

State aid Outlook 2022

EU Competition Law Briefing

Agenda



State aid policy: from recovery to sustainability

Annabelle Lepière



Important Projects of Common European Interest

Clemens Kerle



State aid & Tax

Eleni Moraitou



UK subsidy control regime

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Climate, Energy and Environmental State aid guidelines

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State aid policy: from recovery to sustainability

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State aid policy: from recovery to sustainability

What is it about?

- State aid is forbidden (art. 107 (1) TFEU)
Unless declared compatible by the European Commission (art. 107 (2) and (3) TFEU)
- Communication on the notion of State aid and EU jurisprudence
- Guidelines, Communications and Frameworks on policy objectives (RDI, regional aid, etc.), forms of aid (guarantees, fiscal aid, etc.), sectors (aviation, cinema, broadband, etc.)
- Exemption Regulations (GBER, de minimis and SGEI)
- Broad and evolutive notion of State aid, complex rules and risks borne by the beneficiaries of illegal and incompatible aid

Current state of play

- COVID-19 outbreak
 - Swift reaction of the European Commission
 - Article 107 (2) (b) and (3) (b)
 - Temporary Framework (into force until 30 June 2022) : aid of limited amount, public guarantees, subsidised loans, recapitalisation, aid schemes to support uncovered costs, wage subsidies, aid for research and production of COVID-19 related products
 - Rescue and Restructuring aid Guidelines
- Recovery and Resilience Facility: Green deal and digitalisation
- Revision of State aid legislation

State aid policy: from recovery to sustainability

Important developments

- Temporary Framework: solvency support and investment support towards a sustainable recovery
- Regional aid Guidelines
- Climate, Energy and Environmental aid Guidelines
- Risk Finance Guidelines
- Communication on Important Projects of Common European Interest (IPCEI)
- GBER :
 - Investments to enable higher energy efficiency or digitalisation of buildings
 - Aid for the construction of networks of charging stations for electric cars
 - Aid for the digitalisation of SMEs
 - Aid for the development of broadband

Next Steps and outlook

- To be adopted in 2022:
 - Research, Development and Innovation Framework
 - GBER targeted
 - State aid rules for the agriculture, forestry, fishery and aquaculture sectors (consultation until 13 March 2022)
- No precise timeline:
 - SGEI package for health and social services
 - Aviation Guidelines
 - Railways Guidelines (consultation until 16 March 2022)
 - Rescue and Restructuring aid Guidelines
 - De minimis aid Regulation (increase up to 500,000 EUR/3 years ?)
 - Overall GBER revision
- Specific sectorial Temporary framework?
- Specific rules for companies impacted by Ukraine conflict ?

State aid & Tax

Eleni Moraitou

State aid & Tax

What is it about?

- Fiscal autonomy of Member States but in compliance with EU State aid rules
- Tax measures classified as State aid based on 4 cumulative criteria:
 - State origin
 - Advantage
 - Selectivity
 - Effect on trade and competition

Current state of play

- Recent case-law on the notions of advantage and selectivity
- **Advantage:**
 - Lower tax liability than it would have been if the general tax regime had been applied
 - *Commission v FC Barcelona* case (C-362/19 P)
- **Selectivity:**
 - 3-step test applied to broader measures applicable to all undertakings fulfilling certain criteria
 - *World Duty Free* case (C-51/19 P)

State aid & Tax

Important content and changes

- Broad interpretation of the State aid criteria
- Undue extension of the scope of State aid law?
- Legal uncertainty for undertakings likely to benefit from a tax measure: classification as illegal State aid and recovery measures
- Double risk: at European level and at national level

Next Steps and outlook

- Judgements on selectivity
 - The *Spanish tax lease* system (C-649/20 P)
 - The *Gibraltar's corporate tax exemption* (T-508/19)
- Judgements on tax rulings
 - The *Apple* ruling (C-465/20 P)
 - The *Amazon* ruling (C-451/21 P)

Climate, Energy and Environmental State aid guidelines (CEEAG)

Helmer Krane

Climate, Energy and Environmental State aid guidelines (CEEAG)

What is it about?

- New **Guidelines** on State aid for climate, environmental protection and energy
- New **general assessment** scheme for aid
- New (and amended) **aid categories** cover aid for:
 - **reduction and removal of greenhouse gas emissions** (including renewable energy and energy efficiency)
 - the **improvement of the energy and environmental performance of buildings**
 - **clean mobility** (including acquisition of clean vehicles and deployment of recharging and refueling infrastructure)
 - **resource efficiency** and transition towards a **circular economy**
 - the **closure of power plants** using **coal, peat or oil shale** and of **mining operations** relating to those resources
 - **energy-intensive users** in the form of **reductions from electricity levies**

Current state of play

- Adoption of the new Guidelines on **27 January 2022**
- Previously, among others, **two public consultations**

Climate, Energy and Environmental State aid guidelines (CEEAG)

Potential Outcome 2022

- Aid schemes approved under the previous Guidelines must be adapted **by 31 December 2023**
- Member States have to **redesign structure of aid schemes** and funding programmes:
 - **Stricter assessment** of the **appropriateness** of aid (e.g. Member States must carry out pre-notification **public consultations** for certain aid from 1 July 2023)
 - A **greater focus** is put on **competitive bidding processes** for State aid
 - The **maximum aid intensity** for a number of measures has been **lowered**
 - No **threshold** for individual notifications exists any more
 - The **principle of technological neutrality** is given **greater importance**

Next Steps

- The guidelines are to be **evaluated from 31 December 2027**
- Important element for the EU's **interim target of reducing greenhouse gas emissions** by at least 55% by 2030

Important Projects of Common European Interest

Clemens Kerle

Important Projects of Common European Interest (IPCEIs)

What is it about?

- Compatibility rules for the assessment of State aid under Article 107(3)(b)
 - Rarely used provision until the adoption of the first IPCEI Communication of 2014
- What are IPCEIs?
 - Cross-border single or integrated projects
 - Important contribution to Union's objectives (Green Deal, Health Union, Digital Decade etc.)
 - Overcome important market or systemic failures, major innovative nature for R&D
 - Involve several EEA Member States
 - Important in size, scope or risk, to benefit the wider Union

Current state of play

- Revised IPCEI Communication in force since 1 January 2022
- Five IPCEIs approved under 2014 Communication
 - Transport infrastructure (2x)
 - Batteries (2x)
 - Microelectronics
- Growing importance of IPCEIs – tool to achieve strategic autonomy and perform industrial policy at Union level
 - In practice, often heavy involvement of EU bodies / governments in conception and design of industrial IPCEIs

Battery IPCEI – "right recipe for our 21st century industrial policy"

(Maroš Šefčovič)

- 17 beneficiaries
- Germany, France and Italy fund
~2.6 bn
- Result of a Commission led-
initiative and the European
Battery Alliance

Commission approves €3.2 billion support by seven
Member States for project of common European
interest for **battery value chain**



Important Projects of Common European Interest (IPCEIs)

Important content and changes

- IPCEIs must ordinarily involve at least four Member States (two before) – all must be given possibility to participate
 - Inclusion of SMEs
- There are no restrictions on aid amount and intensity
 - Funding gap
 - Commission can require claw-back mechanism
- Positive indicators (general and R&D specific)
 - Subsidies granted in third countries
- No significant harm principle / taxonomy
- No EEA-internal relocation
 - Risk of subsidy race between EEA MS taken into account

Next Steps and outlook

- Many IPCEIs in the pipeline
 - Cloud computing
 - Health
 - Hydrogen
 - Semiconductor
 - ...
- Publication of further public versions of approval decisions forthcoming
 - Incl. decision on Austria joining the IPCEI microelectronics ([SA.56606](#))
- Greater focus on transparency?

UK subsidy control regime

Graeme Young

UK position post-Brexit

UK position post-Brexit – is messy!

- EU-UK Withdrawal Agreement (2019)
- Includes the Northern Ireland (NI) Protocol – one foot still in the Single Market?
- EU-UK Trade and Cooperation Agreement (TCA) (2020)
- Requires the UK to put in a place a substantively equivalent regime, as a condition of “frictionless” trade with the EU
- Must respect certain (6) key principles designed to ensure a “level playing field for open and fair competition and sustainable development” between the UK and the EU
- 11pm, 31 December 2020...
- The European Union (Future Relationship) Act 2020, S29
- UK Government (BEIS) guidance (31 Dec. 2020, updated June 2021)

Subsidy Control Bill – new regime Autumn 2022

- “Aid” = “subsidy” (similar four-part test)
- 7 subsidy control principles + limited specific prohibitions
- Self assessment (“baseline route”) OR reliance on a UK Govt. “streamline route” (similar to EC block exemptions)
- Distinction between “subsidies of interest” and “subsidies of particular interest”
- No standstill obligation other than for the granting of a subsidy, or the making of a subsidy scheme, “of particular interest”
- New “Subsidy Advice Unit” (SAU) set up within the UK’s Competition and Markets Authority (CMA)
- CMA role in relation to mandatory and voluntary referrals is limited (SAU reports will be non-binding)
- Publication of subsidies on a transparency / subsidy database

Implications?

Easier to grant (and receive) subsidies?

- Specific prohibitions on:
 - Unlimited State guarantees
 - Subsidies conditional upon export performance
 - Subsidies conditional upon use of domestic goods or services
 - Subsidies conditional upon relocation within the UK
 - Rescue and/or restructuring subsidies not meeting certain requirements
- Otherwise, authorities can rely on their own self-assessment applying the subsidy control principles, with no standstill (ex ante) regime (other than for subsidies of particular interest, which need to be referred for review by the CMA)

More difficult to challenge subsidies?

- CMA has no formal enforcement powers (though the Secretary of State can make post-award referrals to the CMA within 20 working days of publication in the database)
- Interested parties can challenge subsidies before the UK's Competition Appeal Tribunal (CAT), but must do so within one month of publication in the database
- CAT must apply standard judicial review principles (not a merits review)
- CAT can make a recovery order if the subsidy is held to be unlawful
- *“Government anticipates challenges will only occur in exceptional circumstances as we expect high levels of compliance with the new regime”*

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