

# 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

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

# Serbia

**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 country for EU membership, Serbia undertook, by signing the Stabilisation and Association Agreement (SAA), to harmonise its legislation with the *acquis communautaire*, including the rules on competition and state aid. Alignment in the area of state aid is prescribed by article 73 of the SAA and Protocol V covering rules for state aid in the steel sector, as well as article 74 stipulating the application of the EU rules to public undertakings. Serbia is obliged to apply the criteria for assessment of state aid procedures that are in line with articles 106 and 107 of the Treaty on the Functioning of the European Union (TFEU), as well as the relevant EU instruments for implementation and interpretation of these rules. To date, Serbia has to a certain extent aligned its state aid legislation with the *acquis*. However, the country still has to align certain important aspects of state aid legislation, most notably by repealing the exemption from the application of state aid rules to undertakings under privatisation and aligning the rules granting special or exclusive rights to numerous state-owned enterprises.

In accordance with its obligation pursuant to the SAA to confer the implementation of state aid rules to an operationally independent body, the government established the State Aid Control Commission (SACC). However, its operational independence is still to be strengthened through its enforcement record. The SACC lacks mechanisms to obtain information regarding all state aid granted without prior notification, as there are no repercussions for state authorities that fail to comply with the notification obligation.

On the basis of the SAA state aid transparency provisions, Serbia submits to the European Commission regular annual reports prepared on the basis of the methodology and presentation of the EU state aid overview. Furthermore, the national state aid authorities are obliged to regularly exchange information with the European Commission on individual state aid cases to strengthen the state aid enforcement track record. The European Commission assesses the progress in this area regularly in its annual progress reports.

The amount of state aid has been increasing in the past three years, and in 2014 the total state aid amounted to 2.74 per cent of GDP. A large portion of this aid, 31 per cent, was granted to the sector of agriculture in the form of subsidies. Many of the state aid schemes, and especially fiscal aid, still need to be aligned with the state aid rules.

Serbia has not yet complied with the requirement of article 73(6) of the SAA to establish a comprehensive inventory of aid schemes within a period of no more than four years from the entry into force of SAA (which expires on 1 September 2017).

Since the concept of the general prohibition of state aid was introduced in Serbia only with the start of the European integration process, state aid grantors and beneficiaries are still not sufficiently familiar with the notion of state aid and substantive and procedural state aid rules. The SACC still dedicates a lot of its efforts to the ex post assessment of state aid awarded without prior notification, which is why the advocacy of the importance of state aid control is still an important task for the government. However, to advocate this successfully, the SACC must first strengthen its operational independence and institutional capacities.

### 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. The SACC is competent to monitor the implementation of the State Aid Control Act and to approve state aid schemes and individual aid. The SACC has five members who are appointed on the proposal of the Ministry of Finance, the Ministry of Economy, The Ministry of Construction, Transport and Infrastructure, the Ministry of Agriculture and Environmental Protection, as well as the Commission for Protection of Competition.

The State Aid Control Unit (the Unit), an organisational unit within the Ministry of Finance, performs the administrative and technical tasks for the SACC. The Unit, inter alia, prepares the basis for the SACC's decision-making in communications with state aid 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?

Aid may be granted on the national level, on the level of the autonomous province of Vojvodina, on the level of local self-government units and by legal entities in charge of the management of state resources, such as state-owned companies and public entities providing services of general economic interest (SGEI).

The main grantors of state aid are the ministries (most notably the Ministry of Economy), the Tax Administration, the Development Fund of the Republic of Serbia, the National Employment Office, the Development Agency (formerly known as the Agency for Foreign Investments and Promotion of Export), the Serbian Export and Credit Insurance Agency, the government of the Autonomous Region of Vojvodina and the local governments.

### 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 (Official Gazette of the Republic of Serbia (OGRS) 51/2009), with the exception of the sectors of agriculture and fisheries for which special rules apply. Detailed criteria, conditions and manner of granting state aid are stipulated by a Government Decree on Rules for Granting State Aid (OGRS 13/2010, 100/2011, 91/2012, 37/2013, 97/2013 and 119/2014) (the State Aid Decree) and in the Decree on the Manner and Proceedings for Notification of State Aid, adopted for the implementation of the State Aid Control Act.

State aid can be granted on the basis of a public act, whether a law or a by-law adopted by a competent state authority. Rules on the basis of which state aid may be granted can be found in several sector-specific statutes and regulations in various economic sectors. Specific aid measures may also be granted on the basis of schemes defined in special programmes for pursuing different socio-economic objectives adopted by the competent authorities, or on a basis of public contracts for the provision of a certain legally conferred SGEI. Fiscal aid may be provided on the basis of the Corporate Income Tax Act and Tax Procedure and Administration Act, as well as the Personal Income Tax Act.

The General Administrative Procedure Act applies to all procedural matters that are not regulated in the State Aid Control Act or another special statute regulating a particular state aid scheme.

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

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

As a candidate country, Serbia does not have the obligation to directly implement the European state aid rules. However, in accordance with the obligations of the SAA, it has to a certain extent harmonised its legislative framework with the European state aid rules.

The State Aid Control Act regulates the general substantive and procedural framework for granting state aid in line with the EU *acquis*.

The State Aid Decree regulates the detailed criteria, conditions and manner for granting state aid. Grantors may award the regional, horizontal, sector-specific or *de minimis* aid on the basis of the conditions specified by the State Aid Decree. The Decree was amended to include the application of state aid rules to compensation for provision of SGEI and most recently to align the provisions on *de minimis* aid with the *acquis*. *De minimis* aids no longer have to be notified to the SACC. The State Aid Decree must be further amended to repeal the exemption of undertakings under privatisation from the application of state aid rules.

## Programmes

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

The European Commission has no competence to approve state aid schemes. Instead, the SACC assesses and approves state aid schemes, as well as individual exemptions.

National schemes that have been approved by the SACC are mainly aimed at promotion of economic development and attracting investments, creation of jobs, regional aid for underdeveloped areas, and culture and media.

One of the most significant existing schemes is the Decree on conditions and manner of attracting investments, available only for companies registered in Serbia, irrespective of whether they have domestic or foreign capital. The scheme offers a new set of incentives to greenfield and brownfield investors, in the form of non-repayable grants. Incentives are available in support of investments in the production sector (with the exception of certain excluded industries) and in electronically provided export-oriented services.

Other significant schemes include incentives for investors to produce audiovisual works in Serbia, granting loans for promotion of the quality of the touristic offer, financing and co-financing of cultural programmes and projects, aid for promotion of competitiveness and internationalisation of the Serbian economy, as well as the annual aid programmes for granting of loans, developed by the Serbian Development Fund.

There are no schemes for R&D&I, and the state did not grant any aid for these purposes in 2014 and 2015, while the amounts granted before 2014 are negligible.

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

There are no special rules for the implementation of the GBER in Serbia.

## 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?

State-owned enterprises and the special or exclusive rights that they enjoy have a strong tradition in Serbia because of the country's history as a state-run economy. With the transition to a market economy, the state's influence has been declining as a consequence of privatisation processes. However, there is still a large number of undertakings enjoying special or exclusive rights, particularly in sectors such as energy, mining, transport, infrastructure, postal services, telecommunications, broadcasting, agriculture and environment.

State-owned media companies receive substantial state aid, which is not sufficiently transparent and often not notified to the SACC. State aid rules were not applicable to state-owned companies until 1 January 2012. This changed with the amendments of the State Aid Decree. However, the thresholds for the maximum amount of state aid that may be granted to these companies for provision of services of general economic interest (€15 million), even though in line with the *acquis*, is high given the size of the Serbian economy, and such aid may distort competition in the market. The government recently adopted a new set of media laws to align this area with the State Aid Control Act.

Another problematic issue is state guarantees for state-owned enterprises, which in many cases constitute unlawful state aid. Such guarantees were, in many cases, activated, becoming public debt of the Republic of Serbia. Companies operating in the energy, transport, copper and steel sectors were those that received aid in this form the most.

There is a large presence of non-returnable subsidies granted to state-owned companies that have been in temporary privatisation restructuring for more than 10 years. These subsidies come in the form of:

- direct grants from the budget;
- loans granted nominally by the Development Fund from the state budget, which the state never reclaims;
- outstanding payables to state-owned utilities, which these utilities do not enforce; and
- unpaid taxes that the tax authority does not pursue.

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

State compensation for provision of SGEI is very significant in Serbia, on the national, regional and local levels. However, the concept of SGEI and the *Altmark* criteria have been introduced only recently in terms of the harmonisation process.

State aid for services of general economic interest is regulated in the State Aid Decree in accordance with the *Altmark* criteria. The aid awarded on the basis of these provisions is not considered to constitute state aid and does not have to be notified to the SACC.

Provision of SGEI may be conferred on the basis of the legislation regulating particular sectors. Provision of SGEI may be conferred by means of a decision of the government or, as the case may be, the local self-government unit, or by means of a contract with the services provider. For example, the Energy Act (Official Gazette of the Republic of Serbia 145/2014) provides the basis for the provision of SGEI in the energy sector. The public service obligation prescribed by the Energy Act must be clearly defined, transparent, non-discriminatory, measurable, limited in time and must guarantee the equality of all energy entities in provision of public services, without influencing the ability of new competitors to enter the energy market. The guaranteed supplier that performs the public service of supply of electricity for households and small purchasers of electricity is selected by public tender. The Energy Act also contains the provisions aimed at avoiding overcompensation.

## 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. The right to aid exists when the applicants meet the requirements set out in an aid scheme defined in a law or other legislation adopted by the aid grantor. The relevant legislation often defines the level of the authority's discretion in granting of aid.

In the cases of SGEI, the conditions for compensation for the provision of those services are defined in the act conferring on the undertaking the right to provide the service.

In cases of individual state aid, the authorities have wide discretion in deciding to grant 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 national authorities will consider before making an award depend on the nature and objectives of the aid in question.

When state aid is awarded on the basis of an aid scheme, the applicant must meet the requirements specified in such scheme. The quality of the

project and the experience of the applicant nominally play a decisive role in the selection process. However, the historical presence of political favouritism in the aid-granting processes in almost any sector cannot be ignored.

Job creation is an important criterion for granting of aid with the objective of economic and regional development, and often such schemes include a requirement to safeguard the jobs created within the project for a certain number of years. Undertakings may be considered ineligible to receive aid if they are in difficulties (except for the rescue and restructuring aid), if they have outstanding debts to the state, if they have already received state aid for the same investment or are subject to the obligation to repay illegally received state aid.

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

The best strategy for applicants 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 for particular types of aid or sectors of industry.

When applying for individual aid, applicants should aim to submit a complete, realistic and clear application in accordance with the provisions of the State Aid Decree. They should demonstrate the sustainability of the project and its alignment with a certain national or regional strategy or a defined policy objective and the expected contribution of the aid to the achievement of that objective.

Aid applicants are advised to communicate with the granting authority to collect as much information as possible.

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

The available remedy for an authority's refusal to grant aid depends on the type and nature of the 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 meets all the statutory eligibility requirements. When an authority refuses to grant aid by means of an administrative act, such refusal may be challenged in the administrative procedure, usually in an appeal to a 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?**

Given that Serbia is not yet an EU member state there is no obligation to notify the European Commission.

In cases before the national authorities, the State Aid Control Act stipulates that the state aid grantor and the recipient have the right to participate in the assessment procedure before the SACC, without the right to vote.

### **Strategic considerations for competitors**

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

Any person whose interests may be affected by the granted state aid may initiate proceedings before the SACC for ex post control of granted state aid.

The SACC will forward the information and documents to the aid grantor with a request for a response within a set deadline. The SACC will adopt a decision within 60 days from receiving the grantor's opinion or within 60 days from the expiration of the deadline that was given to the grantor. The competitors may challenge the SACC's decision in judicial review proceedings before the Administrative Court.

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

Transparency of state aid is one of the requirements laid down in the SAA. The transparency of the state aid granting process has been improved in recent years as a result of requirements of the EU accession process. The

SACC publishes all decisions, including the reasoning behind them, on its website.

The Ministry of Finance and the SACC do not keep a comprehensive inventory of awarded state aid. The SACC only publishes annual lists of beneficiaries of de minimis aid.

It is quite difficult to find out about aid that has not been notified to the SACC. Competitors and even the SACC itself often obtain information about state aid from the media or the websites of grantors. Government officials often reveal state aid in political speeches.

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

The competitors may request the access to file on the basis of the Free Access to Information in Public Interest Act (Official Gazette of the Republic of Serbia 120/2004, 54/2007, 104/2009 and 36/2010). This Act 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. The access to information may be limited or prohibited on the grounds of prevailing public interest in exceptional cases for the purpose of protection of life, health and safety of individuals, national security, protection of due course criminal investigations, protection of professional duty and protection of commercial and other economic interests of the Republic of Serbia. The government relies on these exceptions extensively and the Freedom of Information Commissioner has been very busy with issuing disclosure orders and fines for non-compliance.

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

Information about unlawful aid (state aid that has not been notified) or incompatible aid (state aid that is not in line with the state aid rules) may be obtained from the financial statements and annual work reports of aid grantors or beneficiaries, to the extent to which they are obliged to publish those reports. Also, depending on the form and type of aid, the information on illegal aid (state aid that encompasses both unlawful and incompatible aid) may be difficult to infer from those statements.

Media may be a useful source of information on illegal 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 the illegality of aid. Since the interested parties may initiate the procedure before the SACC, it may be possible for a complainant to approach other interested parties to exert more pressure on the SACC.

However, the European Commission politically intervened with the Serbian government on several occasions involving state aid, such as in 2014, when the Serbian government undertook to extend to Fiat financial support in the total amount of €14 million on the conditions that Fiat employs a certain number of people within the said period, offers a €3,000 discount to the resale price of its new car model 'Nacionale 500L' on the Serbian market and ensures that commercial banks and leasing companies offer financing to Serbian buyers for the purchase of the said vehicle on favourable terms. The European Commission assessed that the state aid to Fiat was not in line with the SAA, and exerted political pressure on the government of Serbia to reconsider the aid measure. The measure was subsequently repealed by the government. The measure created uproar in the Serbian Association of Car Importers.

Furthermore, members of parliament from the opposition parties, as well as political analysts, have raised the issues of unlawful, incompatible and, in their opinion, inefficient state aid several times in parliamentary questions to the government.

### **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?**

Generally, the competence of a court depends on the nature of the act by which the disputed aid was granted. If the aid was granted by an administrative act in the exercise of the public authority's powers, the complaint should be brought before the Administrative Court. However, if the aid was granted by virtue of a contract in cases where the authority does not



### Update and trends

The priority of national authorities in Serbia is to continue with the harmonisation of state aid rules with the acquis. With that aim, the government plans to adopt a new State Aid Decree, as well as special decrees containing rules for awarding state aid in the sector of transport, rules for state aid for SGEL, as well as a separate decree on de minimis aids.

The government also plans to establish a comprehensive inventory of all state aid granted on the national, regional and local levels.

The most important task remains to raise awareness and to increase the discipline of state aid grantors to notify their aid schemes and individual aids prior to granting, to strengthen the enforcement of state aid rules and decrease the negative effects that state aid currently has on competition in the various markets in Serbia.

exercise its public powers, such complaints could be brought before basic civil courts. Any natural or legal person that suffered damage as a result of the award of state aid may bring an action for damages before basic civil courts.

Depending on the competence of the court, the legal standing of complainants is defined in the Administrative Disputes Act or the Civil Procedure Act. Any natural or legal person with a legal interest, which includes competitors of the beneficiary but presumably also any other natural or legal persons able to demonstrate a legal interest, may bring a claim against the award of a state aid measure in civil or administrative proceedings, as the case may be.

Private enforcement of state aid rules has not yet been developed in Serbia. To our knowledge, only one action against an approved state aid measure has been brought before the national courts to date, but was ultimately withdrawn by the claimant.

In 2012, two competitors of the state-owned media company Tanjug claimed that this company received unlawful state aid for provision of SGEL and requested that the SACC investigate the case. The SACC dismissed the request as unfounded, and the competitors challenged this decision before the Administrative Court. The Administrative Court annulled the contested decision and the SACC complied with the Court's decision on annulment, but it never adopted a new decision on the contested state aid.

There have been no published cases where competitors sued the aid grantor or aid recipient for damages or for declaration of nullity of a contract giving rise to state aid.

### 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 standalone action without the prior application to the State Aid Control Commission of 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 the 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. Any party that would suffer damage from the annulment of the challenged act has the right to participate as a party to the judicial proceedings.

In a private action in civil proceedings, the defendant is the natural or legal person against whom the action was filed. 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?

Neither the EU state aid rules nor the standstill obligation within the meaning of article 108(3) TFEU may be invoked directly before the national courts. We are not aware of any case law 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 European Commission since Serbia 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 administrative judicial review, the Administrative Court carries out a comprehensive overview of all the relevant facts. 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 established the facts correctly, correctly applied the substantive provisions and complied with all the procedural rules. Therefore, the party claiming the existence of illegal aid must provide sufficient evidence to that effect. In the absence of any relevant case law in Serbia with regard to private enforcement of state aid rules, it is difficult to say how easy the burden of proof would be to discharge or if there would be any alleviation of the standard of proof by the courts. 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 that the court order the delivery of such evidence or 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 as 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 in line with the relevant substantial and procedural provisions. 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 deadlines for the courts to decide either in the first instance or upon appeal. The average duration of the judicial review proceedings is two years. 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?

In the ex post control procedure of unlawful aid, the SACC has the authority to order the grantor to provisionally stop the granting of aid until the SACC decides on its compatibility with the State Aid Control Act. The SACC will order such interim measure if it assesses that the further granting of aid may seriously distort the competition on the market.

In civil litigation proceedings, 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*. However, where the claimant makes probable that the defendant will only suffer negligible damage as a result of the interim measure, he or she need not fulfil the *periculum in mora* requirement. The requirements of *periculum in mora* and *fumus boni iuris* may, however, be waived if the claimant places a guarantee in the amount of damage that the defendant could suffer as a result of the interim measure. Instead of requiring the court to adopt an interim measure, the claimant may accept a guarantee placed by the defendant.

Interim relief in administrative proceedings may be granted under the same conditions as described above. However, it should be noted that in administrative proceedings, the court may suspend the implementation of

the administrative act in question where a party can prove the existence of periculum in mora, and where the suspension of the administrative act is not contrary to public interest and where it does not cause the other party irreparable and significant damage.

The party that was against the interim relief has the right to obtain damages it suffered as a result of the interim measure, if it is later established that the measure was unfounded or unjustified.

We are not aware of any requests for interim relief having been filed to prevent or suspend the granting of unlawful aid, or that any such measures have been ordered by national courts.

**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 where 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 unlawful 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.

The Obligations Act stipulates that a legal person is responsible for the damage its bodies cause to third parties, when such damage was caused by or in relation to the performance of its tasks. This provision applies accordingly to the state. However, applicants are highly unlikely to be successful with such a claim in state aid cases. They would have to prove the existence of the damage and that it was caused by the illegal state aid.

Damages encompass both actual damages and lost profits. There is no experience with calculation of damages, given that there have been no cases as yet.

**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. In a decision pronouncing the aid incompatible with the law, the SACC may order the grantor to recover the granted aid and to stop any further granting of aid that has not yet been transferred to the beneficiary. The amount of aid to be recovered is the amount of transferred aid from the day when the aid was awarded until the day of recovery with calculated interest. The statute of limitations for the recovery of aid is 10 years.

The SACC will communicate its decision to the state audit institution, as well as the state body in charge of the budget inspection, or, as the case may be, the relevant body of the autonomous province of Vojvodina or the local self-government unit. The SACC will also inform the government about the recovery order.

There are no adequate detailed procedural rules in place for the recovery of aid. There were no cases to date in which the SACC ordered the recovery of aid.

**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).

**32 How is recovery effected?**

There have been no cases of recovery of aid so far. It is not possible for the grantor to recover aid on the basis of a unilateral administrative decision adopted pursuant to the SACC's decision ordering the recovery. Therefore, the authority would need to seek the recovery of the granted aid before the competent civil court.

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

The beneficiaries may initiate the administrative judicial review before the Administrative Court against the decision of the SACC ordering the recovery. As there were no cases of requests for recovery of aid, 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 of the administrative procedure before the Administrative Court.

The authorities have not yet had an opportunity to rule on whether the aid recipient that has to repay the incompatible aid is entitled to damages from the grantor that fails to clear the aid. The state is responsible for the damage caused by a public authority to a private person in the performance of its statutory duties. However, the State Aid Control Act stipulates the obligation of the grantor to deliver a copy of the SACC's decision to the beneficiary before the transfer of aid, or to inform it about where to obtain information on the contents of that decision. Therefore, it would be very difficult for the beneficiary to claim in good faith that it had no knowledge of the grantor's failure to obtain prior approval of the aid.



Advokati / Attorneys at Law  
Belgrade • Podgorica • Banja Luka

**Bisera Andrijašević**

**bandrijasevic@bdklegal.com**

Majke Jevrosime 23  
11000 Belgrade  
Serbia

Tel: +381 11 3284 212  
Fax: +381 11 3284 213  
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](http://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