

State aid Outlook 2024

Eu Competition Law Briefing



Agenda



State aid policy

Clemens Kerle



State aid and taxation

Claire Vannini



State aid in the aviation sector

Annabelle Lepièce



State aid and procedure

Marie Vandenneucker

State aid policy

The reform of the GBER, the amended Temporary Crisis and Transition Framework and the new *de minimis* aid rules

Clemens Kerle

TCTF, GBER and de minimis aid

How to grant State aid without a (burdensome) notification procedure?

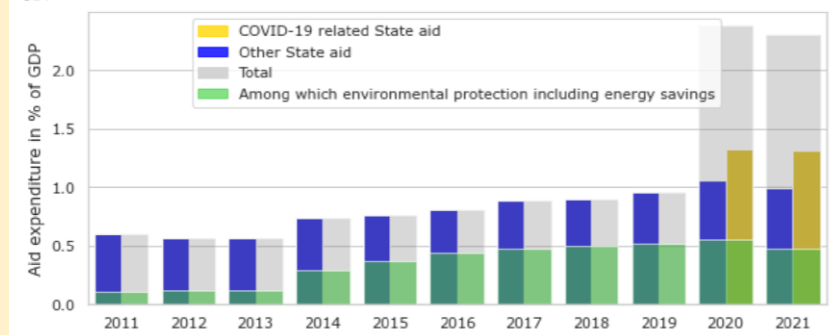
What is it about?

- State aid is forbidden (art. 107 (1) TFEU) unless declared compatible by the European Commission (art. 107 (2) and (3) TFEU)
- Guidelines
 - Check-list notifications and assessments - temporary crisis and transition framework (**TCTF**)
- Exemption Regulations
 - General Block exemption regulation (**GBER**)
 - **De minimis** aid regulations
- Recent changes to GBER, de minimis aid regulations and the TCTF provide aid granting authorities with unprecedented possibilities to award state aid, and swiftly

Current state of play

- The era of state aid?
- Commission acts increasingly as a coordinator of MS' spending
- Revisions discussed today illustrate these developments

Figure 6 : Evolution of total State Aid expenditure from 2011 to 2021 in the EU 27, as % of EU 27 GDP



Source: State aid scoreboard

Aid that is not State aid: the new de minimis regulations

What is de minimis aid?

- Small amounts of aid that are deemed not to have any effect on trade nor distort competition
- Several de minimis regulations (**general, SGEI, agriculture**)
- Maximum amounts **per undertaking per Member State over 3 fiscal years** until 2023
 - EUR 200.000
 - EUR 500.000 (SGEI)
- Applies to transparent aid only
- Eligible costs and cumulation
- Aid granting authority ensures compliance based on sworn declarations from beneficiary
- The SGEI de minimis regulation only applies to funding genuine SGEI

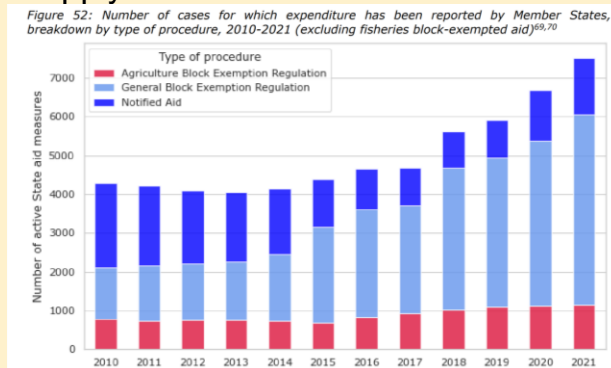
Important developments

- Revised regulations applicable since **1 January 2024**
- Increased maximum amounts
 - **EUR 300.000**
 - **EUR 750.000** (SGEI)
- Clarifications on cumulation, in particular on cumulation of different de minimis aid
- Possibility to grant transparent aid through financial intermediaries
- SGEI de minimis can now be granted to undertakings in difficulty
- Obligation for Member States to register de minimis aid in a central register as of **1 January 2026**
 - Further increase in MS' transparency (and reporting!) obligations

The (almost) new GBER – a short recap

What is GBER?

- The general block exemption regulation (GBER) exempts (an increasing number of) types of aid from the notification obligation
- A revision with over 100 pages of changes was adopted in June 2023
- The revised GBER is longer, more generous and even more complex to apply



Source: State aid scoreboard

Overview of changes in the GBER

- **Objective of revision**
 - align with and reflect changes to State aid guidelines, as well as
 - the European Green Deal and Green Industrial Plan;
 - remedy consequences of Ukraine war, covid-pandemic....
- **Revision entails**
 - additional types of aid that are exempt
 - increased notification thresholds
 - a move towards competitive bidding processes as granting mechanism
- **N.B: When applying GBER, do not overlook the general provisions in its Chapter I, and the Annexes**

Selected examples of changes in the revised GBER

Important developments

- The most fundamental changes were made to section 7
 - Most provisions have an increased notification threshold of EUR 30 million
 - Article 36 can accommodate most decarbonisation aid
 - 100% aid intensity if competitive bidding processes are used
 - Counterfactual assessments as basis for the calculation of eligible costs
- Important changes also in section 4
 - New Article 26a on testing and experimentation infrastructure
 - Article 28 on innovation aid seems to entail a pass-on possibility for consulting services
- In section 3, new provisions to support companies' energy costs
 - Articles 19(c) and (d)
 - First example of aid exclusively meant for micro-undertakings
- **N.B. Don't overlook the revisions in articles 2, 4, 5 and 6**

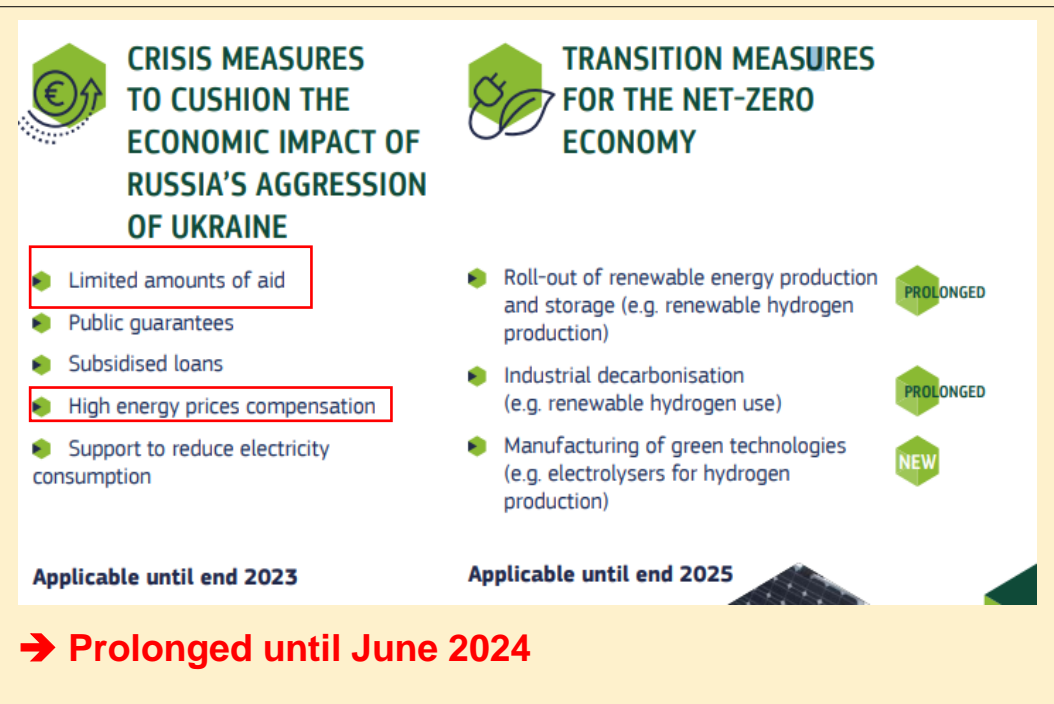
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Section 3 —	Aid for access to finance for SMEs
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Section 5 —	Training aid
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TCTF: More transition, less crisis

What is the TCTF?

- The TCTF is akin to state aid guidelines, but allows for more concise notifications and faster approvals
 - Reaction to Ukraine-war, energy crisis and the IRA
- When adopted in March 2023, it prolonged and expanded the earlier Temporary Crisis Framework (TCF)
- Allows for „crisis“ and „transition“ aid – the former focusing on energy prices, the later on investment in renewables and net-zero technologies

Revision of the TCTF in November 2023



Supporting the “transition” of industrial production under the TCTF

Why the TCTF remains special?

- The TCTF’s provision on support to renewables and decarbonization are little more than a condensation of the CEEAG (caveat!)
- Its provisions on aid to industrial production, including on matching aid, are nothing short of revolutionary
- These novel features of state aid “control” are increasingly used

The screenshot shows two panels. The left panel is a news article titled "EU approves €902mn in German state aid for battery maker Northvolt". It includes a photo of two men at a press conference and a small text box that says "EU competition commissioner Margrethe Vestager, left, and Germany's economy minister Robert Habeck at a press conference in Brussels on Monday © Kenzo Tribouillard/AFP/Getty Images". The right panel is a list of supported activities under the TCTF, categorized into "What can be supported?" and "How can aid be granted?".

EU state aid + Add to myPT

EU approves €902mn in German state aid for battery maker Northvolt

Cash is first use of rule for strategic projects that allows governments to match subsidy offers from outside bloc

EU competition commissioner Margrethe Vestager, left, and Germany's economy minister Robert Habeck at a press conference in Brussels on Monday © Kenzo Tribouillard/AFP/Getty Images

What can be supported?

- Manufacturing of:
 - strategic equipment (batteries, solar panels, wind turbines, heat-pumps, electrolyzers and carbon capture usage and storage)
 - Related key components
- Production or recycling of related critical raw materials

How can aid be granted?

- Simple schemes with maximum aid amount and maximum % of support over total investment costs, depending on:
 - size of company
 - location (assisted region or not)
 - type of support (higher % possible for tax credits, loans and guarantees)
- Ad-hoc support for companies at risk of diverting investments to extra-EU locations:
 - Matching aid: maximum amount depending on support from 3rd country

or

- Funding gap: amount needed to incentivize the company to locate the investment in the single market

▶ whichever the lowest

The screenshot shows a news feed titled "News (402)" with an RSS icon. It displays three news items, each with a small image, a date, and a headline. The first item is dated 8 March 2024 and mentions a €1.1 billion Italian state aid scheme. The second is dated 6 March 2024 and mentions a €3 billion Romanian state aid scheme. The third is dated 1 March 2024 and mentions a €350 million Portuguese state aid scheme. A filter for "state aid" is visible.

News (402)

Showing results 1 to 10

COMPETITION INSTRUMENT **state aid**

Press release | 8 March 2024
Commission approves €1.1 billion Italian State aid scheme to support investments in equipment necessary to foster the transition to a net-zero economy
press release

Press release | 6 March 2024
Commission approves €3 billion Romanian State aid scheme to support onshore wind and solar photovoltaic installations to foster the transition to a net-zero economy
press release

Press release | 1 March 2024
Commission approves €350 million Portuguese State aid scheme to support investments in equipment necessary to foster the transition to a net-zero economy
press release

Going forward in the brave new State aid world

Next steps and outlook

- The EU policy framework promoting a competitive, sustainable and zero-emission Europe remains unchanged
 - The role of State aid (control) will remain unchanged
 - New aid instruments such as CCfDs will become more widespread
- The TCTF will – presumably – cease to apply by 2025
 - Significantly less possibilities to grant investment aid
 - CEEAG will become – again – the main basis to grant aid to renewables, hydrogen and decarbonise the industry
- The importance of GBER will increase
 - More State aid under the GBER, more (rigid) monitoring?
 - Additional block-exemptions are on the horizon → TBER



State aid in the aviation sector

Commercial incentives to airlines and aid in the context of the pandemic

Annabelle Lepière

State aid in the aviation sector

What is it about?

1. Measures in favour of airlines

- Commercial incentives and start-up aid for new routes in favour of airlines (Aviation Guidelines)
- Rescue and restructuring aid in favour of airlines (Guidelines)
- Aid in favour of airlines in the context of the pandemic (Temporary framework and/or Article 107.2, c) TFEU)

2. Measures in favour of airports

- Functioning and investment aid for airports (Aviation Guidelines and GBER)

Current state of play

Recent ECJ's case-law on :

1. Commercial incentives/illegal aid to airlines:

- Sardinian airports, Montpellier airport, Klagenfurt airport, Frankfurt-Hahn airport, etc.

2. Aid in the context of the pandemic:

- ➔ Confirmation of legality of Commission decisions on aid to French and Swedish schemes, SAS (guarantee), Alitalia, Brussels Airlines, AirBaltic, Finnair, etc.
- ➔ Annulment of Commission decisions regarding an Condor, TAP, Italian aid scheme, Air France and KLM (twice), Deutsche Lufthansa (DL)

State aid & Aviation

Important content & changes

- Legal uncertainty regarding marketing services contracts concluded by public authorities with airlines
- Confirmation of the Commission's broad powers regarding the compatibility conditions BUT obligation for the Commission to comply to its framework
- Rejection of arguments on non-discrimination and EU freedoms: aid are per definition selective
- Possibility for MS to support their national airlines/national licences BUT legitimate objective
- Balancing test : not necessary under Art. 107.3, b)
- Novelty: higher requirement of the assessment of indirect beneficiary

Next steps & outlook

1. European Commission:

- Decisions to adopt on:
 - Following annulment: Sardinian airports, Timisoara airport, KLM, DL, Italian aid scheme
 - Old cases: Carcassonne airport, Gerona and Reus airports, Cluj airport, Beziers airport, etc.
- Public consultation on start-up aid for the summer

2. ECJ

- Decisions on Ryanair: Montpellier, Klagenfurt airport and La Rochelle airport
- Aid in the context of the pandemic: DL, Air France/KLM, etc.

State aid and taxation

What is the status of the European jurisprudence on tax rulings?

Claire Vannini

State aid & taxation: Status of ECJ's case-law on tax rulings

What is it about?

- In the absence of harmonization at EU level, **direct taxation falls under the exclusive jurisdiction of Member States**
- Settled ECJ case-law : **MS must exercise this competence in compliance with EU law** (and notably State aid constraints)
- **First steps from DG COMP against tax measures using the tool of State aid**
 - First Communication on SA and direct taxation in 1998
 - Limited number of formal proceedings during the 2000s
- **2014: starting point of DG COMP's actions against tax rulings**
 - General investigation concerning all MS
 - Targeted proceedings in terms of MS and companies:
 - Luxembourg, Netherlands, Ireland
 - Apple, Starbucks, Fiat, Amazon, Engie

Current state of play

- General criteria of **Article 107 TFEU** for the qualification of a public measure as State aid
- Specific focus in the field of **taxation**
 - Identification of an “**advantage**”
 - Demonstration that such advantage is “**selective**”
- Key issue: how to demonstrate the selectivity criterion?
 - Identification of the reference system (RS)
 - Demonstration of the existence of a derogation to such reference system (**ECJ, World Duty Free Group, C-50/19P**)
 - → Presumption of selectivity
 - MS may reverse such presumption by demonstrating that the derogation is justified by the nature or the general structure of the RS

State aid & taxation: Status of ECJ's case-law on tax rulings

What the EU COM intended to achieve when tackling tax rulings under State aid law?

- Special dedicated task force created within DG COMP to **investigate against tax rulings issued by several MS which endorsed transfer prices policies of multinational groups that were deemed to depart from the Arm's Length Principle (ALP)**
- Rationale of the DG COMP's action under SA
 - Endorsement of "favorable" TP policies allow multinational companies to unduly allocate profits in MS with low tax rates (or totally escape from any taxation)
 - Such rulings derogate from the "reference system" as they deviate from **the ALP which itself directly derives from EU law** (even if not explicitly referred to in the domestic legislation)
 - Such ruling confer an advantage to its beneficiary which should be qualified as State aid
 - The beneficiary should reimburse the amount of "unpaid" taxes

What is the ECJ's position on the EU COM's analysis?

- Error in determining the RS vitiates the selectivity analysis
- **MS determines the characteristics of its own tax system which constitutes the RS**
 - EU COM must accept interpretation of domestic law by the MS (presumption of validity)
 - Can be reversed by EU COM only if it is sufficiently evidenced by national case-law or administrative practice that the interpretation of domestic law suggested by the MS is incorrect
- **As a principle, ALP is not per se part of EU law and can only be taken as part of the RS if it is explicitly incorporated in domestic law → Severe condemnation of the EU COM's position**

State aid & taxation: Status of ECJ's case-law on tax rulings

Case	Commission's decision	General Court	CJEU
Starbucks	Decision (EU) 2017/502 21 October 2015	24 September 2019 (T-760/15 and T-636/16): Annulment of the Commission's decision	No appeal
Fiat	Decision (EU) 2016/2326 21 October 2015	24 September 2019 (T-755/15 and T-759/15): Confirmation of the Commission's decision	8 November 2022 (C-885/19 P): Annulment of the Commission and the General Court decisions
Engie	Decision (EU) 2019/421 20 June 2018	12 May 2021 (T-516/18 and T-525/18): Confirmation of the Commission's decision	5 December 2023 (C-451/21 P and C-454/21 P): Annulment of the Commission and the General Court decisions
Amazon	Decision (EU) 2018/859 4 October 2017	12 May 2021 (T-816/17 and T-318/18): Annulment of the Commission's decision	14 December 2023 (C-457/21 P): Confirmation of the General Court's judgment
Apple	Decision (EU) 2017/1283 30 August 2016	15 July 2020 (T-778/16 and T-892/16): Annulment of the Commission's decision	On going

State aid & taxation: Status of ECJ's case-law on tax rulings

What are the consequences and next steps?

- Within the field of State aid

- Tax rulings
- What about the assessment of the selectivity criterion for other kind of tax measures ?

- Policy making initiatives

- Proposal of transfer pricing directive COM (2023) 529
- A mean to enshrine the Arm's Length Principle into EU law ?

State aid and procedure

What will be the impact of the recent European case-law on State aid cases?

Marie Vandenneucker

State aid & procedure

What is it about?

- Article 108.3 TFEU
- **Procedural Regulation** laying down detailed rules for the application of Article 108 TFUE
- **Implementing Regulations** as regards notification forms and information sheets; the calculation of certain time limits, the handling of complaints, and the identification and protection of confidential information
- **Code of Best Practices** for the conduct of State aid control procedures
- **Notices** on the recovery of unlawful and incompatible State aid; the enforcement of State aid rules by national courts; the determination of the applicable rules for the assessment of unlawful State aid

What to be aware of

- Recent case-law on :
 - Definition of the concepts of “interested parties” / “parties concerned” / “directly concerned”
 - The opening of a formal investigation procedure
 - The recovery of illegal State aid
 - The qualification as “existing aid” vs “new aid”
 - The qualification as “State aid scheme” vs “individual State aid”

State aid & procedure

Important changes / clarifications	Relevant case-law
<p>Definition of the concepts: “interested parties” / “parties concerned” / “directly concerned”</p>	<ul style="list-style-type: none">• CJEU, Jan. 31st, 2023, C-284/21 P, <i>European Commission v Anthony Braesch a.o.</i>• CJEU, Sept. 14th, 2023, C-466/21 P, <i>Land Rheinland-Pfalz v Deutsche Lufthansa AG</i>• CJEU, July 3rd, 2023, Joined cases C-73/22 P and C-77/22 P, <i>Grupa Azoty S.A. a.o. v European Commission</i>
<p>Opening of a formal investigation procedure</p>	<ul style="list-style-type: none">• EU General Court, Sept. 13th, 2023, T-525/20, <i>ITD, Brancheorganisation for den danske vejgodstransport and Danske Fragtmænd A/S v European Commission</i>• CJEU, Sept. 14th, 2023, Joined cases C-508/21 P and C-509/21 P, <i>European Commission and IGG v Dansk Erhverv</i>• EU General Court, Nov. 15th, 2023, T-167/21, <i>European Gaming and Betting Association v European Commission</i>

State aid & procedure

Important changes / clarifications	Relevant case-law
<p>Illegal State aid recovery</p>	<ul style="list-style-type: none"> • CJEU, Dec. 7th, 2023, C-700/22, <i>RegioJet a.s. and STUDENT AGENCY k.s. v České dráhy a.s., Správa železnic, státní organizace and Česká republika, Ministerstvo dopravy</i> • EU General Court, Feb. 21st, 2024, Joined cases T-29/14 and T-31/14, <i>Telefónica Gestión Integral de Edificios y Servicios, SL and Banco Santander, SA v European Commission</i>
<p>“Existing aid” vs “new aid”</p>	<ul style="list-style-type: none"> • CJEU, Dec. 7th, 2023, C-700/22, <i>RegioJet a.s. and STUDENT AGENCY k.s. v České dráhy a.s., Správa železnic, státní organizace and Česká republika, Ministerstvo dopravy</i> • CJEU, Jan. 12th, 2023, Joined cases C-702/20 and C-17/21, <i>DOBELES HES</i>
<p>“State aid scheme” vs “individual State aid”</p>	<ul style="list-style-type: none"> • Belgian tax rulings judgments <u>including</u> EU General Court, Sept. 20th, 2023, T-131/16 RENV, <i>Kingdom of Belgium v European Commission</i>

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