# Belgium

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## Overview

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

Belgium grants on average less state aid than other member states, excluding in the railways sector. According to the latest available data (2016), Belgium granted state aid amounting to approximately 0.58 per cent of its GDP, compared to the EU-28 average of approximately 0.69 per cent. In absolute amounts, this corresponded to approximately €2.5 billion, up from approximately €2 billion in 2015. However, Belgium was the fifth highest provider of state aid to the railways in absolute amounts in 2015 (€2.9 billion), behind only France, Germany, Italy and Austria.

In terms of objectives, 31 per cent of the state aid granted by Belgium related to research, development and innovation (R&D&I) and 24 per cent related to culture. Interestingly, Belgium has not granted any state aid for rescue and restructuring over the past few years.

In terms of Belgium's track record with the European Commission, the latter has opened over 20 formal investigation procedures in the past 10 years concerning Belgium and has adopted 11 recovery decisions (see questions 32 to 37). 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). The latest negative decision, but without recovery (existing aid), concerned the *Ports taxation* case, in which the European Commission ordered Belgium to abolish the corporate tax exemptions granted to its ports (SA38393).

### 2 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 *Vlaamse Gewest*), the Walloon region (the *Région wallonne*) and the Brussels-Capital region (the *Région de Bruxelles-Capitale/Brussels Hoofdstedelijk Gewest*), 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 in order 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, either at federal or regional level. To verify the compliance of the received aid with the General Block Exemption Regulation (GBER), 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 (SMEs), 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.

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

See the relevant federal, regional and communities competences in question 2 above. Broadly speaking, authority for granting aid is split as follows within Belgium:

- 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 government and agencies are responsible for investment, R&D aid, social aid, export aid and some forms of fiscal aid.
- Community government 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.

### 4 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, SMEs and employment.

### 5 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.

## Programmes

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

As of May 2018, the status of aid schemes notified to the European Commission and approved by the latter is as follows (see the EC Search Aid Award Data at https://webgate.ec.europa.eu/competition/transparency/public/search/BE?resetSearch=true):

- SA50068: *Arrêté du Gouvernement de la Région de Bruxelles-Capitale concernant l'octroi d'une subvention à la SA AUDI Brussels.*

- SA50522: *Besluit van de Vlaamse Regering houdende toekenning van een subsidie aan BIONERGA nv ter ondersteuning van groene-stroom-opwekking en een warmtenet naar het bedrijf Borealis.*
- SA50830: *Besluit van de Vlaamse Regering houdende toekenning van een subsidie aan AZTEQ bvba ter ondersteuning van groene-warmte-opwekking op basis van geconcentreerd zonlicht voor industriële (proces) toepassingen.*
- SA49825: *Régime d'aide encadré par le Règlement (UE) No. 651/2014 concernant les projets du 2e appel sélectionnés dans le cadre du programme Interreg France-Wallonie-Vlaanderen 2014–2020.*
- SA49178: *Besluit Ontwikkeling en Innovatie.*
- SA49177: *Besluit O&O Kennisintensief.*
- SA49055: *Programme opérationnel FEDER 2014–2020 portefeuille Liège, Ville en transition projet Pôle Bavière - Pépinière d'entreprises.*
- SA43252: *Steunregeling voor nuttige groene warmte. Steunregeling voor restwarmte. Steunregeling voor injectie van biomethaan.*
- SA41602: *Strategische transformatiesteun aan ondernemingen in het Vlaamse Gewest.*
- SA38083: *Filmfonds.*
- SA35534: *Aide en faveur de la recherche industrielle.*
- SA35533: *Aide en faveur du développement expérimental.*
- SA33193: *R&D&I scheme Flanders.*
- SA40452: *Decreet betreffende het onroerend erfgoed van 12 juli 2013.*
- SA37017: *Compensation for Indirect EU ETS costs.*
- SA46225: *Professionele integratie van personen met een handicap – VOP.*
- SA36066: *Strategische ecologiesteun.*
- SA45785: *Regeling voor steun in het kader van Interreg Vlaanderen-Nederland 2014–2020 onder de algemene groepsvrijstellingsverordening.*
- SA47498: *Addendum aan de beheersovereenkomst tussen de Vlaamse Gemeenschap en het Vlaams Audiovisueel Fonds vzw 2014-2016 m.b.t. het Mediafonds.*
- SA39167: *Decreet betreffende de ondersteuning van de circuskunsten in Vlaanderen.*
- SA39168: *Decreet betreffende het Lokaal Cultuurbeleid.*
- SA39169: *Decreet houdende de ondersteuning van de professionele Kunsten.*
- SA41382: *Incitants régionaux destinés à favoriser la protection de l'environnement et l'utilisation durable de l'énergie.*
- SA41843: *Incitants régionaux en faveur des PME.*
- SA41383: *Incitants régionaux en faveur des grandes entreprises.*
- SA46764: *Régime d'aide encadré par le Règlement (UE) No. 651/2014 de la Commission du 17 juin 2014 concernant les projets du 1er appel sélectionnés sous l'axe 1 du programme Interreg France-Wallonie-Vlaanderen 2014–2020.*
- SA43244: *Incitants régionaux en faveur des PME (cofinancé par le Feder).*
- SA47109: *Prolongation du régime de promotion du transport combiné ferroviaire et du trafic diffus pour 2017–2020.*
- SA45867: The Belgian federal regime governing renewable energy certificates and aid to the Rentel and Norther wind farm projects.
- SA43117: *Prolongation de l'Aide à la marine marchande, aux secteurs du dragage et du remorquage.*
- SA42388: *Mesure de soutien au transport intermodal par la voie d'eau dans la Région Bruxelles-capitale pour la période 2016–2020.*
- SA38336: Prolongation of social contributions exemption scheme for seafarers employed in maritime transport and maritime dredging.
- SA40037: Guarantee calculation method.
- SA38370: *Modifications du 'tax shelter' pour soutenir des oeuvres audiovisuelles.*
- SA37414: *Adaptation des cotisations au Fonds pour la santé animale (secteur avicole).*
- SA37293: *Régime d'aides en faveur des modes de transport alternatif à la route pour la période 2014–2020.*
- SA37109: Football stadiums in Flanders.
- SA36656: *Indemnisation des pertes subies par les producteurs de pommes de terre suite aux mesures prises contre des organismes nuisibles.*
- SA35587: *Mesures d'accompagnement pour l'agriculture dans le cadre de l'extension du port d'Anvers.*
- SA36188: Decision of the Flemish government on Aid to Incubators. Innovation-cluster scheme. Belgium.
- SA34722 *Screen flanders – Steun aan audiovisuele werken.*
- SA46908: Aid for the relocation of farms in the Antwerp harbour area.
- SA41605: *Ecologiepremie-Plus.*
- SA43810: *Interreg steun.*
- SA46172: *Filmfonds 2014–2018.*
- SA40015: Regulation for support to associations active in promotion and spreading of new agricultural production methods.
- SA47809: Aid for knowledge transfer and information regarding milk production.
- SA38232: *Dotatie aan de EVAP Proefbedrijf Pluimveehouderij vzw.*
- SA37852: *Facultatieve subsidie aan het Steunpunt Hoeveproducten.*
- SA45796: *Régime cadre relatif aux aides au transfert de connaissances et aux actions d'information dans le secteur agricole et sylvicole pour la période 2015–2020.*
- SA44839: *Régime d'aides en faveur de la participation des producteurs de lait au régime de certification obligatoire en matière de la composition du lait cru.*
- SA39195: *VIA Social Profit (Paritair Comité 329).*
- SA46098: *Decreet betreffende het Lokaal Cultuurbeleid zoals gewijzigd door artikel 3 en 4 van het Programmadecreet.*
- SA39982: Nominative aid to the Flemish Information Centre for Agriculture and Horticulture.
- SA43551: Aid for recognised breeding organisations.
- SA43953: *Subsidies voor inrichtingswerken en uitvoeringsinitiatieven in het kader van landinrichting, deel steun voor instandhouding van het erfgoed op bedrijven, andere dan landbouwbedrijven.*
- SA46536: *Aide au démarrage pour les groupements et organisations de producteurs dans le secteur agricole pour la période 2016–2020.*
- SA44350: *Ondersteuning van investeringen in zones in moeilijkheden.*
- SA40615: *Tewerkstellingspremie 50+.*
- SA39997: Aid for recognised breeding associations.
- SA41604: *Strategische ecologie-investeringen.*
- SA46719: *Aide aux structures d'accueil pour la création radiophonique.*
- SA45885: *Interreg Vlaanderen-Nederland 2014–2020.*
- SA48346: *Ondersteuning van investeringen in zones in moeilijkheden (uitbreiding).*
- SA47780: *Organisation de la collecte et de la destruction des animaux d'élevage trouvés morts en Wallonie.*
- SA41817: *Subsidiëring van bedrijvencentra en doorgangsgebouwen.*
- SA39184: *Filmfonds 2014–2018.*

### 7 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. That said, all public authorities publish the necessary information by feeding it into the Transparency Award Module developed by the European Commission and available online at https://webgate.ec.europa.eu/competition/transparency/public?lang=en.

## Public ownership and services of general economic interest (SGEI)

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

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

In the *Charleroi Airport* case (SA14093), the European 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 (SA23420), 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 (SA32635), the Commission required Belgium to amend its financing regime of Belgium's French language public service broadcaster, RTBF, in order 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).

**9 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 (SA19864), 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).

## Considerations for aid recipients

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

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.

**11 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 SMEs, regional development, job creation and R&D&I.

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

As explained above, aid for R&D&I and culture are the two most common types of aid in Belgium, and aid in the railway sector is also very significant.

**13 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.

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

All 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 (for instance, 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 European 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 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).

## Strategic considerations for competitors

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

In 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.

**16 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 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 GBER, 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 (again, this depends on the federal, regional and community levels). See the Transparency Award Module developed by the European Commission mentioned in question 7.

**17 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.

**18 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. These are available at www.nbb.be/en/central-balance-sheet-office.

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

In 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.

## Private enforcement in national courts

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

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 or implemented before the latter's approval and unlawful and incompatible aid following a negative decision by the European 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. So far, 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. It should be noted that, 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. It should be noted that, 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.

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

As described above, there are several available grounds for bringing a private enforcement action, including article 108(3) TFEU directly, tort

(article 1382 of the Civil Code), constitutional fundamental rights and contractual provisions.

**22 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.

**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?**

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 since pecuniary damage is only deemed to be irreparable if it leads a claimant to bankruptcy – see question 20).

There is no significant cost risk in 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', a 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 in addition 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.

**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?**

Belgian courts can directly apply article 29 of Regulation 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 Court of Justice of the European Union (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 a.o.*; see also Cases C-19/11 *Libert e.a.*; 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 ducroire et État belge*).

**25 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.

**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?**

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. That said, granting interim relief against the aid measure is subject to very strict legal requirements before national courts as well. In the event that 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 a.o.* and Case C-465/93 *Atlanta a.o.*; 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.*

**27 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.

**28 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.

**29 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.

**30 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 European Commission and not implemented before its approval by the European Commission). The assessment of the compatibility of an aid measure is an exclusive competence of the European 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. As explained above, 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.

**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?**

**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: (i) the rule of law infringed is intended to confer rights on individuals; (ii) the breach is sufficiently serious; and (iii) 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 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 a 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 de-localise following the promise of an unlawful aid – the loss from the non-delocalisation could be a 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 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.

## State actions to recover incompatible aid

### 32 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.

That said, in some instances Belgium adopted a specific law to implement a 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 European 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 SA38105.

In the event of implementing an EU negative decision, the European 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. It is worth noting that 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*.

### 33 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 (case of the EU negative decision – even if in some cases Belgium adopted a specific law to implement the Commission's decision – see question 32). Otherwise, the legal basis is article 108(3) TFEU in case of aid unlawfully granted where the European 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.

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

As explained above, 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.
- Case 156/77: failure to fulfil obligations by not complying with Commission 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.

### 35 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.

In order 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).

In the event that 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 in order 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 so as to ensure the recovery of unlawfully paid aid (for example, 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 mentioned above).

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 mentioned above, 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.

**36 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 his 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 in order 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 his 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 (see question 31 – we simply reiterate that the beneficiary's damages cannot include the recovery of the aid plus interest).

**37 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. As mentioned above, 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

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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*).

**38 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 conditions set out by the EU courts: prima facie case, urgency and risk of irreparable damage. The conditions of liability of the state for having granted unlawful and incompatible aid have been described above (question 31).