

State Aid

Contributing editor
Ulrich Soltész



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GETTING THE
DEAL THROUGH

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Overview

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

The years 2013 and 2014 were characterised by cutbacks in the amount of subsidies granted by Austria. In 2015, however, an increase of subsidies to €2.102 billion overall (excluding subsidies to the railway sector) stopped this negative trend. The amount spent in 2016 has not been published yet. In contrast to other EU member states, Austria is quite restrained in spending subsidies. For example, in 2015, Germany spent 1.22 per cent of its GDP on state aid and Austria only 0.62 per cent. Besides subsidies for agriculture and transport, large portions of subsidies were given to environmental protection, including energy saving, regional development, rescue and restructure of companies, research and development and small and medium-sized enterprises (SMEs), including risk capital.

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 of Science, Research and Economy 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 a regional government, municipalities or 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 at 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 available aid has to be published.

Programmes

6 What are the most significant national schemes in place 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 small and medium-sized enterprises (SMEs), including risk capital. While the scheme for rescue and restructure was very important because of the economic crisis in 2009 (€505 million), it decreased significantly until 2015 (€0.9 million). On the other hand, the scheme for sectoral development has seen an increase from €12.3 million in 2014 to €200.3 million.

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 General Block Exemption Regulation.

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?

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, Austria did not accept the bid of the highest bidder but that of the Austrian insurance company Grazer Wechselseitige Versicherung (GRAWE). The highest bidder lodged a complaint with the EC and finally the European Court of Justice (ECJ) stated that the award to GRAWE fulfilled the criteria of unlawful aid. GRAWE had to compensate the aid.

However, in the past few years the trend has been reversed because of the economic crisis. Austria had to intervene 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 (PPP) projects is currently growing (for example, over the next few years two hospitals and 10 educational facilities in Vienna will be established as PPPs).

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

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.

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 a database where all 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 already 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 be successful.

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. Which administrative court or which authority is competent depends 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 (SANI) 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 be successful in the notification proceedings before the EC.

Strategic considerations for competitors

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

In Austria, no specific authority is competent to decide on complaints from competitors of a state aid recipient. Entities that claim damages because of infringement of state aid as 'protection laws' may sue the body granting the aid before civil courts. 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 (TAM) 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. However, the Austrian parliament is currently working on modifying the rules on 'official secrets' and the establishment of the obligation to inform on official issues. It should, however, be noted that the constitutional committee of the Austrian parliament adjourned its decision on this matter in October 2016. Thus the implementation of this reform will be delayed. Even after entering into force, the scope of this law will be limited, as the draft shows many exceptions for the disclosure of information. These exceptions may frustrate the objective of this reform.

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.

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 ff 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 defendants would avert the claim by arguing that

the claimant had 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 the state aid.

In certain circumstances, it may also be possible to bring a claim against the state aid recipient. How and under which circumstances has, however, 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? 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.

As to actions based on unfair competition, the Austrian Supreme Court has ruled that the promotion of other competition can constitute an 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).

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 is possible for Austrian courts to refer certain questions to the ECJ under article 267 of the 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.

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 a state aid, and that the aid was not duly notified.

26 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.

27 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.

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

The claimant may combine his or her 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 his or her case is *prima facie* well founded.

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

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 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).

It is worth mentioning that public authorities can – under certain circumstances – be liable to pay compensation to individuals who have suffered damages as a consequence of a breach of EU law, following the ECJ. 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

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

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

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31 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.

32 How is recovery effected?

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 31). 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).

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

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

34 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 27). Such an appeal has a suspensive effect. A separate application for interim relief is not necessary.

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