



Study on the enforcement of State aid rules and decisions by national courts

Country report Bulgaria



Bulgaria

Country report

Name national legal expert

Boyan Ivanov
Dimitrov, Petrov & Co. law firm

Date

04/01/2019

A description of the competent courts in cases concerning the public enforcement of State aid rules (from first to last instance)

Pursuant to the State Aid Act¹ (promulgated State Gazette issue 86 of 24 October 2006, in force until 28 October 2017): administrative courts are courts of first instance (there are 28 administrative courts established in every regional capital city, following the administrative and territorial division of the country); the Supreme Administrative Court is the court of second and last instance.

The new State Aid Act² (promulgated State Gazette, issue 85 of 24 October 2017, entered into force on 27 October 2017) refers to the general rules of administrative procedure of the Tax and Social Security Procedure Code and the Administrative Procedure Code.³ In this sense, competent courts are: the administrative courts as courts of first instance (there are 28 administrative courts established in every regional capital city, following the administrative and territorial division of the country), and the Supreme Administrative Court as the court of second and last instance.

In specific cases where the act for the establishment of 'public-law debt' (generally defined as a monetary debt to the State, such as tax or social security obligations, unlawfully granted State aid is also explicitly listed in national law as a 'public-law debt') is issued by a minister acting as an administrator of State aid, the competent court of first instance will be the Supreme Administrative Court, sitting with three judges, while the court of second and last instance will be the Supreme Administrative Court, sitting with five judges.

¹ State Aid Act (repealed), promulgated State Gazette issue 86 of 24 October 2006, in force until 28.10.2017; consolidated text available at: <https://www.lex.bg/laws/ldoc/2135536537> (Bulgarian only) (last accessed on 4 January 2019). Accordingly to Article 14, para. 2 of the State Aid Act (repealed): where the Commission adopts a decision for the recovery of unlawfully granted State aid, the Minister of Finance shall require the State aid administrator to take action for the recovery of the State aid. The aid is recovered in accordance with the decision of the Commission. The beneficiary of the aid shall also be liable for the interest accrued throughout the period from the date on which the unlawful aid was at the disposal of the beneficiary until the date of recovery of the aid. The amount of the interest shall be determined by the Commission. Pursuant to the next paragraph, Article 14, para. 3, where the Commission adopts a decision for termination of State aid or for recovery of unlawfully granted State aid in the agriculture and fishery sectors, the Minister of Agriculture, Food and Forestry shall take action for the execution of the decision or the State Fund Agriculture shall take action for the recovery of the unlawfully granted State aid within a seven-day period.

² State Aid Act (new), promulgated State Gazette, issue 85 of 24 October 2017, entered into force on 27 October 2017; consolidated text available at: <https://lex.bg/bg/laws/ldoc/2137177456> (Bulgarian only) (last accessed on 4 January 2019).

³ Administrative Procedure Code; promulgated State Gazette issue 39 of 11 April 2006, last amended State Gazette issue 77 of 18 September 2018, consolidated text available at: <https://lex.bg/bg/laws/ldoc/2135521015> (Bulgarian only) (last accessed on 4 January 2019).

A description of the procedural framework applicable in public enforcement of State aid rules

Pursuant to the State Aid Act, following a recovery decision of the Commission, the Minister of Finance (or if the aid concerns State aid in the agriculture and fishery sectors, the Minister of Agriculture, Food and Forestry) requires the competent State aid administrator to take necessary action in order to recover the aid. A 'State aid administrator' is any person who plans, develops, manages, notifies and reports the granting of State aid and *de minimis* aid.⁴ The aid is recovered in the manner provided for by the decision of the Commission. Therefore, challenging the recovery of the aid would in fact require challenging the decision of the Commission before the CJEU. Not appealing the decision of the Commission before the CJEU or having the CJEU confirm the recovery decision would mean that it would not be possible to challenge the recovery procedure before national courts in relation to any or all of its material aspects (aspects related to the material law rather than procedural law). National courts would however be able to review cases where procedural errors of national authorities have been committed.

Repealed national State aid legislation did contain a specific procedural framework regarding State aid recovery, other than what is already described above, and the general rules for recovery of 'public-law debts' under the Bulgarian Tax and Social Security Procedure Code⁵ applied to State aid as well. Following and based on the recovery decision of the Commission and the requirement of the Minister of Finance that the competent State aid administrator take action on it, the State aid administrator would have to issue an act for the establishment of the 'public-law debt'. It would have to be based entirely on the recovery decision with regard to both the manner of recovery (including terms) and amounts.⁶ The act for the establishment of the 'public-law debt' could be challenged within 14 days of its service but (as mentioned above) only in terms of procedural errors. After the act's entry into force the aid beneficiary could voluntarily comply with it. Otherwise, the matter was forwarded to the competent public enforcement agency.

The State Aid Act (new) stipulates that State aid recovery may be based either on a recovery decision by the Commission or on an act for the establishment of 'public-law debt' issued by competent Bulgarian authorities (State aid administrators, Article 38(1) of the State Aid Act (new)).

According to Article 38(2) of the State Aid Act (new), recovery decisions of the Commission are enforced following the provisions of the Tax and Social Security Procedure Code. The

⁴ Pursuant to Section 1, item 4 of the Additional Provisions to the State Aid Act (repealed).

⁵ Promulgated State Gazette issue 105 of 29 December 2005, last amended and supplemented State Gazette issue 98 of 27 November 2018; consolidated text available at: <https://www.lex.bg/laws/ldoc/2135514513> (Bulgarian only) (last accessed on 4 January 2019).

⁶ In case the Commission issues a recovery decision lacking conditions relating to terms and amounts, a Bulgarian State aid administrator cannot issue a valid act for the establishment of "public-law debt". Any such act of the national authorities could be challenged before the national court and since national authorities do not have the competence to determine such elements (as these are within the discretion of the Commission), it is probable that the court would declare the act invalid. The same applies with respect to discrepancies between terms and amounts prescribed by the recovery decision of the Commission and terms and amounts determined in the national authority's act for the establishment of "public-law debt". The old State Aid Act did not contain provisions dealing with such hypotheses and therefore these matters would have to be resolved following the general rules applicable to administrative procedure (*i.e.* on the basis of the Administrative Procedure Code). There are no known cases where such situations occurred and there is no available case law of the national courts on such matters.

Minister of Finance (or the Minister of Agriculture, Food and Forestry, in case the aid concerns State aid in the agriculture and fishery sectors) informs the competent State aid administrator of the recovery decision (Article 38(5) of the State Aid Act (new)). Whenever the decision of the Commission does not individualise the aid beneficiaries and/or does not determine aid amounts, the State aid administrator issues an act for the establishment of 'public-law debt' pursuant to the Administrative Procedure Code. In these cases, the State aid administrator has to identify the State aid beneficiaries and has to determine the individual State aid amounts received by them (Article 38(6) of the State Aid Act (new)). The State aid amounts are determined on the basis of available information with the administrator or on the basis of an assessment, adopted by the administrator. Recovery interest (for the period between the receipt of the unlawful aid and its complete recovery) is added to the determined aid amount. The assessment (determining the State aid amounts) is done by an independent assessor, appointed by the State aid administrator, following the terms and conditions stipulated in the recovery decision.⁷ A second assessment may be carried out in case the administrator does not adopt the initial one. The act for the establishment of 'public-law debt' has to contain a reference to the recovery decision. A copy of the act for the establishment of 'public-law debt' and a copy of the Commission decision are served on the aid beneficiary. If the beneficiary is under an insolvency procedure, the act is served through the insolvency court.

The recovery of claims relating to incompatible/unlawful State aid is done by the National Revenue Agency.

Within the recovery deadline set out in the recovery decision, and in case the decision does not stipulate a deadline, within two months of its issuance, the State aid administrator must inform the Minister of Finance of: (i) the identity of State aid beneficiaries, (ii) the amount of State aid to be recovered (principal sum and interest), (iii) the measures undertaken and planned for enforcement of the Commission decision, (iv) the acts for the establishment of public-law debt that have been issued and (v) the acts for the establishment of 'public-law debt' that have been appealed. Within the same deadline, the National Revenue Agency must inform the Minister of Finance of the recovery activities that have been undertaken with respect to insolvency procedures and other measures for the enforcement of the Commission decision. The Minister of Finance (or the Minister of Agriculture, Food and Forestry) may request additional information or evidence from the State aid administrator and the National Revenue Agency. All information gathered in this manner is then sent to the Commission by the Minister of Finance.

Whenever recovery of State aid is not possible, the administrator or the National Revenue Agency is obliged to immediately inform the Commission through the Minister of Finance.

Pursuant to the State Aid Act (new), and following general administrative procedural rules of the Tax and Social Security Procedure Code and the Administrative Procedure Code, an act for the establishment of 'public-law debt' can be contested before the head of the authority that has issued it. In case the administrative contestation of the act is unsuccessful, the concerned State aid beneficiary may challenge the act before the administrative court. However, challenging the recovery of the aid would in fact require challenging the recovery decision before the CJEU, when the Commission decision defines the recovery deadline and conditions for the recovery, as well as the amounts to be

recovered. Not appealing the decision of the Commission before the CJEU or having the CJEU confirm the recovery decision would mean that it would not be possible to challenge the recovery procedure before national courts in its material aspects. Pursuant to Article 38(2) of the State Aid Act (new) the decision of the Commission is itself enforceable without additional acts of national authorities whenever aid beneficiaries, amounts and recovery terms and conditions are stipulated in the decision. In such cases, national authorities, namely the aid administrator, are engaged with the notification of affected persons. Therefore, the subject of an appeal before national courts can only relate to the notification competences of national authorities.

A description of the competent courts in cases concerning the private enforcement of State aid rules (from first to last instance)

Bulgarian national law, in force until the adoption of the new State Aid Act, did not provide for the necessary legal basis for competitors of the aid beneficiary to start an action in a national court in order to ask for recovery of State aid.

Such legal framework was introduced with the adoption of the new State Aid Act. Pursuant to the provisions of Article 54(1) of the State Aid Act (new), the competent courts now are: administrative courts as courts of first instance (there are 28 administrative courts established in every regional capital city, following the administrative and territorial division of the country), and the Supreme Administrative Court as the court of second and last instance.

In specific cases where the recovery decision is issued (or is yet to be issued) by a minister acting as an administrator of State aid, the competent court of first instance will be the Supreme Administrative Court, sitting with three judges, while the court of second and last instance will be the Supreme Administrative Court, sitting with five judges.

A description of the procedural framework applicable in private enforcement of State aid rules

Bulgarian national law, in force until the adoption of the new State Aid Act, did not provide the necessary legal basis for competitors of the aid beneficiary to start an action in a national court in order to ask for the recovery of State aid.

The national legal framework relating to private enforcement of State aid was recently introduced with the adoption of the new State Aid Act, which explicitly states (Article 54) that any interested person may contest an act granting State aid or *de minimis* aid and by doing so may seek: (i) prevention of the granting of the State aid or the payment of the State aid; (ii) a remedy for an infringement of the standstill obligation; (iii) full recovery of the State aid; (iv) a remedy for damage suffered by the aid beneficiary's competition or third parties as a result of the unlawfully granted aid; and/or (v) recovery of State aid that was not recovered on the basis of a Commission decision, regardless of whether an act for the establishment of a 'public-law debt' was issued or not.

⁷ Relevant national law does not provide what is the scope of the "terms and conditions" of the recovery decision. Article 38 of the State Aid Act (new) only provides that the provisions of Commission decisions must be observed with respect to the recovery process.

Claims contesting an act granting State aid or *de minimis* aid have to be addressed to the competent administrative court, that is, the matter can only be resolved following a judicial review.

Actions seeking (i) prevention of the granting of the State aid or the payment of the State aid; (ii) a remedy for an infringement of the standstill obligation; (iii) a remedy for damage suffered by the aid beneficiary's competition or third parties as a result of the unlawfully granted aid; and/or (iv) recovery of State aid that was not recovered on the basis of a Commission decision must be brought against the State aid administrator (Article 55(1) of the State Aid Act (new)). If in any of these cases the State aid has already been paid, the action must be brought against the State aid beneficiary as well (Article 55(2) of the State Aid Act (new)). Actions relating to requests for full recovery of the State aid must be brought against the State aid beneficiary.

Bringing an action before the court does not stop or suspend an on-going procedure for the granting of State aid (Article 54(5) of the State Aid Act (new)). Pursuant to Article 56 of the State Aid Act (new), the court reviews the claim regardless of whether a State aid measure is under review by the Commission for the purpose of establishing its compatibility with the internal market. Furthermore, the court is explicitly obliged to take into account relevant CJEU case law and practice of the Commission (Article 56(2) of the State Aid Act (new)).

According to Article 57(1) of the State Aid Act (new), the court may request for an opinion from the Commission on the compatibility of a State aid measure. (The new State Aid Act does not define the legal nature and effects of any such opinions, and does not refer to Council Regulation (EU) 2015/1589 of 13 July 2015 in that regard,⁸ but considering the general framework of Union law, such opinions do not have binding force.) Or the court may request the Commission to issue a decision on establishing the compatibility of the State aid with the internal market. The court may not rule on the compatibility of the State aid by itself (Article 56(1) of the State Aid Act (new)). Pursuant to Article 57(2) of the State Aid Act (new), the court may request assistance from the Commission with respect to information related to the reviewed matter (to be provided by the Commission), including information regarding on-going State aid procedures, unpublished documents, statistical information, market surveys, etc., and may also request the position of the Commission on the application of State aid rules and regulations.

Regardless of the above, the court may refer a request to the CJEU for a preliminary ruling on the interpretation of EU *acquis* or an interpretation on the validity of acts by EU authorities, which are of relevance to the case (Article 58 of the State Aid Act (new)).

In cases where the court has requested the assistance of the Commission or a preliminary ruling by the CJEU, the court temporarily suspends the recovery proceedings.

As a result of the proceedings, the court may: (i) repeal the act granting the State aid; (ii) suspend the payment of the State aid; (iii) grant a remedy for an infringement of the standstill obligation; (iv) order the recovery of the granted State aid (including interest); (v) grant a remedy for damage suffered by the aid beneficiary's competition or third parties as a result of the unlawfully granted aid; (vi) order the recovery of State aid that was not recovered on the basis of a decision of the Commission, regardless of whether an act for

the establishment of a public-law debt was issued or not; and/or (vii) prohibit any actions related to payment of unlawful State aid.

Whenever the court rules in favour of State aid recovery it also determines the amount of the 'illegality interest' to be paid by the beneficiary. If by the date of the court's ruling, the Commission has decided that the State aid is compatible with the market, the court will not order full recovery of the aid, but will instead determine an 'illegality interest' payable from the date of receipt of the unlawful State aid until the date of the decision of the Commission. If the amount of the 'illegality interest' was determined by the Commission, the court will order payment of the determined amount.

The court may rule in favour of claimed damages if any such damage was proven by the plaintiff and (cumulatively): (i) if the act granting the aid violates a law and this violation is substantive and (ii) if granting the aid has led to favourable market conditions for the aid beneficiary, as compared to the beneficiary's competition, or has resulted in material damage to third persons. When determining remedies, the court has to take into account any: (i) incurred loss of profit relating to non-realisation of goods or services on the market; (ii) incurred loss of assets or inability to acquire assets; (iii) incurred loss of market share; (iv) cessation of activities or insolvency; and (v) other actions or inactions of the aid beneficiary, which have caused damage to the plaintiff and have resulted in a competitive advantage of the beneficiary.

Main findings based on the case summaries

Relevant researched court practice deals with taxation as well as excise duty issues within the context of State aid, but it does not cover enforcement of State aid rules *per se*. This can be attributed to the fact that national State aid rules were not the direct subject to court proceedings, since the regulations were focused on inter-authority relations and relations between the Bulgarian State (represented by the Minister of Finance or the Minister of Agriculture, Food and Forestry) and the Commission (as stated in the description of the procedural framework applicable to the public enforcement of State aid rules).

The issues at the heart of the case summaries relate to taxation and excise duty and can be considered more of a secondary expression of State aid rules but still related to their enforcement nonetheless. As a result, there are no national court rulings that are pure 'public enforcement' cases, in the sense that they are the result of a recovery decision adopted by the Commission, ordering the recovery of unlawful/incompatible State aid. The relevant court practice dealt with establishing whether there was an existing State aid scheme as well as whether a party to the case was an eligible aid beneficiary under the State aid scheme, in order to determine whether the party would qualify for certain tax or excise duty exemptions. Therefore, the State aid matters in the summarised rulings, although of substantive importance, were dealt with on an *ad hoc* basis within tax and excise duties related cases. This conclusion seems to be applicable to the majority of cases reviewed by Bulgarian courts where State aid rules came into play and can be attributed to the peculiarities of the legislative framework where State aid aspects are mostly intertwined (sometimes in a not so obvious manner — e.g. Supreme Administrative Court, 18.8.2011 - 11158/18.08.2011 (BG3)) with tax and excise duty legislation.

⁸ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU, *op.cit.*

In two of the relevant cases (Supreme Administrative Court, 28.4.2015 - 4774/28.04.2015 (BG1) and Supreme Administrative Court, 5.7.2017 - 8706/05.07.2017 (the latter is not part of the sample), parties to the cases were private entities engaged in the agriculture sector. In one (Supreme Administrative Court, 18.8.2011 - 11158/18.08.2011 (BG3)), the private entity was a company engaged in production, storing and distribution of biofuels (biodiesel); and in the other (Supreme Administrative Court, 28.5.2013 - 7227/28.05.2013 (BG2)), the private entity was engaged in the railroad transportation sector.

In terms of main actors — public authorities, all cases concerned revenue authorities — competent regional offices of either the National Revenue Agency (tax retention (assignment) or the Customs Agency (excise duty recovery)).

Qualitative assessment of the average time of court proceedings

The duration of first instance court proceedings (from the date of bringing the action and initiation to the date the administrative court adopts its ruling), in relation to the reviewed cases, is four to five months.

The average duration of court proceedings (from the date of bringing the action and initiation to the date the Supreme Administrative Court adopts its ruling), in relation to the reviewed cases, is 11 to 12 months.

There is no publicly available official information (statistical, judicial or governmental reports) on the average duration of administrative court or Supreme Administrative Court proceedings per subject matter of the case that would allow us to estimate whether the abovementioned durations are 'longer' or 'shorter' than the average (for administrative cases).

If compared to other cases, State aid related matters are generally resolved by administrative courts as well as by the Supreme Administrative Court close to the average duration (for administrative cases).⁹

Qualitative assessment of the remedies awarded by national courts

It is a fact that only a small number of Bulgarian court rulings reviewed throughout the Study resulted in the award of remedies that might constitute recovery of unlawful/incompatible State aid. However, a definitive opinion on the low number of awarded remedies in comparison with the overall number of cases decided by national courts would be rather inaccurate and therefore incorrect, since each case has its own peculiarities and specifics.

Qualitative assessment of the application of the State aid *acquis*; preliminary references

In the cases where State aid *acquis* was involved in resolving the matter, it was correctly applied by national courts.¹⁰ However, State aid rules were interpreted rather formally and without an in-depth interpretation of their context and historical development. This conclusion is drawn from the observation that when EU *acquis* had to be discussed, the court simply cited or referred to relevant provisions without providing any or little

interpretation on the matter. Meanwhile reasoning originating from national law of relevance to the respective cases seems to have been elaborated on with more depth and intensity. The summarised cases contained no references to CJEU case law, nor were any references made to the GBER. Furthermore, none of the cases referred a request to the CJEU for a preliminary ruling.

The above can generally be attributed (i) to the national courts' lack of specialisation in State aid related matters (especially in the first years following the accession of Bulgaria to the EU) and (ii) to the fact that the cases primarily related to matters of taxation and excise duties.

Qualitative assessment of any other relevant trends in State aid enforcement

The most significant trend for the 2007–2017 period is that it seems that national courts have become much more comfortable and competent in dealing with State aid issues and seem to have started to review cases brought before them in-depth and with better understanding of Union and national legislation.

However, the adoption of a new State aid legal framework in Bulgaria (a new State Aid Act, promulgated State Gazette, issue 85 of 24 October 2017 and new Regulations on the Application of the State Aid Act, promulgated State Gazette issue 72 of 31 August 2018) has introduced a more comprehensive national legal framework that details national procedures with respect to notifications under Article 108(3) TFEU and gives way to private enforcement on a national level, which was not discussed in the repealed State Aid Act. However, we are yet to see and assess the results of this new national law.

Qualitative assessment of whether the notion of State aid was conducted well or not; challenges

The main challenge before national courts in terms of the enforcement of State aid rules is that these matters were always entangled with other country specific issues (in terms of taxation and excise duties legislation). In this sense, on occasion, national legislation was lagging behind the *acquis*, EU legislation was improperly transposed or there was a lack of coordination between competent national authorities.¹¹ An example of improper transposition is the case with Supreme Administrative Court, 18.8.2011 - 11158/18.08.2011 (BG3): although a State aid scheme (State Aid No. 607/2008 – Bulgaria, tax reductions for biofuels) was not applicable to the reviewed period (1.1.2007 to 31.10.2008), the plaintiff was not found liable for the excise duties, because applicable national tax law was not updated, and was allowed a zero rate excise duty for biodiesel. An example of a case that shows a lack of coordination between competent national authorities is Supreme Administrative Court, 28.5.2013 - 7227/28.05.2013 (BG2), where the Bulgarian authorities did not notify the Commission of a State aid scheme allowing the possibility for the recovery of excise duties for electrical power by railway carriers thus rendering this possibility provided by the national Excise Duties and Excise Warehouses Act inapplicable. In some cases, inter-related State aid and taxation matters were not properly synchronised, which led to loopholes and a legal vacuum. Regardless, the notion of State aid was conducted well by national courts in all the reviewed cases.

⁹ This statement is based on the authors' professional knowledge and expertise.

¹⁰ *Idem*.

¹¹ This statements reflects the authors' personal opinion.

Any other relevant comments or findings

Not applicable

