

# State Aid

*Contributing editor*  
**Ulrich Soltész**



2018

GETTING THE  
DEAL THROUGH

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*Contributing editor*

**Ulrich Soltész**

**Gleiss Lutz**

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# Preface

## State Aid 2018

### Fifth edition

**Getting the Deal Through** is delighted to publish the fifth edition of *State Aid*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Romania and Greece.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Ulrich Soltész of Gleiss Lutz, for his continued assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
July 2018

# Austria

Bernt Elsner, Molly Kos and Marlene Wimmer-Nistelberger

CMS Reich-Rohrwig Hainz

## Overview

### 1 Outline your jurisdiction's state aid policy and track record of compliance and enforcement. What is the general attitude towards subsidies in your system?

The years 2013 and 2014 were characterised by cutbacks in the amount of subsidies granted by Austria. In 2015 and 2016, however, an increase of subsidies to €1.996 billion overall (excluding subsidies to the railway sector) stopped this negative trend. The amount spent in 2017 has not been published yet. In contrast to other EU member states, Austria is quite restrained in spending subsidies. For example, in 2016, Germany spent 1.31 per cent of its GDP on state aid and Austria only 0.56 per cent. Besides subsidies for agriculture and transport, large portions of subsidies were given to environmental protection, including energy saving, research and development, regional development, compensation for damages caused by natural disaster and small and medium-sized enterprises (SMEs), including risk capital. With regard to instruments, Austria mostly used grants, tax exemptions and guarantees.

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

Austria is organised as a federal state. Therefore, the federal government, as well as the regional governments, may grant aid. The EU State Aid Law department located at the Federal Ministry for Digital and Economic Affairs is the sole coordinator of communication with the European Commission (EC). Thus, it is the service and coordination office for all kinds of state aid matters, excluding aid in the agriculture sector. The EU State Aid Law department is also competent for aid granted by regional governments, municipalities and other state bodies.

The EU State Aid Department itself does not grant aid.

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

The competence for granting aid is split between the federal government and regional governments, municipalities and other state bodies. These institutions have to ensure compliance with EU state aid law and execution of aid in their jurisdiction on their own. Despite this federal system, in case of breaches of EU law and subsequent infringement proceedings, the Republic of Austria may be sued.

### 4 Describe the general procedural and substantive framework.

In Austria, there is no specific legislation that deals with state aid. There is only legislation on the regional level that deals with aid in specific sectors. Moreover, most of the aid granted is not governed by public law, but civil law (private sector administration). In most cases the procedural rules follow the Austrian Code of Civil Procedure, and the substantive rules follow the Austrian Civil Code. Disputes may therefore be raised before civil courts.

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

There is no specific national legislation implementing European state aid rules. However, the Transparency Database Act provides for the

implementation of a transparency database where information on granted aid has to be published. This database also intends to implement the central register of de minimis aid mentioned in article 6, paragraph 2 of the De Minimis Regulation.

## Programmes

### 6 What are the most significant national schemes in place governing the application and the granting of aid, that have been approved by the Commission or that qualify for block exemptions?

Currently, the most important schemes concern environmental protection, including energy saving, regional development, research and development and SMEs, including risk capital. While the scheme for rescue and restructure was very important because of the economic crisis in 2009 (€505 million), it had decreased significantly by 2016 (€0.8 million). In addition, the scheme for regional development has seen a significant decrease from €177.3 million in 2009 to €19.2 million in 2016. On the other hand, the scheme for culture increased from €13.5 million in 2009 to €69.3 million in 2016. Furthermore, Austria announced plans to invest around €1 billion into the development of broadband infrastructure based on its Broadband Austria 2020 agenda.

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

Austria has not put in place any specific rules on the implementation of the GBER.

## Public ownership and services of general economic interest (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?

Austria has some important undertakings that are funded by their shareholders (eg, Austrian Railways, Austrian Television). This is sometimes considered problematic by their competitors.

In recent decades, there has been a privatisation trend and, therefore, a decline of public influence. However, privatisation procedures raise some state aid issues. For example, when Bank Burgenland was privatised, the province of Burgenland did not accept the highest bid, submitted by a Ukrainian company, but instead accepted the bid of Austrian insurance company Grazer Wechsellseitige Versicherung (GRAWE). The bidder of the highest bid lodged a complaint with the EC and finally the European Court of Justice (ECJ) stated that the award to GRAWE constituted unlawful aid. GRAWE was obliged to reconstitute the aid.

However, in the past few years the privatisation trend has been reversed owing to the economic crisis. Austria had to intervene in order to prevent some major banks from insolvency and, therefore, public influence in the bank sector grew again.

As Austria, like many other countries, has a tight budget, the number of public-private partnership projects has recently been growing.

## 9 Are there any specific national rules on SGEI? Is the concept of SGEI well developed in your jurisdiction?

There are no specific rules on services of general economic interest. Therefore, EU case law, specifically the *Altmark Trans* decision and the state aid SGEI package of the EC, are relevant in Austria.

Based on the 2017 report of the European Committee of Regions about the implementation of the Decision and the Framework on SGEIs, Austria provides fewer details than other member states. For example, Austria has been criticised for the lack of reporting in the field of social housing. The committee assumed that funding of social housing exceeded the de minimis threshold; however, Austria did not report any SGEI in that field.

Owing to Austria being organised as a federal state, regions are entitled to grant aid and thus they may also provide information about their SGEI measures. So far, Tyrol and Lower Austria have done this. Tyrol provided details on two measures: one relating to medical care for disaster management and one regarding mountain rescue. Both measures were implemented through legislation (Tyrol Disaster Management Act 2006, Tyrol Emergency Services Act 2009). Lower Austria reported one measure relating to a garden show, which was entrusted by way of a civil law contract.

Moreover, the report of the Committee included a report from the Austrian Employment Service regarding the funding of skills training in health and social care and, since 2015, nursery education. This is an SGEI at a federal level. The entrustment was implemented through a funding agreement.

As all those contracts awarded in line with the *Altmark* criteria do not entail state aid, there is no publicly available information on them.

## 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?

There is no general legal right under Austrian law to receive state aid. However, if an undertaking fulfils the conditions set out in the state aid scheme in question, the authority may not decide freely but is bound by the principles of non-discrimination and equal treatment. Therefore, the position of the undertaking is relatively strong in this context and may lead to an entitlement to aid, even though it is not explicitly stipulated in the scheme.

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

Austrian law does not set out criteria that national authorities need to consider before making an award of state aid. Generally, it depends on the purpose of the particular state aid scheme. As in many jurisdictions, the authorities will often take innovation, employment and environmental issues into account.

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

Generally, there is public interest in supporting businesses, especially SMEs, innovations, employment and the environment. Therefore, Austria launched databases where the vast majority of available subsidies are listed. Its objective is to provide all state aid available for businesses on one single platform.

If the potential recipient applies for aid based on an existing scheme, then the most important aspect is to show that the relevant criteria are met. The authority is bound by the principles of equal treatment and non-discrimination; thus if the applicant can demonstrate that the criteria are met, the application is likely to succeed.

If the application is made for ad hoc aid, the application has a considerably poorer prognosis because the authority may argue that the award would raise EU law issues.

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

If the refusal to grant aid is an administrative decision, often one may be entitled to launch an appeal within the administrative system. Questions regarding the competence of the administrative court or authority depend on the body that denied the aid.

However, it is also possible that aid is awarded in private-sector administration. In this case, the authority does not issue a notice but renders its decision with an informal letter, which may be challenged before civil courts.

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

There is no publicly available information on this issue, but generally there is no formal right for the aid recipient to be involved in the EU notification process. The EU State Aid Law department is responsible for all types of notifications. It notifies both ad hoc aid and schemes via the EC's State Aid Notifications Interactive system. From a practical perspective, the EU State Aid Law department may be willing to interact with the applicant in ad hoc aid cases when the applicant holds the expertise necessary to succeed in the notification proceedings before the EC.

## Strategic considerations for competitors

### 15 To which national bodies should competitors address complaints about state aid? Do these bodies have enforcement powers, and do they cooperate with authorities in other member states?

In Austria, no specific authority is competent to decide on complaints from competitors of a state aid recipient. Austria grants state aid in various ways (by contract, legislation and notice). Therefore, legal protection depends on the *modus operandi*.

If state aid is granted via an administrative decision such as a notice, a competitor is not a party to this procedure. While Germany has already accepted that a competitor may challenge an administrative decision (granting state aid) before administrative courts, Austria does not have a similar legal protection (yet).

If state aid is granted by a civil law contract, a competitor may claim damages because of infringement of state aid as 'protection laws'. Therefore, the body granting the aid can be sued before civil courts.

If state aid is granted by legislation, a competitor would have to challenge the legislation before the Austrian Constitutional Court.

However, it will often be advisable to address the responsible authority directly before filing a claim. This may be particularly successful if made at the stage of negotiations.

If the aid was received unlawfully, the competitor may lodge a complaint with the EC.

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

In the course of modernising the EU State Aid Law, it became compulsory as of 1 July 2016 to publish all aid awards exceeding €500,000. The Transparency Award Module developed by the EC serves this publication obligation. There is no mandatory publication required for state aid below that threshold. Since state aid measures do not need to be approved by Parliament in every case, public records are only available to a very limited extent. However, the transparency database for aid in the agriculture sector is publicly available. This database publishes the names of all those receiving more than €1,250 of aid per year.

One publication that should also be noted in this context is the State Aid Scoreboard of the EC. The Austrian EU State Aid Law department reports annually on the total funding activities. These annual reports include information about the extent of aid, funded projects, a regional and sectoral breakdown and information on ad hoc aid.

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

There is no specific state aid-related Austrian legislation. The Austrian parliament worked on modifying the rules on 'official secrets' and the establishment of the obligation to inform on official issues for more than three years. However, in June 2017 the negotiations failed. Whether the new administration (in office since December 2017) will start new negotiations, remains unclear. In any case, since this reform requires a two-third majority the new administration will need the support of the opposition.



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

Apart from the possibilities mentioned above, certain types of companies have to register their annual reports and financial statements in the Company Register. Competitors may be able to obtain information about illegal state aid from these publicly available sources. However, it is quite hard to derive proof of (illegal) state aid from these documents.

Media articles and public statements by competitors or politicians may raise suspicions of illegal state aid; however, usually such information is very vague and does not allow precise conclusions.

In general, it can be a challenge for competitors to find out about illegal state aid.

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

It is possible to indicate the risk of illegal state aid to (potential) investors or other third parties. This risk includes the nullity of the respective contract as well as the risk of repayment of the aid received. However, competitors have to be cautious as such allegations may have consequences based on the Austrian Federal Act against Unfair Competition.

This Act stipulates that any party that alleges or disseminates facts about the enterprise of another in such a way that a third party becomes aware of it shall be liable for damages to the injured party unless such facts are demonstrably true. However, the party is only liable if the allegations have been made for competitive purposes.

### 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?

Apart from complaints before the EC, competitors (private undertakings) can – under certain circumstances – bring actions relating to state aid before the civil courts (for instance, an act of a state-owned undertaking taking discriminatory or favourable measures for the benefit of certain competitors may be appealed).

Apart from exceptional cases, individuals may not directly challenge legislation. Legislative provisions may be repealed by the Constitutional Court, which can be called upon by the competent court or the parties in the course of remedy proceedings.

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

Under private law, a competitor may, for example, file an action for omission. The most likely material basis for the claim for damages would, in our view, be articles 107 et seq of the Treaty on the Functioning of the European Union (TFEU).

As a general rule, the claimant bears the burden of proof for his or her arguments. The defendant will contest the claim by arguing that the claimant has not provided sufficient evidence that a certain measure constituted aid.

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

The defendant of actions challenging state aid is the body that has granted state aid.

In certain circumstances, it may also be possible to bring a claim against the state aid recipient. How and under which circumstances this may happen, however, has not yet been entirely clarified by Austrian courts.

### 23 Have the national courts been petitioned to enforce compliance with EU state aid rules or the standstill obligation under article 108(3) TFEU? Does an action by a competitor have suspensory effect? What is the national courts' track record for enforcement?

The number of court appeals against illegal state aid is still relatively low in Austria. Given the very different circumstances of the few individual cases, it is also difficult to give a general idea of a success rate. However, the awareness of state aid issues continues to increase with more literature and more cases in legal practice.

### Update and trends

In line with the Europe 2020 strategy, including the Digital Agenda, Austria notified the Austria Broadband 2020 scheme with the Commission (SA41175 (2015/N)). The objective of the scheme is to achieve full coverage with high capacity broadband networks. The overall budget amounts to €1 billion and consists of one-off non-refundable subsidies.

Additionally, Austria prolonged a scheme for supporting the development of connecting railways and transfer terminals in inter-modal transport from 2018 to 2022 (SA48390). This scheme aims to support the modal shift of freight from road to rail and water.

As to actions based on unfair competition, the Austrian Supreme Court has ruled that the promotion of other competition can constitute unlawful behaviour under the Austrian Unfair Competition Act. Whether other competition was promoted intentionally is, however, not relevant for the assessment; only the objective suitability of the behaviour to promote other competition is decisive. In any case, the Supreme Court has tolerated such behaviour if it is led by public interests outbalancing the negative effects (eg, securing livelihood).

However, the Supreme Court has ruled that an action for injunction provides legal protection until the Commission decides on a notification. The Supreme Court did not distinguish between aid being unlawful on procedural grounds or material grounds. Therefore, some scholars argue that it remains unclear whether a competitor may file an action regarding unlawful aid on procedural grounds based on article 108(3) TFEU in conjunction with sections 1 and 15 of the Austrian Federal Act against Unfair Competition.

Moreover, in cases where there has been no notification or where the Commission has not yet issued a decision, an action for repayment can be combined with a request for preliminary injunction. This might be particularly important since national courts must not stay their proceedings until the Commission has ruled on the compatibility of the aid. Where the court considers that the aid is unlawful on procedural grounds, it has to uphold the action, even though there is an indication that the aid is lawful based on material grounds.

### 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?

No, there is no such provision under national Austrian law. However, it might be possible to stay the proceedings based on section 190, paragraph 1 of the Austrian Code of Civil Procedure. This provision stipulates that a court may stay the proceedings if the existence or non-existence of a legal relationship is subject to another proceeding. The Austrian Supreme Court has already applied this provision. However, in the aforementioned case the proceeding was stayed owing to proceedings before the General Court, not the Commission.

Austrian courts may refer certain questions to the ECJ under article 267 TFEU (questions concerning the interpretation of the Treaties of the European Union and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union). Last-instance courts are obliged to refer questions relevant to the decision to the ECJ. Generally, Austrian courts are a bit reluctant when it comes to procedures under article 267 TFEU (eg, Decision of the Austrian Supreme Court 6 Ob 235/16a, where it stipulated that the legal situation is clear and therefore the procedure under article 267 TFEU is not required).

We are not aware of any proceedings in the area of state aid where the Commission acted as *amicus curiae*.

The filing of a complaint to the EC does not affect national civil proceedings.

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

As a general rule, the burden of proof rests on the claimant and the burden of disproving the claimant's arguments is borne by the defendant. This rule also applies to private enforcement proceedings concerning state aid. The claimant is, in particular, obliged to prove the existence of a measure that can be qualified as state aid, and that the aid was not duly notified.

**26 Should a competitor bring state aid proceedings to a national court when the Commission is already investigating the case? Do the national courts fully comply with the *Deutsche Lufthansa* case law? What is the added value of such a 'second track', namely an additional court procedure next to the complaint at the Commission?**

Currently, no Austrian case law refers to the *Deutsche Lufthansa* scenario. However, it is likely that the opening of a proceeding before a national court would not provide any benefit. The court will most probably stay the proceeding until the Commission has completed its investigation and has issued a decision (see question 24).

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

Austrian courts are not bound by formal evidential rules when assessing the merits and evidence (testimonies, documents, expert opinions, etc) provided by the parties (free appraisal of evidence). Accordingly, the courts may take into account economic evidence and evaluate it according to its plausibility.

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

In contrast to proceedings before the administrative courts, Austrian law does not set a time frame or a maximum period for civil proceedings. The duration depends on the specific circumstances of the individual case.

Court proceedings at first instance may last from a few months to several years. In any case, there is a possibility of a first appeal to the superordinate court; a second appeal to the Supreme Court is limited in different ways, such as a certain value in dispute and the presence of a legal question of fundamental importance.

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

The claimant may combine its action with an application for an injunction. The application may be based on general provisions (article 381 of the Austrian Enforcement Act) or on an act on unfair competition. In general, the applicant has to prove a serious risk of frustration of full and adequate final restoration of damages and that its case is *prima facie* well founded.

Usually, a decision on the application for an injunction can be expected within a few weeks.

**30 What are the legal consequences if a national court establishes the presence of illegal aid? What happens in case of (illegal) state guarantees?**

Generally, illegal state aid has to be recovered. However, Austrian scholars disagree about the consequences of a breach against the ban on implementation. While some argue that it is null and void based on section 879 of the Austrian Civil Code, others argue that an agreement is only provisionally invalid until the Commission issues a positive

decision. However, even the second group admits that an agreement is null and void as soon as the Commission issues a negative decision.

As proceedings about illegal state aid usually take place before civil courts, court decisions may order a repayment of the aid. In March 2017, the Austrian Supreme Court held that the 10-year limitation period does not start with the signing of the agreement to grant state aid, but with the actual payment or grant (OGH 6 Ob 235/16a) and refers to the (new) Procedural Regulation.

There is no (published) Austrian case law regarding illegal state guarantees.

**31 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? Can competitors claim damages from the state or the beneficiary? How do national courts calculate damages?**

There is no specific national legislation on the conditions for competitors to obtain damages for an award of unlawful state aid or a breach of the standstill obligation (see question 20).

In cases where a competitor takes actions based on the Federal Act against Unfair Competition or the Austrian Civil Code, it seeks damages from the beneficiary.

It is worth mentioning that public authorities can – under certain circumstances – be liable to pay compensation to individuals who have suffered a damage because of a breach of EU law. The action has to be lodged with the civil courts. However, there is basically no state liability in the private sector.

**State actions to recover incompatible aid**

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

The claim must be based on EU law. There is no specific national legislation on the recovery of incompatible state aid.

In civil proceedings, the granting authority will usually have to request repayment after a negative Commission decision. However, if the authority is not willing to take action, the competence shall be transferred to the federal government according to article 23d, paragraph 5 of the Federal Constitution Act. It is unclear whether all further steps within the proceedings are based on legal assignment, litigation in one's own name on another's behalf or taking up legal capacity.

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

Public authorities may claim recovery based on national provisions (eg, articles 1431 and 1435 of the Austrian Civil Code), if, for example, aid has been granted by mistake, on an unlawful basis or, in individual cases, if the recipient does not comply with certain conditions set out in the granting decision.

# C/M/S/

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**34 Has the Commission ever opened infringement procedures before the CJEU because of non-recovery of aid under article 108(2) TFEU?**

We are aware of cases concerning Italy (C-304/09) and Slovakia (C-507/08), but we are not aware of any Austrian case.

**35 How is recovery implemented?**

Either the recipient voluntarily returns the aid, which will most probably be the case if the EC determines that the aid was granted illegally, or the body that granted the aid may initiate proceedings for recovery before civil courts (see question 33). The Austrian Supreme Court ruled that the right of elimination of the unlawful aid does not go beyond the obligation to repay the aid. The decision on how the recovery shall take place (compensation payment, unravelling of the contract, etc) is at the discretion of the recipient of the aid (OGH 25.3.2014, 4 Ob 209/13h).

**36 Can a public body rely on article 108(3) TFEU?**

There is no case law clarifying this question and there are two opposing principles that cover this subject: on the one hand, the estoppel principle and on the other hand, the *effet utile*. Which one is of greater importance remains unclear. However, one could argue that as soon as a granting body suspects a notification requirement, it has to notify the measure immediately in order to avoid a damage for the beneficiary owing to the principle of trust.

**37 On which grounds can a beneficiary defend itself against a recovery order? How may beneficiaries of aid challenge recovery actions by the state?**

We are not aware of any legal basis entitling a beneficiary to be involved in the proceedings before the EC. However, as mentioned in question 14, the granting body might use the beneficiary's expertise or in-house information to avoid a negative decision. For example, a potential beneficiary might be able to demonstrate, by analysing the costs, that the *Altmark* criteria were met and therefore no advantage was conferred. Nevertheless, based on the case law of EU courts, there is little space for the beneficiary to rely on legitimate expectations.

We are not aware of any case in which beneficiaries have challenged a recovery action by the state.

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

If a recovery action by the state is decided in favour of the state, the court decision may be appealed by the beneficiary (see question 28). Such an appeal has a suspensory effect. A separate application for interim relief is not necessary.

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