

the legality of the measure. Without prejudice to the possibility of seeking interim relief from the court, this must lead the Member State to suspend the application of the State

aid.³ Although the Union Courts recognize that unlike a suspension injunction addressed to a Member State which is immediately binding, it is for the Member State to draw

the necessary conclusions from the legal effects produced by such a decision, this procedural difference shall not affect the scope of those legal effects.⁴

Subject to the exact wording of the Commission's Opening Decision and to possible challenges of the Commission's Opening Decision before the General Court, it cannot be excluded that the BNA and/or the German courts may draw these conclusions.

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3 Joined Cases T-346/99 to T-348/99 – *Territorio Histórico de Álava and Others v. Commission* [2002] ECR II-4259, para. 34 with reference to Case C-400/99 – *Italy v. Commission (Tirrenia)* [2001] ECR I-7303, paras. 59 and 69, and to Joined Cases T-195/01 and T-207/01 – *Government of Gibraltar v. Commission* [2002] ECR II-2309, para. 85.

4 Joined Cases T-346/99 to T-348/99 – *Territorio Histórico de Álava and Others v. Commission* [2002] ECR II-4259, para. 35.

Hungary

Which Court to Go to in State Aid-Related Disputes?

In December 2012, the Administrative and Labour Law Department of the Supreme Court of Hungary, jointly with the Civil Law Department of the Supreme Court of Hungary, issued Guidance¹ in relation to the court competence-related issues of State aid (the "Guidance"). The Guidance clarifies the main principles to be used to assess whether a State aid-related dispute falls under the competence of administrative courts or civil courts.

Problems of court competence started arising in 2008-2009, when some civil court judgments declared that civil courts did not have competence in State aid cases due to their administrative law nature. Most of the problems arose in connection with legal disputes that related to the monitoring and the recovery of State aid, rather than in cases relating to the tender proce-

cedure or the implementation of the project subsidized by the aid. This created the possibility that there may have been no effective legal remedy in such State aid-related disputes.

Therefore, in 2012, the Supreme Court set up a team to analyze the court practice applied to competence issues in State aid cases.

The report of the team found that the reason for the competence problems was the fact that the types of legal relationships under which State aid was granted were mixed ones under Hungarian law, since in the relevant laws governing these, both public and civil law elements appeared without stating anything about the nature of the legal relationship or court competence in the case of legal disputes. In many cases, the entity deciding on the State aid was an administra-

tive authority vested with public law competences. In addition to this, the collaterals and the rights relating to the recovery of the State aid and the determination of the legal consequences of a breach are of a public law nature (e.g., the State aid to be repaid is considered as a public debt and may be enforced as tax). Also, it is usually unclear whether the parties to the legal relationship have equal positions or if there is a hierarchy between them.

The Guidance issued as a result of the report of this team briefly summarizes the above findings and provides *vade mecum* for the courts on how to decide this significant issue.

According to the Guidance, State aid related legal disputes may only be considered to be of an administrative law nature if, in the relevant legal norm, there is an explicitly administrative competence established for the entity in connection with the State aid legal relationship. The mere fact that in the legal relationship itself there are elements that are of a public law nature does not make the decision on the aid an administrative decision. Furthermore, it is important to stress that, when making the distinction, the issue as

1 Guidance no. 1/2012 (XII. 10.) of the Administrative and Labour Law and the Civil Law Department of the Supreme Court.

to whether civil law or administrative law-related elements are more significant in a legal relationship is not decisive, since a greater weight on either of the elements does not imply that there is actually an administrative or civil law competence.

Consequently, if the relevant legal norm does not explicitly establish administrative competence for the entity and name the authority acting in the first instance, the court procedure may not be initiated before an administrative court and,

rather, a civil court shall have competence.

According to the Guidance, this competence issue stresses the significance of the judgment of second instance courts in cases where the lack of competence is established in the second instance. A faulty ruling of second instance courts may lead to the inability of a party to seek legal remedy if, after such a judgment, the legal remedy cannot be effectively sought at other courts. Therefore, when establishing the lack of competence at second instance, courts

have to support not only why they lack competence, but also whether or not a legal remedy may be effectively sought at another type of court.

Although the guidance of the Supreme Court only serves as a directive for the courts (it is not considered binding from a legal point of view), it plays a very significant role in the court system of Hungary. Hopefully, as a result of this Guidance, courts can focus on the merits of the cases instead of the attendant procedural issues.

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Italy

EU State Aid Enforcement under Law No 234/2012

By Law No 234/2012,¹ Italy enacted a comprehensive set of provisions aimed at strengthening its participation to the European Union after the Lisbon Treaty.

A specific section of the Law² is devoted to EU State aid matters. In this respect, Law No 234/2012 aims to enhance the institutional coordination at national level *vis-à-vis* the European Commission, fosters the effectiveness of the recovery decisions and clarifies the competences held by the administrative courts as far as judicial enforcement is concerned.

For the fulfillment of these aims, the Law vested a pivotal role in the Department for European Affairs of the Council of Ministers' Presidency,

which is responsible for the overall coordination of the activities foreseen in view of ensuring the Italian participation to the EU.³

With regard to State aid, Law No. 234/2012 provides in particular that:

- (i) the Italian Prime Minister or the Minister for Economic Affairs, together with the Minister for Foreign Affairs shall coordinate the relevant Ministers (who vary depending on the subject matter in question) in order to represent a national position on State aid matters *vis-à-vis* the European Union pursuant to Articles 107 and 108 TFEU (Law No 234/2012, Article 44);
- (ii) any Italian public administration which notifies a State

aid measure pursuant to Article 107(3) TFEU shall moreover file a note on the measure at stake with the Department for European Affairs, which is accordingly timely informed of all notification procedures pending in Brussels;

- (iii) the Department for European Affairs shall moreover provide the European Commission with all information pertaining to any alleged illegal State aid pursuant to Article 108(3) TFEU. In this respect, under Article 45, the local administrations which granted the illegal measure shall transmit any relevant information to the Department for European Affairs which reverts it to the European Commission;
- (iv) Law No 234/2012 codifies the *Deggendorf Commitment* providing that no State aid may be received by the undertakings which have already benefited from an illegal measure which is still subject to recovery pursuant to Article 14 of Regulation No 659/1999/EC (Law No 234/2012, Article 46);
- (v) Article 47 deals with State aid measures aiming at compen-

1 Law No 234 of 24 December 2012, *Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea*, in GURI No 3/2013.

2 Section VIII, Articles 44-52.

3 Further information on the Italian Department for European Affairs may be found at the official website www.politichecomunitarie.it.