

State Aid

Contributing editor
Ulrich Soltész



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GETTING THE
DEAL THROUGH

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State Aid 2016

Contributing editor

Ulrich Soltész

Gleiss Lutz

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



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Law Business Research Ltd
87 Lancaster Road
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Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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Switzerland

Simon Hirsbrunner

Steptoe & Johnson LLP

Overview

1 Outline your jurisdiction's state aid policy and track record of compliance and enforcement.

Like all other member states of the World Trade Organization (WTO), Switzerland has committed itself to observing the prohibition of trade-distorting subsidies for the product groups that are covered by the WTO Agreement on Subsidies and Countervailing Measures (ASCM). The ASCM does not concern trade in services. Not being a member of the European Union or the European Economic Area, Switzerland is, in principle, not subject to the far-reaching state aid disciplines applying to trade in products and services between the EU member states and the three EFTA states that are members of the EEA (Iceland, Liechtenstein and Norway).

To date, there is one exception relating to aviation services, as Switzerland and the EU have concluded a bilateral air transport agreement that incorporates, among other things, the EU prohibition of state aid. The agreement provides that the contracting parties shall each have the power to control state aid within their respective territories. Furthermore, the contracting parties have agreed that the European Commission and the Swiss authorities shall constantly review state aid matters within the ambit of the agreement and all systems of aid existing in the EU member states and in Switzerland respectively. The parties should also inform each other mutually of any procedure initiated to guarantee respect of the state aid rules, and they should give each other the opportunity to submit observations before any final decision is taken. There is little evidence to suggest that these mutual information and consultation obligations are of great practical relevance. If necessary, each contracting party may request a joint committee to discuss any appropriate measures required by the purpose and functioning of the agreement.

Moreover, a free trade agreement (FTA) dating from 1972 contains a state aid prohibition, which is modelled on the EU example. The prohibition is enshrined in article 23(iii) of the FTA and stipulates that 'any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' shall be deemed incompatible with the proper functioning of the agreement, insofar as it may affect trade between the two trading partners. This prohibition has been all but dormant since its entry into force. The single most notable exception relates to the area of company taxation where the European Commission took the view (in a decision of 13 February 2007) that the tax regimes of certain Swiss cantons in relation to certain holding, mixed and management company structures were not in line with the state aid provision of the FTA. To what extent the factual and legal assumptions in this decision are justified is controversial and, indeed, the link to the FTA, which only concerns free trade with goods, was always tenuous. There has been no legal follow-up, and instead the apparent divergence of economic interests resulted in a political settlement in October 2014.

The FTA's state aid prohibition is subject to implicit exceptions that are not set out in the FTA. Indeed, the EU, its member states and Switzerland continue to grant subsidies and other state aid, despite the seemingly unconditional wording of the agreement. The EU institutions have developed for their own state aid regime, which does not concern aid granted by the Union itself; a set of judicial precedents, rules, exceptions and justifications, which are partly codified in various regulations and communications. The corresponding precedents and texts are non-binding on non-member states such as Switzerland, and are constantly evolving and are influenced by other EU policies, which Switzerland has not signed up to. Nevertheless,

the European Commission has a tendency to consider them as being objective benchmarks against which the practices of Switzerland are to be measured. One can also observe that the Swiss authorities take the EU policy into account, where this is considered appropriate, and may adapt their own policy accordingly.

Although the premises are different, the Swiss legal system does not condone the unfettered use of state support and excesses are far from frequent. To the extent that differences between the EU and the Swiss legal order exist, they may also reflect the differing attitudes and convictions concerning the sovereignty of regional and local authorities, as well as the economic and political desirability of competition between business locations for the most attractive investment and fiscal framework conditions.

In legal terms, the ability of the state to intervene in the economy is limited by the constitutional guarantee of economic freedom. From this guarantee flows an obligation of the state to treat private economic operators equally and to carry out its tasks in a manner that has a neutral effect on competition. Thus, public authorities may not adopt measures that have as their object or effect the appreciable distortion or elimination of competition to the detriment of private economic operators. This concerns, in particular, state support measures that create appreciable market foreclosure effects, or whose sole purpose is to ensure the survival of a company. The state is not, in principle, prevented from engaging itself in entrepreneurial activities outside the areas that are exclusively reserved for public undertakings. Nevertheless, the state should avoid any systematic cross-subsidisation of commercial activities from public monopoly revenue, to the extent that this may result in an appreciable distortion of competition.

Exceptions to the guarantee of economic freedoms are only possible if they are either enshrined in the Federal Constitution or are covered by special or exclusive prerogatives bestowed upon the cantons. Article 103 of the Swiss Federal Constitution is particularly relevant in this context. It recognises the power of the federal state (the Confederation) to support geographic regions that are under economic threat and, moreover, promote specific economic sectors and professions if reasonable self-help measures are insufficient to ensure their existence.

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

As explained in question 1, the legal framework applying to state aid in Switzerland differs and there is no single, centralised state aid control. One exception is the aviation sector, where the Swiss Competition Commission monitors compliance with state aid rules, as a consequence of a bilateral air transport agreement with the European Union. The European Commission has no power to enforce state aid rules in Switzerland.

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

A variety of authorities, public institutions and other organisations are in charge of assessing requests for state aid and granting aid at the different levels of the Swiss state.

4 Describe the general procedural and substantive framework.

Public support, which could possibly qualify as state aid, may in principle be granted either by federal, regional or municipal measures, or a combination thereof.

The specific conditions governing public support measures that are based on federal law are consolidated in the Federal Act of 5 October 1990 on Financial Assistance and Compensations (Subsidy Act). The Federal Act of 6 October 2006 on Regional Policy contains specifics concerning regional support measures.

In addition, the 26 Swiss cantons and the municipalities may also decide on matters of economic promotion, as long as this does not conflict with federal law. To the extent that the cantons grant support measures that are based on federal law, they have to comply with the provisions of the above-mentioned Federal Subsidy Act.

State support measures are governed by public law. Under the Federal Subsidy Act, support measures may either take the form of a financial assistance or compensation. A financial assistance is deemed to exist where the recipient has opted to carry out a certain activity and he or she receives support to render possible or sustain this activity. The support may be granted in various shapes or forms including, by means of a subsidy, advantageous loan conditions, a state guarantee or services without or at a reduced charge. A compensation is deemed to exist where support is granted to reduce or cover a financial burden that results either from the performance of a task required by federal law or a public service obligation that has been imposed by the federal state.

Financial assistance, or compensation to individual applicants, is, as a rule, awarded by means of a binding decision. It may also be granted by means of a public contract if either the granting authority has significant discretion in the sector concerned or the support is awarded in the form of financial assistance and the granting authority wishes to ensure that the recipient fulfils a certain task in the public interest. If the support is destined to reach a large number of recipients, it may also be granted without a formal decision.

A separate set of rules and regulations concerns support measures of a fiscal nature. On the federal level, tax measures are governed by the Federal Act of 14 December 1990 on Direct Federal Taxation. On the cantonal level, the cantons are, in principle, sovereign in how they define their fiscal policy, but must nevertheless observe the framework conditions defined in the Federal Act of 14 December 1990 on the Harmonisation of Cantonal and Municipal Direct Taxes. These framework conditions create limits to competition between the cantons with regard to the taxation of individuals and companies. In certain cases, a canton may grant tax relief to companies wishing to establish themselves on the territory of the canton concerned, and whose activities are in the economic interest of the canton. The specific conditions are defined by cantonal law. The Confederation may complement the cantonal measure with relief on the direct federal income tax if this supports the creation of jobs, or if existing jobs are being converted. The project must be of specific importance from a regional policy perspective.

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

To date, Swiss national legislation implementing European state aid rules only covers the aviation sector, as a consequence of the bilateral agreement between the EU and Switzerland concerning air transport. The Swiss Competition Commission has the power to assess state aid measures in the Swiss air transport sector, by virtue of article 103 of the Federal Act of 21 December 1948 on Air Transport (Air Transport Act). To this end, the Competition Commission reviews draft acts of the Swiss government (the Federal Council) and measures on a regional or municipal level, either by public authorities or other public bodies, organisations, institutions or companies under public or joint public and private ownership, as well as measures by the European Union or the EU member states. The Competition Commission is independent in its review. It substantiates its assessment in a resolution, which must be taken into account by the body granting the aid.

Programmes

6 What are the most significant national schemes in place that have been approved by the Commission or that qualify for block exemptions?

Given that Switzerland is not a member state of the EU, the European Commission has no power to approve state aid schemes or to grant block exemptions.

As explained below (see 'Update and trends'), the EU and Switzerland are currently negotiating a host of bilateral issues. One of the topics being

discussed concerns the possible introduction of a state aid prohibition and a corresponding supervisory mechanism. It is currently uncertain what the outcome of these negotiations will be.

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

The GBER is not implemented in Switzerland because Switzerland is not a member of the EU.

Public ownership and SGEI

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

Public ownership plays a significant role in the Swiss economy. An important precedent concerns the sector of building property insurance, where there are still cantonal monopolies. In *Glarnersach* of 3 July 2012, the Swiss Federal Tribunal took the view that it is compatible with the constitutional right of economic freedom if a public insurance institution is authorised to extend its activities beyond the limits of the monopoly into other product and geographic sectors where private economic operators are active. However, the Tribunal also confirmed the case law, according to which a cross-subsidisation of commercial activities from monopoly revenues must be avoided to the extent that this results in a significant distortion of competition.

9 Are there any specific national rules on services of general economic interest?

The notion that state support granted to compensate for the performance of public service obligations may, under certain circumstances, be desirable is not alien to the Swiss legal order. Thus, the Federal Act of 5 October 1990 on Financial Assistance and Compensations (Subsidy Act) includes specific provisions relating to financial support of such public service obligations. According to the Act, a public body may only grant compensation based on federal law if the following three cumulative conditions are met: on balance, the public interest in the performance of the service must outweigh the private interest of the aid recipient; secondly, it would be unreasonable for the recipient to bear the full financial burden; and thirdly, the performance of the public service obligation would be unprofitable because the resulting benefits do not cover the costs. Moreover, a cross-subsidisation of commercial activities with revenues from monopolies is, in principle, incompatible with the constitutional guarantee of economic freedom, as explained above. Therefore, the Swiss system contains some of the guiding principles that are applicable to SGEI in the EU.

Notwithstanding the apparent similarities, there still are notable differences between the Swiss and the EU legal order. An exception concerns again the air transport sector, where the basic principles applying to services of general economic interest are identical in the EU and Switzerland. This is because the bilateral agreement concerning air transport includes in its article 12(2) a clause that is nearly identical to article 106(2) of the Treaty on the Functioning of the European Union (TFEU). Consequently, '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 on competition, 'insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'. Moreover, the agreement has rendered binding part of the European Commission Directive No. 80/723 of 25 June 1980 on the Transparency of Financial Relations between Member States and Public Undertakings and Commission Directive No. 85/413 of 24 July 1985 amending said Directive 80/723/EEC.

Considerations for aid recipients

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

Whether or not businesses have a right to obtain financial assistance or compensation depends on the specific regulation.

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

This depends on a variety of factors, including the specific type of financial support, the applicable law and the sector concerned.

Under the Federal Subsidy Act, the following distinction applies to financial assistance and compensation that is based on federal law.

Financial assistance may be granted where the recipient has opted to carry out a certain activity and:

- the Confederation has an interest that this particular activity be carried out;
- the cantons are not able to ensure the performance and the financing of the task independently;
- the task may not be performed in a satisfying manner in the absence of financial assistance;
- reasonable self-support and other financing methods are not sufficient; and
- it is not possible to perform the task in a more straightforward, effective and rational manner.

Compensation may be granted for the performance of a public service obligation if:

- the recipient is not driven to perform a certain task by overwhelming self-interest;
- it would be unreasonable to impose the financial burden resulting from the performance of the task on the recipient; and
- the benefits resulting from the performance of the task do not outweigh the financial burden.

Regional support measures that are based on the Federal Regional Policy Act may be granted:

- either for initiatives, programmes or projects that are innovative for the region concerned and the resulting benefits are mainly used in the region concerned;
- for the support of regional development organisations, regional offices and other regional actors;
- for the promotion of cross-border cooperation; or
- by means of loans for infrastructure projects.

Moreover, the recipients of regional financial support based on federal law must bear at least part of the financial burden themselves.

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

The main difference when compared to the situation in the EU and the EEA is that there is no obligation of prior notification of the aid measure to the European Commission. Otherwise, the usual strategic considerations apply.

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

A decision to reject a request for public financial support may only be appealed before the Federal Tribunal if the federal or cantonal law bestows a right onto the applicant to receive such assistance.

Requests for individual financial assistance and compensation that are governed by federal law may only be rejected by formal decisions. To the extent that the relevant federal act bestows a right on the applicant to obtain support, those decisions are then open to court challenges according to federal administrative law.

Special rules apply to the award of public support by way of a contract pursuant to federal law. Once the negotiations on the content of the contract are finalised, the granting authority submits a request for the conclusion of the contract to the potential recipient and sets a time limit for a response. The request must also be communicated to any third party that has a right of appeal. If either the potential recipient or any sufficiently interested third party takes issue with the request for contract, they may ask within 30 days that the granting authority issue a formal decision, which is then challengeable in court.

Different rules may apply to other requests according to the legislation of individual cantons or municipalities.

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

Given that the European Commission has no jurisdiction in Switzerland, there is no obligation to notify aid to the Commission.

Strategic considerations for competitors

15 To which national bodies should competitors address complaints about state aid?

It follows from the already-mentioned guarantee of economic freedom that a competitor of an aid recipient may invoke a right to be treated equally. It can be argued that such right of equal treatment is, in principle, safeguarded to the extent that requests for public support are governed by uniform standards under generally applicable legal acts.

The jurisdiction for hearing complaints against public support measures varies depending on the granting authority, the type of support and the applicable law. There is no single national body with the power to hear such complaints.

If a company intends to challenge a cantonal tax relief granted to a competitor before the Federal Tribunal, it may only do so if it is able to demonstrate that it is particularly affected by the measure and has a legitimate interest that the measure be overturned. The rules governing appeals before lower instance courts may differ.

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

Competitors may find out about public support measures from records of a granting authority or through the press. At least every six years, the Swiss government prepares a report for the national parliament concerning the public support measures that are granted on a federal level. Some cantons may report on cantonal measures.

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

On a federal level, the Act on Freedom of Information in the Administration of 17 December 2004 governs the right to inspect official documents and to obtain information about the content of official documents. This right is subject to certain exceptions. Similar legal acts exist in a number of cantons.

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

To the extent that a company is obliged to publish data in quarterly or annual intervals, it may be possible to gather relevant intelligence from these sources.

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

It is not uncommon that interested third parties intervene on the political level. For example, in 2010 and 2011 the Swiss government had to respond to several parliamentary questions concerning public support by the Grisons canton for the financial rescue of the largest Swiss timber saw mill, based in Domat-Ems.

Private enforcement in national courts

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

According to the case law of the Federal Tribunal, only direct competitors have the right to invoke the principle of equal treatment, which is part of the right of economic freedom when challenging measures granting financial support to other companies. Otherwise, it essentially depends on the applicable legal statute whether or not a competitor may be able to challenge the award of public financial support. As concerns the right to bring an appeal before the Federal Tribunal, a competitor must be able to demonstrate that he is individually affected by a particular measure and has a legitimate interest to have the measure overturned. Different rules apply to appeals before lower instance courts.

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

Complainants may either rely on the constitutional right of economic freedom or the particular provisions governing the granting of the particular measure. They may not rely on the standstill obligation within the meaning of article 108(3) TFEU because this is not part of the Swiss legal order.

Update and trends

The Swiss parliament is currently debating a range of proposed amendments to federal rules on corporate taxation (Third series of corporate tax reforms – CTR III). These reforms will likely rule out a different treatment of domestic and foreign revenue ('ring-fencing'), which is still possible in certain Swiss cantons. The new tax measures will be in line with the standards of the Organisation for Economic Co-operation and Development (OECD), namely the OECD action plan on base erosion and profit shifting (BEPS).

More generally, Switzerland and the EU continue talks to resolve the impasse in bilateral relations, which has been caused by a negative popular vote on immigration in February 2015. The parties are also discussing a possible new institutional framework agreement that is meant to introduce a coherent and more stringent set-up for the development and supervision of various bilateral agreements between the two partners. The possible introduction of a state aid prohibition for Switzerland is among the topics being discussed in these negotiations.

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

Any action against an aid measure must be directed against the authority granting the aid.

23 Have the national courts been petitioned to enforce compliance with EU state aid rules or the standstill obligation under article 108(3) TFEU? What is the national courts' track record for enforcement?

The standstill obligation within the meaning of article 108(3) TFEU does not apply to Swiss measures.

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

Since Switzerland is not a member of the EU, there is no mechanism for referring a question on state aid to the European Commission or the European Court of Justice.

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

As a rule, at least in the first instance, the administrative courts hearing cases carry out a comprehensive review of the relevant facts and legal provisions.

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

It is possible to submit economic expert opinions.

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

While it is not possible to generalise, Swiss courts are rather swift.

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

On a federal level, as a rule, appeals against administrative decisions have suspensive effect, unless the applicable law provides otherwise or the authority adopting the decision has withdrawn the benefit of a suspensive effect.

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

The conditions governing the liability of the state for unlawful acts are governed by a variety of legal acts on the federal and cantonal level. As a rule, liability is only deemed to exist if an authority or its officers have breached a legal obligation.

A claim for compensation may not be based on the standstill obligation according to article 108(3) TFEU, as this is not part of the Swiss legal order.

State actions to recover incompatible aid

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

The conditions governing the recovery of financial aid or compensation are regulated in a variety of domestic legal acts. The EU Procedural Regulation is not applicable to Switzerland.

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

The grounds for recovery are based on national law. The above-mentioned Federal Subsidy Act provides that the granting authority may revoke financial assistance based on federal law as follows, if the following conditions are met.

The authority may recover the full amount if the recipient has failed to fulfil his or her task despite a reminder, or it may recover part of the amount if the recipient has not fulfilled his or her task satisfactorily.

If financial aid has been granted for the financing of a building or another moveable or immovable object, and this object is either used in a way that is contrary to what was intended or it is divested, then the authority may also recover the financial assistance.

Furthermore, the authority revokes the decision by which the assistance has been granted and recovers the assistance if either the applicable rules have been disregarded or the facts have been presented in an incomplete or incorrect manner.

If the financial assistance has been granted by means of a contract, the authority terminates the contractual relationship by giving notice.

Recovery is subject to payment of interest of 5 per cent per annum. In the case that a recovery order causes hardships, exceptions may apply.

32 How is recovery effected?

As a rule, the granting authority may recover the public support by means of a unilateral administrative decision.

If the support is based on federal law, the granting authority must order the repayment within a year of having obtained knowledge of the

Steptoe
STEPTOE & JOHNSON LLP

Simon Hirsbrunner

shirsbrunner@steptoe.com

Avenue Louise 489
1050 Brussels
Belgium

Tel: +32 2 626 0500
Fax: +32 2 626 0510
www.steptoe.com

facts giving rise to the recovery order or otherwise within 10 years. If the facts giving rise to the recovery order are of a criminal nature, the longer time limits of criminal law may apply.

33 How may beneficiaries of aid challenge recovery actions by the state?

Statistical data concerning this particular aspect is not available.

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

While it is difficult to generalise, appeals based on federal law have, in principle, a suspensive effect.

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