

# STATE AID

## Belgium



# State Aid

Consulting editors

**Ulrich Soltész**

*Gleiss Lutz*

---

Quick reference guide containing side-by-side comparison of local insights into state aid, including national policies and track record; relevant national authorities and implementing legislation; national schemes and any specific rules on implementing the General Block Exemption Regulation; implications of public ownership; services of general economic interest; considerations for aid applicants and for competitors; private enforcement in national courts; state actions to recover incompatible aid; and recent trends.

---

Generated 09 May 2023

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2023 Law Business Research

# Table of contents

## OVERVIEW

Policy and track record  
Relevant authorities  
General procedural and substantive framework  
National legislation

## PROGRAMMES

National schemes  
General Block Exemption Regulation

## PUBLIC OWNERSHIP AND SERVICES OF GENERAL ECONOMIC INTEREST (SGEI)

Public undertakings, public holdings in company capital and public-private partnerships  
SGEI

## CONSIDERATIONS FOR AID RECIPIENTS

Legal right to state aid  
Main award criteria  
Strategic considerations and best practice  
Challenging refusal to grant aid  
Involvement in EU investigation and notification process

## STRATEGIC CONSIDERATIONS FOR COMPETITORS

Complaints about state aid  
Dealing with illegal or incompatible aid  
Other ways to counter illegal or incompatible aid

## PRIVATE ENFORCEMENT IN NATIONAL COURTS

Relevant courts and standing  
Available grounds  
Defence of an action  
Compliance with EU law  
Referral by national courts to European Commission  
Burden of proof  
Deutsche Lufthansa scenario  
Economic evidence

**Time frame**

**Interim relief**

**Legal consequence of illegal aid**

**Damages**

## **STATE ACTIONS TO RECOVER INCOMPATIBLE AID**

**Relevant legislation**

**Legal basis for recovery**

**Commission-instigated infringement procedures**

**Implementation of recovery**

**Article 108(3) TFEU**

**Defence against recovery order**

**Interim relief against recovery order**

## **UPDATE AND TRENDS**

**Key developments of the past year**

## Contributors

### Belgium



**Jacques Derenne**  
jderenne@sheppardmullin.com  
*Sheppard Mullin Richter & Hampton LLP*

**SheppardMullin**



**Dimitris Vallindas**  
dvallindas@sheppardmullin.com  
*Sheppard Mullin Richter & Hampton LLP*

**OVERVIEW****Policy and track record**

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

According to the latest available data (2018), Belgium grants state aid slightly above the EU28 (27) average, excluding aid in the agriculture, fisheries and railway sectors. Belgium granted state aid amounting to approximately 0.79 per cent of its GDP, compared to the EU28 (27) average of approximately 0.76 per cent. In absolute amounts, this corresponded to approximately €3.6 billion, up from approximately €2.2 billion in 2017. Belgium was the fifth highest provider of state aid to the railways in absolute amounts in 2018 (€2.9 billion), behind only Germany, France, Italy and Austria.

In terms of objectives, 31.9 per cent of the state aid granted by Belgium related to environmental protection, 31.6 per cent related to research, development and innovation and 16.4 per cent related to culture. Interestingly, Belgium has granted relatively little state aid for rescue and restructuring over the past two years, around 4 per cent of total state aid.

In terms of Belgium's track record with the European Commission, the latter has opened over 50 formal investigation procedures in the past 10 years concerning Belgium (but 39 of them concern the excess profit exemption case) and has adopted 14 recovery decisions. These concerned a variety of sectors, such as export credit, banking, hospitals, ports and air transport, the two best-known cases being the Charleroi Airport/Ryanair case and the excess profit exemption case (one of the tax rulings cases, the only one concerning an aid scheme). This tax ruling decision was annulled by the General Court of the European Union in 2019 (T-131/16 & T-263/16) and the Commission decided to initiate a formal investigation procedure in these 39 cases but has not yet formed a definitive view in view of its challenge of that ruling. Indeed, following the Commission's appeal, the CJEU (C-337/19 P) the General Court's judgment (error of law on the concept of 'aid scheme') in September 2021. The Court decided to refer the case back to the General Court for a ruling on other outstanding pleas in law. The case was still pending in March 2023.

The latest negative decision concerned the JC Decaux case, in relation to tax and rent exemptions for advertising (SA.33078).

*Law stated - 08 March 2023*

**Relevant authorities**

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

Belgium is a federal state divided into both regions and communities. The constitutional organisation of the country is complex. There are three regions: the Flemish region, the Walloon region and the Brussels-Capital region, and three communities based on the language spoken: the Flemish community (merged with the Flemish region), the French community and the German community.

The regions enjoy executive and legislative authority in economic matters relating to their territory, such as employment, economic development, transport, agriculture, housing and also international trade and cooperation related to matters with respect to which they have been granted autonomy. The communities have executive and legislative authority with respect to other matters, such as cultural affairs, education, tourism, health and social affairs.

The transfer of powers to the regions and communities includes the grant of state aid competence in areas where the regions and communities enjoy authority.

Currently, there is no system for monitoring state aid in Belgium to ensure that article 108(3) TFEU and article 16 of Regulation No. 2015/1589 (notification requirement) are complied with.

There is no obligation to publish the intention to grant aid measures at national level. There is no specific procedure, and no recommendations relating to the notification of aid projects, at either federal or regional level. To verify the compliance of the received aid with the General Block Exemption Regulation, the beneficiaries are supposed to obtain advice from proficient advisers on EU state aid law. In addition, the Federal Public Service for Economy, Small to Medium-Sized Enterprises, Self-employed and Energy and the relevant ministries for economy in the regions and communities can provide advice in the sectors of their respective powers.

*Law stated - 08 March 2023*

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

Broadly speaking, authority for granting aid is split as follows within Belgium:

- the federal government and agencies are responsible for aid of a federal nature, in particular fiscal (tax reductions or exemptions) or social measures (social contributions, reductions and exemptions);
- regional governments and agencies are responsible for investment, R&D aid, social aid, export aid and some forms of fiscal aid; and
- community governments and agencies are responsible for training aid and aid to promote culture.

The legal basis needed to grant aid depends on the origin of the aid.

*Law stated - 08 March 2023*

### General procedural and substantive framework

Describe the general procedural and substantive framework.

As state aid measures are usually granted by the state (at federal, regional or community levels), they are mainly governed by public law. There are no general codes, statutes or guidelines governing the granting of state aid. The public authorities have wide discretion within the scope of their respective powers. However, specific aid measures at regional or community level are often governed by specific decrees (regional acts) or ordinances (regional acts at the Brussels-Capital region), on the basis of which the local governments often adopt circulars or guidelines summarising for businesses the conditions for granting aid. This mainly concerns aid for regional investment, small and medium-sized enterprises, and employment.

*Law stated - 08 March 2023*

### National legislation

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

There is no specific federal, regional or community Belgian legislation implementing EU state aid law. EU law is directly applicable and the Belgian aid schemes refer explicitly to EU rules. Belgium has not adopted any domestic legislation on state aid law.

*Law stated - 08 March 2023*

## PROGRAMMES

### National schemes

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?

As of the end of 2020, the main Belgian aid schemes approved by the Commission are the following (see the EC Search Aid Award Data , which lists all aid granted under all available schemes). This is a short list of the most representative schemes. To facilitate reading, the official Belgian (in Dutch or in French) titles of the schemes have been removed and translated into English:

- SA.55379: climate subsidy (environmental and energy support);
- SA.52328: Walloon Decree on Innovation;
- SA.50495: financing of innovative companies;
- SA.49825: aid scheme governed by Regulation (EU) No. 651/2014 concerning the projects of the 2nd call selected in the framework of the Interreg France-Wallonie-Vlaanderen programme 2014–2020;
- SA.49508: investment fund for the audiovisual sector in Wallonia;
- SA.49178: Decision on Development and Innovation;
- SA.49177: Decision on R&D Knowledge Intensive;
- SA.43252: support scheme for green heat, support scheme for residual heat and support scheme for biomethane injection;
- SA.41382 : regional incentives to promote environmental protection and sustainable energy use;
- SA.41602: strategic transformation aid to enterprises in the Flemish region;
- SA.38083: Film Fund;
- SA.35534: support for industrial research;
- SA.35533: support for experimental development;
- SA.33193: R&D&I Flanders scheme;
- SA.37017: Compensation for Indirect EU ETS costs;
- SA.36066: strategic ecology support;
- SA.41382: regional incentives to promote environmental protection and sustainable energy use;
- SA.41843: regional incentives for SMEs;
- SA.41383: regional incentives for large companies;
- SA.43244: regional incentives for SMEs (co-financed by ERDF);
- SA.43117: extension of assistance to the merchant marine, dredging and towing sectors;
- SA.38370: modifications to the 'tax shelter' measure to support audiovisual works;
- SA.36188: Decision of the Flemish government on Aid to Incubators. Innovation-cluster scheme, Belgium;
- SA.34722: screen flanders – support for audiovisual works;
- SA.41605: Ecologiepremie-Plus;
- SA.44350: support for investments in disadvantaged areas;
- SA.41604: strategic ecology investments;
- SA.48346: support for investments in disadvantaged areas (enlargement);
- SA.41817: subsidising business centres and transit buildings;
- SA.100118/SA.100480/SA.61807/SA.62336/SA.62407/SA.62562/SA.62651/SA.63215: Aid granted following covid-19 in the tourism sector;
- SA.64775: Recovery aid of the Government of the Brussels-Capital Region for businesses still heavily affected in the sectors of the nightclubs, restaurants and cafés and some of their suppliers, events, culture, tourism, sport and passenger transport (La prime Relance);



- SA.56819, COVID-19 – Loan guarantee scheme in response to the COVID-19 crisis;
- SA.58045, COVID-19: Modification to State aid measures SA.56919, SA.56819, SA.57056, SA.57057, SA.57083, SA.57132, SA.57173, SA.57187, SA.57188, SA.57246 and SA.57605;
- SA.57870, Belgium Second amendment to the scheme SA.56819 (2020/N) – COVID-19: Loan guarantee scheme in response to the COVID-19 crisis;
- SA.60114, Belgium Amendment to the scheme SA.57869 (2020/N) – COVID-19: Loan guarantee scheme in response to the COVID-19 crisis aimed at SMEs;
- SA.56919, Belgium The COVID-19- loan guarantee – Flemish Region;
- SA.59113, Prolongation of approved measures under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak;
- SA.57132, Belgium COVID-19: Flemish subordinated loan scheme for start-ups, scale-ups and SMEs;
- SA.57246, Belgium COVID-19: Second Flemish subordinated loan scheme for start-ups, scale-ups and SMEs;
- SA.57083, Belgium COVID-19: Guarantee scheme – Walloon Region;
- SA.57187, Credendo Bridge Guarantee;
- SA.59113 – Belgium Prolongation of approved measures under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak;
- SA.57188, Belgium COVID-19: Reinsurance of short-term credit and surety risks;
- SA.58218, Pan-European Guarantee Fund in response to COVID-19;
- SA.57797, Belgium COVID-19: Support for the social tourism sector;
- SA.58165, Belgium COVID-19: Exemption from the payment of the annual fee due to the Agence Fédérale pour la Sécurité de la Chaîne Alimentaire (AFSCA) for 2020 (HORECA contribution);
- SA.59297, Belgium COVID-19: aid for the payment of employer social security contributions in sectors particularly affected by the COVID-19 outbreak;
- SA.58763, Belgium COVID-19: Aid to hotels and aparthotels;
- SA.57605, COVID-19: strategic aid for the transformation of companies in the Flemish Region that invest in the manufacture of COVID-19 relevant products;
- SA.58691, COVID-19: Aid to the Flemish coach sector;
- SA.59113, Belgium: Prolongation of approved measures under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak;
- SA.55046: Support for cultural, artistic and educational video games (Wallimage);
- SA.59274: Prolongation of the Tax Shelter aid scheme for the production of audiovisual works;
- SA.54817: Tax Shelter aid scheme for the production of video games;
- SA.58081: Decision by the Flemish government to set up a refundable advance to support the start-up of the events sector;
- SA.54915: Market-wide capacity mechanism in Belgium;
- SA. 57173: Walloon scheme for Covid-19 relevant research and development;
- SA.57057: R&D scheme of Brussels Capital Region 'R&D Projects – Covid-19'.
- SA.59632, Walloon Region: Rescue and restructuring aid scheme for SMEs;
- SA.56807, COVID-19: Support measures for Walloon airports – Moratorium on concession fees;
- SA.58299, COVID-19: Aid to Flemish airports;
- SA.38393: Taxation of ports in Belgium;
- SA.38336: Extension of the exemption from social security contributions for seafarers employed in the maritime transport and dredging sector;
- SA.56475: Extension of the exemption scheme for seafarers to certain ships;
- SA.47109, Belgium: Scheme to promote combined rail transport (intermodal transport units) and diffuse rail traffic;
- SA.57556, Belgium: Extension of the scheme to promote combined transport by rail and diffuse traffic for 2021;
- SA.58023, Belgium: Prolongation of the aid scheme for alternative modes of transport to road for the period

2021–2025;

- SA.63286, Belgium – COVID-19: Extension Belgian Loan guarantee scheme in response to the COVID-19 crisis aimed at SMEs – Second amendment to SA.57869;
- SA.60548, Belgium – COVID-19: Prolongation of and Amendment to SA.57188 – Reinsurance of short-term credit and surety risks;
- SA.63243, Belgium – COVID-19: Amendments to scheme SA.57246, 'Second Flemish subordinated loan scheme for start-ups, scale-ups, and SMEs';
- SA.63242, Belgium – COVID-19: Amendments to scheme SA.57132 'Flemish subordinated loan scheme for start-ups, scale-ups, and SMEs';
- SA.60524, Belgium – COVID-19: Flemish Protection Mechanism for undertakings that suffer a turnover decline due to the continuing Covid-19 measures of 28 October 2020;
- SA.62156, Belgium Amendment to SA.60524 (2020/N) – COVID-19: Flemish Protection Mechanism for undertakings that suffer a turnover decline due to the continuing Covid-19 measures of 28 October 2020;
- SA.62826, Belgium Second Amendment to SA.60524 (2020/N) – COVID-19: Flemish Protection Mechanism for undertakings that suffer a turnover decline due to the continuing Covid-19 measures of 28 October 2020;
- SA.61748, Belgium – COVID-19: Flemish support for uncovered fixed costs;
- SA.62430, Belgium – COVID-19: Granting of a restart loan for undertakings with liquidity problems;
- SA.63252, Belgium – COVID-19: working from home in a healthy and vital way: call for projects;
- SA.62032, Belgium – COVID-19: Subsidised loans scheme – Société Régionale d'Investissement de Wallonie;
- SA.62883, Belgium – COVID-19: Aid scheme for certain sectors indirectly affected by the closure decisions in the context of the COVID-19 crisis;
- SA.62884, Belgium – COVID-19: compensation for undertakings active in BtoB and indirectly affected by closure decisions in the Walloon region;
- SA.60414, Belgium – COVID-19: Investment aid scheme for the production of COVID-19 relevant products (Walloon Region);
- SA.60198, Belgium – COVID-19: Investment aid for the production of COVID-19 related products (Université de Liège);
- SA.63443: Synthetic securitisation product under the Pan-European Guarantee Fund in response to the COVID-19 crisis;
- SA.62651, Belgium – COVID-19: Reduction of social security contributions for employers active in the travel sector and 'target group' reductions for employers active in the hotel and events sectors;
- SA.100480, Belgium – COVID-19: Aid to travel organisers;
- SA.61807, Belgium – COVID-19: Aid for tourism undertakings in the context of the coronavirus;
- SA.60198, Belgium – COVID-19: Investment aid for the production of COVID-19 related products (Université de Liège);
- SA.63443: Synthetic securitisation product under the Pan-European Guarantee Fund in response to the COVID-19 crisis;
- SA.62651, Belgium – COVID-19: Reduction of social security contributions for employers active in the travel sector and 'target group' reductions for employers active in the hotel and events sectors;
- SA.100480, Belgium – COVID-19: Aid to travel organisers;
- SA.61807, Belgium – COVID-19: Aid for tourism undertakings in the context of the coronavirus;
- SA.62336, Belgium – COVID-19: Tourism attractions in Wallonia;
- SA.62407, Belgium – COVID-19: Scheme for support to hotels and similar accommodation in Wallonia;
- SA.62017, Belgium – COVID-19: Support from the Flemish Government through the project call 'Flanders is a festival 2021' for organising festivals in the summer of 2021 in the context of the coronavirus;
- SA.63932, Belgium – COVID-19: Compensation for the costs of rebooking events in the Flemish Region;
- SA.62466, Belgium – COVID-19: Aid for professional sport clubs;
- SA.100716, Belgium – COVID-19: Financial support for the organisation of events in the context of the COVID-19

health crisis in the Brussels-Capital Region;

- SA.59765, Belgium – COVID-19: Aid to the Waterloo 1815 Memorial concession holder;
- SA.62651, Belgium – COVID-19: Reduction of social security contributions for employers active in the travel sector and 'target group' reductions for employers active in the hotel and events sectors;
- SA.47085, Belgium: Compensation for losses suffered by potato producers as a result of measures taken against harmful organisms;
- SA.61752, Belgium: Compensation for losses suffered by potato producers as a result of measures taken against harmful organisms;
- SA.56086, Belgium: Budgetary fund for the health and quality of animals and animal products, known as the 'Health Fund' for the cattle, small ruminants, pigs, poultry and milk sector;
- SA.52919, Belgium: Granting of compensatory aid for the slaughter of pigs following the outbreak of swine fever;
- SA.62393, Belgium: COVID-19: Aid for pig farmers with breeding sows (Wallonia);
- SA.55407, Belgium: Fisheries support fund in transition (OVIS) – aid for the fisheries and aquaculture sector ;
- SA.62042, Belgium – COVID-19: Amendments of approved measures;
- SA.63242, Belgium – COVID-19: Amendments to scheme SA.57132 'Flemish subordinated loan scheme for start-ups, scale-ups, and SMEs;
- SA.60682, Belgium – COVID-19: Support measures for Walloon airports – Moratorium on concession fees (extension and amendment of aid scheme SA.56807);
- SA.61709, Belgium – COVID-19: Aid to Air Belgium SA;
- SA.60451, Belgium: Support measure for intermodal transport by waterway in the Brussels Capital Region for the period 2021–2025;
- SA.60177, Belgium: Aid scheme to improve the quality of intermodal connections to and from Flemish seaports;
- SA.60499, Belgium: Aid scheme for the retrofitting of wagons to reduce noise pollution from rail freight transport;
- SA.62160 and SA.62498, Belgium – COVID-19: Temporary measures to reduce charges for commercial rail passenger and freight traffic;
- SA.62882, Belgium – COVID-19: Aid to passenger transport sector in Wallonia;
- SA.62486, Belgium: Prolongation of the 6th Management Contract between the Belgian State and bpost;
- SA.42366, Belgium: State compensations to bpost for the delivery of public services over 2016–2020;
- SA.100860: bpost SA/NV;
- SA.56448, Belgium: Prolongation of bpost's concessions over 2021 and 2022;
- SA.54915, Belgium: Capacity remuneration mechanism;
- SA.103790, Belgium – TCF: Scheme to compensate for additional costs in the fisheries sector caused by the Russian aggression against Ukraine;
- SA.103842, Belgium – TCF: 'Walloon schemes of temporary limited amounts of aid, public guarantees and subsidised loans for Walloon undertakings affected by the conflict in Ukraine';
- SA.104585, Belgium – TCF: State guarantee for natural gas and electricity suppliers and intermediaries;
- SA.104588, Belgium – TCF: Aid to undertakings facing increased energy costs following Russian aggression against Ukraine, regarding Q4 of 2022;
- SA.104845, Belgium – TCF: Amendments to SA.103314 (bridge loans in the Flemish region);
- SA.103314 Belgium – TCF: bridge loans in the Flemish Region;
- SA.106234, Belgium –TCF: Brussels-Capital Region aid scheme for energy costs to enterprises affected by the direct and indirect economic consequences of Russia's aggression against Ukraine;
- SA.105315, Belgium – TCF: Support measures in response to rising energy prices for the health and social work sectors in Wallonia; and
- SA.105513, Belgium – TCF: aid for undertakings in the framework of the energy crisis in the fourth quarter of 2022 in the Walloon region.

*Law stated - 08 March 2023*

## General Block Exemption Regulation

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

Belgium has not adopted any specific rules on the implementation of the GBER. However, all public authorities publish the necessary information by feeding it into the Transparency Award Module developed by the European Commission, which is available online.

*Law stated - 08 March 2023*

## PUBLIC OWNERSHIP AND SERVICES OF GENERAL ECONOMIC INTEREST (SGEI)

**Public undertakings, public holdings in company capital and public-private partnerships**

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

There have been several important state aid cases involving companies in which the Belgian state has some participation.

In the Charleroi Airport case (SA.14093), the European Commission (the Commission) found that a number of measures granted by Belgium to Brussels South Charleroi Airport (BSCA), the operator of Charleroi airport, under the form of a concession fee that was too low compared to what a private operator would have required, constituted state aid within the meaning of EU rules. A number of other measures in favour of BSCA were found either not to constitute state aid, or to constitute state aid that could be authorised because it was compatible with the internal market. The Commission's decision was challenged by BSCA (Case T-818/14) and Sowaer (Case T-474/16) before the General Court of the EU, which rejected these actions in its judgment of 25 January 2018.

In the Ducroire case (SA.23420), the Commission found that €36.6 million, from an initial capital injection of €150 million, constituted incompatible aid. This is because this amount supported activities that were open to competition (contrary to the remainder of the capital injection), and the expected profitability of the investment was insufficient for a private investor.

In the RTBF case (SA.32635), the Commission required Belgium to amend its financing regime of Belgium's French language public service broadcaster, RTBF, to bring it in line with state aid rules. The aid scheme was qualified as existing aid. In particular, Belgium made several commitments to clarify RTBF's public service remit and ensure that RTBF's public financing is limited to what is necessary to fulfil its tasks as a public service broadcaster. This ensures that RTBF does not use public money for commercial activities (where it competes with private players that receive no such subsidies).

*Law stated - 08 March 2023*

## SGEI

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

There are no specific national rules on services of general economic interest (SGEI), and this concept is similar as under EU law. However, the concept of public service, which is used more widely in Belgian law, is broader.

This is one of the reasons why, in the IRIS hospitals case (SA.19864), Belgium argued that at least part of the hospitals' activities was not economic, and therefore outside the scope of state aid rules. In this case, the Commission had received a complaint on the public compensation granted to five public hospitals in Brussels, together known as the IRIS hospitals. Following an in-depth assessment, the Commission concluded that the IRIS hospitals were undertakings and that their activities were economic in nature, but also that they had been entrusted with a number of additional obligations on top of the minimum requirements that apply to all hospitals in Belgium. Moreover, the Commission found that the compensation in question was in line with the 2012 SGEI decision (OJ 2012 L 7/3).

These additional obligations included, for instance, the duty to treat all patients in all circumstances (including non-emergency situations), regardless of their ability to pay (universal care obligation). These obligations also included the duty to offer a full range of basic hospital services at multiple sites. Finally, the IRIS hospitals were also obliged to provide extensive social services to patients and their families. Taking into account that the financing sources common to both public and private hospitals are insufficient to cover the costs of these additional obligations, the IRIS hospitals incur deficits. By compensating these deficits, the Brussels municipalities ensure that the IRIS hospitals can continue to fulfil their public service obligations.

In its investigation, the Commission also verified that the amount of compensation paid for the provision of the SGEI did not exceed what was necessary to cover the net cost incurred in discharging the public service obligation, including a reasonable profit. On this basis, the Commission concluded that the deficit financing awarded by the Brussels municipalities to the IRIS hospitals since 1996 was in line with state aid rules (a first Commission decision of 2009 was annulled by the General Court on 7 November 2012, T-137/10; the new Commission decision was adopted on 5 July 2016).

*Law stated - 08 March 2023*

## CONSIDERATIONS FOR AID RECIPIENTS

### Legal right to state aid

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

In Belgium, there is no general principle pursuant to which businesses have a legal right to obtain state aid. Nevertheless, the authorities' discretion can be limited by the conditions that must be met for a company to be entitled to a specific aid measure. If these conditions are detailed and objective, then companies meeting them will have in principle a legal right to obtain the aid in question, within the limits of the budget available for that measure.

*Law stated - 08 March 2023*

### Main award criteria

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

Depending on the type of the aid measure in question, the Belgian authorities consider a wide-ranging set of criteria before making an award, including culture and heritage conservation, support for small and medium-sized enterprises (SMEs), regional development, job creation and research, development and innovation (R&D&I).

*Law stated - 08 March 2023*

## Strategic considerations and best practice

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

Aid for environmental protection, for R&D&I and culture are the most common types of aid in Belgium, and aid in the railway sector is also very significant.

*Law stated - 08 March 2023*

## Challenging refusal to grant aid

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

The procedure for granting state aid is subject to the control of the judge who examines the legality of the refusal decision to grant aid. When these decisions are governed by administrative law, an action for annulment can be lodged before the administrative judge (Council of State). When these decisions are governed by civil law (contract, for instance), an action can be lodged before the competent commercial or civil judge.

The Council of State rejected an application in this respect. Vincibi, a company active in the housing sector, challenged the decree of the Government of the Brussels-Capital Region of 22 October 2020 relating to aid for hotels and apartment hotels in the context of the covid-19 health crisis, from which it was unable to benefit. The Council of State ruled that Vincibi was not eligible and could not argue any discrimination because the distinction between, on the one hand, hotels and apart-hotels and, on the other hand, lodgings in private homes was appropriate and justified in view of the objectives pursued by the aid for economic recovery following the pandemic (Council of State, 16 May 2022, *Vincibi v Région de Bruxelles-Capitale*, No. 253.763).

*Law stated - 08 March 2023*

## Involvement in EU investigation and notification process

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

It will depend on the nature of the aid measures and of the lead ministry in charge.

In the event of aid schemes, the aid beneficiaries are generally not involved, except through preliminary public consultations (eg, on draft decrees for regional aid for SMEs); however, the procedure with the European Commission is strictly bilateral, the regions or communities being in direct contact with the Directorate-General for Competition of the Commission through Belgium's Permanent Representation, which includes delegates from various regional and community governments.

In the event of individual aid, the beneficiary is generally closely involved, including in the drafting of the aid measures or the responses to questions by the European Commission (the Commission) about specific measures being investigated. This is particularly the case in restructuring or rescue aid cases and within the framework of services of general economic interest measures.

Each ministry also has its own tradition to involve more or less the beneficiaries depending on the circumstances.

In case of close involvement, the aid beneficiary usually has access to the entire file, and can attend meetings between the national authorities and the Commission (the latter being decided on a case-by-case basis depending on the political situation).

*Law stated - 08 March 2023*



## STRATEGIC CONSIDERATIONS FOR COMPETITORS

### Complaints about state aid

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 Belgium, there is no specific entity for hearing complaints from competitors of a state aid beneficiary outside the competent courts. In certain sectors, there is an ombudsman that can act in certain cases, but this is not specifically designed for state aid matters.

Only the courts are competent to efficiently hear competitor claims contesting the grant of state aid.

*Law stated - 08 March 2023*

### Dealing with illegal or incompatible aid

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

Information on all state aid expenditure, at federal, regional and community level, is collected by the state with a view to complying with the annual reporting exercise pursuant to Regulation 794/2004. It is then transmitted to the European Commission (the Commission) for publication through the annual state aid scoreboard and on the Eurostat website.

In addition, since the entry into force in July 2016 of the General Block Exemption Regulation, each relevant state aid scheme adopted by the Belgian public authorities foresees an obligation of publicity according to which all aid above €500,000 granted on the basis of a given scheme will be published on various websites dedicated to state aid (this depends on the federal, regional and community levels). See the Transparency Award Module developed by the Commission available online.

*Law stated - 08 March 2023*

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

Right of access to public documents is governed by various acts depending on the level of the administration concerned. A competitor can turn to the relevant public authority to obtain access to the documents that led to the grant of the measure that it contests (deliberations, contracts, etc), to check whether they contain any possible elements of state aid.

In addition, parliamentary debates are published in full whatever the level, which can provide useful information on certain aid measures.

*Law stated - 08 March 2023*

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

The Central Balance Sheet Office collects and handles the annual accounts of nearly all legal entities active in Belgium and makes these accounts available for the public online.

### Other ways to counter illegal or incompatible aid

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

In the case of suspected unlawful or incompatible aid granted to an alleged aid beneficiary, competitors (or in fact any interested parties) have the right to raise these issues by virtue of any legal means or threaten to bring an action against such a measure at EU level (before the Commission) or national level (before national courts).

It is not unusual to contact directly the aid intermediary (a bank or an institution at the end of the chain of the aid-granting process) to raise an aid issue. Such measures could only potentially qualify as unfair competition practices if it were found that the allegations made were manifestly unfounded and resulted in lasting damages for the company.

Law stated - 08 March 2023

## PRIVATE ENFORCEMENT IN NATIONAL COURTS

### Relevant courts and standing

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

The main principles are governed by EU state aid law directly. Against this EU state aid law background, any competent court will have to hear private complaints against the award of state aid (unlawful aid, ie, not notified to the European Commission (the Commission) or implemented before its approval, and unlawful and incompatible aid following a negative decision by the Commission).

The general powers of the national courts concerning the direct effect of article 108(3) TFEU are as follows.

### Proceedings before the Council of State

Any administrative act of a non-legislative nature can be reviewed by the Council of State (action for annulment). The action can be lodged by any party demonstrating an interest (such interest must be personal, present, certain, direct and legitimate). The time limit for submitting the action is two months from the notification, publication or full knowledge of the act. Until now, state aid cases before the Council of State have involved challenges by beneficiaries against a recovery decision, and against a decision rejecting a tender on state aid grounds. To date, no actions have been brought by competitors before the Council of State against a decision granting state aid in breach of article 108(3) TFEU. It may be that the procedure before the Council of State, which is quite lengthy, is not convenient for a claimant that is a competitor of a beneficiary of unlawfully granted state aid. Complainants also have the possibility of requesting, in parallel with the action for annulment, the suspension of the challenged act (the decision granting state aid, for instance). A decision by the Council of State is then delivered within 45 days. The pleas invoked in a request for suspension must be 'serious and likely to justify the annulment' and there must be a risk of serious and irreparable harm (the latter condition is very difficult to fulfil since pecuniary damage is only deemed to be irreparable if it leads a claimant to bankruptcy). If it is not possible for the claimant to wait 45 days, it can make use of the extreme urgency procedure. The risk of damage from an immediate implementation of the challenged act must be imminent or, at least, likely before the expiry of the 45 days; in addition, the claimant must have taken all steps to prevent the damage and must have lodged the request with the court as soon as possible. The case may then be registered immediately (within one or a few hours). A decision can be delivered on the day of the request. To the best of our knowledge, neither the



suspension procedure nor the extreme urgency procedure has been used in state aid matters.

## Proceedings before civil courts

Actions may be brought before the civil courts (and the commercial courts) regarding litigation between private parties, or between the latter and the state, when there is no intention to request the annulment of a particular state measure (the sole administrative court in Belgium is the Council of State described above). Civil courts have jurisdiction to rule on the state's liability. The commercial courts have jurisdiction over litigation between professionals in the course of their business, and over any litigation concerning business acts.

Actions for damages brought against a competitor should be brought before the commercial courts. Where the claimant is not a commercial operator, such an action can also be brought before the civil courts.

Judgments of the commercial courts can be appealed before the commercial division of the court of appeal and further appealed, on points of law only, before the Supreme Court.

## Procedure before the Constitutional Court

The Constitutional Court is competent to review the constitutionality of certain legislative acts. It can review the compatibility of laws (from the federal Parliament), decrees (legislative acts of the Flemish region, of the Walloon region and of the French- and German-speaking communities) and ordinances (legislative acts of the Brussels region) with:

- the rules establishing the division of powers between the state, the communities and the regions found in the Constitution and in special laws;
- the fundamental rights and liberties guaranteed in section II of the Constitution (articles 8 to 32 of the Constitution);
- the principle of legality of taxation as laid down in article 170 of the Constitution;
- the principle of non-discrimination in fiscal matters as laid down in article 172 of the Constitution; and
- the protection for non-citizens as expressed in article 191 of the Constitution.

A violation of EU state aid rules constitutes a violation of such fundamental rights. Thus, in some state aid cases, the Constitutional Court has found that the relevant laws breached articles 10 and 11 of the Constitution (the principle of non-discrimination) in parallel with state aid rules. Prior to the extension of the Constitutional Court's competences in 2004, only the violation of the principle of non-discrimination (and not the other fundamental rights mentioned in section II of the Constitution) could be directly invoked before the Constitutional Court (then named the Court of Arbitration). Before 2004, claimants invoked the violation of this principle read in conjunction with the state aid rules. Following the extension of the court's competences, these rules remain an indirect ground of review. Regulations having the force of law, which are subject to constitutional control, include both substantive and formal rules adopted as laws, decrees and ordinances as mentioned above.

All other regulations, such as royal decrees, decisions by governments, communities and regions, ministerial decrees, regulations and decisions of provinces and municipalities, as well as court judgments, fall outside the jurisdiction of the Constitutional Court. A case may be brought before the Constitutional Court by virtue of a direct action or through a preliminary reference by another court. The claimants in such actions are not necessarily competitors of the beneficiary.

In two cases, the claimants were municipalities seeking to withdraw the tax exemption granted to a beneficiary of aid. In other cases, the claimants have been parties unwilling to pay taxes under a regime that could constitute state aid.

In one case, the claimant was a professional association representing insurance companies against a measure that would benefit a competitor of the members of that association.

*Law stated - 08 March 2023*

## Available grounds

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

There are several available grounds for bringing a private enforcement action, including article 108(3) TFEU directly, tort (article 1382 of the Belgian Civil Code), constitutional fundamental rights and contractual provisions.

*Law stated - 08 March 2023*

## Defence of an action

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

Before administrative courts, it is the state that will defend the aid measure being challenged. Before civil courts, it could be either the state or the beneficiary, depending on how the applicant has formulated his or her application.

*Law stated - 08 March 2023*

## Compliance with EU law

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?

Belgian national courts have been petitioned to enforce compliance with state aid rules or the standstill obligation under article 108(3) TFEU, although such actions are still not very frequent, despite an increasing trend. An action by a competitor does not automatically have a suspensory effect, but the competitor can request the suspension or even the provisional recovery of the aid granted in violation of the standstill obligation. The pleas invoked in a request for suspension must be 'serious and likely to justify the annulment' and there must be a risk of serious and irreparable harm (the latter condition is very difficult to fulfil as pecuniary damage is only deemed to be irreparable if it leads a claimant to bankruptcy).

There is no significant cost risk in the case of an unsuccessful challenge. According to a law of 21 April 2007, a party that loses its case risks having to settle the procedure indemnity, compensation covering both procedural costs and lawyers' costs, granted by the court to the winning party. The amounts are lump sums, capped to maxima (basic amounts from €180 to €18,000 and maximum amounts from €360 to €36,000 for cases valued at more than €1 million) according to the value of the cases (when the case cannot be evaluated in pecuniary sums, the basic amount is fixed at €1,440 with a maximum of €12,000).

In Belgium, the Breda case (President of Brussels Commercial Court, 13 February 1995, Breda Fucine Meridionali v Manoir Industries , JTDE, 1995, p72) constitutes an exemplary decision that refers to all the consequences, with regard to the beneficiary of unlawful aid, of the violation of article 108(3) TFEU. The claimant successfully obtained a cease and desist order against an Italian company regarding its participation in a tender process with the benefit of unlawful aid in Italy. However, damages were not sought in this case. Another action, brought by Hays against La Poste in 2000, was finally not ruled upon by the Court of Appeal (President of Commercial Court of Brussels, 15 September 2000 and

Court of Appeal of Brussels of 7 December 2001, *Hays v La Poste* (Assurmail service) and *Key Mail*, unreported), because the Commission's decision finding a breach of article 102 TFEU was sufficient for the service allegedly subsidised to be discontinued.

On 4 May 2018, the First Instance Tribunal of Brussels ordered the suspension of 20 per cent of the subsidies granted by the Brussels region to Agence Bruxelles-Propreté (ABP). ABP has a de facto monopoly for the collection of household waste and receives subsidies for this activity. The collection of non-household waste is, on the other hand, open to competition and certain competitors brought an action before the First Instance Tribunal of Brussels claiming ABP was cross-subsidising its non-household waste activity, which constituted unlawful aid. The Tribunal agreed with the complainants and ordered the suspension of 20 per cent of the subsidies received by ABP, corresponding approximately to its non-household waste activity. ABP does not keep separate accounts for the two activities and denied access to its accounts during the procedure. Unfortunately, the Tribunal did not go as far as requesting the recovery of the unlawful aid for the previous years, which it would have been entitled to do under article 108(3) TFEU. This shows the reluctance of judges to draw all the necessary conclusions of the violation of article 108(3) TFEU.

*Law stated - 08 March 2023*

### **Referral by national courts to European Commission**

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?

Belgian courts can directly apply article 29 of Regulation (EU) 2015/1589 providing for the amicus curiae conditions in state aid matters. There is no need for a specific national rule of procedure. According to this provision, Belgian courts can ask the Commission:

- to transmit to them relevant information in its possession (whether a procedure is ongoing, whether a decision has been taken, data, statistics, etc); and
- for an opinion concerning the application of EU state aid rules (on all economic, factual or legal matters arising in the context of the national proceedings).

The amicus curiae provisions also allow the Commission, where the coherent application of state aid rules so requires, acting on its own initiative, to submit written observations to Belgian courts. The Commission may, with the permission of the court, also make oral observations and, to prepare its observations, it may request the court to transmit documents at its disposal.

This is of course without prejudice to the possibility or obligation for the national court to ask the CJEU for a preliminary ruling regarding the interpretation or the validity of EU law in accordance with article 267 TFEU.

Although national courts can stay proceedings while waiting for the Commission's opinion, they remain under the obligation to protect individual rights under article 108(3) TFEU, which can include interim measures.

To our knowledge, the Commission has not intervened as an amicus curiae before a Belgian court. On the other hand, Belgian courts have used the procedure under article 267 TFEU on several occasions (see, for example, recent Cases C-318/18 *Oracle Belgium* and C-76/15 *Vervloet* ; see also Cases C-19/11 *Libert* ; C-89/10 *Q-Beef* et *Bosschaert* ; C-393/04 *Air Liquide Industries Belgium* ; C-261/01 *van Calster et Cleeren* ; C-262/01 *Openbaar slachthuis* ; C-256/97 *DM Transport* ; and C-44/93 *Namur-Les assurances du crédit/Office national du du croire et État belge* ).

*Law stated - 08 March 2023*

## Burden of proof

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

It is the claimant that bears the burden of proof under Belgian procedural rules. The claimant must therefore establish the existence of the contested aid and produce evidence thereof. Courts are empowered to request the production of documents but these must be specifically determined in the request (no discovery or disclosure procedure – the new disclosure procedure for antitrust damages actions does not apply in state aid matters). Proof can be provided by any means.

*Law stated - 08 March 2023*

## Deutsche Lufthansa scenario

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?

A competitor should bring state aid proceedings before a national court when the Commission is already investigating the case if it believes it meets the requirements to request interim relief. While the Commission itself is competent to order the suspension or the provisional recovery of state aid granted in violation of the standstill obligation, national courts may be more willing to hear the competitor's case. However, granting interim relief against the aid measure is subject to very strict legal requirements before national courts as well. If the request for interim relief concerns the EU act itself (request for the suspension of the recovery order on the basis of the alleged invalidity of the Commission's decision), the conditions are even stricter for the national court (see Joined Cases C-143/88 and C-92/89 Zuckerfabrik Süderdithmarschen *ao* and Case C-465/93 Atlanta *ao* ; see also Case 314/85 Foto-Frost , obliging a national court to refer the matter to the CJEU if it raises the invalidity of an EU act).

In addition to the above added value, national courts are obliged to take into account the preliminary assessment of the European Commission in its decision to open a formal investigation, pursuant to the CJEU's judgment in Case C-284/12 Deutsche Lufthansa . In this judgment the CJEU found that:

*'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.'*

*Law stated - 08 March 2023*

## Economic evidence

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

As national courts are competent to assess whether a measure constitutes state aid under EU law, economic evidence can play an important role, in particular when ruling on whether the state acted as a private operator pursuant to the market economy investor principle.

*Law stated - 08 March 2023*

## Time frame

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

The time frame for court proceedings is generally long in Belgium, especially in Brussels, although requests for interim measures are faster.

*Law stated - 08 March 2023*

## Interim relief

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

A request for interim measures can be made before the Council of State (in parallel with a request for suspension, which in turn will require a request for annulment). It is technically possible for the Belgian state to seek interim measures from the civil judge requiring the beneficiary of unlawful aid to pay a bank guarantee for the aid in question before the final judgment.

The conditions for this type of interim measure are urgency, the existence of a prima facie case and the risk of serious and immediate harm. However, it is apparent from the case law that the 'urgency' criterion is a very difficult one to satisfy.

*Law stated - 08 March 2023*

## Legal consequence of illegal aid

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

National courts can only rule on the existence of aid, and on whether it is unlawful (ie, whether it has been notified to the Commission and not implemented before its approval by the Commission). The assessment of the compatibility of an aid measure is an exclusive competence of the Commission.

The legal consequences of the presence of unlawful aid will depend on what the applicant has requested. The EU courts' case law imposes that the measures of the national courts must make it possible to restore the competitive situation existing prior to the payment of the aid. The consequences could include suspension of the grant of the aid, provisional or definitive recovery of aid already granted or damages.

Pursuant to the judgment in Case C-275/10 *Residex*, while EU law does not impose specific consequences that the national courts must draw with regard to an infringement of article 108(3) TFEU, the measures of the national courts must make it possible to restore the competitive situation existing prior to the payment of the aid. Therefore, it is for

the national courts to determine whether cancellation of a guarantee may, given the specific circumstances of the dispute, be a more effective means of achieving that restoration than other means.

National courts can, therefore, cancel a state guarantee if they consider it constitutes unlawful aid. It is for the national court to decide whether there is any less onerous procedural measure to restore the competitive situation, such as increasing the premium paid for the guarantee, or the interest rate for the corresponding loan.

As a recent case law illustration, it was ruled that unlawful aid vitiated the validity of a sale in the public domain. The annulment of the deed of sale was a sufficient reparation in kind (Ghent Court of Appeal, 8 November 2022, VPP v OCMW Gent ).

*Law stated - 08 March 2023*

## Damages

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?

### **Damages claims by competitors, third parties or beneficiaries against the granting authority before the national courts**

Damages can be sought from the Belgian state for non-compliance with EU law in the following two ways.

First, under national liability law, a person has to make good in full any damage caused by his or her fault (article 1382 of the Belgian Civil Code) or by his or her negligence (article 1383 of the Belgian Civil Code). The Belgian state and its organs can also be held liable for fault or negligence under these provisions. Unlike French law, for instance, Belgian law therefore allows in principle the granting of damages in cases of state liability according to the same conditions that apply to individuals. It is necessary to prove a fault, the resulting damage and a causal link. These provisions can, therefore, be used to engage the state's responsibility (including the legislature and even the judiciary in certain circumstances) for adopting an act that breaches EU law. Harm can include the breach of a legitimate interest.

Second, damages can also be sought from the Belgian state under EU law liability principles, in line with the principles set out in CJEU cases (Joined Cases C-6/90 and C-9/90 Francovich and Bonifaci and Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur-Factortame III ). Under this case law, the liability of the state will be engaged where:

- the rule of law infringed is intended to confer rights on individuals;
- the breach is sufficiently serious; and
- there is a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

As regards the second condition, where the state has a large margin of discretion in implementing a policy, the CJEU has considered that the state's liability can only be engaged where the state has manifestly and gravely disregarded the limits on its discretion. This second condition can therefore be much harder to satisfy than the test under civil liability, where a simple breach is sufficient evidence of damage. However, this is not the case in the field of state aid, as no margin of discretion is left to the member states on the application of article 108(3) TFEU. By definition, therefore, a violation of article 108(3) TFEU should always be regarded as a serious breach, likely to engage the state's liability within the meaning of the case law mentioned above. Concerning state aid rules, the CJEU's case law may, therefore, seem more favourable than (or at least equivalent to, since any breach of the law by the state is regarded as a fault on behalf of the state) the traditional national liability system based on 'fault, damage and causal link' (article 1382 of the

Belgian Civil Code).

Damages claims by the beneficiary (against the granting authority) before the national courts are based on the same principles. However, the damage for the beneficiary cannot be the aid's recovery. This is not damage, only the logical consequence of the restoration of undistorted competition following the granting of unlawful aid. The damage must be inherently different in nature and in scope: the beneficiary should show specific damage (eg, postponement of a decision to delocalise following the promise of an unlawful aid – the loss from the non-delocalisation could be damage; the beneficiary would probably have to share the damage owing to his or her obligations of diligence with regard to the state's decisions).

## **Damages claims by competitors or third parties against the beneficiary before the national courts**

This type of action is based on the principles of actions for unfair competition. Under EU case law, the beneficiary, by claiming any benefit from the violation of article 108(3) TFEU, commits an act of unfair competition under national legislation (Case C-39/94, SFEI and others v La Poste and others ). The competitor of such a beneficiary has the right to stop this act of unfair competition by having recourse to an efficient litigation procedure that leads to a definitive decision, even though the latter is adopted by virtue of an interim relief procedure (specific procedure for a cease-and-desist order). The question of the liability of the beneficiary of unlawful aid must be brought before the civil courts under article 1382 of the Belgian Civil Code. The relevant courts will have to determine whether the beneficiary benefited from the aid in full knowledge of its unlawful character, or whether the beneficiary ought to have been aware of this unlawfulness, as well as the amount of damages to be granted to the competitors. This would appear to be a difficult test to satisfy.

In both types of claims described above, damages are calculated according to methodologies similar to antitrust cases (loss of revenue, reduction of turnover, etc) but, as explained above, they cannot include the aid and interest to be recovered.

*Law stated - 08 March 2023*

## **STATE ACTIONS TO RECOVER INCOMPATIBLE AID**

### **Relevant legislation**

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

In Belgium, there is no specific legislation for aid recovery. However, the recovery of public debts is organised by the coordinated acts of 17 July 1991 on the accountancy of the state. Pursuant to this text, implicitly (state aid is not expressly mentioned), the authority responsible for recovering aid granted at the national level is, in theory, the Ministry of the Economy and Finances (the Treasury). Nevertheless, in certain cases other ministries can be responsible for recovery. Unlawful state aid can be regarded as a debt owed to the state or a claim by the state against an aid beneficiary.

Similar regulations apply at regional or community level.

However, most of the recovery cases are implemented by a mere letter of formal notice. If this letter is not complied with within a reasonable time, public authorities will proceed to the recovery on their own motion and by any means, more specifically through action before the relevant and competent courts.

However, in some instances Belgium has adopted a specific law to implement a European Commission (the Commission) decision ordering the recovery of aid. For example, Belgium adopted on 22 December 2016 the law covering the implementation of the European Commission decision of 11 January 2016 with regard to the Belgian



excess profit provision based on article 185 section 2 of the Belgian Income Tax Code 1992. The law was drafted in cooperation with and with the approval of the Commission. On the basis of this law, the Belgian tax authorities are entitled to issue a tax assessment to companies that obtained and applied an excess profit ruling.

Likewise, a royal decree was adopted on 15 March 2017 to recover the aid that the Commission was investigating in Case SA.38105.

In the event of implementing a negative decision, the Commission systematically monitors whether the recovery has really been required by the Belgian state in due course. The Commission regularly initiates action for failure to fulfil EU obligations before the CJEU where the state fails to do so. When a member state does not comply with a state aid decision in due time, the Commission can refer it to the CJEU without initiating an infringement procedure under article 258 TFEU. Belgium has been found not to have fulfilled its obligations under article 288 TFEU and the Commission's decision in several cases, for example Case C-591/14 Commission v Belgium and Case C-378/98 Commission v Belgium .

*Law stated - 08 March 2023*

### **Legal basis for recovery**

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

The legal basis for recovery is usually the Commission's decision declaring the aid unlawful and incompatible, and ordering its recovery by the state (a negative decision – even if in some cases Belgium adopted a specific law to implement the Commission's decision). Otherwise, the legal basis is article 108(3) TFEU in case of aid unlawfully granted where the Commission has not adopted any decision. In certain circumstances, the granting of aid is subject to compliance with certain conditions, especially in terms of investment, employment or environmental objectives. Non-compliance with those conditions could serve as a basis for the granting authority to demand the recovery of said aid.

*Law stated - 08 March 2023*

### **Commission-instigated infringement procedures**

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

When a member state does not comply with a state aid decision in due time, the Commission can refer it to the CJEU without initiating an infringement procedure under article 258 TFEU. This has been the case for Belgium on several occasions, in particular the following:

- Case C-591/14: failure to fulfil obligations under article 288 TFEU and Commission Decision 2011/678/EU concerning the state aid for financing screening of transmissible spongiform encephalopathies in bovine animals implemented by Belgium (State aid C 44/08 (ex NN 45/04)), by not adopting within the period prescribed the measures necessary to recover the unlawful and incompatible aid;
- Case C-187/06: case withdrawn before judgment following the recovery of the aid declared incompatible by Commission Decision C(2002) 1341 fin on the aid granted to the Beaulieu group;
- Case C-378/98: failure to fulfil obligations under article 288 TFEU and Commission Decision 97/239/EC of 4 December 1996 concerning aid granted by Belgium under the Maribel bis/ter scheme, by not adopting within the period prescribed the measures necessary to recover the unlawful and incompatible aid;
- Case C-375/89: failure to fulfil obligations by not complying with the judgment of the CJEU of 9 April 1987 in



Case 5/86;

- Case C-74/89: failure to fulfil obligations by not complying with Commission Decision 84/111/EEC of 30 November 1983 on the proposal of the Belgian government to grant aid to a synthetic fibre producer;
- Case 5/86: failure to fulfil obligations by not complying with Commission Decision 84/508/EEC of 27 June 1984 on the aid granted by the Belgian government to a producer of polypropylene fibre and yarn;
- Case 52/84: failure to fulfil obligations by not complying with Commission Decision 83/130/EEC of 16 February 1983 on aid granted by the Belgian government to a firm manufacturing ceramic sanitary ware; and
- Case 156/77: failure to fulfil obligations by not complying with Commission Decision of 4 May 1976 on aid from the Belgian government to the Société Nationale des Chemins de Fer Belges for through international railway tariffs for coal and steel.

*Law stated - 08 March 2023*

## Implementation of recovery

### How is recovery implemented?

The recovery procedure is put in motion by the relevant administration (federal, regional or community), in the same way as the state would proceed to obtain the repayment of any other debt. A recovery order is usually established by the relevant authority and is delivered to the beneficiary of the unlawful aid. This document requires that the latter repay the unlawful aid to the public authority concerned. The public authorities can rely directly on article 108(3) TFEU and serve a letter of formal notice as a recovery order.

When the aid beneficiary does not obey the order, the public authorities must go to court to enforce the recovery order.

### Rules applicable to recovery

In Belgium, a variety of national and regional bodies may be responsible for the recovery of aid, either on their own initiative or following a negative Commission decision. Indeed, in recovery cases, the Belgian federal government, the Walloon region, the Flemish region, the Brussels region, the various communities and the Belgian Social Security office, as well as other public bodies responsible for granting financial assistance, have all taken measures to recover aid.

To recover unlawful aid, the Belgian authorities follow the general Belgian civil rules relating to the recovery of a debt, the legal basis thereof being the Commission decision. The first step of the debt-recovery procedure requires the creditor (the relevant Belgian authority responsible for the recovery of the unlawful aid) to send a letter of formal notice to the debtor (the beneficiary of the aid) requesting payment of its debt (the aid).

If the beneficiary of the aid refuses to comply with the letter of formal notice, the relevant Belgian authority can bring an action before the civil courts to obtain a judgment ordering the beneficiary to pay the debt (unlawful aid). The first-instance judgment, generally rendered by a commercial court, can be appealed to the Court of Appeal and then to the Supreme Court (on points of law only).

### Action for recovery

#### By the state

In Belgium, there are some examples of cases whereby the Belgian state adopted a law to ensure the recovery of unlawfully paid aid (eg, the Maribel case; the law of 30 December 2001, amended by the law of 2 August 2002, implemented by Royal Decree of 3 October 2002; the Excess Profit Scheme (tax ruling) case: the law of 22 December 2016).

In the Ryanair case, the state (the Walloon region) sought aid recovery before foreign jurisdictions (in Ireland).

### **By competitors**

We are not aware of any case where a competitor has sought to obtain the recovery of unlawful aid. In the ABP case, the competitors seem to have requested the recovery of the unlawful aid for the previous years but the tribunal did not grant this request.

### **By beneficiaries**

There have been few actions brought by beneficiaries opposing a recovery order. This can be explained by the fact that a recovery order only becomes enforceable after a judgment of the relevant court. The beneficiary of the aid can contest the recovery order by bringing an action for annulment of the decision ordering the recovery before the Council of State. Recipients of incompatible aid have thus preferred to challenge the grounds for recovery before national courts, in actions for debt recovery brought by the authorities. In the cases identified, beneficiaries of the aid have usually resisted returning the aid after the initial request from the member state. The beneficiary has usually appealed the court orders for repayment of the unlawful aid. Such actions by the beneficiary, although logical, delay the date by which the aid can be fully recovered.

*Law stated - 08 March 2023*

## **Article 108(3) TFEU**

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

In view of the primacy of EU law over national law, national courts are obliged to set aside the contractual provisions that constitute the contractual basis for the grant of the aid. Therefore, a public body can rely on article 108(3) TFEU, even if this means that it is relying on its own fault to escape its contractual obligations, which seems contrary to the principle that no one can be heard to invoke their own turpitude.

The CJEU accepted this in Case C-505/14 Klausner Holz Niedersachsen, where the unlawfulness of aid contained within a contract was invoked to escape the execution of that contract. A final judgment from a national court had held that the contract in question remained in force. The CJEU found that EU state aid rules must prevail even over the res judicata principle. Consequently, the principle that no one can be heard to invoke their own turpitude must also be set aside in case of a violation of article 108(3) TFEU.

The above does not necessarily mean that the contract as a whole will be declared invalid. The national court must assess the contract as a whole in light of the intent of the parties. If the granting of the aid is the principal object of the contract, the whole contract will be declared void. But if the granting of the aid was only an accessory to the principal object of the contract, the remaining provisions of the contract will remain valid. A similar reasoning was applied in a judgment of 19 October 2012 by the Court of Appeal of Brussels. The latter assessed whether a Commission decision stating that a public guarantee constituted unlawful and incompatible aid in favour of Forges de Clabecq affected the validity of the loans that were covered by this guarantee. The Court of Appeal considered that the guarantee did not constitute the determining motive of the loans, which were never as such put in question by the Commission. Therefore, the loans were not void.

Finally, the fact that a public body could rely on article 108(3) TFEU would not exonerate it from its potential liability for damages it may have caused by not complying with the EU notification and standstill obligations (we simply reiterate that the beneficiary's damages cannot include the recovery of the aid plus interest).

**Defence against recovery order**

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

In Belgium, the administrative act ordering recovery (which may simply be a letter to the beneficiary, or court proceedings) can be based directly on the negative Commission decision. The beneficiary of the aid can contest the recovery order by bringing an action for annulment before the Council of State. The beneficiary can also contest the recovery order before the competent court in its defence of a recovery action brought by the relevant Belgian authority. There have only been a few direct actions brought by beneficiaries of state aid. Two of these cases were actions for annulment, brought before the Council of State against administrative measures taken by a relevant national authority or public body that had negatively affected the beneficiary of the state aid.

**Action contesting the validity of the Commission decision**

National courts have no jurisdiction under EU law to declare acts of European institutions invalid. Even though it might consider the Commission's negative decision to be illegal, a national court may not prevent the ensuing recovery procedure. Should it disagree with a Commission decision, the court should refer a preliminary question as to its validity to the CJEU under article 267 TFEU (see Case 314/85 Foto-Frost).

Such requests (by the beneficiaries of aid or competitors of the beneficiaries) are, however, inadmissible if a direct challenge of the Commission decision before the General Court under article 263 TFEU would have been manifestly admissible (the Commercial Court of Ghent anticipated this rule a few days before the General Court in the TWD case (Case C-355/95 P TWD v Commission)).

**Other grounds**

While the national courts' recovery obligation is not absolute, the EU courts' case law demonstrates that it is only in exceptional circumstances that the recovery of unlawful state aid will not be appropriate. The legal standard to be applied in this context is similar to that applicable under articles 16 and 17 of the Procedural Regulation. In other words, circumstances that did not stand in the way of a recovery order by the Commission cannot justify a national court refraining from ordering full recovery. The standard that the EU courts apply in this respect is very strict. In particular, the CJEU has consistently held that, in principle, a beneficiary of unlawful aid cannot plead legitimate expectation against a Commission recovery order. This is because a diligent businessperson would have been able to verify whether the aid received was notified.

In fact, the only exception that has been accepted by the EU courts is the absolute impossibility to implement the recovery decision and only the member state concerned can raise this defence. This concept has been interpreted in a very restrictive manner. For instance, a member state cannot plead requirements of national law, such as national prescription rules (Case C-24/95, Alcan) or the absence of a recovery title under national law (Case C-303/88, Italy v Commission). Moreover, the CJEU has consistently held that the obligation to recover is not affected by circumstances linked to the economic situation of the beneficiary. In other words, a company in financial difficulties does not constitute proof that recovery is impossible (Case C-52/84, Commission v Belgium). For the CJEU, the only way to demonstrate an absolute impossibility of recovering the aid is to show the absence of any recoverable assets (Case C-52/84, Commission v Belgium).

## Interim relief against recovery order

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

Interim relief is available to a beneficiary wanting to suspend a recovery order, under the following conditions set out by the EU courts: prima facie case, urgency and risk of irreparable damage.

Under national liability law, a person has to make good in full any damage caused by his or her fault (article 1382 of the Belgian Civil Code) or by his or her negligence (article 1383 of the Belgian Civil Code). The Belgian state and its organs can also be held liable for fault or negligence under these provisions. Unlike French law, for instance, Belgian law therefore allows in principle the granting of damages in cases of state liability according to the same conditions that apply to individuals. It is necessary to prove a fault, the resulting damage and a causal link. These provisions can, therefore, be used to engage the state's responsibility (including the legislature and even the judiciary in certain circumstances) for adopting an act that breaches EU law. Harm can include the breach of a legitimate interest.

*Law stated - 08 March 2023*

## UPDATE AND TRENDS

### Key developments of the past year

Are there any emerging trends or hot topics relating to state aid control in your jurisdiction? What are the priorities of the national authorities? Are there any current proposals to change the legislation? Are there any recent important cases in the field of fiscal aid (taxes), infrastructure, or energy? Any sector enquiries?

The recent crisis aid frameworks adopted by the European Commission (the Commission) gave rise to a series of state aids granted at federal and regional level for the benefit of several actors.

### Covid-19

The covid-19 outbreak of 2020 continued into 2021. The Commission's covid-19 temporary framework adopted in 2020 was therefore extended during 2021 and has since expired on 30 June 2022.

The covid-19 pandemic brought with it many challenges and hit the economy hard on several levels. Member states were forced to adopt various containment measures, such as social distancing, travel restrictions, quarantines and lockdowns, which had and continue to have an immediate impact on the economy, affecting businesses and employees in all sectors. The impact is also being felt in global financial markets, including concerns about corporate liquidity.

Against this background, the Commission adopted a temporary framework to support the economy in the context of the covid-19 outbreak, on the basis of article 107(3)(b) TFEU, which allows the grant of aid to remedy a serious disturbance in the economy of a member state.

Belgium has adopted around 50 measures in response to the covid-19 pandemic. A number of measures involved bank loan guarantees. Several measures aim to ensure that sufficient liquidity remains available on the market, to counter the damage inflicted on companies affected by the pandemic and to preserve the continuity of economic activity during and after the pandemic (SA.56819, SA.57187, SA.64775, SA.62884).

The extreme contraction or even collapse of economic activity and trade due to the covid-19 outbreak created

significant liquidity shortfalls for many non-financial companies. As liquidity is a key risk factor in the assessment of creditworthiness, the Belgian authorities faced a tightening of corporate borrowing possibilities and credit limits covered by credit insurance companies, even for borrowers with acceptable creditworthiness. In this respect, the Belgian authorities set up a reinsurance programme to complement a broader set of measures to avoid a systemic crisis in the Belgian economy. The measure is administered in the name and on behalf of the Belgian State by Credendo, the Belgian export credit agency, by virtue of its tasks under the law of 31 August 1939 on Ducreo. This measure has been extended until 30 June 2021 (SA.57188, SA.60548).

The measures adopted by Belgium are aimed at remedying the serious disruption of payments and cash flow experienced by many companies which have had difficulties not only in servicing existing loans but also in obtaining additional credit to cover their liquidity needs.

In addition, aid has been granted to the tourism and events sectors (SA.100716, SA.63490, SA.63490, SA.63215, SA.100118) and other sectors particularly affected by the crisis such as transport (SA.62882, SA.56807). It is in this context that the Commission has authorised a deferral of the payment of concession fees due to the airports of Liège and Charleroi, and has approved a set of subsidies and two payment moratoria for the benefit of airports located in Flanders.

One of the main measures taken in response to the health crisis was the creation of a pan-European guarantee fund to ensure that SMEs and large companies in the participating member states have sufficient liquidity to cope with the economic impact of the covid-19 pandemic. In the same vein, 22 member states, including Belgium, notified the Commission of a fifth aid measure in the form of a guarantee on synthetic securitisation tranches to encourage financial intermediaries to lend to small and medium-sized enterprises (SA.63422–SA.63443), which the Commission accepted.

## Ukraine

The European Commission adopted the Temporary Crisis Framework on 23 March 2022, which is designed to help member states support their economies during the ongoing crisis caused by Russia's invasion of Ukraine. This crisis framework complements the existing state aid toolbox by providing additional measures that member states can use to support businesses and workers affected by the crisis.

Member states can also use the existing state aid toolbox to support their economies during the crisis (article 107(2)b TFEU). For example, they can provide compensation to companies for damages directly suffered due to exceptional circumstances, such as the crisis caused by the invasion of Ukraine. They can also use measures outlined in the Commission Communication on energy market developments to support the energy sector during the crisis.







The Belgian government has implemented several state aid measures to support businesses and industries affected by the crisis caused by Russia's invasion of Ukraine. These measures include a €12 million scheme to support companies (SA.106461) and a Wallonia aid regime of €114 million to support businesses (SA.105513), as well as a Wallonia aid regime of €300 million to support companies (SA.103842). These measures were designed to mitigate the economic impact of the crisis on affected industries and to provide financial support to businesses and organisations facing financial difficulties due to the ongoing conflict. All of these state aid measures were approved by the European Commission under the Temporary Crisis Framework. It is possible that additional state aid measures have been implemented by Belgium since the information provided.

In addition to the state aid measures previously mentioned, Belgium has also implemented measures to support companies and industries facing increased energy costs due to the conflict with Russia. These measures include a €250 million Flemish scheme to support companies facing increased energy costs in the context of Russia's war against Ukraine (SA.104588). The Belgian government has introduced a scheme worth €1.5 billion to support energy suppliers in the context of the ongoing crisis between Ukraine and Russia. The scheme is aimed at providing state

guarantees to natural gas and electricity suppliers and intermediaries holding a licence for the supply of electricity or natural gas to end-users in Belgium. To be eligible, these companies should not be in financial difficulties at the time of application. The current geopolitical crisis has resulted in increased demand for working capital by energy suppliers due to the rise in gas and electricity prices and a lack of liquidity, which has led to large requests for additional credit lines from banks, credit institutions and insurers. The guarantees will be granted by the Ministry of Energy and will cover new working capital loans for a maximum of two years. The aim of the scheme is to ensure the stability of the energy markets and the security of supply (SA.104585).

*Law stated - 08 March 2023*

## Jurisdictions

	<b>Belgium</b>	Sheppard Mullin Richter & Hampton LLP
	<b>Germany</b>	Gleiss Lutz
	<b>Greece</b>	Sheppard Mullin Richter & Hampton LLP
	<b>Malta</b>	GVZH Advocates
	<b>Netherlands</b>	Pels Rijcken
	<b>United Kingdom</b>	Willkie Farr & Gallagher LLP