

BRX Update: State aid

December 2018

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

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State aid for inland ports – an introduction

Inland ports are of significant importance for handling of freight. Most inland ports are trimodal (road, railways and waterways) and have the necessary infrastructure to handle freight coming from all over the world. Recent State aid measures address the increasing importance of inland ports and allow subsidisation predominantly for constructing infrastructure.

The current low tides of German rivers represent a problem for the inland waterways transport system and show the significance of inland ports and inland waterways for the transport and logistics handling of freight. As a surge in freight volumes is expected in the coming years, road infrastructure will not be able to handle such volume. The German Ministry of Transport and Digital Infrastructure regards inland waterways transportation as a cost-efficient mode of transport ideal to reduce freight transport on the roads.

When assessing State aid issues linked to inland ports, one should distinguish between (i) the commercial and non-commercial use of infrastructure and (ii) between the construction of infrastructure meant for commercial purposes and the operation of a port. The construction of port infrastructure and its subsequent use are assessed independently from a State aid perspective.

With regard to the construction of infrastructure in inland ports, State aid questions only arise in case an economic activity is present. An economic activity is required to fulfil the prerequisites of Article 107 (1) TFEU. If no economic activity is present, no State aid questions arise.

State funding for non-commercial infrastructure is always possible. Therefore, the infrastructure used for the exercise of public powers (e.g. traffic control, police, customs, control and security of navigation or the protection against flooding or



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Waterway transport has significant importance

Separate State aid assessment for infrastructure construction and port operation

Economic activity triggers State aid rules application

Public funding for non-commercial infrastructure does not represent State aid

erosion) is non-commercial. Also, access infrastructure (e.g. public roads, railways or channels) benefit the general public and thus can be paid for through public funds. However, this does not include access infrastructure which only serves the port or access infrastructure within the premises of the port which are used for commercial purposes. In this latter case, State aid rules might apply and a more in-depth analysis is necessary.

Where port infrastructure has both commercial and non-commercial purposes, public funding represents State aid in respect of costs attributed to the commercial use of the infrastructure since cross-subsidising commercial activities by non-commercial activities is prohibited. Therefore, it seems imperative to distinguish between the costs allotted to each category.

If there is State aid, one has to check whether the owner/developer of the port infrastructure acted like a private investor undertaking the same risks and benefits – it had a business plan developed *ex ante* that provides for a return on the investments made in a reasonable timeframe. If the state acted like a private investor in funding an infrastructure, no State aid is present.

If the private investor test is not fulfilled, public funding could still be considered compatible with TFEU State aid rules provided that it was meant “*to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*” (Art. 107 para. 3 lit. c) TFEU). Furthermore, in a [communication](#) issued by the Commission it is acknowledged that the construction of new port infrastructure and better use of the existing ports’ capacities is a key element for the future logistics of freight handling in Europe. Also this [regulation](#) indicates that further development of these ports is a goal of common interest of the EU and contributes to the development of certain economic areas as required by Art. 107 para. 3 lit. c) TFEU.

In a final step, the possible distortion of competition and effect on intra-EU trade has to be assessed in order to weigh up the consequences for competition and the importance of

Allocation of costs for commercial and non-commercial infrastructure necessary

State aid for the owner/developer

pursuing a common interest of the EU.

A port infrastructure operator benefits from public funding if he obtains an advantage that he would not have been able to receive under normal market conditions. Where the operator wins a contract based on a competitive, transparent, non-discriminatory and unconditional tender under EU procurement rules, the public funding does not represent State aid.

Where there was no tender procedure, the operator can still prove that the costs incurred in operating the infrastructure are at market level e.g. by benchmarking or a generally accepted method of assessing operating fee. However, it is more difficult to prove compatibility with State aid rules if no tender has been carried out.

Lately, the Commission has been looking more closely into the compatibility of State aid rules in the financing of infrastructure. However, one should bear in mind that the EU aims at strengthening inland ports as logistics hubs and freight handling via inland waterways as an alternative mode of transportation to decrease the road transport of freight.

State aid for the operator

Conclusion



EU State aid rules and the national courts: an opportunity for German litigators

These days more and more use is being made of the Treaty rules on State aid. The European Commission is using the State aid rules in an innovative way to take over competence from the Member States in tax regulation by challenging the selectivity of national measures or rulings, which give preferable treatment to certain taxpayers. Companies, too, are making more use of the rules to attack the unfair competitive advantages of competitors, who receive subsidies, by complaining to the Commission leading to investigation and possible repayment with interest by the subsidised party.

A complaint to the Commission is not the only option open to an aggrieved competitor. The national courts have competence in State aid matters and unlike the Commission, whose role is to enforce competition, they have a duty to uphold the rights and obligations of individuals, making them potentially a more attractive forum for redress. In the past however, German courts have consistently misapplied EU law by ruling that there is no legal basis in German law for a competitor to bring actions. Recent developments in a series of cases before German Courts and rulings by the ECJ have thankfully changed this trend and should encourage more use of the national courts by German litigators in State aid matters.

National Courts have an important role in the enforcement of the State aid rules because of the standstill obligation of Article 108 para. 3 TFEU, which provides that aid must be notified to the Commission and cannot be put into effect until the latter has taken a decision regarding its compatibility with the common market. Article 108 para. 3 TFEU has direct effect and the courts have a duty to apply it and to ensure that EU law takes primacy over national law. They can interpret whether a subsidy amounts to State aid within the meaning of the Treaty rules or whether an aid is block exempted or



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The historical reluctance of German courts to apply State aid rules has changed

The Commission's 2009 Notice on Enforcement of State aid law by the national courts provides that the court is obliged to order recovery of aid which has not been notified

falls within a pre-approved scheme; can declare aid to be unlawful and order its recovery with interest; issue an injunction preventing payment of aid; impose interim measures and award damages for breach of the standstill rule. What they cannot do is to declare State aid to be compatible with the common market because this is an exclusive competence of the Commission. In this way the national court, as a forum for the challenging party, has a certain attraction. While the Commission is obliged to make an assessment whether an aid, even if it has not been notified and has already been put into effect, is nevertheless compatible with the common market (exempted), the national court is obliged to declare such aid unlawful and may also decide to order its recovery.

In 2009, the Commission adopted a Notice on Enforcement of State aid law by the national courts, which summarises the jurisprudence and practice and set out its view on co-operation with the national courts. Some commentators have accused the Commission of interpreting the courts' role too generously, probably because the Commission would like to promote private enforcement and conserve its resources for the bigger and more important cases. For example, the Commission considers that the court is obliged to order recovery of aid, which it has declared unlawful (it has not been notified), while the Commission itself does not have this power but must first make an assessment of the aid. While the national court can take its own decision and may not stay proceedings even where the matter in question is being dealt with in parallel by the Commission, it can also ask the Commission for information or for a (non-legally binding) opinion or ask the ECJ for a preliminary ruling under Article 267 TFEU.

A study in 2006, updated in 2009, showed that private enforcement is growing and although most cases are appeals against tax measures and no court has yet ordered damages, there has been an increase in the successful actions for suspension or recovery of unlawful aid.

The study showed that in Germany, the lower courts were reluctant to apply EU law correctly and in several cases denied the rights of competitors, holding incorrectly that the aim of the standstill obligation was not the protection of the indi-

The German courts now recognise that the TFEU establishes individual rights that have to be upheld and that the German courts are obliged to provide legal protection for competitors

viduals, that there had to be a corresponding legal basis to Article 108 para. 3 TFEU in national law and that any claim by a competitor could only be brought after the Commission has taken a negative decision.

This situation has now changed. In 2011, the German Bundesgerichtshof clarified that Article 108 para. 3 TFEU establishes individual rights that have to be upheld by the German courts, which are obliged to provide legal protection for competitors, who are disadvantaged by unlawful State aid measures. It also identified Section 823 para. 2 of the German civil code as the appropriate legal basis for such action. In 2012 and 2014 the ECJ also confirmed its earlier ruling in the CELF case and ruled in two separate preliminary rulings referred by German Courts (*Flughafen Lübeck/Air Berlin* and *Deutsche Lufthansa*) that the national court may not stay proceedings where the Commission has opened a formal procedure to examine the aid in question but must either suspend the aid or impose interim measures. In 2017, the Bundesgerichtshof followed the ECJ position in a line of judgments.

We think that these recent developments have made it clearer and easier for German litigants to use the State aid rules in seeking redress against unfair competitive advantage in the market caused by illegal subsidies and expect to see many more cases come before the German courts in the future.

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Commission approves subsidies for electric buses

According to the EU Commission, the Federal Ministry of Environment (BMU) and the federal states may grant public transport companies subsidies totaling EUR 190 million until 2021 for the purchase of electric buses and charging infrastructures. The immediate action programme to modernize public transport is compatible with the EU State aid rules (Commission, decision of 26 February 2018, SA.48190 (2017/N); Commission, decision of 28 May 2018, SA.50776 (2018/N)).

The BMU intends to contribute up to 80% of the additional investment costs for approx. 600 new electric or rechargeable plug-in hybrid buses - instead of conventional diesel buses – under the "Guideline for the Promotion of the Purchase of Electric Buses in Public Transport". The buses powered by electricity from renewable sources are expected to reduce CO2 emissions by an estimated 45,000 tonnes per year. In addition, the BMU supports 40% of the additional investment costs that public transport companies incur by setting up charging infrastructures. The BMU is providing a total budget of EUR 155 million.

A special clause provided for in the immediate action programme enables the federal states to make an additional contribution of up to EUR 35 million to the program set up by the federal government. At present, approx. 36,000 buses with diesel engines are being used by public transport companies. Due to the high investment costs, only a small number of electric buses have been purchased so far, mainly for testing purposes.

The Commission regarded the subsidies as State aid within the meaning of Article 107 para. 1 TFEU. The BMU favours transport companies by exempting them pro rata from the costs which they would normally have to bear themselves.



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Federal government participates in the modernisation of public transport with emission-free electric buses

Federal states can also subsidize additional investment costs

Subsidies constitute State aid

This measure has the potential to distort the internal market, as the national transport companies in Germany are competing with those from other Member States.

The EU Commission approved the funding measure as compatible with the EU internal market pursuant to Art. 107 para. 3 lit. c) TFEU. It regarded the benefits of the non-repayable subsidies as being clearly greater than the distortions of competition caused by the aid, as the project serves the EU's environmental objectives of reducing CO2 emissions and improving air quality.

With the aim of achieving a reduction in CO2 emissions, Germany is pursuing the general interest of climate protection. The proportionate subsidy is necessary because the purchase of an electric bus is nearly twice as expensive as the purchase of a diesel bus (additional costs of approx. EUR 270,000). Further, the purchase of diesel buses with the latest EURO VI standard would not be as effective as the purchase of electric buses, since electric buses are fully emission-free. The aid is also appropriate because the BMU contributes only 80 % of the additional costs resulting from the purchase of electric buses. Hereby the BMU ensures that the aid is limited to the additional expenditure for the purpose of climate protection. Any distorting effects of the subsidy on competition would be less significant than the serious concerns of environmental protection and would be negligible.

The EU Commission's supportive position on climate protection issues should not obscure the fact that there is always a risk of recovery for recipients of subsidies and grants. Especially in the case of the purchase of electric buses, public transport companies can therefore only be advised to comply with the sometimes complex and interlinked requirements of EU state aid and public procurement law as well as the requirements of the grant notices.

This Newsletter BRX Update State aid does not constitute legal advice. While the information contained in this Newsletter has been carefully researched, it only offers a partial reflection of the law and its developments. It can be no substitute for individual advice appropriate to the facts of an individual case.

Subsidies for the purpose of CO2 reduction are compatible with internal market

Purchase-related additional expenditure for electric buses and infrastructure can be compensated proportionally

Conclusion



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