

# STATE AID

## Germany



# State Aid

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

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### Germany



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## OVERVIEW

### Policy and track record

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

Germany has a reputation for granting generous amounts of state support. It has often been said that one of the cornerstones of German economic policy is the handing out of vast subsidies. In the European Commission's state aid scoreboard, Germany has always been portrayed as one of the major offenders under state aid rules. There is certainly some truth to this impression.

Historically, the relatively large volume of state aid granted by the German authorities is partly because of the size of the German economy and the very difficult economic situation in eastern Germany following reunification. However, it is also fair to say that a great number of political leaders have shown a strong belief in the benefits of state intervention in the market. This was confirmed in the covid-19 pandemic when the public authorities supported the economy with generous funding. The same applies, to a certain extent, in relation to the economic repercussions of the war in Ukraine.

Germany still has a significant public sector – public banks, in particular – a fact that has frequently triggered state aid investigations. In addition, services of general economic interest are a very popular tool and are currently used in many areas, such as transport, broadcasting, healthcare, public infrastructure and culture.

*Law stated - 11 January 2023*

### Relevant authorities

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

Germany is a federal republic, and competence for granting aid lies mainly with its 16 federal states (the Länder). The federal government has limited competence to grant aid. Regions and municipalities often support the local economy with subsidies.

The federal government is the sole point of contact with the European Commission where state aid procedures in Brussels are concerned, even when they relate to aid granted by the federal states, the regions, municipalities or other state bodies. However, the federal government is under a duty of loyalty regarding cooperation with the other state bodies, in particular the federal states, and views itself as their representative. Under normal circumstances, therefore, the federal government will not act against the political will or agenda of other state bodies and will always actively defend their interests with regard to the European Commission.

*Law stated - 11 January 2023*

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

In the German federal system, the granting of aid lies mainly within the competence of the Länder. Although, in some cases, state aid is granted directly by the governments of the federal states, most of them have created specific institutions – in particular, development banks, business development corporations and state-owned investment funds – tasked with granting state funds, as well as technically implementing and administering aid schemes. In some cases, the authorities have also entrusted private entities, such as accountancy firms, with this task.

The same applies at the federal level, where the federal government has largely delegated the implementation of

funding schemes, particularly in the field of environmental aid, to the KfW banking group, a public body. The KfW has been extremely active in supporting the economy during the covid-19 pandemic and during the Ukraine crisis.

*Law stated - 11 January 2023*

## General procedural and substantive framework

Describe the general procedural and substantive framework.

German rules on state aid are regulated in a fragmentary fashion and are unnecessarily complicated. In the first place, there is no specific code that deals with state aid, so the legal framework bears a variety of different characteristics. In addition, some confusion stems from the existence of the basic (and also very academic) distinction of private law versus public law, which is a specific feature of the civil law (continental law) system unknown to the (certainly more pragmatic) common law system.

The decision to grant subsidies is, broadly speaking, governed by public law – in other words, by the general statutes on administrative procedure as well as the budgetary rules.

To make things more complicated, while the question of granting subsidies is a matter of public law, the authorities often choose to use instruments governed by private law (ie, the German Civil Code) when implementing state aid measures – for example, guarantees, capital injections and loans.

This leads to the occasional situation where disputes concerning the question of whether a state measure can or should be granted (public law) are dealt with by the administrative courts, whereas litigation regarding the modalities of implementation (private law) has to be brought before the civil courts (the two-level theory). This is a confusing situation that can lead to significant delays in litigation.

*Law stated - 11 January 2023*

## National legislation

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

Unlike in other countries, there is no comprehensive statutory act covering state subsidies in Germany. As a result, apart from some exceptions (eg, in tax law), the legal framework resembles a patchwork of statutory provisions, case law, general principles of administrative law and countless guidelines.

Important sources are the budgetary rules at both federal and state level, which deal with the conditions under which the government is generally entitled to grant subsidies. The administrative procedures on the adoption of grant decisions (including the procedural rights of the parties, the imposition of conditions and obligations, access to the file and recovery) are contained in the Administrative Procedure Acts of the federal government and the federal states. Judicial remedies (in particular, appeals to the administrative courts) are regulated by the Rules of the Administrative Courts.

In addition, the authorities have made extensive use of 'soft law': in particular, of guidelines that factually serve as a basis for the granting of subsidies and have quasi-binding effect, thereby limiting the authorities' (generally wide) scope of discretion.

*Law stated - 11 January 2023*

## PROGRAMMES

## National schemes

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

Currently, the most important schemes in Germany concern research and development, small and medium-sized enterprises, training, risk capital, climate and environmental protection, energy, broadband infrastructure and others. The schemes for regional aid have traditionally been of major significance in the past, but since the reform of the Commission's Regional Aid Guidelines in 2013 (which has led to significant cuts in aid intensities), these schemes have become less relevant in practice.

During the covid-19 pandemic the federal government adopted a multibillion-euro aid package for loans and state guarantees. This was based on the Commission's 'Temporary Framework for State aid in the COVID-19 outbreak'. The German state-owned development bank KfW, the development banks of Germany's 16 federal states, and the Economic Stabilisation Fund played a key role in the implementation of these schemes. The same has happened, to a smaller extent, during the Ukraine crisis.

The Federal Ministry of Economics' website contains a very helpful, up-to-date database that provides details on the aid schemes available on a federal and local level.

*Law stated - 11 January 2023*

## General Block Exemption Regulation

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

Germany has not yet implemented any specific rules on the implementation of the GBER.

*Law stated - 11 January 2023*

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

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

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

Traditionally, Germany has always had a number of important public undertakings, sometimes generously supported by their public shareholders, which has often given rise to state aid investigations. While public influence is gradually declining in most sectors (ie, banks, postal services, air transport, railways, broadcasting and hospitals), principally as a result of privatisation, there have recently been reverse trends to '(re)nationalise' certain utilities (mostly energy, water, etc, but also broadband infrastructure), mainly at a regional or communal level. Such '(re)communalisation' grassroots movements often enjoy broad political support, but they raise, at least in some cases, state aid implications.

*Law stated - 11 January 2023*

## SGEI



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

It is very popular among German public undertakings to refer to Altmark and article 106(2) of the TFEU when justifying public subsidies. However, although the SGEI package has already been in force for several years, a number of public authorities and the providers of (alleged) SGEI still struggle to fulfil the formal and substantive requirements under Altmark or the Monti/Almunia package, in particular when it comes to the act of entrustment and the control of overcompensation.

This also applies to the German legislation on SGEI. While there are a number of statutes that can be considered as an act of entrustment, the other conditions under Altmark and article 106(2) TFEU are not usually regulated by law. Apart from a few exceptions (eg, public broadcasting), the other SGEI requirements are usually contained in separate documents (contractual arrangements, administrative acts, etc) that are not publicly accessible.

*Law stated - 11 January 2023*

## CONSIDERATIONS FOR AID RECIPIENTS

### Legal right to state aid

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

Compared with other jurisdictions, in Germany, the position of the aid recipient is relatively strong. Some schemes, in particular in the field of tax benefits, even grant an explicit legal right to obtain state support.

In most cases, the granting of state aid, however, remains at the discretion of the authorities. In such cases, however, public bodies are not entirely free in their decision but are bound by the principles of non-discrimination (equal treatment). In addition, German courts have developed the principle that the administration is bound by its own decision-making practice and its guidelines (soft law). A combination of factors (continuous decision-making practice (ie, other players have received aid under similar circumstances); existence of guidelines; etc) might, therefore, lead to de facto entitlement, even though there is no explicit statutory right for a certain type of state support.

*Law stated - 11 January 2023*

### Main award criteria

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

Similar to the situation in most EU member states, the authorities will primarily take the effect on employment into account when awarding aid – in other words, the number of jobs created or safeguarded through the project. In many cases, the aid recipient will also have to commit to maintaining a certain number of jobs over a specific period of time (usually five years) after the conclusion of the project.

Even in cases where there is no formal commitment to create or safeguard a certain level of employment, in exercising their discretion the public authorities will always consider the impact of aid on the job situation. This particularly applies to cases of rescue and restructuring aid. When negotiating an aid package with the authorities, it is, therefore, advisable to emphasise this aspect.

Apart from this, the criteria are mostly similar to those on an EU level (namely, environmental aid should lead to benefits in terms of environmental protection; research, development, and innovation aid to an increase in research,

development and innovation efforts; etc).

*Law stated - 11 January 2023*

### **Strategic considerations and best practice**

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

An application for state aid is normally more successful either if it is based on an existing aid scheme that provides an explicit legal right to obtain state aid or where there is public authorities' continuous decision-making practice to grant support if certain circumstances are met. In contrast, applications for ad hoc aid (in other words, where no scheme exists that could be the basis for the subsidy) are significantly less likely to succeed.

In addition, public authorities are often easier to convince if it can be demonstrated that the matter will not raise any concerns under EU state aid law; in other words, if the measure is covered either by an approved scheme or a block exemption, or is clearly in line with the applicable legal framework so that it could be approved easily. On the other hand, if there are any potential concerns regarding compatibility with the EU state aid rules, public authorities might often use 'EU issues' as a pretext to reject an aid application and to cover their unwillingness to grant state support.

Depending on the size of the assisted project, political contacts help in facilitating the discussions. As in every member state, the decision makers – in other words, politicians at every level (federal, states, regions and municipalities) – are receptive to the concerns of the national or local economy and the aid recipient's employees. This applies both to members of the government and to the opposition, and to trade union leaders and members of the works council.

*Law stated - 11 January 2023*

### **Challenging refusal to grant aid**

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

Under German law, the dismissal of an aid application (even partial dismissal) can be challenged in court, and the applicant can lodge an action for a grant decision to be issued. In cases where the authority did not take any decision at all, the aid recipient can file an action for failure to act. Such appeals will usually go to the administrative courts, as under case law the decision to grant aid is of a public (administrative) law nature. In the field of tax benefits, the appeal should be lodged at the fiscal courts.

In most cases, the aid recipient will first have to undergo formal opposition proceedings against such a negative decision before going to court. In this case, the procedure will basically be brought to the next administrative level; in other words, it is the superior authority that will decide (again) on the aid application. These steps can take a long time.

*Law stated - 11 January 2023*

### **Involvement in EU investigation and notification process**

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

The Federal Ministry of Economics (BMWK), which deals with the Commission in all state aid procedures, attaches great importance to the aid recipient's active involvement in the procedure before the European Commission. The BMWK is very transparent as far as the relationship with the aid recipient is concerned. Under normal circumstances, the aid recipient will be fully informed at all stages of the procedure, will obtain full access to the file and will always have the possibility to attend (pre-notification) meetings with the Commission.

On the other hand, it is usually expected that the aid recipient fully supports the government in the drafting process – the texts of the notification and the follow-up submissions are usually drafted by the aid recipient. This division of labour makes sense because the public authorities usually do not have sufficient resources or the market knowledge required to fill in the elaborate notification forms. It also allows the aid recipient (which bears the main risks in that it is the recipient that will ultimately be affected by a negative decision) to present its case to the Commission, but within certain limits.

*Law stated - 11 January 2023*

## **STRATEGIC CONSIDERATIONS FOR COMPETITORS**

### **Complaints about state aid**

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

Competitors are advised to address the public authorities directly before seeking judicial protection before the courts. If made at an early stage – ideally at a point in time when the authorities are still at the beginning of the negotiations – such submissions can often succeed. Civil servants are often risk-averse and, of course, bound by the EU state aid rules. Such pre-aid-granting contact can raise the public authorities' awareness that there is a (potential) complainant out there, meaning that they are, therefore, likely to (at least) reduce the amount of aid that will ultimately be granted. In addition, such letters to the authorities do not carry the risk of bearing the other party's costs.

This applies particularly in the case of state aid granted by cities and municipalities that fall under the statutory supervision of the state (usually by the respective federal state), which means that the supervising authority can override the municipality's decision with the argument that the supervised entity acted contrary to articles 107 and 108 of the TFEU. In such cases, submissions to the supervising authority have often helped to support the competitor's position. In any case, since the Eesti Pagar judgment of the CJEU, it is clear that national authorities are obliged to recover illegal aid on their own initiative (ie, even without a Commission decision).

There is no cooperation mechanism in place under which the German authorities will cooperate with authorities in other member states.

*Law stated - 11 January 2023*

### **Dealing with illegal or incompatible aid**

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

Apart from the transparency obligations under the General Block Exemption Regulation, there is no mandatory publication process concerning state aid. As such measures do not necessarily have to be approved by parliament, and given that the internal minutes of the administration are not published, public records are usually only available to a very limited extent.

One exception is the state budget plan, which has to be published at all levels (federal government, federal states, regions and municipalities) and which contains, in principle, all state aid measures. However, as such information contained in the budget plan is usually very generic and vague, it is usually not sufficient to base a complaint to the European Commission on it.

*Law stated - 11 January 2023*

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

In terms of transparency and access to information, the situation is fairly difficult for the aid recipient's competitors.

In recent years the federal government and most of the federal states have adopted freedom of information laws that allow some access by the general public to information held by public authorities. However, all these statutes contain a number of significant exceptions (most of these exceptions being broader than those under Regulation 1049/2001), so that there is still virtually no transparency when it comes to state aid. As a result, competitors do not have an explicit statutory right to access the file to gain a factual basis to file a complaint.

However, there are also some positive developments. In case law dated February 2017 the Federal Court of Justice 'did not rule out' that a competitor's right to obtain information on the aid measure could possibly be based on the law of torts in conjunction with the state aid rules. This is certainly a promising trend, but it remains to be seen whether the civil courts will refine this principle any further.

*Law stated - 11 January 2023*

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

As there is no transparency regarding aid measures taken by the main state aid measures, complainants have to locate other sources to find out about illegal subsidies. This lack of information is one of the main problems that complainants have to face when they address German state aid measures. As a result, complaints regarding German state aid measures are often based purely on media reports and on public statements by politicians (who are often keen to show their efforts to support the economy). Another option, seldom available, is to gain access via means of corporate law (eg, by becoming a shareholder of the aid recipient and learning about the aid measure through the exercise of shareholders' rights, such as participating in a shareholder meeting).

In any case, experience has shown that even in cases where the complainant has only very limited evidence at hand, the European Commission is very well aware of the limited transparency under German law. For this reason, in most cases the Directorate-General for Competition will send out a questionnaire to the German government, even on a relatively thin factual basis. This usually leads to follow-up discussions, during which more facts will emerge. Complainants should therefore not be discouraged by a lack of hard evidence.

*Law stated - 11 January 2023*

## Other ways to counter illegal or incompatible aid

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

As German civil and administrative courts have recognised the direct effect of the standstill obligation under article 108(3) TFEU, all market participants and their advisers have become more cautious about possible state aid implications. Depending on the specific situation, therefore, it can make sense to raise possible state aid concerns to third parties (ie, outside the courts and outside the funding authorities) that could be affected by the illegality of the measure in question.

Some competitors have therefore addressed third parties, such as the financing banks, in a transaction that intends to

rely on a state guarantee, and have pointed out the illegality of the measure to them. Another option is to challenge the validity of a capital injection by writing to the Commercial Register (such measures have to be on the public record to take legal effect), to raise this point at a public shareholder meeting or directly to the board, or to contact an insolvency administrator who plans to rely on an illegal capital injection by the state that would 'save' the aid recipient.

However, competitors should tread carefully when taking such steps. Under German unfair competition law (which is generally rather rigid), such aggressive measures can constitute illegal unfair business practices (defamation).

*Law stated - 11 January 2023*

## PRIVATE ENFORCEMENT IN NATIONAL COURTS

### Relevant courts and standing

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

Depending on the nature of the measure, mainly competitors (ie, not any other parties) can bring complaints before the civil courts (in case of private law disputes) or before the administrative courts (in case of public law disputes). Both the highest German administrative court and the highest German civil court have made it clear that competitors affected by the (allegedly illegal) aid have locus standi to bring such an action.

*Law stated - 11 January 2023*

### Available grounds

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

The appropriate legal basis depends on the nature of the measure. Under private law, a competitor can bring an action under the provisions on torts, sections 823 and 1004 of the German Civil Code, in conjunction with article 108(3)TFEU. Under public law, these are the general provisions concerning judicial review, namely sections 40, 42 and 113 of the Rules of the Administrative Courts. These options are, in terms of practical application, not fundamentally different. In both cases, the plaintiff has to show that illegal state aid has been granted and that it has a distortive effect.

*Law stated - 11 January 2023*

### Defence of an action

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

It is beyond doubt that actions can be brought directly against the state or the body that has granted state aid. The courts have confirmed this possibility on a number of occasions.

However, it is less clear whether it is also possible to bring a claim directly against the aid recipient based on the rules on unfair competition, as has been suggested by some legal scholars. In such a scenario (which has not yet been tested before the courts), the plaintiff (ie, the competitor) must show not only that the defendant (ie, the aid recipient) received illegal aid, but also that it actively used state aid to undercut its competitors, thereby causing damage to them (losses, etc). It therefore seems that the bar is significantly higher in a horizontal setup (action against aid recipient) than in the case of an action against the state.

*Law stated - 11 January 2023*

## Compliance with EU law

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

Although the number of court appeals against illegal state aid is increasing, the overall number is still relatively low in Germany. Given the very different circumstances of the few individual cases, it is also difficult to give a general idea of the success rate. German courts have generally become more open to the idea of competitor complaints. However, some courts, in particular administrative courts, still show some tendency to ignore the EU case law.

An action by a competitor does not always have suspensory effect, but the competitor can apply for interim relief measures to be adopted. In this regard, the German courts are more generous compared to the EU courts.

In any case, the comparatively small number of court cases can probably be explained by the fact that until recently some lower courts have been extremely reluctant to apply state aid at all and have, in clear breach of the case law of the European courts, denied the locus standi of competitors. This situation has improved since 2011–2012, when the highest German administrative and civil courts confirmed that competitors can base their right of standing on the EU state aid rules. These recent judgments have created legal certainty, which will probably encourage plaintiffs as well as German judges to apply the full practical effectiveness of EU state aid law.

Another reason for the reluctance of competitors is probably the burden of proof. In the case of non liquet (if the plaintiff cannot prove the existence of aid), the court will reject the appeal and the plaintiff has to bear the costs of the other party.

*Law stated - 11 January 2023*

## Referral by national courts to European Commission

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

If a competitor has challenged an (alleged) state measure, it is not uncommon for national courts to refer a question on state aid to the Commission to obtain some guidance. In the case of parallel procedures (if a formal state aid procedure is also pending at the Commission), according to case law, the national judge is not always obliged to render a decision without delay. In some cases, the judge can also stay the national proceedings to await the Commission's formal decision.

The highest German courts have traditionally been reluctant to refer questions to the CJEU under article 267 TFEU. However, the number referred recently, especially from the lower courts, seems to have increased.

*Law stated - 11 January 2023*

## Burden of proof

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

In terms of the burden of proof, it is necessary to distinguish in principle between the different courts. Broadly speaking, the administrative courts are based on the inquisitorial system, which means that it is not only up to the parties to present evidence, but it is also the obligation of the court to investigate the case. The civil courts, on the other hand, are based on the adversarial system, where the court renders its judgment on the basis of the evidence

presented by the parties.

Therefore, from a plaintiff's perspective, the administrative courts seem slightly more advantageous. However, the difference should not be overstated, given that before both the administrative and the civil courts the plaintiff ultimately bears the risk of a non liquet situation in the end. In other words, if it cannot be established that illegal aid has been granted, the court will reject the appeal and the plaintiff has to bear the costs of the other party.

In some cases, in particular if the plaintiff is not in a position to present clear evidence for the existence of illegal aid, the rules on the burden of proof can have a deterrent effect on the plaintiff. Given the lack of transparency regarding state aid measures, competitors often find it very difficult to present compelling evidence to the court that proves that state aid has actually been granted. This is particularly difficult in complex transactions; for example, regarding capital injections, where the 'private investor test' has to be applied, which by its very nature requires a lot of information (financial data, etc). In addition, German courts do not have a system of discovery or similar disclosure obligations comparable to the common law system. The German courts have not yet developed any principles that would alleviate this burden of proof to make the system more plaintiff-friendly.

*Law stated - 11 January 2023*

### **Deutsche Lufthansa scenario**

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

If the Commission is already examining a case in the context of a formal investigation, it should be carefully considered whether there is any added value in bringing the case to a national court. Under normal circumstances, the national judge might stay (or de facto delay) proceedings and await the outcome of the Commission investigation. If the Commission then adopts a negative decision, the (costly) national proceedings will become obsolete; if the Commission adopts a positive decision, the national court will usually comply with it.

In exceptional cases, bringing a case before the national courts can help to enforce the standstill obligation during the interim period (ie, before the Commission adopts a final decision). In such a scenario, the German courts might follow the Deutsche Lufthansa case law, which states that a national court is bound by the qualification of a measure as state aid in an opening decision by the Commission.

*Law stated - 11 January 2023*

### **Economic evidence**

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

The 'new economic approach' promoted by Competition Commissioner Neelie Kroes around 18 years ago has not left a significant footprint in the German courts. Until now, national courts have shown little willingness to accept economic evidence and will retain independent outside experts only in a very specific and limited context (eg, the evaluation of a piece of land).

*Law stated - 11 January 2023*



## Time frame

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

The duration depends very much on the specific circumstances of the individual case. Court proceedings at first instance before the civil or administrative courts usually last about two to three years at least. There is usually the possibility of a first appeal and a second appeal solely on points of law, which may last one to three years each.

*Law stated - 11 January 2023*

## Interim relief

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

As in most jurisdictions, to obtain interim relief or an injunction, the applicant must, as a principle, demonstrate that a prima facie case exists, as well as urgency. Appeals by competitors before the administrative courts can also have automatic suspensory effect in some situations.

Applications for grant of interim relief against unlawfully granted aid can involve some risks. If the court has granted an injunction against the aid and if this decision is annulled at a later stage, the applicant may have to pay damages.

*Law stated - 11 January 2023*

## Legal consequence of illegal aid

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

Under German law, if a measure contains illegal aid, it is usually null and void (section 134 of the German Civil Code). This has been confirmed by the Federal Civil Court on a number of occasions.

In case of (illegal) state guarantees, the situation is more complicated. The prevailing view seems to be that, in line with the Residex case law, a bank can still invoke the guarantee, provided that it cannot be considered as an aid recipient itself (this applies in the majority of cases). However, in the rather exceptional situation where the bank has to be qualified as an aid recipient itself, it cannot rely on the illegal guarantee.

*Law stated - 11 January 2023*

## Damages

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

According to the Francovich case law of the European courts, public authorities can be liable to pay compensation to individuals that have suffered as a consequence of a breach of EU law. It is generally recognised that the principle of state liability in EU law also applies, in principle, if a member state has violated the standstill obligation under article 108(3) TFEU. The plaintiff must prove a qualified breach of the state aid rules and that this has led to damage to the competitor. There must be a causal link between the infringement and the damage; in other words, the applicant must show that the alleged financial losses have only been caused by the granting of aid and not by any other factors



(general market trends, etc). As this bar is relatively high, to date there has not been a single case before a national court where such damages have been awarded. In a recent judgment, the lower court of Bonn dismissed such a claim.

To date, there have been no cases in which competitors have successfully claimed damages from competitors.

*Law stated - 11 January 2023*

## STATE ACTIONS TO RECOVER INCOMPATIBLE AID

### Relevant legislation

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

As a general principle, the aid must be recovered by the body that granted the aid to the beneficiary. Germany has not introduced any specific rules to implement article 16 of the Procedural Regulation, which has created some legal uncertainty and given cause for academic discussion.

*Law stated - 11 January 2023*

### Legal basis for recovery

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

Public authorities often order recovery purely based on national provisions. This is particularly the case if the aid recipient does not comply with certain conditions commonly included in the granting decision, such as the obligation to create a certain number of jobs, invest a certain minimum and maintain the investment for a certain period.

*Law stated - 11 January 2023*

### Commission-instigated infringement procedures

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

There have been cases in which the Commission has (successfully) brought Germany before the CJEU because of non-recovery of aid, for example, relatively recently in the *Biria* case.

*Law stated - 11 January 2023*

### Implementation of recovery

How is recovery implemented?

The legal situation on recovery is unnecessarily confusing, which is partly a result of the distinction of private law versus public law, a specific feature of the civil law system.

In general, if the aid has been granted under public law, the general provisions under administrative law concerning recovery will apply. In other words, the authority can order recovery by way of a unilateral administrative decision. As has been confirmed many times by the EU courts, there is virtually no room for the aid recipient to invoke legitimate expectations against recovery.

If, on the other hand, the aid has been granted under private law, the situation is less clear. Some legal scholars have

argued that the authority would have to bring a civil action for recovery before a civil court based on the provisions in the German Civil Code on unjust enrichment. As this process can last several years, in its very recent case law the CJEU has made it clear that this is not a sufficient (since not very effective) implementation of the state aid rules on recovery. Some administrative courts have therefore held that, based on the idea of *effet utile*, the authority could also order recovery by way of a unilateral decision in such a 'civil law situation'.

*Law stated - 11 January 2023*

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

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

A public body can rely on the standstill obligation (ie, invoke nullity of an agreement because of a breach of the state aid rules), even if it has committed the breach against article 108(3) TFEU itself. This does not constitute a breach of the *venire contra factum proprium* principle (which prohibits a party from an agreement to set him or herself in contradiction to his or her own previous conduct). In this case, the *effet utile* of the state aid rules must be respected.

Unfortunately, such cases are not rare in practice. Public bodies quite frequently invoke the nullity of an agreement to escape their contractual obligations, even many years after the signing of an agreement, based on an alleged violation of the state aid rules. This often happens when the decision-makers realise that the deal in question is no longer politically desirable. In such a scenario, the state aid defence provides a welcome opportunity ('easy way out'). The CJEU judgment in *Klausner Holz/Niedersachsen* supports such a defence strategy by the public body.

*Law stated - 11 January 2023*

### **Defence against recovery order**

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

In the majority of cases, the authority will order recovery by way of a (unilateral) decision under administrative law. In this case the aid recipient must challenge the recovery order in the administrative courts.

If, on the other hand, recovery is implemented by way of a claim before a civil court, the aid recipient must defend itself as in a normal civil procedure. From the aid recipient's perspective, this is certainly the more 'comfortable' position. However, the CJEU has made it clear that this does not always constitute a sufficient implementation of the state aid rules on recovery.

*Law stated - 11 January 2023*

### **Interim relief against recovery order**

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

The aid recipient could, in both a civil and administrative court, apply for interim relief against the national recovery decision. However, under the case law of the European courts, the grounds for such an application are rather limited. In particular, if the aid recipient invokes the alleged illegality of the Commission's recovery decision, the national judge has to assess whether the case at hand fulfils the conditions of the *Zuckerfabrik* and *Atlanta* case law. According to these principles, interim relief can be ordered by the national court only if that court entertains serious doubts as to the validity of the decision and – if the validity of the contested act is not already in issue before the CJEU – itself refers

the question to the CJEU. In addition, there has to be urgency (ie, the interim relief is necessary to avoid serious and irreparable damage), the court must take due account of the EU interest, and in its assessment of all those conditions it must respect any decisions of the CJEU or the General Court ruling on the lawfulness of the decision. Given these narrow restrictions, such applications have often not succeeded.

In addition, the Federal Court of Justice has confirmed that, in principle, the aid recipient could be entitled to receive damages from the public authorities if incompatible aid had to be recovered and if the public authorities have failed to point out this specific risk to the beneficiary (based on culpa in contrahendo ). However, such cases will probably remain rare.

*Law stated - 11 January 2023*

## UPDATE AND TRENDS

### Key developments of the past year

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







Apart from the measures relating to the covid-19 pandemic and the Ukraine crisis, the German government has recently focussed on the implementation of the Green Deal. State aid for energy, in particular for renewables, is still very important. The same applies to the decarbonisation of industries. The new Commission guidelines on climate, energy and environmental aid will therefore be of crucial significance.

The German government is a keen supporter of Important Projects of Common European Interest (IPCEI). After the Commission approved the first battery IPCEI in 2019 and the microelectronics IPCEI in 2018, other projects, also under the European Chips Act Communication, are in the pipeline.

State aid in the field of tax law seems to have become less of an issue in Germany. The recent crusade by the Commission against 'aggressive tax planning measures' was mainly targeted at other jurisdictions. It does not seem very likely that Germany will be in the spotlight in the near future as far as tax aid is concerned.

*Law stated - 11 January 2023*

## Jurisdictions

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