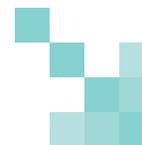


# European state aid control: latest developments



Thomas Nordby and Espen Bakken, Arntzen de Besche Advokatfirma AS\*

[www.practicallaw.com/8-384-7011](http://www.practicallaw.com/8-384-7011)

In June 2005, the European Commission launched a comprehensive reform of state aid rules and procedures in the State Aid Action Plan (SAAP). The Commission announced that a particular aim was to ensure that the EC Treaty's state aid rules were better suited to encouraging member states to contribute to the Lisbon Strategy (see box, *The Lisbon Strategy*). This was to be achieved by focusing aid on:

- Improving the competitiveness of EU industry.
- Creating sustainable jobs.
- Ensuring social and regional cohesion.
- Improving public services.

This chapter gives an update on the latest important developments in European state aid control. In particular, it provides:

- An introduction to the applicable legal framework.
- An outline of state aid legislative, case law and policy developments over the past year.
- An overview of the proposed developments in state aid policy and administrative practice.

## LEGAL FRAMEWORK

The legal basis of EU state aid policy is set out in Article 87(1) of the EC Treaty. This provides that state aid is, in principle, incompatible with the common market.

In the context of Article 87(1), state aid has five characteristics:

- **State resources.** The aid must be state resourced. This includes public funds administered by the member states through central, regional or local authorities or other public or private bodies designated or controlled by the state.
- **Economic advantage.** The aid should provide an economic advantage that the undertaking would not have received in the normal course of business. Examples of transactions satisfying this condition are:
  - a company buying or renting publicly owned land at less than market price;
  - a company selling land to the state at higher than market price;

- a company enjoying privileged access to infrastructure without paying a fee;
- an enterprise obtaining risk capital from the state on terms that are more favourable than it would have obtained from a private investor.

- **Selective measure.** The aid must be available only to certain undertakings, for example, when the state selects individual businesses, sectors, areas, sizes of business, or the production of certain goods. A benefit available to all businesses is not state aid but a general measure.
- **Distortion of competition.** The aid must potentially or actually strengthen the position of the recipient in relation to competitors. Almost all selective aid has the potential to distort competition.
- **Effect on trade (including potential effects).** The aid must have an effect on trade between member states. Most products and services are traded between member states. As a result, state aid for almost any selected business or economic activity is capable of affecting trade between states, even if the assisted business does not itself directly trade with member states.

Aid measures that satisfy all of the above criteria are, in principle, incompatible with the common market. However, the principle of incompatibility does not amount to a full-scale prohibition. There are a number of cases in which state aid may be considered compatible (*Articles 87(2), 87(3) and 86(2), EC Treaty*).

European state aid control is based on a system of *ex ante* authorisation. Under this system, member states must notify the Commission of any plan to grant or alter state aid and they are not allowed to put such aid into effect before it has been authorised by the Commission. Under the EC Treaty, the Commission determines whether the notified aid measure constitutes state aid within the meaning of Article 87(1) of the EC Treaty, and if it does, whether it qualifies for exemption under Article 87(2) or 87(3), or Article 86(2).

As member states cannot grant any state aid unless it has been notified and authorised by the Commission, any aid granted in the absence of Commission approval is automatically classified as "unlawful aid" and subject to recovery.

To ensure transparency, predictability and legal certainty, the Commission has made public the criteria it uses when deciding whether aid measures notified to it qualify for exemption. These publications have taken the form of regulations, communications, notices, frameworks, guidelines and letters to member states.

## RECENT DEVELOPMENTS

This section sets out recent developments in the area of European state aid control, in particular:

- Legislative reform.
- Recent judgments handed down by the European Court of Justice (ECJ) and the Court of First Instance (CFI).
- Commission state aid policy, focusing on the following four areas where the Commission has been particularly active of late:
  - environmental protection;
  - guarantees;
  - rescue aid;
  - recovery of unlawful and incompatible state aid.

### Legislative reform

The Commission has been working to modernise and simplify state aid procedures in recent years. In this regard:

- On 12 December 2007, the Commission amended the regulation that establishes complementary procedural provisions for the application of the EC Treaty state aid rules (*Regulation (EC) No. 794/2004* (Implementing Regulation)). The new regulation aims to rationalise and streamline procedures through clearer rules and faster decision-making procedures. As part of the measures introduced, since 1 July 2008, the use of the established electronic notification system (State Aid Notification Interactive) (SANI) and the secured e-mail system (Public Key Infrastructure) (PKI) have been compulsory for the submission of state aid notifications by member states and for subsequent correspondence in connection with a notification.
- On 7 May 1998, the Council adopted a block exemption enabling regulation (*Regulation 994/98 OJ 1998 L142/1*), which enables the Commission to adopt block exemption regulations for state aid. With a block exemption regulation, the Commission can declare specific categories of state aid compatible with the EC Treaty if they fulfil certain conditions, exempting them from the requirement of prior notification and Commission approval.
- On 7 July 2008, the Commission adopted a general block exemption regulation (*Commission Regulation 800/2008, OJ 2008 L214/3*) (GBER). The GBER harmonises and consolidates into one text the rules that previously existed in five separate block exemption regulations, and enlarges the categories of state aid covered by the exemption (see *box, State aid and the GBER: authorised categories*). State aid measures not included in the GBER are not illegal per se (such measures remain subject to the traditional notification requirement).

### Recent judgments by the ECJ

The ECJ has recently overturned settled CFI case law regarding the conditions under which the Commission can refuse access to

## THE LISBON STRATEGY

At the meeting of the March 2000 European Council in Lisbon, the EU member states launched a “Lisbon Strategy”, aimed at making the EU “the most competitive economy in the world and achieving full employment by 2010” (see *Europa Glossary*, [http://europa.eu/scadplus/glossary/lisbon\\_strategy\\_en.htm](http://europa.eu/scadplus/glossary/lisbon_strategy_en.htm)). This strategy is based on three “pillars”: an economic pillar, a social pillar and an environmental pillar.

documents originating from member states, which has an impact on state aid cases. In *Sweden v Commission (C-64/05)*, the ECJ:

- Held that Article 4(5) of the Council Regulation on access to documents (*Regulation No 1049/2001*) cannot be interpreted as conferring on the member state a general and unconditional right of veto to disclosure of documents.
- Confirmed the need to obtain prior agreement of the member state to disclose the documents originating from it. A consulted member state objecting to the disclosure of its documents must now state reasons with reference to the exceptions of Article 4 and cannot simply rely on the fact that the documents emanated from it.
- Found that to ensure efficient co-operation when an institution receives a request for access to documents originating from a member state, a genuine dialogue must be established between the member state and the institution.

In another recent case, the ECJ required Greece to recover state aid from Olympic Airways and Olympic Airlines (*Case C-419/06, Commission v Greece*). In September 2005, the Commission decided that Greece was obliged to recover state aid granted to national airlines. The decision implied that Greece had to recover the state aid without delay, and to immediately suspend the granting of any additional aid to Olympic Airways and Olympic Airlines.

The ECJ heard the case on 14 February 2008. Greece submitted that the Commission’s decision was imprecise with regard to the amount that was to be recovered. The ECJ found that the Commission decision indicated amounts that were sufficiently precise and that there is no EC law provision that requires the Commission to determine the exact amount of aid to be repaid. In addition, Greece could not validly justify a failure to implement the decision on the basis of its alleged illegality. The Court declared that, by not taking all measures necessary to put an end to the unlawful aid, and to recover it from the recipients, Greece failed to fulfil its obligations.

On 13 November 2008, the ECJ ruled that France failed to fulfil its obligations under EC Treaty state aid rules by failing to execute a Commission decision adopted on 16 December 2003 (*Case C-214/07, Commission v French Republic*). This decision ordered France to abolish an aid scheme granting tax exemptions for the takeover of companies in difficulties and to recover the illegal aid already granted from the beneficiaries.

The court confirmed the Commission’s decision and rejected all pleas brought by France. The ruling is important because the court provides clear criteria for determining whether a recovery decision is implemented correctly. In particular, it specified that where a beneficiary of illegal aid has ceased its activity by the

**STATE AID AND THE GBER: AUTHORISED CATEGORIES**

The Commission's general block exemption regulation (*Commission Regulation 800/2008, OJ 2008 L214/3*) (GBER) authorises aid concerning:

- Small- and medium-sized enterprise (SME) investment and employment.
- Small enterprises newly created by female entrepreneurs.
- Consultancies in favour of SMEs.
- SMEs' participation in fairs.
- Provision of risk capital.
- Research and development.
- Technical feasibility studies.
- SMEs' industrial property rights costs.
- Research and development in the agricultural and fisheries sectors.
- Young innovative enterprises.
- Innovation advisory services and innovation support services.
- The loan of highly qualified personnel.
- Training.
- Recruitment of disadvantaged workers in the form of wage subsidies.
- Employment of disabled workers in the form of wage subsidies.
- Compensating the additional costs of employing disabled workers.
- Regional investment and employment.
- Newly created small enterprises in assisted regions.
- Investment beyond Community standards for environmental protection.
- Acquisition of transport vehicles that go beyond Community environmental protection standards.
- Early adaptation to future environmental standards for SMEs.
- Investment in energy saving measures.
- Investment in high efficiency cogeneration.
- Investment in the promotion of energy from renewable energy.
- Environmental studies.
- The environment, in the form of tax reductions.

Cross-border

time the aid must be recovered, the liability must be registered in the schedule of liabilities; if the period for registration has expired, any available procedure must be applied to allow claims to be brought out of time. In relation to recipients that have transferred their assets, the authorities must check whether the financial conditions of the transfer complied with market conditions.

**Recent judgments by the CFI**

The CFI has confirmed the Commission's decision that approved Ireland's risk equalisation system (*Case T-289/03, British United Provident Association Ltd, BUPA Insurance Limited, BUPA Ireland Limited v Commission*). As part of the liberalisation of the private health insurance market (PMI) in Ireland, the Irish government established a risk equalisation system designed to transfer funds from PMI insurers with a low risk profile to insurers with a risk profile higher than the average. This ensured that all persons living in Ireland would receive a minimum level of PMI services at the same price. The system was approved by the Commission because the compensation was intended to be a compensation for the obligations associated with a service in the general economic interest (SGEI).

The application of the equalisation system led to funds being transferred from the British United Provident Association Ltd (BUPA) to its largest competitor, and BUPA brought an action for annulment of the decision. The Commission's decision was

confirmed by the CFI. The court found that Ireland fulfilled the conditions under which the member states can invoke the existence and need for protection of an SGEI mission, in that:

- There was an act of a public authority entrusting the operators in question with an SGEI mission.
- The universal and compulsory nature of that mission, and the compensation system provided for by the risk equalisation system, was necessary and proportionate by reference to the costs incurred in discharging the PMI obligations.

The CFI also recently annulled the Commission's decision regarding aid granted by Denmark to the Danish state broadcaster, TV2/Danmark A/S (TV2) (*Cases T-309/04, T-317/04, T-329/04 and T-336/04 - TV2, SBS, Viasat and Kingdom of Denmark v Commission*). It upheld the complaint raised by TV2 and Denmark in several of their pleas that the Commission decision was based on an inadequate statement of reasons, in that the conditions under which Denmark provided funding to TV2 were not adequately examined, with the result that the Commission erred in making a finding of state aid. The CFI found that:

- There was nothing in the contested decision to prove that the Commission was correct in asserting that the overcompensation that TV2 was found to have received was simply the result of an uncontrolled accumulation of capital (rather

than as a result of a build-up of reserves carried out in a transparent and carefully considered manner with the specific aim of guaranteeing the provision of the public service despite fluctuations in advertising revenue).

The failure to provide an adequate statement of reasons in that regard amounted to an infringement of essential procedural requirements. That failure was in turn attributable to the Commission's failure to examine seriously, during the formal investigation procedure, the actual conditions that, during the period under investigation, governed the setting of the amount of licence fee income payable to TV2.

- The Commission's assertion that the Danish authorities did not regularly check the level of the accumulated reserves was an unsubstantiated claim that was expressly disputed by Denmark during the formal investigation procedure. In addition, the contested decision itself contained information that undermined that allegation.
- The Commission's assertion that from 1999 onwards, TV2 never actually needed to draw on its reserves, could not give rise to a finding that there was state aid.

Finally, shortly before the publication of this chapter, the CFI has handed down important judgments in the field of state aid policy, in particular:

- *Ryanair Ltd v Commission (Case T-196/04)* in which the court annulled the Commission's decision on advantages granted by the Walloon region and by Charleroi airport to Ryanair (<http://curia.europa.eu/en/actu/communiqués/index.htm>).
- *Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland v Commission (Joined Cases T-211/04 and T-215/04)*, in which the court annulled the Commission decision according to which the proposed reform of corporate tax in Gibraltar constituted unlawful state aid (<http://curia.europa.eu/en/actu/communiqués/index.htm>).

### Commission state aid policy

In relation to state aid policy, the Commission has recently been particularly active in the following four areas:

- Environmental protection.
- Guarantees.
- Rescue aid.
- Recovery of unlawful and incompatible state aid.

This section sets out recent Commission policy developments and decisions in the above four areas.

**Environmental protection.** On 23 January 2008, the Commission adopted a revised set of guidelines on state aid for environmental protection (*OJ 2008 C82/1*). The main principle underpinning the revised Commission policy is that member states should not use state aid as the main tool to address environmental concerns. Member states have several other means at hand (such as reg-

ulatory measures, a market-based mechanism and so on) that should initially be used for this purpose. State aid should remain a fallback option to be used only when it can be proved that the targeted objective cannot be reached by other measures.

In certain cases, granting state aid may be justified to give undertakings an incentive to invest more in environmental protection or to relieve some firms from a high financial burden to enforce an overall stricter environmental policy.

The new environmental aid guidelines ensure that:

- Competition is not unduly distorted by support mechanisms.
- State aid measures are better targeted and that the positive effects outweigh the negative effects in terms of distortions of competition.
- Businesses receive necessary incentives to make more environmentally friendly investments.

The guidelines also introduce more economic analysis, focus on the most distorting measures, and provide clear rules on tax exemptions and emissions trading schemes.

The new guidelines differ from the old guidelines (of 2001) in that:

- There are a number of new provisions in the guidelines, for example, for aid for early adaptation to standards, aid for environmental studies, aid for district heating, aid for waste management and aid involved in tradable permit schemes.
- The aid intensities have increased. The intensities for large enterprises have risen from a range of between 30% and 40%, to between 50% and 60%. For small enterprises, the intensities have risen from between 50% and 60%, to between 70% and 80%. In addition, where an investment to improve on Community standards or improve the level of environmental protection in the absence of standards involves eco-innovation, a further 10% aid bonus may be granted. The option of granting 100% following a competitive procedure has also been introduced.
- The guidelines keep the possibility of long-term derogations from environmental taxes without conditions as long as, after derogation comes into effect, the company concerned pays at least the Community minimum level of environmental tax. If a company does not pay at least this Community minimum, long-term derogations remain possible but the relevant member state must demonstrate that the derogation is necessary and proportionate.
- The guidelines provide for either a standard assessment or a detailed assessment of aid. The detailed assessment method applies in the case of large aid amounts given to individual enterprises, and was introduced to allow for greater scrutiny of those individual cases that have the greatest potential to distort competition and trade. Schemes involving tax exemptions and reductions are only assessed at the level of the scheme, that is, the individual enterprise concerned is subject to a standard assessment only.

In a recent matter, on 17 June 2008, the Commission decided not to raise objections to the financial support of EUR61 million (about US\$78 million) granted by France to the LOWCO2MOTION research and development (R&D) programme (*Case No. N 597/2007* and *Commission press release IP/08/954*). LOWCO2MOTION is being implemented by a consortium of eight partners, headed by the car supplier Valeo. The purpose of the programme is to introduce innovative products to improve engine efficiency and economise on fuel consumption when vehicles brake and stop. The programme's target of reducing fuel consumption by up to 30% will also contribute to efforts to reduce greenhouse gas emissions.

In other recent decisions, on 16 July 2008, the EFTA (European Free Trade Association) Surveillance Authority (ESA) (with which the Commission co-operates closely) adopted a decision not to raise objections to the Norwegian state's investment in a project in the western part of Norway (Mongstad) whose objective is to test, verify and demonstrate different concepts and technologies capable of reducing costs and risks related to large-scale carbon dioxide capture (*Case No. 503/08/COL* and *ESA press release (08) 52*). The Norwegian project is a pilot project and said to be the first of its kind in Europe.

Finally, on 11 March 2008, the Commission authorised an Italian tax reduction to stimulate the production and use of biodiesel (*Case No. N-326/2007* and *Commission press release IP/08/436*). The measure modifies and extends a previously approved scheme and introduces a supply obligation for biofuels. The co-existence of a supply obligation and a tax reduction is a novelty and at this stage it cannot be predicted how it will affect the market. Despite these uncertainties, there was no risk of over-compensation because the proposed tax reduction would only:

- Apply to parts of the released biodiesel.
- Cover parts of the difference in production costs.

The aid was therefore found to be compatible.

**Guarantees.** On 20 May 2008, the Commission adopted a new notice on state aid in the form of guarantees (*OJ 2008 C155/10*). The text sets out clear and transparent methodologies to calculate the aid element in a guarantee and provides simplified rules for small- and medium-sized enterprises (SMEs), including pre-defined safe-harbour premiums and single premium rates for low-amount guarantees.

Guarantees are of particular importance for SMEs, as they often have low share capital and a lack of stable resources. The new notice sets out rules for SMEs that will allow them to assess the aid element of a guarantee simply. These rules are:

- Pre-defined safe-harbour premiums based on rating classes are considered to be market-conforming and so free of aid. They can also be used as a reference to calculate the aid equivalent in the case of lower premiums. The safe-harbour grid is a simplification tool. Member states can decide not to use it if they believe they can demonstrate that lower premiums are market-conforming.
- A premium of 3.8% per year is applicable, even in the absence of rating, for example, for start-up companies.

- A single premium can be applied across the board for schemes when the guaranteed amount remains below EUR2.5 million (about US\$3.2 million) per company. This allows for a risk-pooling effect in favour of low-amount guarantees for SMEs.

**Rescue aid.** On 13 October 2008, the Commission published guidance on how member states can best support financial institutions in the current financial crisis while respecting EC state aid rules, to avoid excessive distortions of competition (*OJ 2008 C270/8*). The guidance (in the form of a communication) indicates how the Commission, in the current crisis, intends to apply EC Treaty state aid rules to state support schemes and individual assistance for financial institutions.

Support schemes such as guarantees or recapitalisation schemes can be cleared by the Commission quickly if they fulfil conditions that guarantee that they are well-targeted and proportionate to the objective of stabilising financial markets and they contain certain safeguards against unnecessary negative effects on competition. The specific conditions include:

- Non-discriminatory access to protect the functioning of the single market by making sure that eligibility for a support scheme is not based on nationality.
- State commitments to be limited in time in such a way that it is ensured that support can be provided as long as it is necessary to cope with the current turmoil in financial markets, but will be reviewed and adjusted or terminated as soon as improved market conditions permit this.
- State support to be clearly defined and limited in scope to what is necessary to address the acute crisis in financial markets while excluding unjustified benefits for shareholders of financial institutions at the taxpayer's expense.
- An appropriate contribution of the private sector by way of an adequate remuneration for the introduction of general support schemes (such as a guarantee scheme) and the coverage by the private sector of at least a significant part of the cost of assistance granted.
- Sufficient behavioural rules for beneficiaries that prevent an abuse of state support, such as, for example, expansion and aggressive market strategies on the back of a state guarantee.
- An appropriate follow-up by structural adjustment measures for the financial sector as a whole and/or by restructuring individual financial institutions that have had to rely on state intervention.

On 5 December 2008, the Commission published detailed guidance on how member states can recapitalise banks in the current financial crisis to ensure adequate levels of lending to the rest of the economy and stabilise financial markets while avoiding excessive distortions of competition, in line with EC state aid rules. The guidance takes account of the fact that the credit crunch is now beginning to affect the real economy and that financially sound banks may need state capital to ensure an adequate level for loans to companies.

The Communication complements and refines the broader guidance document adopted on 13 October 2008 (see above), to ensure member states had rapid guidance on the adequate pricing of state capital injections into banks designed to stabilise the banks themselves. The present guidance further addresses the necessity of appropriate safeguards to ensure that public capital is used to sustain lending to the real economy and not to finance aggressive commercial conduct to the detriment of competitors who manage without state aid. Such safeguards also need to provide incentives for maintaining state intervention in the financial sector only as long as the crisis in the financial markets so requires.

A detailed overview of the individual cases dealt with by the Commission can be found on Commissioner Kroes' website (*Competition policy and the financial/banking crisis: taking action* ([http://ec.europa.eu/commission\\_barroso/kroes/](http://ec.europa.eu/commission_barroso/kroes/))).

**Recovery of unlawful and incompatible state aid.** On 26 October 2007, the Commission adopted a notice on the implementation of decisions ordering member states to recover unlawful and incompatible state aid (*OJ 2007 C272/4*). The notice provides guidance to member states on how to achieve a more immediate and effective execution of recovery decisions. Effective and prompt recovery is essential to ensure the ending of distortions of competition resulting from illegal and incompatible aid.

The notice emphasises that improving the enforcement of state aid decisions is a shared responsibility between the Commission and the member states. It recalls the principles applying to the recovery of state aid as confirmed by the Community courts' case law and defines the respective roles of the Commission and the member states in the recovery procedures.

The following are recent noteworthy decisions by the Commission on the recovery of state aid:

- On 27 February 2008, the Commission closed its in-depth investigation, under the EC Treaty state aid rules, into the privatisation of Automobile Craiova (*Case No. C-46/2007* and *Commission press release IP/08/315*). The investigation, opened in October 2007, found that Romania had imposed conditions on the sale that aimed at ensuring a certain production and employment level, accepting in exchange a lower sales price. It found that the higher production and employment level achieved for Craiova, through the conditional sale, and the lower revenue Romania had earned, amounted to state aid. To avoid companies receiving unfair advantages over competitors, aid can only be granted under strict conditions. None of these conditions applied to the privatisation and the aid was therefore found to be incompatible with the single market.

To redress the distortion of competition caused by the unlawful aid, the Romanian government has been ordered to recover EUR27 million (about US\$34.4 million) from Automobile Craiova.

- On 12 March 2008, the Commission closed its in-depth investigation, under EC Treaty state aid rules, into the provision of Italy's 2004 Finance Law that allowed former public-owned banks to release hidden capital gains matured during their privatisation by paying a nominal tax of 9%,

instead of the ordinary company tax of 37.25% (*Case No. C-15/2007 Commission press release IP/08/433*). The investigation, opened in May 2007, found that this tax scheme favoured a select group of Italian banks without objective justification under the tax system for company reorganisations in Italy.

To redress the distortion of competition caused by the aid unlawfully granted, the Italian government must recover the aid from its beneficiaries. On the basis of the circumstances of the case, the Commission has limited the recovery to the difference between the tax actually paid, and the tax the beneficiary banks would have had to pay if they had applied a general tax revaluation scheme provided for by the same 2004 Finance Law. The aid to be recovered is estimated at EUR123 million (about US\$157 million) among the nine beneficiaries.

- On 30 April 2008, the Commission decided, under EC Treaty state aid rules, that Austria must recover around EUR55 million (about US\$70 million) from Austrian insurance group Grazer Wechselseitige (GRAWE) following an in-depth investigation into the privatisation of Bank Burgenland (*Case No. C-56/2006* and *Commission press release IP/08/667*). The investigation, opened in December 2006, found that the Austrian regional government of Burgenland had not behaved like a private market seller when it sold Bank Burgenland to the second highest bidder, GRAWE, disregarding a substantially higher offer from an Austro-Ukrainian consortium.

The Commission decision confirms that a public vendor needs to clearly distinguish its role as a seller of an asset on an open market, and its role as a public authority (which in this case had granted state aid in the form of a guarantee to Bank Burgenland). A private seller would not have taken existing guarantee liabilities into consideration but would have taken the highest bid. By not doing so, the regional government of Burgenland provided an undue competitive advantage to GRAWE that constituted incompatible state aid. To remedy the distortion of competition and eliminate the aid, Austria must recover the advantage from GRAWE, on the basis of the difference between the price offered by the Austro-Ukrainian consortium and the price paid by GRAWE (around EUR55 million).

- On 4 June 2008, the Commission requested that Hungary, following an in-depth investigation under EC Treaty state aid rules, end long-term power purchase agreements (PPAs) for electricity because they amount to unlawful and incompatible state aid to the power generators (*Case No. C-41/2005* and *Commission press release IP/08/850*). The PPAs were ordered to be terminated before the end of 2008. At the same time, Hungary must recover the aid granted to the generators concerned since Hungary's accession to the EU.
- On 2 July 2008, the Commission requested that Greece, following an in-depth investigation under EC Treaty state aid rules, recover more than EUR230 million (about US\$293 million) of illegal state aid from Hellenic Shipyards SA (HSY) (*Case C-16/2004* and *Commission press release IP/08/1078*). Between 1996 and 2002, Greece implemented 16 separate aid measures for HSY, at a time when the yard was in difficulty.

The Commission found that several of these aids were granted to HSY by the Greek state and the then state-owned bank ETVA in the form of loans, guarantees and capital injections without prior authorisation from the Commission and, in addition, they were incompatible with state aid rules. The Commission also found that Greece and HSY failed to respect conditions attached to the aid it had authorised in 1997 and in 2002. These measures benefited the civil commercial activities of HSY, giving it an unfair advantage over its competitors. As a result, they must be recovered, with interest, from HSY. In addition, the Commission found that some measures investigated, worth tens of millions of Euros, did not constitute state aid, some were compatible aid, and some supported the production of military ships for the Greek Navy and were therefore exempted from EC state aid rules.

- On 26 June 2008, the Commission requested that Spain implement an ECJ judgment ordering the recovery of illegal and incompatible state aid in the form of fiscal measures in the Basque region (*Commission press release IP/08/1039*). Although the ECJ judgment had been given in 2006, the Spanish authorities have still not informed the Commission that the aid has been entirely repaid. The Commission's request takes the form of a "reasoned opinion", the second step of infringement proceedings for failure to respect a court judgment (*Article 228, EC Treaty*).

## THE FUTURE

As at the end of 2008, key likely future developments relate to:

- **Financing of public service broadcasting.** On 10 January 2008, the Commission published a consultation paper on the future framework that will apply to state funding of public service broadcasting (*Commission press release IP/08/24*). On 4 November 2008, the Commission published a second consultation paper (*Commission press release IP/08/1626*); the deadline for comment expires on 15 January 2009.
- In 2001, the Commission adopted a communication on the application of state aid rules to public service broadcasting (*OJ 2001 C320/5*). The aim of this communication is to provide guidance on how to assess the financing of public service broadcasters in accordance with Article 86(2) of the EC Treaty and the protocol on the system of public broadcasting in the member states (Amsterdam Protocol). After numerous decisions in this area, it is likely that the Commission will adopt a new set of guidelines by the end of 2009.
- **State aid to shipbuilding.** On 26 February 2008, the Commission published a consultation paper on a review of the framework on state aid to shipbuilding, which originally entered into effect on 1 January 2004, to be applied initially for a period of three years, until 31 December 2006. On 28 October 2006, the Commission decided to continue to apply the framework for a further two-year period, until 31 December 2008 (*Commission press release IP/06/1452*). As a result, an extension of the existing rules or a new set of guidelines on state aid to shipbuilding were expected by the end of 2008 (at the time of writing, they had not been issued).

- **Enforcement of state aid law by national courts.** On 22 September 2008, the Commission published a consultation on a set of guidelines to assist member states' courts in applying the EC state aid rules (*Commission press release IP/08/1384*). The guidelines are aimed at supporting national courts and potential claimants in relation to domestic state aid challenges. In addition, national judges will be able to ask the Commission for information or opinions on the application of the state aid rules.
- **State aid to film production.** On 16 October 2008, the Commission launched a public consultation on plans to extend the state aid assessment criteria of its Cinema Communication until 31 December 2012 (*Commission press release IP/01/1326*). Under the current criteria, state support for film production can be exempted from the EC Treaty's ban on state aid under certain conditions. In particular, such support must concern cultural films, while respecting certain thresholds regarding territorial requirements and aid intensity. Schemes must also comply with the EC Treaty rules and cannot focus on specific film-making activities.
- **Regional aid to large investment projects.** On 21 November 2008, the Commission issued a public consultation on regional aid to large investment projects (*Guidance for an in-depth assessment of regional aid to large investment projects*); the deadline for comment expires on 23 January 2009.
- **Training aid.** On 21 November 2008, the Commission issued a public consultation on training aid (*Criteria for the compatibility analysis of training State aid cases subject to individual notification*); the deadline for comment expires on 23 January 2009.
- **Aid to disadvantaged and disabled workers.** On 21 November 2008, the Commission issued a public consultation on aid to disadvantaged and disabled workers (*Criteria for the compatibility analysis of State aid to disadvantaged and disabled workers subject to individual notification*); the deadline for comment expires on 23 January 2009.
- **Best practice.** On 11 December 2008, the Commission launched a public consultation concerning a draft best practice code on the conduct of state aid control proceedings. Following consultation with member states in January 2009, the code will provide guidance on the day-to-day conduct of state aid proceedings.

\*The authors would like to thank the European law practice group of Arntzen de Besche Advokatfirma AS for its contribution to this chapter.

## CONTRIBUTOR DETAILS

**Thomas Nordby and Espen Bakken**  
**Arntzen de Besche Advokatfirma AS**  
**T** +47 98 29 46 01  
+47 98 29 46 51  
**F** +47 23 89 40 01  
**E** [Thomas.Nordby@arntzendebesche.no](mailto:Thomas.Nordby@arntzendebesche.no)  
[Espen.Bakken@arntzendebesche.no](mailto:Espen.Bakken@arntzendebesche.no)  
**W** [www.arntzendebesche.no](http://www.arntzendebesche.no)



# Finding solutions

ARNTZEN  
de BESCHE



[www.adeb.no](http://www.adeb.no)

**Arntzen de Besche**  
**Advokatfirma AS**  
Oslo – Stavanger  
Telephone: +47 23 89 40 00  
[www.adeb.no](http://www.adeb.no)

Arntzen de Besche is one of Norway's leading law firms with offices in Oslo and Stavanger. We are an internationally oriented firm of lawyers offering legal services to Norwegian and foreign companies, as well as organisations and the public sector. Our lawyers are recognized for cutting edge legal competence within all areas of commercial law, as well as for detailed knowledge of many industries.