State Aid Policy : Hot Topics

EU Competition Law Briefing

Agenda

1. New Commissioner, new State aid policy?
2. State aid in the energy sector
3. State aid and chips act: how to boost the production of semi-conductors in Europe?
4. Commission’s policy towards SGEI
5. The Commission consultation on the revision of the Aviation Guidelines

1. State aid : new Commissioner, new State aid policy?

Annabelle Lepièce

State aid policy under Vestager II

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Pandemic and RRF

- Temporary Framework : 1185 decisions in 2020-2021 on 865 national measures for a budget of 3.1 trillion EUR
- Recovery and Resilience Facility (RRF) : budget of 650 billion EUR

Tax rulings

- End of investigations towards FIAT, Starbucks and Amazon
- ECJ : confirmation of negative Commission decision on 13 billion EUR aid to Apple

War in Ukraine and energy crisis

- Temporary Crisis and Transition Framework (TCTF) : Commission decisions for a total budget of 679 billion EUR

Revision of State aid rules

- IPCEI
- Regional aid 2022-2027
- CEEAG
- Revision of GBER
- De minimis aid, RDI Framework, etc.

Recent notifications of State aid by Member States

Focus on :

- Green deal:
  - Renewable energy
  - Decarbonization (steel)
  - Circular economy
  - Alternative fuels
- IPCEI (health, hydrogen networks)
- Semiconductors (Chips Act)
- Aviation

Commissioner Ribera’s mission letter

New Commission, new approach, new State aid policy

- New State aid framework for Clean Industrial Deal
- Simplification of State aid
- Coherence with European Competitiveness Fund
- Proposals for IPCEI for the most strategic sectors and technologies
- Revision of State aid rules for housing support measures

What is coming?

State aid Framework supporting the Clean Industrial Deal

2025

Revision of the GBER

2027

New aviation guidelines

2026

2. State aid in the energy sector

Eleni Moraïtou

Evolution of State aid rules

CEEAG

18.02.2022

- Policy objectives of the Green Deal
- Decarbonise the production process
- New categories of investments and technologies

TCF

23.03.2022

- Limited amounts of aid
- Compensate for the additional costs due to high gas/electricity prices

TCTF

09.03.2023

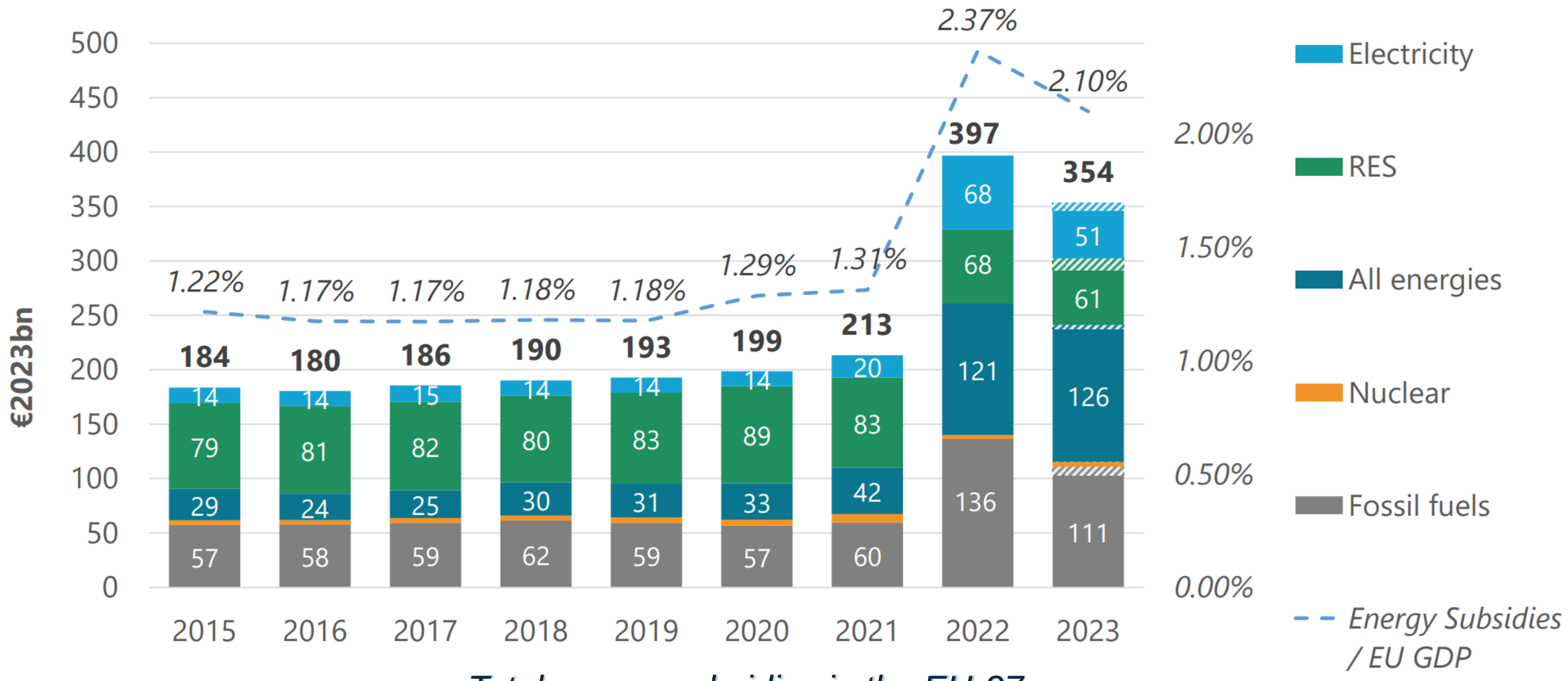
- Cushion the economic impact of the war in Ukraine (until 31.12.2023)
- Foster transition to a net-zero economy (until 31.12.2025)

Revision of the GBER

23.06.2023

- Facilitate and speed up green transition
- Increase the possibilities for aid in the area of environmental protection and energy

Energy subsidy trends in the EU-27



Total energy subsidies in the EU-27

Category	All energies	Electricity	Fossil fuels	Nuclear	RES	Total
Direct transfers	17.3%	1.4%	6.8%	0.3%	2.7%	**29%**
Tax measures	5.0%	5.5%	14.0%	0.2%	2.0%	**27%**
Income/price support	12.1%	7.6%	10.3%	0.3%	12.2%	**42%**
Under-pricing	0%	0.03%	0.18%	0%	0%	**0.2%**
RD&D support	1.2%	0.0%	0.1%	0.4%	0.4%	**2.1%**
Total	**36%**	**15%**	**31%**	**1.2%**	**17%**	**100%**

Subsidy distribution by instrument

Risks and Challenges

Letta Report (April 2024)

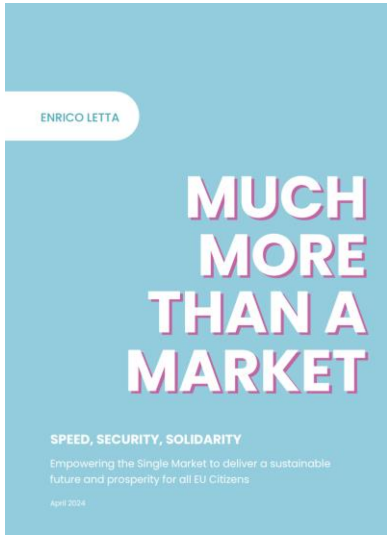
- Relaxation of State aid ⇒ distortions of competition
- Stricter enforcement of State aid but also EU funding support
- Acceleration of the green transformation and expansion of clean technology

European Court of Auditors report (September 2024)

- Unprecedented amounts of aid
- Not sure that the aid was limited to the minimum necessary
- Risk to the integrity of the internal market

Draghi Report (September 2024)

- EU's competitiveness gap also due to non-homogenous taxation and subsidies
- New State aid guidelines harmonising the type of support that is allowed to be provided through State aid, so that it does not distort the Single Market



Latest Developments

A Competitiveness Compass for the EU ○ Based on the analysis of Mario Draghi's report ○ Priority actions for the coming five years to strengthen competitiveness ○ Need for flexible and supportive State aid framework	**29.01.2025**
The Clean Industrial Deal ○ Focus on two sectors (energy-intensive industries and clean-tech) ○ Action Plan for Affordable Energy ○ Simplification of State aid rules by June 2025	**26.02.2025**
Draft Framework for State aid measures to support the Clean Industrial Deal - Complements the CEEAG and replaces the TCTF - Application until end 2030 - Measures accelerating the rollout of renewable energy - Measures facilitating industrial decarbonisation - Measures to de-risk private investments - Tax incentives - Public consultation until 25.4.2025	**11.03.2025**

3. State aid and chips act: how to boost the production of semi-conductors in Europe?

Marlene Wimmer-Nistelberger

Two options to approve State aid for the production of semi-conductors *

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* Unless e.g., aid falls under the scope of GBER (RDI aid)

1

IPCEI – Art. 107(3)(b) TFEU

Conditions for IPCEI based on the ME/CT IPCEI decision

- market failures: IPCEI involves significant technological and financial risks → public support necessary to carry out investment
- important contribution to EU objective, i.e., greener, digital, more secure and resilient economy → projects aim at developing technologies that go beyond what the market currently offers
- involves (generally) at least four MS: here 14, IPCEI designed in a transparent and inclusive manner
- delivers concrete positive spill-over effects for EU economy and society: Results of the project will be widely shared by participating companies
- involves important co-financing by beneficiaries
- Aid is limited to what is necessary, proportionate and does not unduly distort competition: EC verified that the total planned maximum aid amounts are in line with the eligible costs of the projects and their funding gaps; claw-back mechanism for extra net revenues

[C(2023) 3817 final, Germany as coordinating MS]

2

Case-by-case Assessment – Art. 107(3)(c) TFEU

Based on the Chips Act Communication Commission considers

- that it may be justified to fund up to 100% of the funding gap for **first-of-a-kind facilities**
  - Integrated Production Facilities (Article 13)
  - Open EU Foundries (Article 14)
- long-term **viability without** continued **support**,
- clear commitments to **continued innovation**.
- Furthermore e.g.,
  - commitments to fulfill priority orders in crisis,
  - access of SMEs and start-ups to chips,
  - improvements in energy efficiency of chips

[Criteria for detailed State aid assessment, see next slide]

Assessment under Art 107(3)(c)TFEU

Commission must ensure that the aid

Is necessary
Measure brings material improvement that the market alone cannot deliver

Has incentive effect
e.g., counterfactual analyses, showing based on internal documents that without the aid, the beneficiary would not carry out this investment in Europe

Is appropriate
no other tool would be less distortive to competition, e.g., if regulatory measures would not be sufficient, considering the incentives available outside of Europe

Is proportionate
i.e., aid must be limited to the minimum necessary → funding gap must be sufficiently proven

Limited impact on competition/trade
Assessment of (i) potential displacement of existing competitors and (ii) crowding out effect

Commission may also consider additional positive effects such as a

Strengthening
of the semiconductor value chain (security of supply)

Positive contribution
re. attracting qualified workforce to the EU

Positive impact
on innovation in the EU (bringing benefits to SME and endusers).

Examples of Approved Aid under Article 107(3)(c) TFEU

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ESMC 300mm Wafer Fab

Project: Factory in Dresden for 300mm semiconductor front-end manufacturing facility, € 5 billion aid (€ 10-20 billion investment)

- Application as Open EU Foundry
- Commission considered i.a.:
  - first to mass produce such wafers in EEA
  - positive effects: pure-play foundry, reduces dependency, commitment to invest in EU, committed to comply with priority rated orders to produce crisis-relevant products for critical sectors (Article 26).

[SA.107553 – Germany]

MEGAFAB DD - Infineon

Project: € 920 million aid for producing a wide range of different types of chips

- Application as Integrated Production Facility
- Commission considered i.a.:
  - first-of-a-kind: no semiconductor manufacturing facility that would be able to flexibly change its output in such a way
  - aid is proportionate: Infineon has agreed to share potential additional profits going beyond current expectations with Germany.
  - wider positive effects: security of supply, Infineon complies with all obligations linked to IPF status

[SA.106117 – Germany]

4. Commission’s policy towards SGEI

Clemens Kerle

Scene scetter – a complex regulatory landscape for the financing of everyday services

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Many public services are “services of general economic interest” (SGEI) – their financing is (often) subject to State aid control

- Examples: **Public transport**, **postal services**, **social housing**, broadcasting, health, water, broadband in remote areas,
- NB: Subsidised activities may not be *economic* or not distorting competition

Presence of State aid can (normally) only be excluded when they are purchased through competitive procurement procedures

- “Altmark”-criteria
- SGEI de minimis aid

Compatibility basis: Article 106.2 TFEU

- Block exemptions: SGEI decision, Regulation 1370/2007
- SGEI Framework, sometimes in conjunction with sectoral regulation such as the Postal Directives

Long-standing schemes may sometimes also be existing aid

- Introduced before accession or older than 10 years and not materially altered

The tip of the iceberg? Probably only a small share of all schemes have undergone proper review

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There are presumably thousands of active SGEI schemes and even more individual aid awards - an inevitable consequence of European welfare states with liberalised markets

Public financing of SGEIs can give rise to overcompensation and/or cross-subsidisation

Two main indications for significant compliance shortfalls and underenforcement

- MS have to report on the use of the SGEI decisions – reporting manifestly incomplete and application of SGEI decision often legally questionable
- Relatively few Commission (and ESA) decisions for sectors/schemes where block-exemptions cannot (normally) be used

Example: Postal services, airports in remote areas

The notion of “real SGEI” is narrower in European law than in some MS

Use of block-exemptions notoriously challenging

Ex.: Reg.1370/2007, reasonable profit, separate accounts

en no 19 DEC 2024 • STATE AID

ESA opens investigation into alleged State aid to Posten

en no 31 MAY 2023 • COMPETITION

ESA launches investigation into alleged State aid to Vygruppen

Risks and opportunities

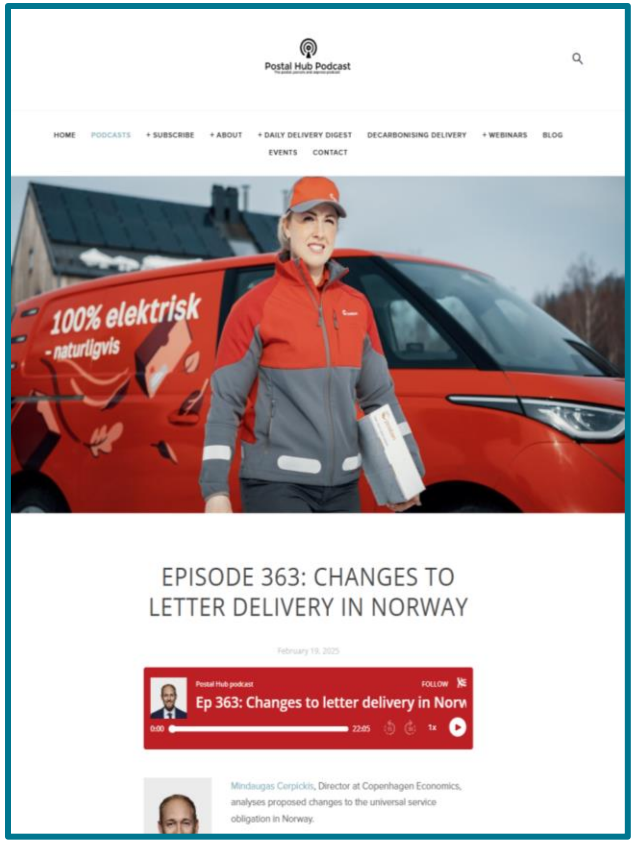
Risks – mainly for aid granting authorities and beneficiaries

- Negative decisions including recovery
- Protracted complaint/infringement procedures
- Reputational damage

→ **Know these risks and think state aid in the design/reform phase**

Opportunities – mainly for competitors of SGEI providers

- Enforcement possibilities through complaints or national lawsuits
- Tackle cross-subsidisation issues
- Bring about market opening and reform



5. The Commission consultation on the revision of the Aviation Guidelines

Marguerite Soete

The adoption of the Aviation Guidelines

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New approach : too many non viable regional airports

2014 Aviation Guidelines		
Investment aid limited to max aid intensities	**Operating aid authorized for a 10 years period for airports up to 3 million passengers/y except for airports < 700,000 passengers/y**	**Start-up aid in the form of rebates on airport charges of max. 50% for 3 years at airports up to 3 million passengers/y**
• Up to 1 million passengers/y : max. 75% • Between 1 and 3 million passengers/y : max. 50% • Between 3 and 5 million passengers/y : max, 25%	• Prolongation until 2027	

Aid to airports exempted from notification to the European Commission

General block exemption Regulation (GBER) 2017		
Exempted aid for airports Exemption of notification to EC applicable to investment and functioning aid to airports to cover their funding gap ➔ Into force until end 2026	**Investment aid to airports < 3 M passengers per year** Aid = funding gap and max. : • Up to 50% between 1 and 3 M passengers • Up to 75% below 1 M passengers • Up to 100% below 200.000 passengers **Not applicable** if another airport within 100 km or 60 min travel operates scheduled air services (except for airports below 200.000 passengers per year)	**Functioning aid to airports** Up to 100% of funding gap (excluding commercial contracts with airlines) for airports below 200.000 passengers per year

➔ 400 information notices registered by Member States to the European Commission

Aid to airports : in practice

Investment aid to airports

- Limited notifications to the European Commission of national aid schemes (France, Ireland, Lithuania) or individual investment aid (Tarbes, Rimini, Vilnius, Ostend and Antwerp, Debrecen, Saarbrücken, Aarhus, Frankfurt-Hahn, etc.)
- Approbation by the European Commission in the context of investigations on illegal aid (Marseille, Pau, etc.)

Operation aid for airports

- Few notifications to the European Commission of national aid schemes (France, Ireland, Romania) or individual aid (Saarbrücken, Rostock, Dortmund, Debrecen, Frankfurt-Hahn, Lappeenranta, Groningen, Antwerp and Ostend, etc.)
- Approbation by the European Commission in the context of investigations on illegal aid (Charleroi, Nîmes, etc.)

Start-up aid

Very few start-up aid

Other commercial incentives

- MEOP well settled practice at the level of the airport
- Legal uncertainty for public support by public authorities

Consultation on the revision of Aviation Guidelines

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"Against the background of the developments in the aviation sector, the 2023 prolongation on the operating aid provisions and the results of the 2020 State aid Fitness Check, the Commission plans to review the Aviation Guidelines. For that purpose, the public consultation launched today takes the form of a questionnaire that will enable stakeholders and the broader public to participate in the review process and make their voices heard, which will ultimately help the Commission to identify the necessary changes and better design the new rules."

State aid in the aviation sector – Commission guidelines on airports and airlines (revision)

Consultation on the revision of Aviation Guidelines

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TOPICS

Importance of Regional Airports	Operating aid to regional airports	Investment aid to airports
Start-up aid to airlines	Greening of aviation	Other topics

What to expect?

Future Aviation Guidelines applicable as from April 2027

Investment aid to airports

Most probably maintained without significant modifications

Functioning aid to airports

In-depth revision but will the Commission still expect regional airports to achieve profitability at some point ?

Start-up aid to airlines

Revision but which form and compatibility conditions ?

Commercial incentives to airlines

Formalization of the Commission practice and European jurisprudence on marketing incentives and other support in line with the MEOP

Revision of the GBER

For 1 January 2027

Greening of aviation

Possible new aid options but under strict conditions and limited national budgets

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