apply. In the proceedings for judicial review of the administrative act granting the aid, the plaintiff is obliged to submit a reasoned complaint. Each party bears a burden of proof with regard to the facts it has alleged, and the Administrative Court assesses if the authority that adopted the challenged act correctly established the facts, correctly applied the substantive provisions and complied with all the procedural rules. In civil proceedings for declaration of nullity of a contract and in civil proceedings for damages, the plaintiff bears the burden of proof. Discovery or disclosure procedures are not available. The party claiming that the opposing party, a third party or a state authority is in the possession of the relevant evidence may request the court to order the delivery of such evidence or to obtain evidence ex officio from another state authority.

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

As there has been no practice with private enforcement, one cannot assess the role of economic evidence other than to say that the judges are not used to admitting and evaluating economic evidence. They instead engage in a purely formalistic approach and assess the legality of a measure. Nevertheless, it is possible to present the economic evidence before the court, as well as to use expert witnesses.

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

There are no binding time limits for the courts to decide either in the first instance or upon appeal in any of the relevant procedures (judicial review and civil litigation). The average duration of the administrative dispute is six months. All the courts have a declaratory duty to conduct the

Update and trends

Montenegro continues to harmonise its legislation and strengthen its institutions to improve state aid enforcement. Amendments to the State Aid Control Act are planned for the second half of 2016, with special emphasis on creating the preconditions for successful recovery of incompatible aid.

The trend in previous years was towards the overall decrease in the amount of granted state aid, which in 2014 amounted to 0.83 per cent of GDP, in comparison to 3.02 per cent of GDP in 2013. Another trend is the decrease of sectoral aids and 'bad' rescue and restructuring aid, and more emphasis on horizontal aids with the aim to encourage investment and growth.

At the end of 2015, the government adopted a scheme in the form of a Decree on Direct Investments into production and services, for financing of projects that contribute to creation of jobs and to economic and regional development.

An important upcoming case of state aid in the energy sector will be the construction of the second unit of the power plant Termoelektrana Pljevlja, and the SACC will decide on the compatibility of aid when the selection process of the winning bid is complete.

proceedings within a reasonable time frame. Without the relevant case law in the area of state aid, one cannot give a practical insight into the duration of proceedings.

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

Pursuant to the Administrative Judicial Review Act, the plaintiff may petition the administrative authority whose act has been challenged to suspend the enforcement of the challenged act. If this measure is not adequate to prevent irreparable damage to the plaintiff, the plaintiff may petition the Administrative Court to provisionally regulate the disputed situation until it decides on the challenge. The Administrative Court will grant the request if such enforcement would cause irreparable damage to the plaintiff and the suspension is not in conflict with the public interest and does not cause material irreparable damage to the defendant.

In civil litigation, interim relief may be granted pursuant to the parties' request or by the court ex officio. Generally, the conditions for granting interim relief are *fumus boni iuris* and *periculum in mora*. The requirements of *periculum in mora* and *fumus boni iuris* may be waived if the claimant places a guarantee in the amount of the damage that the defendant could suffer as a result of the interim measure. A request for an interim measure will not be granted if the defendant offers an adequate guarantee. The defendant is entitled to damages suffered as a result of the interim measure if it is later established that the measure was unfounded or unjustified.

29 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?

There have been no cases in which competitors filed for damages for award of unlawful state aid or a breach of the standstill obligation pursuant to the State Aid Control Act.

The Administrative Court in charge of judicial review of administrative acts granting illegal state aid can award damages when deciding on the legality of an administrative act by which the aid was granted or approved if the facts of the case are sufficiently clear to allow for the determination and calculation of damages. Otherwise, the court will refer the successful plaintiff to civil courts.

Pursuant to the Obligations Act, a legal person, including the state, is responsible for the damage that its body has caused to the injured party when performing tasks entrusted to that body. A successful plaintiff would have to prove the existence of the damage and that it was caused by the illegal state aid granted by the state. Damages encompass both actual damages and lost profits.

There is no experience with calculation of damages, given that there have been no cases so far.

State actions to recover incompatible aid

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

The recovery of incompatible aid is regulated by the State Aid Control Act. When the SACC adopts a decision on incompatibility of aid, it may order the grantor to recover the granted aid without delay and to terminate any further provision of aid on the same grounds. If the grantor fails to comply with this order, the SACC will notify the government or the competent local self-government body and propose the measures to be taken. The statute of limitations for the recovery of aid is 10 years.

There are no procedural rules in place for the recovery of aid. Thus far, the only recovery order by the SACC was not enforced, and the state instituted the bankruptcy procedure against the company in question.

31 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 the State Aid Control Act (see question 30). The SACC may declare the aid incompatible and order its recovery both in the case of the unlawful aid (ie, state aid that has not been notified) and in the case of incorrect use of the approved aid. The SACC will first give an opportunity to the grantor to correct the irregularities within the specified deadline, and the recovery order will be issued if the grantor fails to comply with the SACC's request.

32 How is recovery effected?

There are no precedents to this effect. We think that the authority would be authorised to conduct, on the basis of a final and enforceable administrative decision, the administrative enforcement procedure for recovery of aid capable of being recovered in that manner (eg, repayment of subsidy to the

state budget). If recovery cannot be enforced against the beneficiary's bank account, the authority would have to initiate general enforcement proceedings and seek collection from the proceeds of the beneficiary's assets. In case of the permanent inability of the beneficiary to pay, the state may initiate the bankruptcy proceedings as a creditor.

If the authority has requested a guarantee for the implementation of the project for which the aid was granted, the recovery may be effected through the activation of the guarantee.

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

The beneficiaries may initiate judicial review proceedings before the Administrative Court against the decision of the SACC ordering the recovery. There are no precedents to this effect.

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

It may be possible to obtain an interim relief against a recovery order on the basis of the general rules on interim relief in the proceedings for judicial review of administrative acts before the Administrative Court (please see question 28).

The authorities have not yet had an opportunity to rule whether the aid recipient that had to repay incompatible aid is entitled to damages from the grantor that failed to clear the aid. Given that the state is responsible for the damage caused by a public authority to a private person in the performance of its statutory duties, the beneficiary that suffered the damage as a consequence of the obligation to return the incompatible aid should be able to bring an action for damages against the public authority that granted such aid.



Advokati / Attorneys at Law
Belgrade • Podgorica • Banja Luka

Bisera Andrijašević

bandrijasevic@bdklegal.com

Bul. Džordža Vašingtona 51
81000 Podgorica
Montenegro

Tel: +382 20 230 396
Fax: +382 20 230 396
www.bdklegal.com

Getting the Deal Through

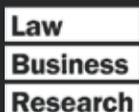
Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



State Aid
ISSN 2056-4155



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law