

STATE AID 2019 KNOW HOW

Belgium

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National state aid control - competent authorities

- 1 Which national authority or body is responsible for the oversight of state aid in your country, in particular the identification of new aid measures and their notification to the European Commission, the monitoring of existing aid measures for compliance with EU state aid rules and decisions, the submission of annual reports on existing aid schemes to the European Commission and cooperation more generally with the European Commission on state aid matters?**

In Belgium, there is no dedicated authority responsible for the oversight of national state aid as such.

The federal state, the regions and the communities are responsible within their areas of competence.

Therefore, each authority handles its own notification of state aid to the European Commission or responds to formal requests of the European Commission on alleged illegal aids. All formal communications of the Belgian authorities to the European Commission go through the Permanent Representation of Belgium to the EU.

- 2 Does any authority monitor the national legislative process to identify potential aid measures? Does this independent authority have sufficient powers to prevent the legislature or government from adopting aid measures that do not comply with EU state aid rules?**

There is no specific authority monitoring the national legislative process to identify potential state aid in Belgium.

Nevertheless, the legislative section of the Council of State has the task to review all draft legislation from the parliaments of the federal state, the Regions and the Communities and draft government or ministerial decrees of those entities. In its legal assessment, European law, including rules on state aid, is taken into consideration and regularly, the legislative section of the Council of State will make comments on the issue of state aid.

- 3 What are the competences of the national authority responsible for state aid control, and what is the legal basis for these powers in domestic law? Does this authority have the power to grant interim measures in addition to any interim relief that may be available in the national courts?**

The Federal, Regional and Communities authorities do not enjoy such investigatory and enforcement powers.

- 4 Aside from the role played by the European Commission and national courts in enforcing EU state aid rules, does the national authority responsible for state aid control accept complaints made by competitors, other interested parties, or other third parties regarding potentially unlawful and incompatible aid measures?**

National authorities are not competent as such to handle state aid complaints made by competitors or by interested parties as it is a competence of the European Commission. Nevertheless, competitors may seize the national judges based on the direct effect of article 108, § 3, of the Treaty on the Functioning of the EU that imposes the obligation of notification of all projects of aids. Those legal actions are rare but they do occur in Belgium and may be effective if they are well-founded.

- 5 Does the national authority responsible for state aid regularly cooperate or exchange information with the state aid authorities in other member states? If so, are there formal structures to facilitate this cooperation and information exchange, or does this occur on a purely ad hoc basis?**

As mentioned here above, there is no national authority specifically dedicated to state aid in Belgium. Cooperation and exchange of information may occur on an informal basis between Federal and Regional authorities with other member states.

6 Which body represents your country in state aid proceedings before the EU courts?

The Federal Ministry of Foreign Affairs represents the Belgian state (including in cases concerning the Regions and Communities) before the EU courts.

7 Is there a national register or other central source of data on national aid measures? Are the various state aid reports, complaints, decisions, etc, published?

All public authorities must publish the information on the aids they grant according to the obligation of transparency imposed by EU state aid regulation. However, there is no central national register on state aid.

National substantive and procedural rules

8 Describe any recent developments in substantive or procedural rules under domestic law relating to state aid.

The recent national jurisprudence in Belgium concerns different aspects of state aid issues: the recovery of illegal aids, the illegality of aids outside any European Commission's investigation or request of a preliminary ruling before the Court of Justice of the EU.

For instance, Brussels South Charleroi Airport (BSCA) challenged before both the Council of State and the judicial tribunal the decisions of the Walloon Region and Sowaer to recover the aid that was the object of the decision of the Commission of 31 October 2014. In a judgment of 27 November 2015, the Council of State declared itself incompetent for the suspension and annulation of a letter of the Walloon Minister in charge of airports addressed to BSCA. The same day, a similar judgment was held on a suspension claim towards the formal notice addressed by SOWAER, the public owner of the infrastructure to BSCA. The Tribunal of First Instance of Namur rendered on 11 October 2016 a first judgment for interim relief considering that the matter was not urgent. Following the judgment of the General Court of 25 January 2018 dismissing the appeal filed BSCA against the Commission's decision, BSCA withdrew its judiciary claims at the national level as they had lost their object.

In a judgment of 19 October 2012, the Court of Appeal of Brussels assessed whether a Commission decision stating that a public guarantee constituted an illegal and incompatible aids in favour of Forges de Clabecq affected the validity of the loans that were covered by this guarantee. In this case, the Court of Appeal considered that the guarantee did not constitute the determining mobile of the loans, which were never as such put in question by the Commission. Therefore, the loans were not void.

In 2013, the Council of State requested the Constitutional Court's judgment on the Arco case and more precisely on the public guarantee granted to the Arco cooperatives in the light of the principle of non-discrimination. In this case, the Constitutional Court referred in 2015 six questions to the Court of Justice of the EU for preliminary rulings. Meanwhile, the European Commission had declared the Arco guarantee illegal and incompatible. The Court rendered its judgment on the questions submitted by the Constitutional Court on 21 December 2016. First, it stated that the Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee did not impose on member states the obligation to adopt a scheme to guarantee shares in recognised cooperatives operating in the financial sector such as the Arco one. The Constitutional Court held its judgment on 15 June 2017 on this basis and concluded to the infringement of Article 10 and 11 of the Belgian Constitution as the King (the Belgian government in practice) can put in place a system of State guarantee for the reimbursement of the natural shareholders of the capital stakes in accredited cooperatives. Furthermore, the Court of Justice of the EU validated the Commission decision of 2014.

Regarding the impact of the illegality of an aid on the validity of a statutory act, the Constitutional Court held in a judgment of 7 November 2013 in which it stated that due to the primacy of European law, it had to annul certain dispositions of the Flemish housing code as it granted illegal aid.

Another case, which was handled by the Tribunal of First Instance of Brussels, concerned the public subsidies granted by the Brussels Region of the public body in charge of collecting and disposal of household waste, the Agence Bruxelles-Propreté. An association of private recycling undertakings and its members challenged the legality of the public subsidies granted between 2007 and 2017 and amounting to €1.5 billion stating that the subsidies were also used for purely economic activities of this public body and the the Agence was thus unfairly competing on the commercial market for the collection and treatment of non-household waste (cross subsidisation). The association of private recycling companies and its members requested the reimbursement of all

the aids granted for 10 years, the suspension of the whole public compensation and the end of a public guarantee to the Agence Bruxelles-Propreté for a VAT litigation.

In its judgment of 4 May 2018, the Tribunal held that the claim of the association was not admissible due to a lack of interest and that the claims of the private recycling undertakings were admissible and partly founded. The Tribunal considered that the existence of the separate accounts had not been demonstrated but it rejected the request of reimbursement of the aids granted between 2008 and 2017 on the basis of the necessity to insure the continuity of public service. Nevertheless, it ordered for the future the suspension of 20 per cent of the subsidy granted by the Region. Furthermore, it considered that the damage claim was without object and that the guarantee granted by the Region to cover a VAT litigation constituted an existing aid which recovery of modification could no longer imposed on.

9 Is there a specific legislative or administrative scheme under national law relating to the application or enforcement of EU state aid rules?

There is no specific national provision regarding the application or enforcement of EU state aid rules in Belgium.

Public authorities and jurisdictions apply directly the EU regulations for instance on the matter on procedure. National regulations on state aids, for instance, RDI schemes or investments aid schemes refer explicitly to the relevant EU regulations. There is no compilation of EU state aid rules at the national level.

10 Are there national rules or guidelines relating to the implementation of EU state aid rules, in particular EU guidelines?

National regulations that are legal basis for the grant of aids refer explicitly to the EU regulation that is relevant, for instance, the Commission Decision approving the Regional aids map for Belgium or the EU regulations that constitute the legal basis for the compatibility of a specific aid.

11 Are there national rules or guidelines relating to the process of applying for, and the granting of, state support?

National regulations that are the legal basis for the grant of aid must detail the process of applying for and the granting of aids. In some cases, administrative instructions will detail further the procedure. Furthermore, forms may be published to help the candidate for a state support to submit a complete file.

12 How is the concept of “service of general economic interest” (SGEI) defined on the national level? Did the definition recently lead to disputes, and, if so, how was the dispute adjudicated?

In Belgium, the concept of service of general economic interest is similar as under EU law but the notion of public service, which is more commonly used in Belgian law is much broader. In one of the major cases regarding the public financing of public Brussels hospitals, the Belgian authorities considered that hospitals were not undertakings under EU state aid rules. The European Commission stated that they were but validated their compensation of public service. A judgment of the General Court of 19 December 2012 also concluded that Belgian hospitals were indeed undertakings. The very light Belgian reports on SGEI submitted every two years to the Commission demonstrate sufficiently that Belgian authorities are reluctant to admit the economic nature of certain services.

13 Do any studies on national enforcement of EU state aid rules exist? If so, describe the main subjects and results of these studies.

There is no study on national enforcement of EU state aid rules in Belgium apart from the one prepared for the European Commission in 2009 on the enforcement of state aid rules by national jurisdiction. A new study has been ordered on this topic by the European Commission and will be published in 2019.

Role of national courts

14 Do all national courts have jurisdiction to apply state aid rules? Or do certain dedicated courts have specific jurisdiction for state aid cases?

Belgian national courts must apply state aid rules under the primacy of European law on national law, which is well respected.

There is no specific jurisdiction for state aid cases and the competence would be relating to the act at stake. Indeed, to challenge a statute that is the legal basis of an aid, one must seize the Constitutional Court. If the legal basis of an aid is an administrative act, the Council of State is competent. If the aid results from commercial contracts with public undertakings or if the claim is founded on an unfair commercial practice, the judiciary court would have to be ceased.

15 Can the judgment of a national court on a state aid matter be appealed? If so, what grounds of appeal are available, and which court can hear the appeals? Does an appeal of a recovery order entail an automatic suspension of the obligation to recover unlawful aid (not notified) pending the outcome of the appeal?

There are no specific procedural rules that apply to national judgments on state aid.

The Code of Judicial Procedure applies on those matters.

A judgment of the tribunal of first instance or the tribunal of commerce may be appealed before the Court of appeal on normal grounds (inadmissibility of the claim, lack of competence, errors of law, errors of fact, lack of motivation, etc).

The Supreme Court is competent to hear appeals against judgments of the State Council.

Judgments of the Constitutional Court may not be appealed.

An appeal is in principle not suspensive of a judgment and a judgment ordering the recovery of an aid must be executed unless the suspension has been explicitly requested and motivated by the beneficiary of the aid and granted by the tribunal.

16 Do national courts sometimes confuse the concept of unlawful aid with incompatible aid?

In former jurisprudence, national judges misinterpreted in some cases the scope of article 107 (notion of aid) and article 108 (procedure).

For instance, in the Breda case of 1995, the President of the tribunal of commerce of Brussels referred to the term “incompatible aid” although the decision as such concerned the unlawfulness of an aid based on the infringement of article 108 (3) of the TFUE (article 88 (3) at that time). It was probably an error of wording.

Nowadays, they tend to have a more accurate assessment of state aid rules.

17 Do national courts sometimes confuse the concept of new aid with existing aid?

In the past, Belgian courts were sometimes not very accurate while assessing the concept of existing aid. For instance, in the *Namur-Les Assurances du credit-Office National du Ducroire*, the Court of Arbitration (which was later replaced by the Constitutional Court) concluded to the existence of an existing aid on the basis that the European Commission had closed an investigation although it had not taken explicitly a position on the qualification of the measure at stake.

Nowadays, the distinction between new aid and existing aid does not raise any specific difficulty in Belgium.

In 2003, The Court of Arbitration (now the Constitutional Court) assessed a tax exemption granted to Belgacom (former Belgian monopolistic telecommunications operator). As the measure had been enacted in 1930, it concluded that it was an existing aid and only the European Commission could declare it incompatible.

In the *Agence Bruxelles Propreté* case, the tribunal of first instance assessed the concept of existing aid in the context of a guarantee granted formally in 2003 and qualified it accordingly (see answer to question 8).

18 Do national courts traditionally refer questions regarding the interpretation of EU state aid rules to the Court of Justice? Provide any notable examples of preliminary references made on state aid questions.

National courts do not hesitate to refer questions regarding the interpretation of EU state aid rules to the Court of Justice for preliminary rulings.

In 1993, the Court of Appeal of Brussels referred a request for a preliminary ruling to the Court of Justice in *Namur-Les Assurances du Crédit v The Office National du Ducroire and the Belgian State*. The questions concerned *inter alia* the granting or alteration of an aid which could have an impact on the notion of existing aid.

For instance, in the DMP case, the Belgian Tribunal of Commerce asked the Court of Justice if very favourable terms granted by the public body in charge of the social security to a company in difficulty for its social debts could be qualified as state aid. In that case, the Court of Justice did confirm that the social security should behave such as a private creditor. More recently, in 2015, the Constitutional Court submitted six questions to the Court of Justice in the Arco case (see answer to question 8).

In May 2018, the tribunal of first instance of Brussels submitted three questions to the Court of Justice concerning the recovery of fiscal aids to Tekelec International in the context of the Belgian “Excess Profit” tax scheme case.

As the Commission decision on the Belgian “Excess Profit” tax scheme case was annulled on 14 February 2019 by the General Court and the recovery procedure was no longer justified, the preliminary procedure was removed from the register on 13 April 2019.

No preliminary request on a state aid issue has been lodged by a Belgian jurisdiction or answered by the Court of justice between July 2018 and July 2019.

19 Do national courts use the possibilities offered by article 29 of Regulation 2015/1589 (Procedural Regulation) providing for the amicus curiae conditions in state aid matters? Has the European Commission submitted written observations to national courts and asked authorisation to appear in court hearings?

In the *Hays v La Poste* case, the President of the tribunal of commerce decided on 15 September 2000 to refer a question to the European Commission but its decision was appealed. The Court of Appeal had not yet ruled on the case when the European Commission, following a complaint, decided on 5 December 2001 that the service concerned constituted an abuse of dominance under 102 TFUE.

No amicus curiae on state aid regarding Belgian courts can be found on DG COMP’s website.

20 Describe recent developments regarding state aid cases before national courts.

The most recent developments regarding state aid before Belgian national courts concern implementation of the European Commission decision on the Charleroi case. Brussels South Charleroi Airport challenged the implementation of this decision before the Chamber of first instance and the Council of State. The Council of State considered that it was not competent in this case. The Tribunal of first instance rejected the interim measures as it considered that there is no emergency. The main proceedings are still pending (see answer to question 8).

In the *Agence Bruxelles Propreté* case, the tribunal of first instance confirmed its power to suspend a public subsidy although the Brussels Region and the Agence argued the Constitutional Court was the competent court in this case as it concerned the legality of a budgetary statute. Furthermore, it refused to order the recovery of past illegal aids as it could impact the public mission of collecting household waste conferred to the Agence by the Brussels Region (see answer to question 8).

21 Under national procedural rules, can a government measure be challenged directly in court on the grounds of illegal state aid, or do applicants first have to go through a preliminary administrative review procedure? If so, describe the steps involved in this procedure.

A government measure can be challenged before the Council of State, which is competent to assess the legality of such measures. There is indeed a preliminary administrative review procedure before the Council of State. In this context, it is possible to obtain a suspension of the government measure if there is an emergency and a risk of damage difficult to repair and if there is a *prima facie* case.

Furthermore, following the recent Agence Bruxelles Propreté jurisprudence, an applicant could request the tribunal of first instance to suspend the grant of a subsidy granted by a government decree.

22 Under national procedural rules, who has legal standing to challenge a government measure in court on the grounds of illegal state aid?

To be able to challenge government measures in court for alleged unlawful state aid, you would have to demonstrate that you have an interest in challenging these measures and therefore that you are being affected directly by the unlawful state aid.

For instance, in 2002, the Council of State dismissed an action for suspension launched by an association of Christian employers of the Limburg Region and the Chamber of commerce of Limburg against amendments to directives on soft aid for consultancy, training and studies in Flanders because it can only suspend a measure if the claimants concerned can demonstrate that they suffer irreparable damage owing to the implementation of the measure. Thus, associations cannot act on behalf of their members.

Similarly, in the Agence Bruxelles Propreté case in 20018, an association of private waste collecting companies was considered not to have such interest.

23 Can a national authority argue in domestic court proceedings that a particular measure contains unlawful state aid, or are there any procedural bars to doing so?

National authorities may argue in national court proceedings that a particular measure contains unlawful state aids. Nevertheless, to our knowledge, there is no precedent in Belgium.

In the Champagne Holding case, the ONSS (the Social Security Service) challenged the restructuring and payment plan for Champagne Holding, which had been presented to the tribunal of commerce due to the company's financial difficulties and approved by the majority of creditors. The plan provided for a write-off of all debts up to 40 per cent. The ONSS claimed that the write-off of its debt constituted an unlawful aid. In its judgment of 18 February 2005, the Supreme Court rejected this claim as the write-off of the social security debts was of the same nature as the write-off of debts of private creditors under the same restructuring and payment plan.

24 What are the limitation periods under national procedural rules for a party seeking to invoke unlawfulness under state aid rules in domestic court proceedings?

In Belgium, there is no specific limitation periods that apply for any party in the national court procedure invoking unlawfulness under state aid rules. In Agence Bruxelles Propreté, to assess the limitation periods regarding a public guarantee granted in 2003, the tribunal of first instance referred to article 17 of the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of article 108 of the Treaty on the Functioning of the European Union.

25 Does any provision of national law prevent an individual with standing from bringing state aid proceedings in the domestic courts concurrently with an investigation by the European Commission (eg, if the individual has complained to the European Commission in parallel, or the European Commission has started an investigation on its own initiative)?

There is no provision of Belgian law preventing an individual from bringing state aid proceedings in the domestic courts concurrently with an investigation by the European Commission. In practice, a claimant will generally opt for a complaint to the Commission or a national proceeding, not both at the same time. It is notably due to the fact that most complaints to the Commission are anonymous, which cannot be the case in a national proceeding.

26 Under which circumstances will a national court stay proceedings as to the existence of state aid pending a European Commission investigation?

Under Belgian procedural rules, there is no objection to bring a national court proceeding in parallel to an investigation by the European Commission. National courts would stay proceedings pending a Commission procedure although they are not compelled to. In principle, the national courts may stay proceedings pending a Commission procedure to wait for the result of this procedure or it may order the suspension of the grant of

the aid if there is an emergency and a risk of damage that would be difficult to repair for the competitor of the beneficiary of an aid. If the European Commission came to the preliminary conclusion in the opening decision that the measure constitutes an incompatible state aid, the national court should take this preliminary conclusion into consideration and order the reimbursement of the aid according to the Deutsche Lufthansa judgment.

27 What are the consequences for national courts if the European Commission has already come to the preliminary conclusion in its opening decision that the measure constitutes incompatible state aid?

Following the Court of Justice of the EU in the Deutsche Lufthansa case, the national judge must take into account the preliminary assessment of the European Commission, which founds the decision to open a formal investigation. Indeed, such a decision is compulsory if the Commission has doubts on the compatibility of an aid.

According to the Court, in that case:

a national court hearing an application for the cessation of the implementation of that measure and the recovery of payments already made is required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure. To that end, the national court may decide to suspend the implementation of the measure in question and order the recovery of payments already made. It may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the European Commission's decision to initiate the formal examination procedure. Where the national court entertains doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure, it may seek clarification from the European Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, it may or must refer a question to the Court of Justice of the European Union for a preliminary ruling.

A Belgian judge would apply this European jurisprudence.

28 How do national courts react to the Deutsche Lufthansa case? By referring matters to the European Commission (for amicus curiae support) or to the Court of Justice of the European Union (CJEU) for a preliminary ruling under article 267 TFEU?

There is no Belgian jurisprudence yet on that matter.

Nevertheless, if an investigation would be pending before the Commission, the Belgian courts should opt for the amicus curiae as the Commission would already be investigating the measure at stake, instead of a preliminary ruling before the Court of Justice of the EU as such procedure takes at least 18 months and may interfere with the Commission's investigation.

29 What is the burden of proof in state aid cases before national courts?

The burden of the proof weights on the claimant under Belgian procedural rules, which apply also in state aid cases.

30 In light of the EU law obligation on national courts to protect the rights of individuals affected by the unlawful implementation of state aid, what are the requirements under national law for a plaintiff seeking interim measures in the courts, in particular to prevent the grant of aid? In what form and under what circumstances can interim relief be granted?

Under Belgian law, the plaintiff can seek interim measures from the courts, for instance to prevent the grant of the aid. Interim relief is granted on the same conditions as other measures. The plaintiff must demonstrate that its case prima facie founded, there is a reason of emergency and a risk of a damage that would be difficult to repair.

Competitors also turn to the action for injunction before the President of the tribunal of commerce as benefiting from an illegal aid may constitute an unfair commercial practice. This action is generally efficient and quick (between four and six months).

Consequences of violation of state aid rules

31 What remedies are available to a national court if it determines that a non-notified measure contained state aid?

If a national court found a non-notified measure to contain state aid, it may decide to suspend it or to impose the recovery of the aid. In case of doubt it may also request from the Commission an amicus curia to enlighten its assessment or may refer to the Court of Justice for a preliminary ruling.

32 In light of the EU law requirement that national courts must, in principle, order the full recovery of unlawful state aid from a beneficiary, are there any domestic law provisions that may hinder a national court from ordering the recovery of non-notified state aid? Do national courts set aside such domestic law provisions as required by the Court of Justice's case law?

No. A national court may order the recovery of a non-notified state aid.

Enforcement by the European Commission

33 Would the national court necessarily declare a guarantee invalid if it secures a loan constituting aid and was granted in breach of article 108(3) TFEU? Does it make a difference if the only aid beneficiary is the borrower and not the lender?

If a loan constitutes an aid granted in breach of article 108 (3) TFEU, the guarantee that would have been granted would not be necessary declare invalid. Under Belgian jurisprudence, the judge assesses the particular facts of the case to identify the intent of the parties.

34 How can a competitor of the beneficiary or other affected third parties claim compensation from the authority granting the state aid for damages caused by the aid? Explain the steps involved in bringing such an action for damages. Explain the steps involved in bringing such an action for damages and how national courts have applied the criteria of the relevant EU case law.

The competitor of the beneficiary of an illegal and incompatible aid or any other affected third parties can claim compensation for damages caused by such an aid from the authority granting the state aid. The fault would consist in the violation of the standstill obligation. The rules that apply are the ones applying to classic liability actions.

Following the Maribel bis/ter case, the Belgian state had to recover illegal aid (in the form of reductions of social security charges) from approximately 10,000 companies. Three of them lodged a damage claim against the Belgian state. None of them were successful as the national courts concluded that the mere reimbursement of an illegal aid did not constitute a damage and the companies concerned had not demonstrated the existence of a distinct damage resulting from the grant of the illegal aid.

In Agence Bruxelles Propreté, the tribunal of first commerce concluded the damage claim lodged by the private waste collecting companies was without object as the damages were estimated at symbolic €1 by the claimants and the region, the grantor of the public subsidies at stake; and the Agence, the beneficiary, had paid that sum without any recognition of their fault.

35 How can a third party claim compensation from the member state for damage caused by failure to respect the standstill obligation?

Under Belgian law, a third-party claim compensation from the member state for damage caused by the failure to respect the standstill obligation. Article 1382 of the Civil Code states that "any act of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it". The infringement of the notification obligation is in principle a fault. Nevertheless, the damage and the link between the fault and the damage are difficult to demonstrate in practice.

36 Under national law, can a third party bring damages actions against the beneficiary?

Under Belgian law, a third party can bring damages actions against the beneficiary for having benefited from an illegal and incompatible aid in accordance to the rules applying to classic liability actions.

In the Agence Bruxelles Propreté case, private companies lodged a damage claim against their public competitor (see answer to question 8).

37 Under national law, how can a beneficiary bring damages actions against the member state as per the SFEI case law of the Court of Justice for having unlawfully granted aid? How do national courts avoid the risk of circumvention of EU state aid rules?

Under Belgian law, a third party can bring damages actions against the member state for having granted an unlawful and incompatible aid in accordance to the rules applying to classic liability actions.

Following the Maribel bis/ter case, the Belgian state had to organise to recovery of illegal aid (in the form of reductions of social security charges) granted to around 10,000 companies. Three of them lodged a damage claim against the Belgian state. No of them were successful as the national courts concluded that the mere reimbursement of an illegal aid did not constitute a damage and the companies concerned had not demonstrated the existence of a distinct damage resulting from the grant of the unlawful aid.

It was the case in the Agence Bruxelles Propreté case (see answer to question 8). The tribunal held that the claim was without object.

The qualification of the aid (unlawful or unlawful and incompatible) would depend on whether the Commission has adopted a final decision on the public intervention at stake.

38 What are the consequences of a violation of EU state aid rules for the validity and enforceability of the aid measure under national law? Are the consequences the same for unlawful aid that was not notified to the European Commission as for aid that the European Commission has ultimately determined as incompatible with the internal market?

Under Belgian law, the violation of EU state aid rules affects the validity and enforceability of an aid measure. It can be declared invalid and thus void because of the primacy of EU law on Belgian law.

Recovery of state aid

39 What are the consequences of a violation of EU state aid rules for the validity of a government regulation or contract containing the aid measure, and for subsequent regulations or contracts linked to the aid measure? Are the consequences the same for unlawful aid that was not notified to the European Commission as for aid that the Commission has ultimately determined to be incompatible with the internal market?

Regarding a government regulation containing an aid measure, due to the principle of primacy of EU law on Belgian law, the government regulation would be put aside by any judiciary court or declared invalid if the Council of State is seized on the issue of its validity. Only the dispositions that are the legal basis for the grant of the aid would be declared void or put aside.

In the case of a contract containing an aid measure, the national judge would put aside the dispositions that are the contractual basis for the grant of the aid. The validity of the contract as whole should be assessed by the national judge in the context of the intent of the parties. If the contractual dispositions regarding the grant of the aid were the principal of the contract, the whole contract would be declared void. If there are accessories to the principal object of the contract, the remaining of the contract will remain valid.

40 Describe any major state aid investigations opened by the Commission against your country over the past 12 months. State whether these investigations were specific to your country or part of a broader investigation into several member states.

There are no formal investigations that have been opened by the Commission on Belgian alleged aid over the past 12 months.

They are a number of pending preliminary investigations that are confidential at the moment, notably regarding tax measures and the transport sector.

41 Has the European Commission suggested appropriate measures concerning existing aid measures in your country over the past 12 months?

No proposal for appropriate measures has been suggested by the European Commission regarding Belgium over the past 12 months.

42 Has the European Commission ever opened specific investigations against your country following a sector inquiry?

There have never been specific investigations opened in Belgium following a sector inquiry. Nevertheless, the Commission adopted a decision on excess profit exemptions in Belgium adopted on 11 January 2016 following a general investigation of the Commission on that matter.

43 Has your country ever been subject to an injunction by the European Commission to suspend or provisionally recover aid under article 13 of Regulation 2015/1589?

Belgium has never been subject to an injunction by the Commission to suspend or provisionally recover aid.

44 Has your country ever been subject to an infringement procedure under article 108(2) TFEU and article 260 TFEU?

Belgium has been subject to several infringement procedures under article 108 (2) TFEU.

For instance, in the Marbel bis/ter, Belgium was condemned a first time for not implementing the final decision of the European Commission imposing recovery. A second infringement procedure was launched by the Commission but later abandoned due to the full compliance by the Belgian state.

The Commission revised a decision concluding to the absence of aid in favour of Verlipack. Following new information, it discovered that it had to put into question its first assessment. The second decision concluded to the existence of unlawful and incompatible aid in favour of Verlipack.

45 Has the European Commission ever undertaken on-site state aid monitoring visits based on article 27 Regulation 2015/1589 (previously article 22 of Regulation 659/1999)? How were the visits carried out? What measures were taken to assist the officials and experts carrying out the visit?

The European Commission has never undertaken on-site state aid monitoring visits based on article 22 of Council Regulation (EC) No. 659/1999 (Procedural Regulation).

Main areas of state aid

46 Which national authority orders the recovery of state aid following a European Commission decision, a judgment of the Court of Justice, or a national court judgment?

In Belgium, there is no dedicated national authority in charge of the recovery of state aid following a Commission decision. The public entity or undertaking that has granted the aid is the one in charge of the recovery. If the beneficiary is reluctant to reimburse the aid, the public authority/undertaking will have to seize the competent national court.

47 What procedural or administrative actions are contemplated in the national law for the recovery of unlawful or incompatible state aid?

As mentioned here above, there is no national recovering authority in charge of the recovery of unlawful and incompatible state aid. The public authority/undertaking that has to implement decision of the Commission will have to go to the national court to request an enforcement order towards the beneficiary.

Other

48 What actions are available to the national recovering authority seeking to force an unwilling beneficiary to refund the unlawful and incompatible state aid?

As mentioned here above, there is no national recovering authority in charge of the recovery of unlawful and incompatible state aid. The public authority/undertaking that has to implement decision of the Commission will have to go to the national court to request an enforcement order against the beneficiary.

49 Can an individual with standing bring an action in the national courts for the purpose of: challenging the validity of the national recovery order implementing the European Commission's recovery decision; or suspending the national recovery order pending a final decision either on the validity of the national recovery order itself, or on the validity of the European Commission's recovery decision?

The beneficiary may challenge the validity of the national recovery order implementing the Commission recovery decision either before the Council of State if the national recovery order has been adopted by an administration, before the judiciary courts if the decision of the Commission is implemented by public undertakings or if the administration has recovered the sum through a seizure. The beneficiary of an illegal and incompatible aid may request the suspension of the recovery order but under the strict condition set up by the European Court of Justice in the *Zückerfabriek* jurisprudence.

50 Can third parties with standing obtain a mandatory order from the court that forces the relevant national authority to recover funds from a beneficiary of incompatible state aid where the former has failed to implement a recovery decision by the European Commission?

Third parties may obtain a mandatory order from the court that forces the relevant authority to recover funds from a beneficiary of incompatible state aid where the former has failed to implement a recovery decision by the European Commission. To the author's knowledge, such procedure never took place in Belgium. Indeed, the European Commission follows closely the implementation of negative decisions and threatens member states of infringement procedures if they do not recover in due time the illegal aids from the beneficiary.

51 What defences by beneficiaries against recovery have been accepted by national authorities or courts?

The defences invoked by beneficiaries against recovery are very limited and they must be in line with the European jurisprudence. In practice, the only obstacle to the effective recovery of an unlawful and incompatible aid is the case of the bankruptcy of the beneficiaries where all its assets have been awarded to privileged creditors.

In the *Tekelec International* case, which is pending, Oracle Belgium claims that it did not benefit from the aid that was qualified as unlawful and incompatible in 2016 by the European Commission as Oracle group acquired Tekelec International after the end of the effect of the tax ruling and at the market price. The definition of the beneficiary in this case is being the object of three questions submitted to the Court of Justice of the EU by the tribunal of first instance of Brussels.

51 Provide information on any other special features of your country's state aid regime not covered above.

There are no special features of the Belgian state aid regime that are not covered above.

52 What is the situation under national law if recovery was ordered by a national court owing to the violation of the standstill obligation but the aid is later declared compatible with the internal market by the European Commission?

Belgian law does not provide specific rules in the case of an unlawful aid that have been declared compatible with the common market by the European Commission. The European jurisprudence stated that the national judge may, in that case, only impose interests on the amount of aid for the period of unlawfulness between the grant of the aid and the decision of the Commission on the compatibility of the aid. In the Fortis case, the illegality of the aid was raised. As the aid had been declared compatible at the latest stage, the commercial court did not impose its recovery nor the payment of interests for its unlawfulness, which was very limited in time.

53 How do national courts apply the CELF I case law (Case C-199/06)?

Following the European jurisprudence, the national judge may, in that case, impose interests on the amount of aid for the period of illegality between the grant of the aid and the decision of the Commission on the compatibility of the aid.

In the Fortis case, the illegality of the aid was raised. As the aid had been declared compatible at the latest stage, the commercial court did not impose its recovery nor the payment of interests for its illegality, which was very limited in time.

54 How do national courts handle cases where the European Commission has not yet decided on compatibility?

In the Agence Bruxelles Propreté case, the tribunal of first instance ordered the suspension of 20 per cent the public subsidy to the Agence and invited the Region to notify the aid to the European Commission.

55 Are the recovery interests paid by a beneficiary tax deductible under national tax rules?

Recovery interests paid by a beneficiary are tax deductible.

56 Is aid that was granted in the form of a fiscal measure always recovered through a new tax assessment, or do the national authorities use the freedom of choice under EU law to recover through the easiest available and most efficient method, even if not fiscal?

In most national cases regarding tax and levies, complainants seized the Court of Arbitration (now the Constitutional Court). When the Court concluded to the unconstitutionality of the statute concerned due to the existence of an illegal aid, it annulled the statute with the result that the public entity at stake had to reimburse the illegal tax or levies.

In the tax rulings case, the aid was recovered through a new tax assessment.

57 Which sectors have received the highest amounts of aid in the past five years?

The Belgian railway sector has received the highest amount of aid in the past five years according to the European Commission state aid scoreboard:

2013	2014	2015	2016	2017
3120,7	3113,2	2987,9	2936,6	2949,9

58 Provide information on the amounts of state aid paid out under approved state aid schemes and individually approved state aid for the past five years.

Following the European Commission state aid scoreboard, the amounts of state aid granted by Belgian authorities the past five years are the following in millions EUR (outside the railway and the agricultural sectors):

2013	2014	2015	2016	2017
1664,6	1808,9	2089,5	2528,1	2317,7

The major increase of aid granted by Belgian public entities between 2015 and 2016 concerns fiscal exemptions.

59 Provide information on any other special features of your country's state aid regime not covered above.

Belgium has been the object of many investigations of the European Commission on alleged illegal aids, certainly in comparison to other countries. The fact that the European Commission is localised in Brussels is certainly a factor as many investigations were launched following the publication of press articles on public investments, for instance.

Until a few years back, the main national litigation concerned the legality of tax measures or levies imposed by the law and dealt by the former Court of Arbitration (now the Constitutional Court). Judiciary courts focus essential on claims regarding the recovery of aids initiated by public entities implementing final negative decisions of the European Commission or by the beneficiaries trying to suspend the recovery process while they were challenging the final decision of the Commission before the General Court.

We are now seeing an increase in national litigation on state aid before judiciary courts as state aid become a legal weapon between competitors, especially in the case of risk of cross-subsidies or public investments in the form of guarantees, loans and capital injections.

As the legal assessment of a public intervention is done at the moment of its grant, it is advised to check the legality of the measure in due time.



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Annabelle Lepière is a European law specialist, particularly in relation to European competition law: state aid, merger control, anti-trust law. She is the head of CMS Belgium's Competition and EU Law practice. She also has expertise with the free provision of services, free movement of goods and freedom of establishment. Her legal practice includes drafting and submitting public intervention notifications to the European Commission (rescue and restructuring aid, investment aids, RDI schemes, etc) and representing the Belgian, French, Spanish, Romanian, Dutch authorities and beneficiaries in European investigations on alleged illegal aid.

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