

State Aid 2015

Switzerland

Franz Hoffet, Marcel Dietrich, Gerald Brei and Alain Girard
Homburger

GCR | Know-how

State Aid 2015

Switzerland

Franz Hoffet, Marcel Dietrich, Gerald Brei and Alain Girard

Homburger

National state aid control competent authorities

1 Which authority is responsible for oversight of national state aid, in particular the notification of aid measures to the European Commission and the monitoring of the compliance of national measures with EU state aid rules?

Switzerland is not a member state of the European Union and has no specific legislation regarding state aid. However, the absence of comparable legislation in this field of law does not mean that state aid could be granted at discretion. In particular, state aid that could distort competition in Switzerland could be caught by public law meant to provide a fair and competitive level playing field, especially with regard to state-owned companies.

Firstly, with regard to the internal market, Switzerland and the European Community concluded a bilateral agreement on air transport (ATA). The ATA provides rules concerning state aid, which have been drafted along the lines of articles 107-109 of the TFEU. These rules introduced de lege state aid control in Switzerland by the way of an international treaty in an important economic sector. Moreover, the free trade Agreement (FTA) concluded in 1972 between Switzerland and the European Community incorporated a general rule regarding state aid. Article 23(1)(iii) of the FTA provides that any state aid which could distort competition in promoting certain undertakings or certain branches of production is incompatible with the FTA. However, this provision proves problematic. On the one hand, it does not define the consequences of a violation. On the other hand, the Federal Supreme Court provided a very restrictive interpretation of the FTA in its early case law. Therefore, article 23(1)(iii) of the FTA did not introduce state aid control legislation in Switzerland.

Secondly, in Swiss national legislation, two sets of rules limit the scope of public authorities to provide aid for undertakings. The first rule, the Law on Subsidies (LSub), ensures that financial aids and compensations from the state may only be granted under certain conditions. Two specific conditions have a connection with state aid rules. According to LSub, financial aid and compensation may only be granted when these are able to fulfil their goal in an efficient and economic manner. Moreover, they must be uniformly and fairly attributed. Hitherto, no court has had to deal with such a case. Nevertheless, these two conditions provide a (broad) safeguard to any kind of state aid in Switzerland. The second set of rules requires that Swiss authorities respect the principle of neutrality in competition (also called 'competitive neutrality'). This principle is guaranteed by article 94 of the Federal Constitution. Economically, the principle of neutrality in competition is based on similar grounds as state aid legislation. In Switzerland this principle plays an important role in providing a fair and competitive level playing field: it prevents public entities from supporting specific companies, for example public-owned companies, at

the expense of other competitors. Violations of this principle may generally be challenged before the Federal Supreme Court. In recent cases, it has eventually prompted the Competition Commission (COMCO) to open informal proceedings when competitors alleged such violations. Case law in this area is, however, very scarce.

Since Switzerland has no specific legislation regarding state aid, no authority is explicitly empowered to enforce state aid rules at national level, except in the air transport sector.

In the air transport sector, according to the ATA in relation with the legislation on civil aviation (LCA), the COMCO is responsible for the oversight of state aid. To review potentially unlawful state aid measures, the COMCO acts independently of the executive body and of the other administrative entities. The COMCO has, however, no competence to directly intervene on state aid grounds. The LCA only provides that decision-making authorities shall take into account the result of the review. This constitutes an important difference compared with the European Commission. According to the ATA, Swiss authorities shall constantly monitor all systems of aid existing in Switzerland and ensure that the European Union is informed of any procedure initiated to guarantee respect of the state aid rules governing air transport. The European Union also has the right to submit observations before any final decision is taken. Upon request, it may refer to a Joint Committee, which shall discuss any appropriate measures required by the purpose and functioning of the ATA. The Joint Committee is established by the ATA and is composed of representatives of the European Union and Switzerland. Its purpose is to ensure proper implementation of the ATA. It shall make recommendations and decisions in the cases provided for in the ATA, including state aid cases. So far, the COMCO has never dealt with such a state aid case.

2 What are the competences and investigatory and enforcement powers of the national authority responsible for state aid control and what is the legal basis for these powers?

See question 1.

3 Do the national authorities accept state aid complaints made by competitors? How would they handle a competitor complaint?

In Switzerland the opportunity for competitors to file a complaint is governed by the general rules regarding legal standing (see question 19). State aid measures constitute no exception.

In a recent case competitors of a state-owned public company challenged

the amendment of a cantonal act directly before the Federal Supreme Court. The competitors claimed that the amendment would distort competition in favour of the state-own company. In this case the Federal Supreme Court approved the legal standing of the competitors and judged the case on its merits. Competitors could also file a complaint with the COMCO, if they so choose. The COMCO has never opened formal proceedings following a complaint regarding state aid measures. In two recent cases, the COMCO did open informal proceedings. However, according to the prevailing doctrine, there are no means for the competitors to compel the COMCO to open such informal proceedings.

4 Does the national state aid authority regularly cooperate or exchange information with authorities from other member states?

Not applicable.

5 Who represents your country in state aid proceedings before the European Commission?

Not applicable.

6 Who represents your country in state aid proceedings before the EU courts?

Not applicable.

7 Is there a national register or other central source of data on national aid measures?

Not applicable.

National substantive and procedural rules

8 Do national provisions regarding the application or enforcement of EU state aid rules exist?

Since Switzerland has no specific legislation regarding state aid, no substantive or procedural rules exist to enforce state aid rules at national level, except in the air transport sector. In this sector, substantive rules regarding state aid are incorporated in the ATA. Article 13 of the ATA provides that any aid granted by Switzerland, by an EU member state or through state resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between contracting parties and save as otherwise provided in the ATA, be incompatible with the ATA. Compatible with the ATA is aid which has a social character that is granted to individual consumers, provided that such aid is granted without discrimination relating to the origin of the products concerned, as well as aid which makes good the damage caused by natural disasters or exceptional occurrences.

Other types of aid are not per se compatible with the ATA but may be in certain circumstances. Article 13(3) of the ATA sets out three such circumstances:

- aid to promote the economic development where the standard of living is abnormally low or where there is serious underemployment;
- aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of the European Union or Switzerland; and
- aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

9 What national laws or other provisions exist that implement EU state aid rules, in particular EU guidelines?

Not applicable.

10 Do national rules or guidelines exist regarding the application for, and the granting of, state support?

Not applicable.

11 How is the concept of ‘service of general economic interest’ (SGEI) defined on the national level?

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the ATA. However, the concept of ‘service of general economic interest’ (SGEI) is not defined at national level.

12 Do any studies on national enforcement of EU state aid rules exist? Describe the main subjects and results of these studies.

Not applicable.

13 List any other rules or actions at the national level that implement and enforce EU state aid rules.

Not applicable.

Role of national courts

14 Must all national courts apply state aid rules? Or is specific jurisdiction for state aid cases exercised by dedicated national courts?

Yes, to the extent that state aid may be relevant without any specific legislation. There are no dedicated national courts in Switzerland.

15 Is there a right to appeal against a national judgment on state aid? What are the grounds and which court hears appeals?

Not applicable.

16 Do national courts traditionally refer questions regarding the interpretation of EU state aid rules to the Court of Justice?

Not applicable.

17 Describe recent developments regarding state aid cases before national courts.

Under national law, there have been several cases in which the Swiss national courts have dealt with the principle of neutrality in competition. In a recent case, the Federal Supreme Court confirmed the lawfulness of a cantonal act allowing a state-owned company, where an exclusive right was granted for a specific service (building insurance), to expand the range of services it offered on the free market (Decision of the Federal Supreme Court, 3 July 2012, Case 138 I 378). In terms of distortion of competition, the Federal Supreme Court stated in this landmark case that the contemplated expansion of the field of activity did not raise concerns, since the cantonal act fully complied with the requirements of the principle of neutrality in com-

petition. The Federal Supreme Court examined in particular the possibility of cross-subsidisation or unbalanced distribution of fixed costs, as such behaviour would not be in line with the principle of competitive neutrality. Indirectly, the Federal Supreme Court therefore confirmed that distortion of competition resulting of state activity would be unlawful.

In the air transport sector, the European Community and Switzerland may request the Joint Committee to discuss any appropriate measures required by the purpose of the state aid rule incorporated in the ATA. However, no such case has occurred thus far. Moreover, because of the very restrictive interpretation of the FTA by the court, the scope of article 23(1) (iii) FTA is programmatic (see our answer above).

18 Can a government measure be challenged in court directly on the grounds of illegal state aid? Is there a preliminary administrative review procedure?

In Switzerland, judicial review is generally based on the existence of a decision ruling an individual case. However, in certain circumstances, a cantonal legislative act may be directly challenged before the Federal Supreme Court in order to examine its conformity with the Federal Constitution. Typically, a new cantonal act regarding a state-owned company that raises concerns relating to competitive neutrality could be challenged before the Federal Supreme Court (see question 17).

19 Who has legal standing to challenge government measures in court for alleged illegal state aid?

Under Swiss law, a right of appeal is generally accorded to anyone who has participated or has been refused the opportunity to participate in proceedings before the lower instance, has been specifically affected by the contested ruling and has an interest that is worthy of protection in the revocation or amendment of the ruling. When a norm raises concerns regarding competitive neutrality, competitors affected by said norm generally have the right to challenge the measure before court.

20 May national authorities argue in national court proceedings that a particular measure contains illegal state aid?

Not applicable.

21 Do specific limitation periods apply for any party in a national court procedure invoking illegality under state aid rules?

Not applicable.

22 Can a national court proceeding be brought in parallel to an investigation by the European Commission? Under which circumstances will a national court stay proceedings pending a Commission procedure? And what are the consequences for national courts if the European Commission already came to the preliminary conclusion in the opening decision that the measure constitutes state aid?

Not applicable.

23 What is the burden of proof in state aid cases before national courts?

Not applicable.

24 Can the plaintiff seek interim measures from the courts, in particular to prevent the grant of aid? In what form and under what circumstances is interim relief granted?

Not applicable.

25 What would the national court decide if it found a non-notified measure to contain state aid?

Not applicable.

26 Can a national court order the recovery of non-notified state aid?

Not applicable.

27 What would a national court decide if it found a measure to contain aid, but saw grounds for the compatibility of such aid with the internal market?

Not applicable.

28 Would the national court necessarily declare a guarantee invalid if it secures a loan constituting aid and was granted in breach of article 108(3) TFEU (standstill obligation)? Does it make a difference if the only aid beneficiary is the borrower and not the lender?

Not applicable.

29 Can a competitor of the beneficiary or other affected third parties claim compensation for damages caused by the aid from the authority granting the state aid?

Not applicable.

30 Does the national law provide for damages actions against the beneficiary?

Not applicable.

Consequences of violation of state aid rules

31 What are the consequences of a violation of EU state aid rules for the validity and enforceability of the aid measure under national law? Are the consequences the same for unlawful aid that was not notified to the Commission and aid that the Commission has finally regarded as incompatible with the common market?

Since EU state aid rules are not applicable in Switzerland, violations of these state aid rules are largely theoretical and have no practical relevance. In Switzerland, a company pretending to be affected by a distortion of competition comparable to unlawful state aid could challenge the measure at stake according to the principle of neutrality in competition. Subject to the facts of the case, such a complaint could potentially lead to the withdrawal of the aid measure and the obligation to reimburse.

In the air transport sector, the consequences of an unlawful aid measure would have to be dealt with by the Joint Committee. The ATA states that the Joint Committee shall discuss any appropriate measures required by the purpose and functioning of the ATA. It shall moreover make recommendations and decisions, and such decisions shall be put into effect by the

European Community and Switzerland in accordance with their respective own rules.

32 What are the consequences of a violation of EU state aid rules for the validity of a government regulation or contract containing the aid measure?

Not applicable.

Enforcement by the European Commission

33 Describe the major state aid investigations opened by the Commission against your country over the past 12 months. State whether these investigations were specific to your country or part of a broader investigation into several member states.

No investigation has ever been opened by the European Commission against Switzerland. Moreover, there has been no request of the European Commission to the Joint Committee regarding state aid in the air transport sector to date.

34 Has the Commission suggested appropriate measures concerning existing aid measures in your country over the last 12 months?

Not applicable (see question 33).

35 Has the Commission ever opened specific investigations against your country following a sector inquiry?

Not applicable.

36 Has your country ever been subject to an injunction by the Commission to suspend or provisionally recover aid?

Not applicable.

37 Has your country ever been subject to an infringement procedure under article 108(2) TFEU?

Not applicable.

38 Has the European Commission ever undertaken on-site state aid monitoring visits based on article 22 of Council Regulation (EC) No. 659/1999 (Procedural Regulation)? How were the visits carried out? What measures were taken to assist the officials and experts carrying out the visit?

Not applicable.

Recovery of state aid

39 Which national authority orders the recovery of state aid following a Commission decision or an enforceable judgment by a national court?

In regards to Switzerland, the recovery of state aid cannot be decided by the European Commission. In the air transport sector, it is unclear how a decision of the Joint Committee would be enforced, since the COMCO has no decision power regarding state aid enforcement. Nevertheless, Switzerland would have the obligation to enforce such a decision, according to the ATA. There is no case law to date in that respect.

40 What legal or administrative actions are contemplated in the national law for the recovery of unlawful or incompatible state aid?

Not applicable.

41 What actions are available to the national recovering authority seeking to force an unwilling beneficiary to refund the unlawful and incompatible state aid?

Not applicable.

42 Can an action be brought in national courts to challenge the validity of the national recovery order implementing the Commission's recovery decision?

Not applicable.

43 Can third parties force national authorities to recover or claim damages from national authorities for failure to implement a recovery decision by the European Commission?

Not applicable.

44 What defences by beneficiaries against recovery have been accepted by national authorities or courts?

Not applicable.

45 What is the situation under national law if recovery was ordered by a national court owing to the violation of the standstill obligation but the aid is later declared compatible with the common market by the European Commission?

Not applicable.

Main areas of state aid

46 Which sectors have received the highest amounts of aid in the past five years?

Not applicable.

47 Provide information on amounts of state aid paid out under approved state aid schemes and individually approved state aid for the past five years.

Not applicable.

Other

48 Provide information on any other special features of your country's state aid regime not covered above.

To date, state aid legislation has only played a very minor role in Switzerland. Articles 13 and 14 of the ATA have never led to any proceeding.

Under Swiss national law, the principle of neutrality in competition was recently at stake in the insurance sector, where both the COMCO and the Federal Supreme Court examined the expansion of activities of state-owned companies in this economic area.

Homburger

Homburger is a major Swiss business law firm. Since its establishment in 1957, Homburger has advised and represented Swiss and international corporate clients and individual entrepreneurs on key aspects of business law. We offer our clients expert legal advice, support them in business negotiations, represent them before arbitral tribunals and in court, and protect their interests in civil and administrative proceedings.

Homburger is organised into six practice teams and five working groups, integrating the skills and experience of around 140 lawyers and tax experts focusing on specific areas. Our practice teams include litigation/arbitration, corporate/M&A, financial services, tax, IP /T and competition/regulatory. The working groups cover employment law, insolvency/restructuring, insurance, private clients and white-collar investigations.

Homburger's competition practice, established as one of the first in Switzerland after the first Swiss Federal Act on Cartels entered into force in the early 1960s, has recently been involved in the first ever Swiss cases of leniency applications, dawn raids and sanction procedures. It advises domestic and foreign multinational as well as small and mid-sized companies in Swiss and European competition law, and represents them before the Swiss Competition Commission and the European Commission as well as before national and international courts and administrative bodies. Services include domestic and EU merger control notifications and the handling of multinational merger control filings, administrative and civil antitrust litigation, and investigations concerning horizontal and vertical restraints of competition and abuses of market power, counselling, antitrust audits and tailored compliance programmes. Other areas of practice include specific advice on public procurement and regulated industries, in particular telecommunications, energy and media.

www.homburger.ch

KNOW-HOW ► BIOGRAPHY



Franz Hoffet heads Homburger's competition and regulatory practice team. He has extensive experience in all areas of Swiss and European competition law, ranging from domestic and multinational merger control to administrative and civil antitrust litigation and compliance. He has represented a wide range of companies and trade associations in proceedings before the Swiss competition authorities, the European Commission and in administrative and civil courts and arbitration proceedings. He also advises clients on state aid, administrative law and regulated markets as well as on trade law and public procurement.

franz.hoffet@homburger.ch



Marcel Dietrich is a partner in the competition & regulatory practice team. His practice focuses on Swiss and European competition and antitrust law as well as administrative law and regulated markets. He represents a wide range of Swiss and foreign clients in administrative and civil antitrust litigation and national, multinational and European merger control procedures. He also advises on state aid, compliance matters and regulated markets, in particular energy, healthcare and pharma, media and telecommunication, infrastructure and transport as well as public procurement.

marcel.dietrich@homburger.ch



Gerald Brei is a partner in the competition & regulatory practice team. His practice focuses on antitrust law with an emphasis on European, Swiss and German law. He is experienced in all aspects of antitrust law, including merger control (with numerous filings in Brussels and Berne), restraints of competition particularly in distribution agreements, technology transfer agreements, infringement procedures, and preliminary investigations of antitrust authorities. He also advises companies on antitrust compliance programmes. Other areas of practice include state aid, regulated markets and public procurement.

gerald.brei@homburger.ch



Associate **Alain Girard**'s practice focuses on Swiss and EU competition law, state aid as well as on general corporate, stock exchange and capital markets law. He is a member of Homburger's competition regulatory as well as corporate M&A practice team.

alain.girard@homburger.ch