

State Aid 2019

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State Aid

2019

Contributing editor**Ulrich Soltész**

Gleiss Lutz

Lexology Getting The Deal Through is delighted to publish the sixth edition of *State Aid*, which is available in print and online at www.lexology.com/gtdt.

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on the Netherlands.

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

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



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OVERVIEW

Policy and track record

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

Portugal has a sound relation with the European Commission in state aid matters, aimed at complying with the applicable EU Treaty provisions and implementing regulations, soft law and the decisional acquis of EU courts and of the European Commission in state aid law. For instance, in 2018 no recovery decision was adopted by the European Commission addressed to Portugal.

National authorities follow closely and on an ongoing basis the decisional practice of the European Commission. When the EU's implementing regulations or soft law are not applicable to the situation at stake – for instance, the 2014 General Block Exemption Regulation (GBER) or the September 2015 Analytical Grids on the application of state aid rules to the financing of infrastructure projects – national authorities tend to notify the aid measure or aid scheme to the Commission as a pre-notification or, when there are no material doubts on the existence of aid, under the formal notification procedure. The use of the 2014 GBER is also common, although under the applicable rules a communication by Portugal is also performed to the Commission.

In grey situations – for instance, those that apparently conform with the guidance provided in the 2016 Notice on the Notion of State Aid but where legal doubts subsist – national authorities also opt to notify the relevant measure or scheme under the pre-notification procedure.

Portugal also had an extensive set of interactions with the European Commission when dealing with the restructuring of the national banking sector. Following the successful exiting of its adjustment programme in 2014, the Commission in 2016 approved under EU state aid rules a prolongation of Portuguese state guarantees on bonds issued by bridge bank Novo Banco (SA43976) and state aid to support the resolution of Banif bank. In particular, as Banif's return to viability could not be demonstrated since Portugal granted aid for its rescue in early 2013 (SA34662), Portuguese authorities decided to resolve the bank in 2016, with the approved measures thus allowing Banif's orderly exit from the market and the takeover of a significant part of its activities for the benefit of its customers and to help underpin the financial stability of the Portuguese banking sector (SA43977).

In 2017 the European Commission also concluded that the €3.9 billion recapitalisation of the fully state-owned bank CGD, the largest bank in Portugal with a leading market share in both deposits and retail loans, which had been making losses since 2011, did not constitute aid (SA47178), as, per conducted assessment, the state invested in the bank under the same conditions as a private owner would have accepted under market terms. By the end of 2017, the Commission had also approved the Portuguese aid support plan for the sale of bank Novo Banco (SA49275).

The decision adopted by the Commission in this later case was subject to an annulment action before the General Court (pending case T-298/18, *Banco Comercial Português and Others v E Commission*).

Relevant authorities

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

All national public authorities are legally bound to comply with EU state aid rules, including at central, regional or local level.

REPER, the Portuguese Permanent Representation to the European Union, is the main point of contact with the European Commission in state aid matters.

In the setting of communications, pre-notifications and formal notifications, Portuguese authorities also use the web application system SANI 2 (State Aid Notification Interactive), which aims to rationalise and streamline procedures through clear rules and quicker decision-making procedures when national authorities interact with the European Commission.

Depending on the state aid matter at stake, local, regional or central authorities can be involved in the preparation of the file to be submitted to the European Commission, potentially also involving the beneficiary in the case of specific individual and more complex proposed individual aid measures.

Further, there are national mechanisms in force aimed at increasing the transparency of national support measures to natural or legal persons as enshrined in Law No. 64/2013. The aforesaid law obliges all public entities, including central or local state administrations, autonomous regions, municipalities, state, municipal or intermunicipal public companies, independent administrative authorities, regulators, public and private foundations of public or private law to report any public support, including transfers of capital and public domain property to natural or legal persons. The law also includes in said reporting obligations:

- time extensions in tax and social security contributions, granted by administrative act of governmental competence, when greater than 90 days;
- the concession, by contract or by administrative act of governmental competence, of exemptions and other non-automatic fiscal and parafiscal benefits whose recognition entails a significant degree of free administrative appraisal, not restricting itself to the mere objective verification of legal requirements;
- subsidies and any EU support; and
- personal guarantees given by the above identified entities.

The attributed benefits are subject to public disclosure via publication of an annual list on the website of the granting entity, and also the website of the Inspectorate General of Finance.

Equally, the national Agency for Development and Cohesion has the attribution of defining and keeping up to date the central registry on de minimis aid and supervising financial and fiscal support measures in this setting; article 3(2)(d) of Decree-Law No. 140/2013, as amended, institutes the agency.

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

In 2014, the European Commission adopted a partnership agreement with Portugal setting down the strategy for the optimal use of European structural and investment funds throughout the country. This agreement paved the way for investing €21.46 billion in total cohesion policy funding over the 2014–2020 period in the Portuguese territory, including the autonomous regions of Madeira and Azores.

The agreement was further implemented through regional and thematic operational programmes, also approved by the European Commission, which are administered by the respective Portuguese managing authorities under the specific national regulations for each programme and the EU's regulations on structural funds.

Moreover, national managing authorities play a significant material role in the allocation of these funds that can entail state aid when granted to entities that perform economic activities. Equally, the aforesaid public entities are responsible for establishing the formal and material requirements with which potential beneficiaries must comply to apply for these grants, assess and hierarchise the applications based on their respective merits, grant the funds and monitor the execution of the projects.

When a managing authority identifies a state aid component of a given project or scheme, prior to the grant of the aid, an assessment is performed and the required actions are adopted to conform with state aid rules – for instance, the reduction of aid intensity per 2014 GBER in accordance with the type of investment, the location and beneficiary dimension (small or medium-sized enterprise (SME) or non-SME) and the non-eligibility of specific investments, among many other variables.

General procedural and substantive framework

4 | Describe the general procedural and substantive framework.

State aid measures are procedurally mainly governed in the Portuguese jurisdiction by the rules of the Administrative Code (Decree-Law No. 4/2015), notably the interactions of beneficiaries with the granting authorities as these, as a rule, have a public nature.

National authorities, when dealing with state aid substantive matters, also follow and apply directly EU Treaty rules and respective implementing regulations, including the soft law and the decisional *acquis* of EU courts and the European Commission.

National legislation

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

EU state aid rules are directly applicable in the jurisdiction and are enforced by any national authority when dealing with aid beneficiaries or potential aid beneficiaries.

National legislation, when deemed required, reinforces and highlights the need to comply with EU rules. For instance, in the context of public subventions and annual indemnities to services of general interest and of general economic interest, the relevant national rules are detailed in Decree-Law No. 167/2008, which establishes the requirements that must be complied with in terms of contract content, duration and determination of the compensation, beneficiaries' obligations, as well as the control and supervision powers of the Ministry of Finance

that are exercised by the Inspectorate General of Finance before the respective beneficiaries.

PROGRAMMES

National schemes

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

Among the most recent communicated and notified schemes by Portuguese authorities, the latter formally approved by the Commission, the following are of note:

- The most significant general national aid scheme that is exempt from article 108(3) TFEU under the General Block Exemption Regulation is Order (Portaria) No. 57-A/2015, as amended, which adopted the Specific Regulation for Competitiveness and Internationalisation under which aid (mainly co-financed by EU structural funds) can be granted for initial productive investments, for research and development, for the qualification and internationalisation of SME and for other projects in continental Portugal, see decisions and summary notifications in Cases SA42136, 41942, 41943 and 41967;
- the regime of support for biomass-operated generators close to forests in Portugal, approved by the European Commission on 8 January 2019, registered under case SA48881;
- a special taxation scheme for maritime transport activities, as well as a special tax and social contributions regime applicable to seafarers involved in such maritime transport activities, approved by European Commission decision of 6 March 2018 in Case SA48929.
- the Funding Support Scheme for Investment in management and eco-driving systems for public passenger transport operators, communicated to the European Commission on 20 February 2018, registered under Case SA50466;
- the financial instrument for urban rehabilitation and revitalisation, communicated to the European Commission on 22 November 2017, registered under Case SA49665, with a budget of €115 million;
- the Scheme on Contractual Tax Benefits to productive investment in the Autonomous Region of Madeira and the Incentive System for Entrepreneurship in the Autonomous Region of Madeira communicated to the European Commission on 11 January 2018 (Case SA50074) and on 16 November 2017 (Case SA49585), respectively;
- the aid scheme for autonomous training projects, communicated to the European Commission on 27 November 2017, registered under Case SA49667, with a budget of €12 million;
- the R&D Projects Scheme, funded by the national budget, communicated to the European Commission on 20 January 2017, registered under Case SA47365;
- the Programme for Clean Buses in Urban Areas, approved by the European Commission decision of 24 October 2016 in Case SA45694, with a budget of €60 million, as amended by decision of 16 May 2018 in Case SA50760;
- the Prolongation of the Portuguese Guarantee Scheme on European Investment Bank Lending, approved by the European Commission decision of 28 July 2016, registered under Case SA45671;
- the Support Programme for Cooperation in Rural Development, approved by the European Commission decision of 19 July 2016 in Case SA43920; and
- the Support Programme for Renewable Electricity, approved by the European Commission decision of 4 May 2016 in Case SA41694.

General Block Exemption Regulation

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

Yes. Pursuant to Order No. 57-A/2015, as amended, which establishes the national rules applicable to specific national projects co-financed by the European Regional Development Fund (ERDF) and the European Social Fund (ESF), such projects must specifically comply with the subsequent set of GBER requirements, among other EU legal instruments, as detailed in the aforesaid national legislation:

- projects to promote investment in entrepreneurship and innovation must conform with articles 13, 14, 28 and 31 of the 2014 GBER and further, when applicable, with Regulation (EU) No. 1407/2013, regarding de minimis aid and guidelines on regional state aid for 2014–2020;
- projects regarding the qualification of SMEs and the internationalisation of SMEs must fulfil the conditions of articles 18, 19, 28, 29 and 31 of the 2014 GBER;
- projects related to research and technological development must comply with articles 19, 25, 28 and 31 of the 2014 GBER and also, when applicable, with Regulation (EU) No. 1407/2013, regarding de minimis aid and the 2014 Framework for State Aid for Research and Development and Innovation; and
- financial support to scientific and technological research must conform with articles 25, 28 and 29 of the 2014 GBER and, if applicable, with Regulation (EU) No. 1407/2013, on de minimis aid.

In terms of transparency, national authorities also follow closely the European Commission rules as set out in the Commission guidelines related to state aid rules for the rapid deployment of broadband networks (2014/C 198/02), regional state aid for 2014–2020 (2013/C 209/01), state aid for films and other audio-visual works (2013/C 332/01), state aid to promote risk finance investments (2014/C 19/04) and state aid to airports and airlines (2014/C 99/03).

Further, under the Transparency Communication (2014/C 198/02), which amends the aforesaid guidelines, Portuguese authorities must ensure the publication of the following information on a comprehensive state aid website, at national or regional level:

- the full text of the approved aid scheme or the individual aid-granting decision and its implementing provisions, or a link to it;
- the identity of the granting authority;
- the identity of the individual beneficiaries, the form and amount of aid granted to each beneficiary, the date of granting and the type of undertaking (SME or large company); and
- the region in which the beneficiary is located (at NUTS level 2) and the principal economic sector in which the beneficiary has its activities (at NACE group level).

This transparency requirement applies in general to all state aid measures, except for awards of less than €500,000, but exceptions may still apply.

Currently the transparency requirements are performed at the national level via the disclosure of the relevant information in the Inspectorate General of Finance (see the detailed information provided in reply to question 2). Further, information on granted aid is also reported and disclosed on the public transparency database website of the Commission's Directorate-General for Competition (DG COMP), also called the Transparency Award Module, which provides access to state aid individual award data provided by Portugal.

PUBLIC OWNERSHIP AND SERVICES OF GENERAL ECONOMIC INTEREST (SGEI)

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

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

Portugal has a sound relation with state aid rules. However, public companies, included those entrusted with services of general economic interest (SGEI), are sometimes scrutinised by competitors in the state aid field. For instance, RTP, the national television public broadcaster, had in the past several state aid procedures pending before DG COMP regarding its ad hoc and recurrent public funding mechanisms and the absence of effective control mechanisms on the proportionality of the accessed funds, based on a private competitor complaint – see, for instance, Case E14/2005 on the financing system of RTP; Case NN31/2006 on the financial support to restructure the accumulated debt of the Portuguese public service broadcaster; Case NN47/2010 on state aid in favour of RTP from 2003 to 2008; and Case SA33294, again on the financial support to restructure the accumulated debt of RTP.

Public bank CGD, the largest Portuguese bank, was also subject to a €1.65 billion recapitalisation plan in 2013, approved as state aid by the European Commission under its temporary rules on state aid for banking recapitalisations during the crisis, registered under Case SA35062. In 2017, the European Commission took a different approach as to the existence of aid regarding a new €3.9 billion recapitalisation plan of CGD, which it deemed not to constitute aid, as the state invested in the bank under the same conditions as a private owner would have accepted under market terms (SA47178).

In social support services to the elderly and disabled and other long-term care services, there was also a state aid complaint assessed by the European Commission regarding a non-profit, private social solidarity institution, active in such services within a specific regional area of Portugal, involving a public grant of €1.8 million to support the construction of an assisted living facility for elderly residents. The Commission found that the public investment had no effect on trade between member states as the services provided by the beneficiary were purely local in nature and available only within a limited geographic area (SA38920).

SGEI

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

SGEI rules and the *Altmark Trans* requirements are indirectly embodied and reflected in the national legislation. The main piece of legislation on this matter, without prejudice to the direct applicability of the relevant EU legal acquis in the jurisdiction – including the 2012 SGEI decision and the SGEI Framework decision – is enshrined in Decree-Law No. 167/2008, which sets out the rules applicable to the grant of public subventions via the national state budget, without resource to EU co-financing, to SGEIs, albeit the regime as a rule refers to services of general interest, not adding the word 'economic' to the referred term.

Hence this regime sets out the definition of services of general interest, aggregating also SGEI in alignment with EU provisions. It further details the legal conditions that must be met for the entrustment of the relevant services, to be grounded on a contract that comprises the following requirements:

- nature of the service and the existence of special or exclusive rights;
- contract duration;
- parties' obligations;

- rules for the determination of the compensation;
- terms under which the compensation is performed;
- procedures and entities responsible for the technical and financial control and audit of the service of general interest;
- compensation amount review mechanism;
- regularisation mechanism for payments performed in excess or by default; and
- penalties for non-compliance with the fulfilment of the service.

In addition, the legal text also specifies the rules for the determination of the compensation that must be reflected in the relevant agreements, which must take into account the costs incurred through the provision of the SGEI; the revenues arising from the fulfilment of the applicable SGEI, desegregated from other rendered SGEI or non-SGEI activities; and a reasonable profit equivalent to the remuneration of the invested capital in the relevant SGEI, if applicable, net of state contributions, taking into account the risk level inherent in the provision of the relevant service by the entrusted entity.

The accessed public compensations are subject to public disclosure on the website of the Directorate-General of Treasury and Finances and on the website of the beneficiary. If the beneficiary develops other non-SGEI activities, it must also comply with the rules of Decree-Law No. 148/2003, as amended, which enacts at the national level the Transparency Directive (Directive 80/723/EEC).

CONSIDERATIONS FOR AID RECIPIENTS

Legal right to state aid

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

In the setting of SGEI and pursuant to the applicable agreements in force, in cases where aid is present (hence, non-cumulative fulfilment of the *Altmark Trans* ruling criteria), the beneficiaries have a legal and contractual right to access the predetermined annual financial compensations that can be judicially enforced before administrative courts in cases of non-attribution.

Outside the SGEI setting it is more difficult for a potential beneficiary to successfully claim that a specific aid measure is due, although such situations can potentially occur, for instance, in the setting of projects compliant with state aid rules approved by a managing authority of a thematic or regional operational programme in the framework of the Portugal 2020 Partnership Agreement, in a scenario where all applicable requirements are met and the corresponding aid payment is not performed.

Main award criteria

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

The requirements for a successful award vary and are detailed in the national programmes that implement, via the relevant managing authorities, the European Commission/Portugal 2020 Partnership Agreement, which covers the ERDF, the ESF, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund.

The 2020 Partnership Agreement is implemented through 12 operational programmes, comprising four thematic programmes, five mainland regional programmes, two programmes for outermost regions and one programme on technical assistance.

Potential successful applications, private and public, have a particular focus on the following priorities, as detailed in the relevant

programmes, and call for proposal documents that implement and execute the Partnership Agreement:

- improving entrepreneurship and business innovation, including developing the e-economy, and improving SME access to finance their investments and advanced business services;
- boosting R&D knowledge, strengthening research and innovation systems in enterprises and developing an innovation-friendly business environment;
- increasing economic competitiveness by enhancing the production of tradable goods and services;
- tackling unemployment, improving the quality of education and training and their match with labour market demand, and raising the qualifications and skills of the active labour force; and
- supporting the shift to a low-carbon and resource-efficient economy.

Strategic considerations and best practice

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

The main strategic considerations and best practices for successful applications are as follows:

- full detailed review and compliance with the call for proposal documentation requirements (material and formal) published by the relevant granting authority;
- sound technical and financial data on the project, as applicable;
- precise definition of total costs, eligible costs and non-eligible costs;
- an investment plan, including by project components;
- timely compliance with the applicable deadlines and conditions of the call for proposal;
- absence of debts to social security and tax authorities;
- public procurement rules knowledge;
- sound evidence that the private contribution to the project is secure; and
- non-execution of the project prior to the respective approval by the relevant public authority.

Challenging refusal to grant aid

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

Unsuccessful applicants' challenges against refusal to grant aid are not uncommon, although such challenges are not reasoned on state aid rules but on the decision adopted by the managing authority grounded on other factors, such as non-fulfilment of the applicable formal requirements (for instance, incomplete disclosure of the required documents by the applicant) or application with lack of merit pursuant to the call for proposal rules or the specific programme regulation. These judicial challenges, which can include interim measures requests, are brought before administrative courts. Per applicable procedural rules, opposition proceedings can also be brought against a granting authority decision, notably by a competitor.

Involvement in EU investigation and notification process

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

Aid recipients tend to be involved in pre-notification or notification processes, solely at the national level and as a rule exclusively in individual cases that require significant knowledge of the sector and activities at stake, notably with regard to collection of updated information on the relevant activity, active players, quantities of produced goods or rendered services and status of the industry, among other variables.

The aid recipient can only participate in the preparatory work if so requested by the relevant central, regional or local Portuguese authority and has no power to enforce its participation in pre-notification or notification processes. Further, although exceptions may apply, aid recipients do not participate in meetings with DG COMP officials, as national authorities, when specific technical knowledge is required, prefer to involve sectoral regulators, national agencies or government bodies that hold in-depth knowledge of the relevant sector.

As such, aid recipients can act as a relevant material support information source for national authorities at the national level, notably when specific detailed information is required on the project or aid measure, although as a rule with no formal involvement in the interactions performed by Portuguese authorities with DG COMP's units.

STRATEGIC CONSIDERATIONS FOR COMPETITORS

Complaints about state aid

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

Although the Portuguese Competition Authority lacks public enforcement powers in state aid matters under the national Competition Act (Law No. 19/2012, as amended), it has a specific unit, the Cabinet of Studies and Market Monitoring, which can propose non-binding recommendations in terms of public policy to tackle undue distortions of competition, including those involving state aid matters and in this setting make any recommendation to the government or any other public body that it deems necessary to eliminate the adverse effects of the measure on competition. The Portuguese Competition Authority, albeit not mandatory, can also refer the complainant to the European Commission services.

Dealing with illegal or incompatible aid

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

Portugal has in force a comprehensive set of rules aimed at complying with transparency requirements. For instance, in the Operational Programmes setting, all granting authorities under Decree-Law No. 159/2014 must publicise on their respective websites the granted measures, subject to monthly updates. A public register list is also available on granted aid, managed by the Inspectorate General of Finance, as detailed in question 2. Managing authorities also disclose the granted amounts on the respective websites. These measures are all in alignment with the 2014 GBER requirements.

Equally, annual SGEI compensations that adopt the form of annual indemnities are subject to publication in the Portuguese Official Journal through a Council of Ministers Resolution. For instance, in 2016, the government via Council of Ministers Resolution No. 150/2018 publicised the amounts granted to public and private entities entrusted with public service missions in the media, culture, telecommunications, rail, road, maritime, inland waterways and air transport sectors.

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

The Portuguese Constitution ensures the right to inform, to inform oneself, and to be informed (article 37(1)), the right to intra-procedural information (article 268(1)), and the general right of access to administrative documents (article 268(2)). Moreover, Portugal has implemented an open file policy regarding administrative documents.

The main piece of legislation is embodied in Law No. 26/2016, which regulates access to and the re-use of administrative documents.

The right of document access includes, as a rule, the right to obtain the reproduction of documents, the right to consult documents and the right to be informed of the existence and the contents thereof. However, when one is not a party to the relevant administrative procedure, under the aforesaid 2016 law rules, access to documents that are instrumental either in proceedings that are undecided or in the preparation of a decision shall be postponed until the decision has been adopted or until the proceedings has been discontinued.

The right to document access, when barred, can be enforced via the Committee of Access to Administrative Documents and also, absent compliance by the relevant entity with the opinion adopted by the committee, before administrative courts. From accessed documents, commercial or industrial secrets relating to the internal life of companies are redacted or deleted.

Law No. 26/2016 can, at the national level, be a useful non-negligible legal mechanism for a competitor to try to gain access to documents held by national authorities related to a state aid matter.

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

Such sources may include, for example, the state budget, statements by granting authorities or by politicians (eg, to the press or in response to parliamentary queries), press coverage, business reports of the aid beneficiary and judicial decisions related to the aid or the aided activity. Access to information through the exercise of shareholders' rights (eg, attendance of shareholder meetings) would require that the competitor be a shareholder of the aid beneficiary, which is typically not the case, and if it is, it may not always have a commercial interest in taking action against the aid. However, even if there is little information available about the aid (eg, a press article), it may (and frequently does) suffice to motivate the Commission, by means of a state aid complaint, to request further information about the aid from national authorities.

Other ways to counter illegal or incompatible aid

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

Competitors may contemplate raising the awareness of third parties, such as those mentioned in the examples, of the invalidity and recoverability of aid granted to a beneficiary, which would follow from a breach of article 108(3) TFEU. However, competitors should carefully consider whether the taking of any such action is indeed necessary to protect their legitimate interests, as it may potentially expose them to liability for damages suffered by the beneficiary – for example, under article 484 of the Civil Code, in particular if there is uncertainty as to whether the aid was indeed granted in violation of article 108(3) TFEU.

PRIVATE ENFORCEMENT IN NATIONAL COURTS

Relevant courts and standing

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

Depending on the nature of the act on the basis of which the aid is granted, administrative courts (eg, if the aid is awarded based on an administrative act) or civil courts (eg, if the aid is awarded based on a contract governed by civil law) may be competent to hear private complaints against the award of state aid. It is recognised in the jurisprudence of Portuguese courts that competitors of recipients of illegal

aid have standing to bring an action for, as the case may be, its suspension, annulment or recovery (for example, the judgment of the Supreme Administrative Court of 5 March 2007, Case 01050/03).

Available grounds

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

Given the direct applicability of article 108(3) TFEU in the Portuguese legal system, as also recognised by article 8(3) of the Portuguese Constitution, it is usually sufficient for a competitor to invoke a violation of this provision if the aid was granted by means of an administrative act.

Although there is, to our knowledge, no relevant case law regarding this question in a scenario where the aid was granted on the basis of an act of private law (eg, a contract), it seems possible – given that the conclusion of such contract violates a legal prohibition forming part of the Portuguese legal system and the violation is liable to affect the interests of competitors of the aid beneficiary – that competitors could bring a claim based on tort law.

Defence of an action

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

In an action challenging the legality of state aid, the defendant is typically the granting authority, namely, the state or other public entity that has granted the aid. The aid beneficiary is an interested party and as such entitled to participate in the proceedings and to submit counter-allegations. The public prosecution service, a constitutional body with powers to represent the state, may also pronounce itself on the action.

Compliance with EU law

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

Portuguese courts have been petitioned to enforce compliance with EU state aid rules. However, there have not been many cases so far. Moreover, only a few of those cases concerned typical private enforcement cases (ie, cases where article 108(3) TFEU was invoked for the purpose of challenging the granting of illegal aid to competitors of the claimant). The most prominent example of a typical private enforcement case is the legal action by ANTRÓP, an association of urban passenger transport providers, against compensation payments by the Portuguese state to STCP, the exclusive concessionaire for the Oporto area, for the performance of public transport services. ANTRÓP complained that STCP did not keep separate accounts for the provision of these services, in violation of the then applicable Regulation (EEC) No 1191/69, and that it could not, as a consequence, be verified whether the compensation was indeed limited to the extra costs incurred in the discharge of these services or, as suspected by ANTRÓP, used by STCP to cross-subsidise its activities outside the concession area, where it competed with associates of ANTRÓP. Upon confirmation by the Court of Justice of the European Union (CJEU), following a reference for a preliminary ruling (judgment of 7 May 2009, Case C-504/07), the Portuguese Supreme Administrative Court allowed the action, concluded that the compensation payments violated Regulation (EEC) No. 1191/69 and annulled the legal act awarding those payments, a resolution of the Council of Ministers (judgment of the Supreme Administrative Court of 12 January 2012, Case 01050/03).

The majority of cases concern atypical private enforcement cases, including legal actions against taxes, and parafiscal charges and actions by customers of the alleged aid beneficiary. State aid rules were invoked to challenge parafiscal charges imposed on the claimants by the state, based on the argument that the proceeds from those charges were used to finance illegal state aid, or that an exemption from the charge constituted illegal state aid. For example, there have been numerous legal actions lodged by undertakings active in the wine sector against their obligation to pay a parafiscal charge for the promotion of wine (a system that had been conditionally approved under state aid rules by European Commission Decision No. 2011/6/EU). Another (current) example is a series of legal proceedings instigated by large food retail operators challenging their obligation to pay the food safety tax. The revenues from that tax accrue to a state fund, which uses them to finance measures dedicated to the maintenance of food security and quality (eg, the removal and destruction of fallen livestock). Small food retailers are exempt from the tax. In one of the proceedings, a claimant invoked a violation of article 108(3) TFEU related to the exemption of small retailers. The Coimbra Administrative and Tax Court stayed proceedings and referred this question to the CJEU, which reiterated the established principle that a tax cannot be challenged on the basis of a violation of article 108(3) TFEU related to aid involved in an exemption from that tax and concluded on this basis that the question raised by the national court was not relevant to the dispute in the national proceedings (judgment of 26 July 2017, Case C-519/16, *Superfoz – Supermercados Lda v Fazenda Pública*). State aid rules have also been invoked by customers of (alleged) aid beneficiaries to challenge actions taken by the latter against the former based on the alleged aid measure. For example, state-owned savings bank CGD and bank Banco de Fomento e Exterior SA were in the past entitled to claim and enforce the collection of debts based on the same rules as the state itself in fiscal matters. A number of debtors challenged the forced execution of their debts, claiming, inter alia, that the special enforcement rights afforded to the respective bank violated state aid rules (in the case of Banco de Fomento e Exterior SA, the challenges led to two references for a preliminary ruling, both declared manifestly inadmissible by the CJEU, see orders of 13 March 1996 (Case C-326/95) and 30 June 1997 (C-66/97)). However, the national courts rejected these arguments as being unfounded and dismissed the actions (judgment of the Supreme Administrative Court of 13 November 2002, Case 026724).

While the so far limited track record of Portuguese courts may give the impression of a mixed picture in terms of success rate of private enforcement actions, it should be noted that the courts have hitherto largely followed the case law of the EU courts and that most of those enforcement actions that were not successful appear to have been unfounded.

A legal action against the granting of alleged illegal aid to a competitor (eg, an application to prohibit the granting authority from implementing an administrative act awarding the aid, ie, from disbursing the aid awarded therein), does not, as such, have suspensory effect (ie, it does not automatically suspend the legal effects of the award act). However, this result can be achieved through an application for interim measures (as, for example, specifically foreseen for cases of an alleged breach of EU law in article 112(2)(i) of the Administrative Court Procedure Code), which the national court is in principle obliged to allow in case of a violation of article 108(3) TFEU, in accordance with the *CELF* case law of the CJEU.

The cost risks associated with judicial enforcement action are normally moderate. For example, in case of a dispute value of €1 million, the statutory court fee for a first-instance administrative court procedure that does not feature particular complexity would be, at present, around €10,000. While the court fee is owed by each party (which, in this example, would result in an aggregate fee of €20,000), its statutory

amount can be significantly reduced by the court at the end of the procedure in light of, in particular, the complexity of the case and the procedural conduct of the parties.

Referral by national courts to European Commission

24 | Is there a mechanism under your jurisdiction's rules of procedure that allows national courts to refer a question on state aid to the Commission and to stay proceedings?

There are no specific rules governing the referral of questions on state aid law to the Commission pursuant to article 29(1) of the Procedural Regulation. However, there are general procedural rules allowing both administrative and civil courts to stay proceedings, including, in principle, for that purpose. We are not aware of any case where a Portuguese court has asked the Commission for information or its opinion or where the Commission has submitted, on its own initiative, amicus curiae observations (which is consistent with the information provided on the DG COMP website). There have been several referrals by Portuguese courts to the CJEU for a preliminary ruling under article 267 TFEU related to the interpretation of the state aid rules (see the cases referred to in questions 23 and 37). There is, to our knowledge, no such referral currently pending.

Burden of proof

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

In proceedings before civil courts, the party invoking the presence of illegal state aid bears the burden of proof. Although administrative courts are competent to investigate on their own and to conduct an extensive review of the legality of administrative acts not limited by the specific allegations presented by claimants, it is nevertheless usually required of the claimant to sufficiently substantiate the claim. Although it should typically be possible to prove that the aid was granted illegally (ie, that the aid should have been but was not notified to and approved by the Commission), it will at times be very difficult for a competitor to establish that what was granted to the beneficiary constitutes state aid.

Deutsche Lufthansa scenario

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

To our knowledge, there has not, so far, been a private enforcement action before a Portuguese court in the scenario underlying the *Deutsche Lufthansa* judgment of the CJEU (Case C-284/12), namely, regarding an alleged aid measure in relation to which the Commission had, at the time of the national court proceedings, already decided to open the formal investigation procedure (opening decision). In cases where the granting authority, despite the Commission's opening decision, does not (at least provisionally, pending the outcome of the Commission's investigation) suspend the granting of the alleged aid or recover amounts already paid out, the added value of such a second track for a competitor of the beneficiary is the possibility to enforce these obligations of the granting authority before a national court that, as appears to follow from *Deutsche Lufthansa*, is bound by the Commission's opening decision insofar as it cannot dismiss the action on the grounds that the contested measure does not constitute illegal state aid.

Economic evidence

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

Economic evidence already plays an important role in proceedings before Portuguese courts in other areas of competition law, in particular in actions for damages resulting from infringements of the cartel or abuse-of-dominance prohibition. In actions challenging the legality of state aid, economic evidence has not yet gained significance, as the questions at stake in the proceedings so far have been of a purely legal nature. However, if, for example, a competitor had to show, in order to establish the presence of aid, that the contested measure (eg, a capital injection by the state into a public undertaking) did not meet the private market investor test, this might require the submission of economic evidence.

Timeframe

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

The time frame for court proceedings very much depends on the complexity and specific circumstances of each case, including, for example, the location of the court (eg, courts in the main metropolitan areas tend to have a greater case load than those in smaller municipalities) and the reporting judge. The possible duration may well range from (usually not less than) one year to several years, both at first instance and on appeal.

Interim relief

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

The rules on administrative court procedure foresee the possibility to apply for interim relief, which, as in most jurisdictions, will only be granted if the applicant demonstrates that:

- there is a prima facie case;
- there is urgency to prevent harm to the applicant that could not be easily undone; and
- the requested relief would not undermine a public interest of greater importance than the private interest of the applicant.

However, the second and third requirements will likely have to be interpreted in an applicant-friendly way in an action against illegal state aid, in light of the case law of the EU courts (see also question 23).

Legal consequence of illegal aid

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

If the national court establishes the presence of illegal aid and if the aid was awarded on the basis of an administrative act, the national (administrative) court will annul the administrative act and order the granting authority to recover aid amounts already disbursed. If the aid is also being investigated by the Commission, the national court may, alternatively, suspend the effects of the award act, order the granting authority to provisionally recover aid amounts already paid out and stay proceedings until the conclusion of the Commission investigation (and possible subsequent annulment proceedings before the EU courts). The legal consequences of an infringement of article 108(3) TFEU in cases where the aid was granted on the basis of a contract or other act of private law – including whether such a violation inevitably and always renders the contract null and void; and whether the granting authority

can only be ordered to recover the aid by means available under private law or whether it can be ordered to do so based on public law (eg, by way of administrative act) – have not yet been clarified in the case law of the Portuguese courts. The same is true for the legal consequences in cases where the unlawful aid takes the form of a state guarantee, ie, for the question of whether and in which circumstances the bank's recourse to the state guarantor, where the undertaking that took out the loan becomes insolvent, remains possible or is (also) invalidated by the unlawfulness of the aid.

Damages

31 | What are the conditions for competitors to obtain damages for award of unlawful state aid or a breach of the standstill obligation in article 108(3) TFEU? Can competitors claim damages from the state or the beneficiary? How do national courts calculate damages?

According to the *Francovich* case law of the EU courts, member states may be liable to pay compensation to parties that have suffered as a consequence of a breach of article 108(3) TFEU, if the party establishes that the member state violated that provision in a qualified way and that the violation caused it financial harm. The Portuguese regime on the non-contractual liability of the state and other public entities (Law No. 67/2007) foresees similar requirements.

STATE ACTIONS TO RECOVER INCOMPATIBLE AID

Relevant legislation

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

There is no specific rule of Portuguese law by which article 16 of the Procedural Regulation has been implemented and also no other specific legislation for the recovery of incompatible aid. Recovery is typically enforced by the granting authority on the basis of the Commission recovery decision.

If the aid was granted based on an administrative act, recovery is governed by the rules on administrative procedure. The granting authority will revoke the granting act and adopt another administrative act by which it orders the beneficiary to repay the aid.

The Supreme Administrative Court ruled, in a case still governed by a previous version of the administrative procedure code, that the revocation of an aid-granting act in implementation of a Commission recovery decision is not subject to the standard time limit for the revocation of administrative acts (of one year from its adoption), but in principle to the time limit for recovery following from EU legislation (ie, 10 years from the granting of the aid, article 17(1) of the Procedural Regulation), without this meaning that legal certainty and legitimate expectations ceased to be protected (judgment of 10 June 2005, Case 02037/02).

Legal basis for recovery

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

See question 32. If the aid is granted subject to certain conditions to be fulfilled by the beneficiary, the aid-granting act may be revoked, pursuant to the rules on administrative procedure, if the beneficiary fails to meet these requirements.

Commission-instigated infringement procedures

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

There has been one infringement proceeding under article 108(2) TFEU against Portugal so far (judgment of 27 June 2000, Case C-404/97).

Implementation of recovery

35 | How is recovery implemented?

See question 32. Where the aid was granted on the basis of an administrative act, the granting authority will revoke that act and adopt another act ordering the beneficiary to repay the aid, which it can also unilaterally enforce vis-à-vis the beneficiary (similar, for example, to a tax debt).

However, if the aid was granted based on an act of private law (eg, under a private law contract), the granting authority must in principle resort to the means available under private law to enforce recovery; namely, if the beneficiary refuses to repay the aid, the authority must sue it in court (although, given the usual duration of court proceedings, this may collide with the requirement of immediate and effective recovery). For example, when the Portuguese state sought recovery of aid granted to Banco Privado Português (BPP), ordered by Commission Decision 2011/346, BPP's insolvency administrator refused to register and include the state's claim in BPP's liabilities, as a result of which the state had to bring an action before the Lisbon Commercial Court.

Article 108(3) TFEU

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

This question has not yet been decided in the case law of the Portuguese courts. See also question 30. However, given the direct effect of article 108(3) TFEU and the obligation of member states to ensure its effectiveness (including to prevent circumvention), a public authority that is party to a contract under which it is granting the other party illegal state aid should, in principle, be able (if not obliged) to discontinue the granting of such aid. At the same time, such a case may well represent exceptional circumstances within the meaning of the case law of the EU courts referred to in question 37, in which national law may allow the other party to force the public body to continue to perform the contract if the public body caused the other party, despite its obligation to conduct its own due diligence in this regard, to legitimately assume that the contract did not involve illegal aid.

Defence against recovery order

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

According to the established case law of the Portuguese administrative courts, if and to the extent an administrative act ordering the beneficiary to pay back the aid merely implements a Commission recovery decision, that act cannot, in principle, be challenged before Portuguese courts. Beneficiaries seeking to challenge recovery in such cases have to lodge an application for annulment of the Commission recovery decision, based on a violation of provisions of EU law (eg, article 16(3) of the Procedural Regulation, protecting legitimate expectations created by assurances from the Commission), before the EU courts within the applicable time limits (eg, judgment of the Supreme Administrative Court of 25 May 2011, Case 069/11).

In the aforementioned example concerning the insolvency of BPP, the insolvency administrator refused registration and inclusion of the state's recovery claim in BPP's liabilities based on the allegation that

the Commission recovery decision was unlawful and thus invalid. It also lodged an action for annulment of the Commission decision before the EU General Court (which was later dismissed as unfounded; judgment of 12 December 2014, Case T-487/11). The Lisbon Commercial Court decided to stay proceedings pending the judgment of the General Court. On appeal by the Portuguese state, that decision was annulled by the Lisbon Appellate Court (judgment of 18 June 2013, Case 519/10.5TYLSB L1-1). The Appellate Court ruled that, given the immediate effect of the Commission decision and the lack of competence of national courts to question its validity, the Commercial Court was not entitled to simply stay proceedings pending judgment of the General Court but had to give effect to the Commission decision. If the Commercial Court had doubts as to the legality of that decision, it could, however, ask the CJEU for a preliminary ruling under article 267 TFEU. Upon such reference by the Commercial Court, the CJEU ruled that the Commercial Court's questions did not disclose anything capable of affecting the validity of the Commission decision (judgment of 5 March 2015, Case C-667/13).

The case law of the EU courts (judgment of 14 January 2004, Case T-109/01, *Fleuren Compost*, paragraphs 135–137) recognises the possibility for national law to protect legitimate expectations of beneficiaries concerning the legality of aid that was created by reasons other than assurances from the Commission (eg, assurances from the granting authority or other national authorities), and thus to allow beneficiaries to successfully oppose a national recovery measure, in exceptional (unspecified) circumstances, provided that the conditions of protection are the same as those for the recovery of purely national financial benefits and that the interests of the EU (eg, prevention of circumvention of the state aid rules) are fully taken into account. To our knowledge, this (very limited) possibility has not yet played a decisive role in the case law of the Portuguese courts, although the Supreme Administrative Court (judgment of 10 June 2005, Case 02037/02) already emphasised its potential relevance.

Interim relief against recovery order

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

This question has not, to our knowledge, been decided by Portuguese courts so far. However, in the aforementioned *BPP* case, the Lisbon Appellate Court considered a suspension of the recovery proceedings by the Lisbon Commercial Court admissible, in light of the latter's serious doubts as to the legality of the Commission recovery decision, for the purpose of referring this question to the CJEU for a preliminary ruling. In relation to the question whether this is in line with the strict requirements established in the *Zuckerfabrik* case law of the EU courts (Cases C-143/88 and C- 92/89), it is noteworthy that the CJEU, in the *BPP* case, considered the reference for a preliminary ruling admissible.



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UPDATE AND TRENDS

Enforcement priorities and reform

39 | 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?

In 2018, the European Commission, following a post-implementation monitoring exercise, opened in Case SA21259, an in-depth investigation into tax exemptions for companies in the Autonomous Region of Madeira Free Zone (ZFM). The Commission carried out a preliminary assessment of how Portugal applied the ZFM aid scheme until its expiry at the end of 2014, taking into account the framework of the 2007 and 2013 Commission decisions approving the scheme, and raised concerns that national authorities potentially may have failed to respect some of the conditions under the adopted 2007 and 2013 decisions. In particular, the Commission has doubts that Portugal complied with the requirements that (i) the company profits benefitting from the income tax reductions originated exclusively from activities carried out in Madeira and (ii) the beneficiary companies actually created and maintained jobs in Madeira.

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