HEUKING KÜHN LÜER WOJTEK

BRX Update: State aid

August 2019

Dear reader,
with our "BRX update: State aid" we like to inform you on current topics and principal issues in State aid law.

Combating white spots – Expansion of mobile networks

Anyone in Germany who wants to make calls outside the city is sometimes not able to do so due to the numerous "white spots" in the mobile network infrastructure. In most areas of Germany, a comprehensive infrastructure is not guaranteed. An expansion by the telecommunications companies (TC) is also not foreseeable in the next three years. Therefore, many municipalities and administrative districts want to eliminate these "white spots" on their own.

Christine Grau, LL.M.
Lawyer
+49 69 975 61-413
c.grau@heuking.de

The radio spectrums for the 5G network will not be available until 2021, so that mobile network expansion will only be possible from that time on. It may take some time until the expansion is completed. Therefore, it seems reasonable to provide a nationwide 3G or 4G network first, since the nationwide comprehensive 5G expansion will likely take some time.

Possible models for the expansion of the mobile networks by municipalities and districts

Two models in particular can be considered in this context. On the one hand, the municipality or district can build the necessary infrastructure itself and then rent it to TC. In this case, the district or municipality must bear the costs of the expansion and take care of the maintenance, but receives the rental income. On the other hand, the municipality or the district can subsidize TC, so that they can carry out the expansion. The district or municipality is then not the owner of the infrastructure and has no rental income, but does not bear the costs of the infrastructure maintenance.

Expansion in the other federal states only on the basis of the NGA Framework

In this regard, it should be noted that the subsidies for the expansion of mobile communication networks must not constitute unlawful aid under Article 107 TFEU. Both models would grant subsidies to companies for which there has to be a legal basis. The possibilities are, however, limited. Due to aid already granted to the relevant telecommunication providers, it is not expected that State aid can be granted under the de minimis Regulation. A notified federal support programme for mobile networks is not in sight.

At present, there remains the possibility of eliminating the white spots through funding under the NGA Framework. White spots are areas where there is no broadband infrastructure at all and where it is unlikely that it will be built in the near future. Thus, funding is not possible if a certain infrastructure already exists in the respective area. Therefore, the NGA Framework is usually not suitable to close the mobile network gaps.

Bavaria funding programme

To date, Bavaria is the only federal state to have an own mobile network expansion funding programme aimed at eliminating white spots. In this program, LTE or 5G technology can be used to close gaps in mobile communication networks in regions that are not developed for economic reasons. The funding program was launched on 1 December 2018 and had previously been approved by the EU Commission as an individual notification.

Funding of mobile network expansion in Hesse planned

In September 2018, it was announced in the federal state of Hesse that a subsidy program for the expansion of mobile communication networks is planned. The municipalities are to provide EUR 50 million to support the building of mobile network infrastructure. Through this funding, up to 300 new mobile communication sites shall be established.

Expansion of mobile communication networks can be subsidised and approved on the basis of individual notifications from the EU Commission

However, this subsidised expansion is only possible if there is such a funding programme in the respective federal state. What can municipalities do if they are located in a federal state where funding is provided at state level?

One possibility of granting funding outside the NGA Framework is – like in Bavaria or Hesse – to have the funding programme approved by the EU Commission as an individual case notification. This allows municipalities to have "their" funding guidelines approved. We can provide legal support for the necessary notification process.

Notice on the recovery of State aid

Michael Vetter, LL.M. (Univ. of Miami)
Lawyer
T +49 211 600 55-535
m.vetter@heuking.de

If, in the course of an in-depth assessment, the EU Commission finds that an unlawfully granted aid is incompatible with the internal market, it is obliged under Article 16 of the Procedural Regulation 2015/1589 to order the recovery of the aid by the Member State. On 23 July 2019, the Commission published an updated notice on recovery (2019/C 247/01).

General principles

The Treaty on the Functioning of the European Union ("TFEU") prevents Member States from granting financial advantages to undertakings and thereby distorting competition in the internal market. Aid must be notified to the EU Commission unless it is exempted from the notification requirement. Pending the decision on the compatibility of the aid with the internal market, the Member States are prohibited from implementing the aid measure ("prohibition of implementation"). Infringement of this prohibition leads to unlawfulness of the measure. The Member State must then stop the implementation of the aid or, if it has already been implemented, order its recovery.

The TFEU does not explicitly provide for recovery. However, this is a necessary addition to the prohibition of State aid under Art. 107 (1) TFEU and the prohibition of implementation under Art. 108 (3) TFEU as the Court of Justice already decided this in 1973 (Case 70/72, Commission/Germany).

Purpose and scope of recovery

Recovery is intended to deprive the recipient of any advantage over its competitors gained by the illegal aid. It is therefore not a sanction but merely a means of restoring a level playing field in the internal market.

Limits to recovery

The recovery requirement finds its limits in the general principles of legal certainty, the protection of legitimate expectations and the legal effect of a decision. However, these prin-

ciples are interpreted narrowly by the Union Courts so that they can rarely limit recovery. For example, an earlier decision of the EU Commission, its silence regarding a notified aid measure or its inaction in relation to a not notified aid measure does not give rise to a legitimate expectation on the part of the beneficiary that would preclude recovery. The provisions to protect confidence of German administrative law may be applicable due to the requirement of effectiveness of European law.

Implementation of a recovery decision

If the Commission concludes that the aid granted is incompatible with the common market, it adopts a recovery decision requiring the Member State concerned to withdraw the aid and to recover it within a specified period.

First, the recovery debtor is determined. As such, not only the specific aid recipient can be considered, but also the whole group of companies must be treated as a single undertaking (as an “economic unit”). The decisive factor is therefore who the beneficiary of the aid is. In the case of an asset deal, the Commission checks whether the economic continuity by the company acquiring the assets is ensured. In the case of mergers or restructuring, the Commission may require the Member State to determine the legal successor of the aid beneficiary. In the case of tax measures, it does not help a company that it has duly declared the aid or that a tax assessment has become final, but it is crucial for recovery whether a tax advantage is present that contravenes State aid law. When quantifying the recovery, the de minimis rule can be applied retroactively.

If the recipient is unable to repay the aid, it must exit the internal market by means of insolvency proceedings without legal or economic successors. The insolvency proceedings allow the distortion of competition caused by the aid to be eliminated.

Where the recovery procedure has been provisionally closed or definitively closed, the Commission may nevertheless reopen the procedure. This is particularly the case where the decisive circumstances of the case have subsequently changed.

Legal protection against recovery orders

The beneficiary of the aid may take legal action against national measures implementing a recovery decision (as well as possibly against the Commission decision itself). However, in order to minimise the risk of delay in implementing recovery, national courts may grant preliminary injunction only under the strict conditions laid down by the Court of Justice in the Sugar Factory and Atlanta cases:

- considerable doubts as to the validity of the recovery order,
- urgency of the decision to avoid serious and irreparable harm to the applicant,
- due consideration of the EU's interests by the national court, and
- consideration of comparable decisions of the EU Courts granting preliminary injunction at European level.

If a recovery decision is not implemented by the Member State, the Commission may initiate infringement proceedings.

Conclusion

The Commission's notice contains useful information and explanations. However, there is still a need for clarification on some points, e.g. the rigid time limit for implementing a recovery decision as well as the conditions for its extension, which is granted only "in exceptional circumstances", the protection of legitimate expectations or the restructuring of an insolvent aid recipient. It remains to be seen how the European courts will deal with the requirements laid down in it.

Public Financing of Infrastructure

Ursula O'Dwyer
Lawyer/Solicitor Ireland
T +32 2 646 20-00
u.odwyer@heuking.de

Although under the Treaty on the Functioning of the European Union, the European Commission has limited power regarding infrastructure policy, which remains a Member state competence, recent rulings of the ECJ regarding ports and airports have allowed it to extend its role in this area by applying the State aid rules to infrastructure financing. In 2016 in its Notice on the Notion of aid, it set out its thinking with regard to various kinds of infrastructure, covering ports, airports broadband, energy, research, railway, roads, waterways and water supply.

Three potential types of State aid beneficiaries

State aid to infrastructure can be found to exist at three different levels. Aid can be provided for the building of infrastructure (including upgrading and improving), benefitting its **developers or owners**. When aid is provided for infrastructure operation, **operators** benefit. Finally, public financing can also confer a benefit on the **end users**, who use it.

Economic or non-economic activity?

According to the general principle developed through case law, aid granted for the building of infrastructure falls within the scope of the State aid rules if it is inextricably linked to an economic activity. However, the building of infrastructure is deemed a non-economic activity if it involves the exercise of public authority (e.g. military installations, customs, air traffic control) or if it is not intended to use the infrastructure to offer goods and services on a market (e.g. roads for free use).

Assessment criteria of State aid measures

Funding, which gives an advantage to an undertaking is considered as State aid if it is imputable to the State and financed through State resources. In addition, such advantage must be selective (not available to all) and have the potential to affect competition and trade between Member States.

Distortion of competition and effect on trade

State aid rules do not apply to situations where a predominantly local catchment area is concerned and it is demonstrated that the infrastructure in question has only marginal effects. This may be the case when the infrastructure has very few users located outside the Member State concerned or when cross-border investments in the relevant market are not possible or very small.

Private investor test

State aid rules do not apply if it can be proven that the State acted as a private investor in funding the development of infrastructure (i.e. a private sector investor would have acted in the same way). In this case, the criterion of "economic advantage" is not met and State aid rules do not apply.

Differentiation for mixed use

In the case of mixed use (economic and non-economic), it must be ensured, in particular by means of separate accounting, that the State funding for non-economic activities is not used to cross-subsidise the economic activity, unless the economic activity is of such small scope that it is considered to be a purely ancillary activity. The European Commission takes the view that an ancillary activity is presumed when both types of activities require the same factors of production (e.g. research institutions renting out their equipment on an occasional basis) or when they represent common ancillary services (e.g. restaurants, car parks). It is generally assumed that such additional services do not serve to attract customers from other Member States.

Developers or Owners as State aid beneficiaries

If the measure through which the State finances the developer or owner of the infrastructure is considered as State aid because it meets the criteria explained above (Article 107(1) TFEU), it is considered to be the beneficiary whether it uses the infrastructure itself or makes it available to third-party operators.

Infrastructure operators as State aid beneficiaries

Infrastructure operators are considered to benefit from a State aid measure if they – by using the infrastructure – obtain advantages, which they would not have obtained under 'normal market conditions'. The European Commission takes the view that the economic advantage can be ruled out if the concession to operate the infrastructure is awarded at an advantageous price following a competitive procurement procedure.

End-users are considered to benefit from public funding if either of the beneficiaries covered above receives State aid or owns State resources that confer an advantage on the end-user. This prerequisite is given if the end-user is an undertaking and that the infrastructure is not made available to him under market conditions. State aid is usually ruled out if the fees paid in exchange for using the infrastructure have been determined following a competitive procurement procedure.

End-users of infrastructure as State aid beneficiaries

Recent case law tends towards giving the Commission more powers in this area. European law has shifted from the position that the development and financing of infrastructure could be considered exclusively a Member State prerogative to one whereby funding entities need to be aware of the need to comply with State aid rules if an economic use of the infrastructure is to be expected. This now appears to be the case for most kinds of infrastructure with the exception of roads.

Conclusion

Your Contact

Lawyer/Solicitor Ireland
Ursula O'Dwyer
T +32 2 646 20-00
F +32 2 646 20-40
u.odwyer@heuking.de

Lawyer/Rechtsanwältin
Christine Grau, LL.M.
T +49 69 975 61-413
F +49 69 975 61-400
c.grau@heuking.de

Lawyer/Rechtsanwalt
Michael Vetter, LL.M.
T +49 211 600 55-535
F +49 211 600 55-530
m.vetter@heuking.de

BRX Update State Aid

☐subscribe (free, without obligation, cancelable at all times)

☐unsubscribe

Fax-response to +49 211 600 55-535

E-Mail-response to: m.vetter@heuking.de

Information on how Heuking Kühn Lüer Wojtek handles your personal data, the purposes for processing your data, the legal basis for processing, and on your rights can be found at www.heuking.de.

Subscription and contact

Name: .....

.....

Email-Address: .....

.....

Address: .....

.....