Enforcement of EU state aid control

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Outline

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   - ✓ Areva restructuring
   - ✓ High-speed test facility in Spain
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   State aid control – why, what and how?

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I. Key points on state aid control

State aid control

- State aid = in principle prohibited
- BUT state aid control is not aimed at eliminating all or any state aid, but is rather intended to ensure that aid is allowed only in warranted instances and implemented in the least anti-competitive way
- Objective: protect competition and the European single market from distortions through state subsidies
- Violation of state aid rules results in prohibition of measure and (if necessary) recovery of illegal aid to restore the competitive situation. No fines for offending Member State or beneficiary.

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Evolving state aid rulebook

- Transparent and publicly available framework to allow subsidies to be used in an acceptable manner (e.g. guidelines)
- Has been refined over time based on case experience
- SAM 2014 – further refinements:
  - ✓ Transparency
  - ✓ Evaluation
  - ✓ Common assessment principles
- Flexible, e.g. response to financial crisis, while safeguarding internal market
- Has proven extremely effective to reduce state aid expenditure and direct it towards horizontal objectives (e.g. environment)

Example: renewable energy

- Historically, various forms of renewable support in EU, financed by taxes, surcharges on electricity, green certificates etc.
- Instruments used sometimes resulted in very high remuneration for producers (e.g. guaranteed feed-in tariffs)
- Potential to distort competition and trade in the single market
  - E.g. distortion of cross-border electricity supplies, distortion of investment incentives, national preferences regarding certain renewable technologies…
- Change in approach required to restore a level playing field

Example: renewable energy

- Use of new state aid guidelines on environmental protection and energy (EEAG 2014) to introduce a common approach to supporting renewable energy (electricity production)
- Compulsory auction mechanism phased in:
  - Aid in the form of top-up premium; electricity sold at market price
  - Open to all technologies (technology-specific tenders are an exception and need to be justified)
- More flexibility to grant aid to small renewable projects as they have limited potential to affect competition
- Auctions have resulted in significant reduction in aid levels

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II. Case studies on enforcement

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Bailing out ailing firms – key issues

Problem: companies kept alive on the back of subsidies, without addressing structural problems, leading to problems for undertakings in other Member States

- Risk of interventions by Member States designed to protect their industries to the detriment of the single market
- Purpose of the Commission's guidelines has been to avoid the risk of competition on subsidies and to encourage the restoration of a company's viability whilst protecting competition, provided State intervention is warranted at all
- State intervention should be exceptional, limited and well-targeted. No repeat aid measures are permitted ('one time last time' principle)

Case study: Areva

Decision of 10 January 2017 approving restructuring aid to Areva

- Background:
  - Main (state-owned) European operator on the markets of nuclear fuel cycle management (2/3 of turnover) and nuclear reactors (1/3)
  - Areva experiences financial difficulties due to financial crisis and Fukushima disaster, as well as cost overruns at Finnish OL2 reactor site
- France notified a restructuring plan involving € 4.5 bn state aid
- Key restructuring proposals:
  - Divestment of reactor business to EDF for € 2.5 bn
  - Refocusing Areva on nuclear fuels business

Areva: formal investigation

- Formal investigation opened to verify several open issues:
  - Sensitivity analysis of business plan and viability in adverse scenario?
  - Sufficient own contribution by Areva to the restructuring (burden sharing) by way of divestments and raising of private capital?
  - Are the proposed divestments sufficient to address the competition distortions resulting from the aid (compensatory measures)?
- Invitation to third parties to provide comments on these points
  - Submissions from France, Areva as well as competitors received
- Commission then carried out detailed economic assessment of the proposed business plan and the functioning of the nuclear sector

Assessment of the restructuring

- Commission approved the restructuring aid on the following basis:
  - Aid promotes the common objective of nuclear safety and energy security
  - Business plan shows return to viability even under adverse scenario
  - Need for state intervention as no further private capital can be raised (beyond € 0.5 bn already foreseen) and sale in parts would not be feasible
  - Aid is proportionate as own contribution of over 50% of restructuring costs and minority shareholders participate in the losses
  - Divestment of reactor business adequately addresses competition distortions as it is a structurally sound business the loss of which eliminates the synergies and advantages of being an integrated operator. Commitment: no strategic partnership agreement Areva-EDF!

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Conclusion on Areva

- Rules on restructuring apply even to sensitive economic sectors
- Assessment of whether aid should be granted as all (promotion of a common objective) – example of application of new requirement introduced in the 2014 R&R guidelines
- Detailed economic assessment of restructuring plan
- Tension between restoration of viability (return to profitability) and compensatory measures – in the end, the aid measure cannot lead to undue distortions of competition!
- Use of behavioural commitment (ban on commercial cooperation) to reinforce impact of divestment on remaining core business

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State aid and infrastructure

- State aid control applies to infrastructure investments by the State in case the infrastructure is destined for economic use. Example: financing of a runway for a commercial airport
- No aid approach: Member States can freely invest in non-economic infrastructure (e.g. public streets), local infrastructure that does not affect trade or if the investment is carried out on normal market terms (Market Economy Operator Principle)
- State aid can be allowed to construct infrastructure to further an objective of common interest (e.g. as described in the state aid guidelines) – e.g. for research infrastructure

Case study: CEATF

Negative decision (with recovery) of 25 July 2016

- Background:
  - Spain notified the financing (€ 359 m) for the construction in the Andalusia region of a test centre for high-speed trains (CEATF), which was intended to enable testing at very high speeds (up to 520 km/h)
  - CEATF was to be built by the Spanish railway infrastructure operator. Spain had already paid out € 140 m in violation of the state aid rules (which Spain had to recover following the decision)
  - Spain claimed that the very high test speeds differentiated the project from other test facilities in Europe, and that the project would have significant positive effects on the development of the region

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CEATF: formal investigation

- Formal investigation opened due to several doubts:
  - No evidence of any industry need or demand for high-speed testing at 520 km/h; not a commercially viable option for the foreseeable future
  - No evidence of a market failure justifying state intervention (coordination failure, positive externalities, asymmetric information…)
  - Proportionality doubtful as no private capita and expected income low. RDI Guidelines limit aid for research facilities to 60% of investment costs
  - CEATF would compete with existing testing facilities across Europe; Spanish operators use test tracks in Czech Republic and in Germany
  - the competition distortions resulting from the aid (compensatory measures)?

Negative decision

- Commission prohibited the aid on the following basis:
  - No genuine objective of common interest as there was no demand for very high-speed testing at 520 km/h – and therefore the facility would simply compete with existing testing facilities in Europe, leading to infrastructure duplication
  - Lack of demand was also shown by the heavily loss-making nature of the project and the absence of interest by private investors despite the aid
  - The project would not promote sustainable development of the Andalusia region, but merely have short-term effects by creating temporary jobs in the construction sector at a disproportionate high cost to the State
  - Major distortion of competition by subsidising a new entrant

Conclusion on CEATF

- State aid assessment focussed on the economic analysis of the project, both as regards its financials and its impact on other facilities in Europe
- In the formal investigation, the Commission received detailed evidence from the industry (comments from 10 rail operators) backing up its analysis of the sector
- State aid rules can be a tool to control large projects to avoid duplication of installations or the financing of unnecessary infrastructure ("White Elephants")

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III. Conclusion

Conclusion on state aid enforcement

- Enforcement needs to be based on clear, transparent rules with objective criteria to be effective
  - Open, transparent and evidence-based rule making
  - Need to regularly adapt rules to new circumstances to steer state aid towards common objectives and appropriate mechanisms
- Enforcement has to be a sharp tool
  - Carried out by independent enforcement authority
  - Based on detailed economic assessment
  - Focus on preventing undue distortions of competition
  - Subject to judicial controls

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Thank you!

Questions?

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Background:
State aid control

Why State aid control?

- "level playing field" – fair competition
- Internal market – fair competition accross borders
- avoid subsidy races to the benefit of consumers (better goods/services at low prices) and citizens (less taxpayers' money spent)

State aid (SA) control is about interventions by Member States (as opposed to Antitrust & Merger Control)

State aid represents about 1% of GDP

Architecture of State aid control

- Set out in the Treaty (binding on Member States)
- Exclusive EU competence
- State aid control by the European Commission
- Very limited role of Council / no role of European Parliament

- Wording in the TFEU on what is State aid has not changed since 1957
- But: scope of SA control has increased over time + importance and awareness of SA control has increased significantly

Example: Airports (Leipzig/Halle)

The two steps of State aid control

1. Is there State aid?

Notion of State aid

- Defined by TFEU (Article 107(1))
- No discretion for the Commission or Member States (objective notion)
- Interpreted by the European Court of Justice
- Commission summarizes and provides additional guidance (Notice on the Notion of Aid)

2. Is the State aid allowed?

Compatibility

- In most cases discretion for the Commission to decide on compatibility
- Commission adopts abstract rules (Guidelines/Frameworks/etc.)

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What is State aid?

The 6 elements of the definition:

- Transfer of state resources
- Advantage
- Undertaking
- Selectivity
- Distortion of competition
- Effect on trade between Member States

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What is State aid?

Transfer of state resources

- Positive transfers or foregone revenues; examples:
  - ✓ Tax waivers
  - ✓ Free use of land/free electricity/…
  - ✓ Non-payment of obligatory social charges
  - ✓ Guarantees, unless if market remuneration is paid
  - ✓ Direct grants
  - ✓ Capital injection, unless if market conform
- What if EU funds are involved?

  Example of structural funds – European Commission supports economic development across all EU countries, in line with the objectives of the Europe 2020 strategy. Subject to State aid control

What is State aid?

Advantage

- Measure improves financial situation of company
- No State aid if MS acts like normal buyer / seller / investor ("Market economy operator test", MEOP)

  E.g. capital injection

  ✓ what is return on investment and is this in line with what a private investor would expect?

  ✓ Only remuneration as shareholder can be taken into account, not "public considerations" (e.g. creating employment) → such considerations might be relevant in deciding whether the aid is compatible

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What is State aid?

Undertaking

- Any entity that is offering goods and services on a market
- Activity counts, not form/set-up
  - ✓ Also departments of public administration, or non-profit organisations can be undertakings!
  - ✓ State owned enterprises (SOEs) can be both recipient and grantor of aid
- Borderline areas: education, health care, culture, …

Selectivity

- Includes measures for one company, but MUCH wider
- Distinction by sector, size of companies, location, public ownership, …
- "De iure" or "de facto" (laid down in law or factual selectivity)

What is State aid?

Distortion of competition &

Effect on trade between Member States

- Both are closely linked
- Broad interpretation

Important exceptions:

- small amounts (de minimis Regulation)
  (200,000€ over a 3 year period)
- purely local services ("big on big, small on small")

Compatibility

Underlying idea: State aid is compatible/allowed when positive effects outweigh the negative effects

- General Block Exemption Regulation (GBER) and other exemption provisions
  The GBER is a set of simplified rules, which are easier to apply
  → Self-review by Member States
  → Safeguards: transparency, monitoring
- Guidelines, Frameworks, etc…
  → Review by European Commission
- "Directly under the Treaty" (Articles 107(2)+(3))
  → Review by European Commission

http://ec.europa.eu/competition/state_aid/legislation/legislation.html

Compatibility – common principles

Compatibility depends on sector/area, but there are common underlying principles

1. Objective of common interest
2. Need for state intervention
3. Is State aid the right tool?
4. Incentive effect
5. Proportionality (is the aid limited to minimum necessary?)
6. Avoidance of undue negative effects on competition and trade
7. Transparency

Procedural set-up

Typical cases without real competition concerns (~90%):

- Commission develops abstract rules (most important: GBER)
- Member State checks itself (self-review)

Potentially more distortive cases/atypical cases:

- Member State has to notify the measure
- Commission checks before implementation ("standstill obligation")

Procedure

Types of cases

- Notifications
- Complaints → important source of information; also provides extra-check in GBER context (self-review by Member States)
- Ex officio investigations
- Monitoring

Steps in a case

- Prenotification
- Notification
- Commission investigation in 2 phases
- Final negative decision typically includes **recovery**: Member State has to claw back the money from the company

Commission powers

- Broad investigative powers to collect information (including from third parties, sanctioned with fines)