# COUNTRY STUDIES CONCERNING STATE AID - CROATIA

Country Study

Justice and Environment 2023

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# Background

In March 2021, the Aarhus Convention Compliance Committee (ACCC) found in favor of J&E member organization ÖKOBÜRO and its member, GLOBAL 2000, in the communication they had brought, namely ACCC/C/2015/128 (EU). Specifically, the Committee found that:

*(a) By failing to provide access to administrative or judicial procedures for members of the public to challenge decisions on State aid measures taken by the European Commission under article 108 (2) TFEU that contravene European Union law relating to the environment, the Party concerned fails to comply with article 9 (3) of the Convention;*

(b) *By failing to provide any procedure under article 9 (3) of the Convention through which members of the public are able to challenge decisions on State aid measures taken by the European Commission under article 108 (2) TFEU that contravene European Union law relating to the environment, the Party concerned also fails to provide an adequate and effective remedy regarding such decisions as required by article 9 (4) of the Convention.*

Accordingly, the Committee made the following recommendation:

> *The Committee, pursuant to paragraph 35 of the annex to decision I/7, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of that annex, recommends that the Party concerned take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on State aid measures taken by the European Commission under article 108 (2) TFEU that contravene European Union law relating to the environment, in accordance with article 9 (3) and (4) of the Convention.*

# Questions

## What courts have competence to make a judgment when allegedly unlawful state aid government measures are challenged in court? Administrative? Civil? Constitutional?

Croatian State Aid law is under-regulated. There is Act on State Aid (OG NN 47/14, 69/17: hereinafter: ASA), however, it mostly regulates policy on state aid and to a lesser extent the procedure of granting the state aid.

Various level of government can be providers of state aid, and the Ministry of finance acts as a coordinating institution for the state aid. Providers of state aid have a level of discretion in deciding how to distribute the state aid. There are two main ways of distributing state aid – directly to a known beneficiary, or based on the criteria set forth in the Program of state aid for unknown (unidentified but identifiable) beneficiary or project.

Programs of state aid are checked for compliance with state aid rules and with the Government's state aid guidelines by the Ministry of finance. Programs of state aid define the requirements under which the state aid can be distributed to individual beneficiaries. State aid framework does not prescribe for the uniform procedure of modes of distributing state aid to individual beneficiaries.

Judicial control of state aid can hence be aimed at Programs of State aid (in abstracto) or at individual state aid decisions (in concreto).

In abstracto control of Programs of state aid is governed by the Act on Administrative Disputes (OG 20/10, 143/12, 152/14, 94/16, 29/17, 110/21; hereinafter: AAD). Programs of state aid are general acts[1] and the control of their legality falls under the purview of High Administrative Court of Croatia. The procedure is regulated in Articles 83 - 88 of Act on Administrative Disputes. However, assessment of legality of general acts is conditioned upon the passing of individual act based on the general act in question. Hence, the proof of impairment of right is required for the initiating of an in abstracto control of general acts. Article 83 paragraph 2, however,

1 For acts to be considered general acts they need to be abstract and have a legal effect (Cro: pravni učinak). Some authors think that policy documents, such as strategies, programs, guidelines, recommendations etc., do not meet the reqirement of legal effect.

provisions that the assessment of legality of general acts can be initiated ex officio by the court based on the information provided by the citizens and ombudsman or at the request by the court.

In concreto control of individual decisions granting state aid is not clearly outlined in the state aid framework. A reason for this might be a rather broad definition of State Aid which was simply literally transposed into national legislation. The state aid is defined as a "real or potential expenditure or decreased revenue of the state granted by the state aid provider **in any form** (…) (Article 2, paragraph 1, point 1 of ASA; our highlight).

Hence, we have a definition of what state aid is, and no definition on how an advantage conferred by state aid comes about, i.e. how the provider of state aid decides on conferring it, and whether any practice by the State aid provider with the above mentioned consequences constitutes the granting of state aid. Logically, following the cited definition, the term "any form" might refer to all and any action by the state aid provider undertaken in line with its competences.

For this reason a due care should have been given to a delineation between different actions of the state aid providers. In cases when a consequence amounting to state aid materializes a general provision for accessing courts should have been prescribed. In all other cases a type of decision by which a state aid is granted should have been clearly defined in law. Currently, as noted above, this is not prescribed with sufficient legal certainty.

A general provisions for accessing courts in cases where a suspicion of state aid is identified could be identified in the provision of Article 34.b. of Civil Procedure Act (OG SFRJ 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, and OG 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19, 80/22, 114/22; Cro: Zakon o parničnom postupku; hereinafter: CPA). In it the competence of Commercial courts is provisioned in case of "disputes arising from the acts of unfair market competition, monopolistic agreements and disruption of equality on the single market of the Republic of Croatia".

Given that the remainder of the state aid definition from Act on State Aid defines state aid as the above mentioned practice of state in "any form" which results in "distortions or threat of distortion of market competition putting in a favorable position a specific entrepreneur or production of certain goods and/or services in so far as it affects the trade between EU member states, all in line with the Article 107 of TFEU", it could be argued that such consequences are actionable under the provision of Article 34.b. of CPA. However, it should be noted that the CPA provisions for the actionability of acts that distort "single market of the Republic of Croatia"

whereas the ASA defines state aid as certain acts of the state “in so far as it affects the trade between EU member states”. Hence, it could be argued that the CPA provision is inadequate for challenging market distortions which are identified as state aid.

Since, as mentioned above, a type of decision by which a state aid is granted has not been clearly defined in law, for an in conreto control of state aid decisions one should resort to general provisions. Given that the resources disbursed as state aid are considered to be state resources these situations should be treated as situations when a state acts authoritatively as public authority (iure imperii), and not as a market subject (iure gestionis). Hence, administrative law framework should be applicable to state aid cases.

In practice state aid is most usually disbursed to final beneficiaries via contract signed between the state aid provider and the state aid beneficiary. These contracts contain most of the main elements of Administrative contracts. Though the law does not provide for the definition of administrative contracts theory and practice defines them as contracts signed under public law between a public authority and a third person with the aim of achieving a wider public benefit. However, for a contract between a public authority and a third person to be considered an administrative contract it needs to be regulated in the sectoral legislation. The Act on State Aid, as mentioned above, does not provide for the modes of disbursing state aid. Hence, the contracts disbursing state aid are not administrative contracts and cannot be judicially disputed as administrative contracts.

Contracts disbursing state aid are preceded by a decision of granting state aid. Though the decisions to grant state aid are not typified nor defined in law they have all the elements of Administrative Acts (Cro: Upravni akt).

The control of administrative acts depends on the public authority passing the act. If it is passed by a lower level public authority then an appeal is decided by a higher level public authority. Against a decision of the higher level authority an administrative lawsuit can be initiated before the administrative court. A lawsuit to administrative court is an appeal procedure also when a higher level authority decides as a first instance authority.

Administrative courts decide in administrative disputes based on Administrative Disputes Act (OG NN 20/10, 143/12, 152/14, 94/16, 29/17, 110/21; hereinafter: ADA). In administrative disputes the court decides on the legality of administrative acts, on the legality of actions by the public authority, on the legality of failure to act by the public authority, and on the legality of administrative contracts. Hence, regardless of the fact if a decision on state aid is an administrative act or not, because they are acts of public authorities, the administrative courts would be competent to decide on decision of providers of state aid to disburse state aid.

Administrative disputes are initiated by lawsuits. Lawsuit can be filed by a person who finds her rights and legal interests violated by an individual decision, by the acts of the public authority, or by the failures of public authorities to act or in disputes concerning administrative contracts. Parties to the proceedings are plaintiff, the public authority in question, and an interested person (Cro: Zainteresirana osoba). An interested person is any person whose right or legal interest would be violated by the annulment, amendment or adoption of an individual decision, action or failure to act of a public authority, or the conclusion, termination or execution of an administrative contract. An interested person can be another public authority with an interest in protecting rights and legal interests which it is entitled with protecting as part of her jurisdiction.

Administrative disputes are initiated in relation to administrative procedures – procedures before the public authorities which are governed by the General Administrative Procedure Act (OG 47/09, 110/21, hereinafter: GAPA). Parties to the proceedings in the administrative procedures are usually designated in the sectoral specific legislation. The aim of the sectoral legislation is to further detail the procedural elements of specific administrative procedures. They cannot contravene the GAPA which still applies as a general act concerning administrative procedures. In the Article 4 of GAPA party in an administrative proceeding before the public authority is a natural or legal person at the request of which a proceeding has been initiated, against whom a proceeding is being conducted, or who, in order to protect his rights or legal interests, has the right to participate in the proceeding. Thus, the impairment of right is a prerequisite to participate in the administrative procedure, as well as in the administrative dispute.

## As to each of the courts identified in reply to answer 1, what requirements must be met in order to show standing? Specifically, could an NGO meet these requirements and initiate/file a case challenging potentially illegal state aid? Could other members of the public meet these requirements (presuming they are neither aid beneficiaries nor (potential) competitors Could

## this NGO join an ongoing case on any side of the legal dispute as an amicus curiae?

As mentioned under answer to Question 1 access to all identified courts require a proof of impairment of rights (or a potential of impairment of right). The party to an administrative proceeding can be a public authority and another state authority, a body of a unit of local or regional self-government or another public authority that does not have legal personality and their regional unit or a branch or a group of persons connected by a common interest, if they can be the holder of the rights and obligations being decided on.

A comparable institute in the administrative disputes, that of an interested person, provisions only that an interested person can be “any person”. Hence, this definition is narrower and does not include those without legal personality or a group of persons connected by a common interest.
Interested person is closest to the institute of amicus curiae (though some significant differences do exist, most notably the fact that the amicus aims to help the court reach a decision whereas the interested person aims to protect primarily her own interests).

## Has any national court granted legal standing in practice to a party whose competitive position was not affected by a state aid? If yes, how would you categorize this party? An NGO? Another type of member of the public (individuals, citizens initiatives, and other non-incorporated groups)? In what position was this party accepted by the court: plaintiff or amicus curiae (on either side)?

We did not identify any such cases in Croatia.

## Presuming a national court would grant standing to an NGO to challenge a state aid decision, what criteria would this NGO need to meet in order to be recognized? Are there different criteria for becoming a party vs. an amicus curiae?

Special standing rights in relation to NGOs exist as part of sectoral environmental legislation, e.g. the Environmental Protection Act and the Nature Protection Act. However, it should be noted that these rights are applicable only for procedures conducted based on those acts, e.g. EIA or Appropriateness Assessment procedures. They are the implementation of the Aarhus Convention granted rights. We are not familiar with their applicability in the context of state aid law.

## Has an eNGO ever filed a lawsuit against a state aid measure in your Member State? Has an eNGO ever been admitted into a case as amicus curiae? If yes, what was the outcome of the case? What was the contribution of the eNGO to the outcome of the case? Please address both admissibility (standing/scope) and merits.

We did not identify any such cases in Croatia.

## Can an applicant claim a state aid measure or scheme violated EU or national law relating to the environment? If yes, please provide details, specific examples where this

## was done, etc. You can quote here cases that were not initiated by eNGOs or members of the public, too.

Based on the overview of the state aid legislation no such possibility is specifically provisioned.

## What sort of remedies is available in a judicial procedure started against a state aid measure?

No specific remedies are provisioned. In the administrative procedures there is a possibility of appeal to a higher level authority. The administrative procedure appeal usually suspends the execution of the administrative decision.

In administrative disputes a court can confirm, overturn or change the decision from the administrative procedure. The administrative lawsuit does not usually suspend the decision, unless explicitly provisioned by law. As noted above, state aid low is underegulated and has no such provisions. Regardless, the court can decide to suspend the administrative decision if its implementation would cause a hard to repair damage and the suspension does not contravene the public interest. Also, at the request by a party to the administrative dispute the court can issue an injunctive relief. The injunctive relief is issued in order to prevent grave and irreparable damage.

## Assuming eNGOs and other members of the public have standing to challenge state aid measures, what potential costs would they face? Would these costs be different if these eNGOs and members of the public are only acting as amicus curiae?

Costs are calculated on the basis of the sum of the object at dispute.

## How can eNGOs and other members of the public have access to information about any possible planned state aid or an actually granted state aid? Specifically, are there national registers? Please answer not only as to general information "out there", but specifically indicate whether, in your view, this register is fit for the purposes of mounting a timely legal challenge of any such aid.

There is a register of planned state aid programs and granted state aid. However, this service, ran by Ministry of finance, is only at disposal to providers of state aid. Based on the data from the register the Ministry issues yearly analytical reports. Both the register and the report cannot be used for purposes of mounting legal challenge against state aid decisions. Following article 9 of Regulation 651/2014 state aid above 500 000 Euros are published on the website of the state aid provider. They contain a link to the document based on which the state aid was granted (general document like state aid program). This as well, though it contains some more information, cannot be used as a direct resource for mounting a legal challenge against a state aid decision.

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