Concurrences

ANTITRUST PUBLICATIONS & EVENTS

Competition Law, Climate Change & Environmental Sustainability

Simon Holmes, Dirk Middelschulte, Martijn Snoep

Foreword by Frans Timmermans

Introduction by Suzanne Kingston

Concurrences
Antitrust Publications & Events

State Aid and Sustainability

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I. Background to EU State Aid Control

The EU is unique in having a legal system of multilateral subsidy control. There are no equivalent systems in other countries or trading blocs.[1] As a form of competition law it is idiosyncratically European and quite different from antitrust and merger control.

Unlike Articles 101 and 102 TFEU, which are addressed to undertakings, the prohibition in Article 107 is directed at Member States. The Treaty itself created no rights or obligations for undertakings in respect of state aid. It is Member States that are prohibited from granting aid that distorted the single market – not undertakings for receiving it. Indeed, until the Court of Justice judgment in *Commission v Germany* in 1973,[2] there were no legal consequences for undertakings from unlawful aid. State aid therefore was originally – and is still in large part – best understood as a system to control competition between Member States rather than between companies. Many of the procedural issues that are discussed in this paper stem from a tension between this characteristic and the ECJ's decision in 1973 to superimpose legal consequences for undertakings.

The Treaty provisions work by first defining and prohibiting state aid. The Commission is then entrusted to permit otherwise prohibited aid that it deems

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1 See Thomas Pope and Alex Stojanovic, *Beyond state aid: The future of subsidy control in the UK* (Institute for Government 2020) for discussion of subsidy control outside the EU.

2 Case 70/72 *Commission v Germany* [1973] ECR 813, [13].

compatible with the single market. The definition of state aid is a substantial topic outside the scope of this paper; however, the basic criteria are:

- an advantage not available under market conditions;
- that is granted by or through state resources;
- via a measure that is imputable to the state;
- favouring certain undertakings (selectivity);
- that threatens to distort competition within the EU; and
- affects trade between Member States.

The last two criteria have long been merged by the Court of Justice of the European Union (CJEU) and Commission and are for practical purposes irrelevant for aid sums above the Commission's *de minimis* threshold.[3,4] The other four criteria are readily established for state measures that are targeted to incentivise behaviour that companies would not undertake in normal market conditions. Given that such measures are central to government and European policy to accelerate the transition to a sustainable European economy, we can address this paper to the interventions by governments that are considered state aid.

Once a measure falls within the definition of aid, it is prohibited unless the Commission approves it. The approval process either occurs via block exemption or an individual basis following notification.

The general block exemption regulation (GBER)[5] has energy and environmental provisions that can permit smaller projects to proceed without notification, provided the terms of the GBER are complied with.[6]

For large aid projects – for example energy infrastructure projects where the aid required exceeds €50 million – individual notification is required. These are assessed on the basis of policy guidance published by the Commission. The Commission is largely free to define the policy objectives that it wishes to pursue in approving such aid. The current guidance for environmental aid is found in the « Guidelines on State aid for environmental protection and energy 2014 – 2020 »

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3 Currently €200,000 over three years – subject to a time limited increase to €800,000 under the Temporary Framework for COVID-19.

4 This became a particularly controversial feature of the UK's FTA negotiation, where the EU sought to impose its state aid rules on the UK. See for example evidence of George Peretz QC to the House of Lords EU Sub-Committee (5 March 2020): Mr Peretz noted that analysis of [this] effect on trade « takes place "at an astonishingly superficial level". The UK and EU have now agreed to a comprehensive Trade and Cooperation Agreement which contains some subsidy provisions, although these are substantively and procedurally very different from EU state aid rules and outside the scope of this paper.

5 Commission Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.

6 In 2018 around €15 billion of state aid spending for environment and energy measures was block-exempted under the GBER. Commission, "State Aid Scoreboard 2019", 38.

(EEAG),[7] which were designed to facilitate attainment of the EU's 2020 climate targets. The policy choices embedded in the EEAG and fitness for purpose in attaining the European Green Deal are discussed at the end of this paper.

This structure – a low threshold for what counts as aid together with freedom for the Commission to determine its own policy for assessing compatibility with the single market – grants the Commission direct and legally enforceable executive authority over Member States' tax and spending decisions. This is unusual and not a power the Commission has to the same extent in almost any other field of EU law, such as tax harmonisation, Eurozone governance, environmental, R&D, regional or energy policy.

The cumulative effect of significant power in respect of state aid approval, but much weaker powers in many other areas, is that the Commission uses state aid as a tool to pursue lots of different policy objectives: regional development, industrial policy, tax harmonisation, environmental and energy goals, financial stability via bank resolution and restructuring, etc. These objectives are often – but not always – consistent with each other. Moreover, even where there is no conflict, assessing consistency of (say) an environmental aid project with industrial or regional policy goals adds to the weight of the approval process in time and resources.

Across these policies, the Commission has made significant efforts to make its assessment criteria coherent – including «common assessment criteria» for aid. These criteria are with a view to:

> strengthening the internal market, promoting more effectiveness in public spending through a better contribution of State aid to the objectives of common interest, greater scrutiny of the incentive effect, … limiting the aid to the minimum necessary, and … avoiding the potential negative effects of the aid on competition and trade.[8]

These common assessment criteria themselves embed policy choices – for example greater scrutiny of incentive effect and limiting aid to the minimum necessary requires evidence and investigation and affects the design of aid measures. This adds to the time and resources required to get approval and hence delays when the aid can be delivered to the beneficiaries. The cost of this is real, as the COVID-19 crisis illustrates. We have seen €3 trillion of aid authorised since March 2020[9] with speed of approval and maintenance of economic capacity (no doubt rightly) prioritised over careful investigation of incentive effect or whether the aid is limited to the minimum necessary.

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7 [2014] OJ C200/1. Recently extended to the end of 2021 to give the Commission time to prepare revised guidelines – in particular to replace the EEAG.

8 EEAG, recital 12.

9 Commission, «Coronavirus: Commission Statement on consulting Member States on proposal to prolong and adjust State aid Temporary Framework»(Statement/20/1805, 2 October 2020).

II. European Green Deal

The European Green Deal (Green Deal) is the EU's ambitious long-term environmental strategy, launched by the Commission in December 2019. The Commission communication says the Green Deal « resets the Commission's commitment to tackling climate and environmental-related challenges that is this generation's defining task ».[10] The headline goal is to reduce greenhouse gas emissions by 55% (compared with 1990) by 2030 and to make Europe the first climate-neutral continent by 2050.[11]

Achieving this target will require an overhaul of certain industries. Most obviously, a focus of the Green Deal is supporting the transition to clean energy, as the EU's current energy profile accounts for 75% of the EU's greenhouse emissions.[12]

In 2018, 55% of total EU spend on state aid, amounting to €66.5 billion, was attributed to environmental and energy savings.[13] This was a massive increase on the previous 10 years, where of the total state aid spent on environmental protection and energy-saving measures, only around 2.4% (€8.2 billion) concerned energy-saving measures, and only 0.2% (€0.7 billion) renewable energy.

But achieving the energy transition will require a step change. The level of investment required to innovate and deploy, at speed, new and green technologies at scale will be vast. The Commission recognises that the private sector is unlikely to provide capital on this scale and will need « the catalyst of public spending to make it happen fast enough ».[14]

State aid measures can either be aimed at the demand or supply side of the energy transition. Aid measures on the supply side are typically aimed at investment or operating aid (such as via contracts for difference for renewable or nuclear energy). These measures are aimed at increasing the supply of green energy above the level the market would produce on its own. Aid measures on the demand side are aimed at increasing demand for green energy above the level the market would produce on its own. Demand-side measures do not usually target specific beneficiaries and may include tax exemptions for users of green energy or hydrogen – or compensation to energy intensive industry from carbon price floor policies.

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10 Commission, "The European Green Deal »(Communication) COM(2019) 640 final.

11 Ursula von der Leyen, « State of the Union Address »(speech at the European Parliament Plenary, 16 September 2020).

12 Commission, "Powering a climate-neutral economy: Commission sets out plans for the energy system of the future and clean hydrogen » press release (IP/20/1259, 8 July 2020).

13 State Aid Scoreboard 2019 (n 6), 4. The State aid Scoreboard 2019 also notes that average spending [by Member States] in 2018 for notified energy and environmental measures was around €354 million, due in large part to the German EEG 2014 aid scheme, while for GBER measures it was around €25.7 million.

14 Margrethe Vestager, « The Green Deal and competition policy »(Renew webinar, 22 September 2020).

Supply-side measures are more popular among Member States,[15] probably because they are politically easier to implement. Public money is being used to provoke domestic investment and hence jobs and regional development goals. As such, we should consider the extent to which state aid procedure – especially for supply-side investment or operating aid schemes – either facilitates or acts as a brake to such investments.

III. State Aid Procedural Concerns

The current state aid procedural rules are complex and fraught with pitfalls – especially for investment aid. These stem from the tension noted at the beginning of this paper, where the Treaty is directed at Member States but case law subsequently created significant legal consequences for business. Procedural issues are not specific to environmental aid, but insofar as they operate to increase investors' legal uncertainty – creating administrative and procedural friction – they risk undermining the role of state aid in achieving the EU's sustainability goals.

1. GBER v individual notification

The EU's efforts over the last decade to increase green energy and environmental aid projects have presented very differently in the two main procedural routes to aid clearance. The number of individually notified aid cases under the EEAG remained flat from 2014 – 2018 – although the aid distributed under such cases has increased significantly this is distorted by a single large scheme in Germany which accounts for almost 20% of total state aid spending in this area.[16] GBER cases increased by 116% during the same period.[17] We are seeing a flat number of individually notified cases – with larger budgets – and a growing number of GBER cases. The main difference between notified and GBER projects is scale. GBER projects are subject to the caps listed in GBER, article 4, on the amount of aid that can be paid either in the scheme as a whole or to specific beneficiaries. The large discrepancy in case numbers between environmental aid authorised under GBER and environmental aid via individually notified projects could be due to a number of factors, e.g. Member States' unwillingness to allocate budget over the GBER thresholds. However, it is also consistent with procedural disincentives for individual or scheme notification for investment aid.

15 For instance, only one carbon price floor aid scheme has been approved : *United Kingdom – Aid for indirect Carbon Price Floor costs* (SA.35449).
16 State aid Scoreboard 2019 (n 6), 38, (Figure 27).
17 State Aid Scoreboard 2019 (n 6), 38, (Figure 28).

2. Lack of speed and legal certainty

Approval timescales for individual or scheme notifications are highly variable but can be slow. For example, Hinkley Point C nuclear power station took a year from notification to approval,[18] but that excludes pre-notification, which is likely to have been significant.

Supply-side investment projects for energy transition (e.g. hydrogen infrastructure or new nuclear electricity generation) of the scale required to achieve the objectives of the Green Deal require huge long-term investments. The Green Deal objectives also imply a high degree of urgency – a year is 10% of the time available to achieve the interim goal of a 55% reduction in greenhouse gas emissions by 2030. It is imperative for private parties making such large investments that approval of a state aid component occurs quickly so as to allow final investment decisions and large capital commitments to be made. Recall that although the EU wishes to be the first climate-neutral continent, it is also the only continent with a state aid regime. The Commission has acknowledged this in a recent speech, saying that environmental measures will benefit from an increased block exemption thresholds and prioritisation once notified.[19]

Once Commission approval has been obtained, parties (and their financial backers) also require legal certainty that the state aid component of a project will not be withdrawn further down the line when the project is in operation and financing has been syndicated. Litigation before the CJEU concerning the GBER is very unusual,[20] but common for notified investment aid, especially if a project or scheme faces domestic or international political opposition or faces a competing technology. Litigation injects fresh delay and uncertainty.

A recent example is the successful action brought by Tempus Energy for the annulment of the Commission's 2014 decision not to open a formal investigation into the UK electricity capacity scheme.[21] The UK electricity capacity scheme

18 See Commission Decision on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station [2015] OJ L109/44, recital 1.

19 Margrethe Vestager, "State aid" (speech at event organised by the Berliner Gesprachskreis zum Europaischen Beihilfenrecht, 30 October 2020).

20 The author is aware of only two such examples: BMW's appeal regarding aid to its Leipzig factory in Case T – 793/13 *Bayerische Motoren Werke v Commission* EU:T:2017:599 (plus ECJ appeal); and Case C – 493/14 *Dilly's Wellnesshotel GmbH* via preliminary reference; Bruno Stromsky, "Exemption by category: The Court of Justice of the European Union confirms the mandatory nature of the conditions for exemption set by a regulation, which exempts Member States from the obligation to notify certain categories of aid, even if the violated condition is limited to a lack of express reference to this regulation by the aid scheme" *(Dilly's Wellnesshotel)*, 21 July 2016, Concurrences Nº 4-2016, Art. N° 82081, pp. 146-147.

21 Case T – 793/14 *Tempus Energy v Commission* EU:T:2018:790; Bruno Stromsky, "Proportionality: The General Court of the European Union annuls a decision not to raise any objection against a State aid scheme granted to the energy capacity market" (*Tempus Energy, Tempus Energy Technology*), 15 November 2018, Concurrences N° 1-2019, Art. N° 89299, pp. 137-140.

covers the period 2014 – 2024 and is intended to enhance energy security by subsidising plants to be on standby for generation when energy demand peaks and additional supply is required. Tempus Energy sells demand-side-response (DSR) electricity consumption management technology, and argued that the scheme, which involves remunerating electricity capacity providers in exchange for their commitment to provide electricity or to reduce or delay their electricity consumption during times of system stress, privileges generation over DSR in a discriminatory and disproportionate manner, which should have raised doubts as to its compatibility with the internal market. As a result of the General Court's judgment, the scheme was suspended in 2018.

In 2019, after a full investigation, the Commission decided that the UK scheme was compatible. Throughout this period of at least five years, companies and their financial backers had allocated capital to UK electricity capacity – without legal certainty that the subsidy scheme that underpins the investment case would be upheld.

While by no means a state aid issue specifically, the reality is that current CJEU procedure with no active case management, no summary judgment or trial of a preliminary issue, no leave requirement for appeals – together with an inability in state aid cases for the court itself to make a substantive finding on compatibility – means that investors can be left in limbo for many years as to the legal status of the aid measures on which their investment was predicated.

3. Change of political priorities

The state aid regime also injects uncertainty by giving Member States a route to change their political priorities and avoid Bilateral Investment Treaty or Energy Charter Treaty (ECT) obligations to investors under the measures of a previous government. A noteworthy example of this is the lowering of renewable energy support in Spain. In 2007, Spain introduced incentives to support electricity generation from renewable energy sources, cogeneration and waste, known as the "premium economic scheme". The incentives attracted tens of billions of euros of investment in renewable assets. However, following the Eurozone debt crisis and under pressure from the Commission and European Central Bank to reduce public spending, the Spanish government began to reduce the subsidy incentives that had attracted the investment, and in 2013 the premium economic scheme was repealed and replaced with the – significantly less generous – "specific remuneration scheme", which was approved by the Commission.[22]

When the investors sued Spain under the ECT, the Commission took the view that any arbitral award for payments expected under the prior scheme would be

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22 *Spain – Support for electricity generation from renewable energy sources, cogeneration and waste* SA.40348 [2017] OJ C442/1. The premium economic scheme was never notified to the Commission.

additional, incompatible, state aid.[23] In this way Spain was prohibited under EU law from paying any award granted to investors by the arbitral tribunal.

This is part of a wider conflict between international investment treaty protections and the Commission's approach to the EU state aid regime.[24] The Commission takes the view that insofar as arbitral awards constitute aid, they require the approval of the Commission before they can be paid. This significantly undermines the benefit of investment treaty protection and creates a risk for investors that simply does not exist in jurisdictions outside the EU.

4. Lack of procedural rights for aid beneficiaries

Added to this is the lack of any effective procedural rights for beneficiaries during the Commission procedure. The aid beneficiary has no formal right to be heard – save a right to make written comments on the opening of the formal investigation procedure. This is despite the fact that the consequences of an adverse decision fall exclusively on the aid beneficiary and can be very significant. Coupled with the legal uncertainty inherent in the EU state aid regime, this presents a significant risk to beneficiaries.

The Commission's process is also necessarily political. State aid is primarily directed at competition between Member States: the Commission must balance one Member State's interests against the whole and in doing so is empowered to control Member States' fiscal decision-making.

The political dimension can manifest itself at a micro as well as macro level within a case. For example, the Commission's approach to the treatment of evidence can vary in practice, depending on how enthusiastic the Commission is in supporting the project. The Commission has significant discretion over the weight it attributes to the evidence before it – this discretion is rarely subject to judicial supervision by the court as most appeals concern a decision not to open proceedings or the definition of aid.[25] This can allow the Commission to be selective with how it uses and attributes weight to evidence in order to find (or not find) sufficient evidence. This can also be a feature of merger investigations,

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23 *Ibid.*, recitals (159) and (165).

24 See, in particular, Commission Decision 2015/1470 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award *Micula v Romania* of 11 December 2013 [2015] OJ L232/43, in which the Commission decided that the payment of compensation pursuant to an ICSID arbitral award, which had the effect of reinstating a revoked aid regime, did constitute, in and of itself, state aid. The Commission's *Micula* decision was subsequently annulled by the General Court (joined Cases T – 624/15, T – 694/15 and T – 704/15 *European Food v Commission* EU:T:2019:423), and is now on appeal to the ECJ (Case C – 638/19 P *Commission v European Food*); Athanase Popov, "The EU General Court annuls the Commission's State aid decision on the basis that it lacked jurisdiction to implement relevant law in situation where all relevant facts have taken place before Romania's accession to the EU" *(Micula)*, 18 juin 2019, e-Competitions June 2019, Art. N° 94141.

25 The General Court's judgment in Case T – 356/15 *Austria v Commission* (Hinkley Point C) EU:T:2018:439 is a notable exception; Bruno Stromsky, "Public interest objective: The General Court of the European Union upholds a European Commission's decision authorizing an aid for the promotion of nuclear energy

but in state aid there is no disciplined timetable nor any of the internal checks and balances that are present in merger review.

It should be recalled that not all the checks and balances come from the Commission's review. Beneficiaries involved in the state aid approval process typically only receive aid for less than 50% of the total eligible cost, meaning that, notwithstanding the intrusive process, most of the risk is still with the private sector.

Conversely, the route the Commission and CJEU have taken to mitigate the uncertainty and lack of rights of defence for beneficiaries is to restrict standing for third parties seeking to challenge aid approvals. The standing rules before the Commission are tightly drawn to "interested parties"[26] – which in practice usually means competitors. Before the court it is even more difficult – especially if seeking to challenge a decision adopted after the formal investigation procedure. There it would be necessary to show *Plaumann* standing – i.e. that « persons other than those to whom a decision is addressed may only claim [standing] if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons »[27]. The way this test has been interpreted by the CJEU in a State aid context represents an almost insurmountable hurdle in most cases requiring a third party to demonstrate that its competitive position has been affected by the aid – in a different way to other competitors.[28]

The system does not serve anyone well – beneficiaries, competitors or civil society organisations seeking to challenge aid approval that may harm transition objectives.

It is also likely that these procedural issues contribute towards the relative attractiveness of the GBER compared with individual notification. One solution to this is to dramatically increase the thresholds under GBER – which would bypass the great majority of these issues. But the level of investment required to support the Green Deal cannot all be block exempted – the sums are too large and the risks of distortion too great. For larger projects – especially investment or operating aid projects – these procedural challenges will continue to act as a brake on the ability of state aid to support energy transition.

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and clarifies how the objectives of the *Euratom* treaty match together with Treaty on the Functioning of the European Union objectives" (*Austria / Commission*), 12 July 2018, Concurrences N° 4-2018, Art. N° 88249, pp. 159 – 162.

26 Article 108(2) TFEU.

27 Plaumann & Co v Commission, (1963) C-25/62 ECLI:EU:C:1963:17

28 For example, see Case T – 118/3 *Whirlpool Europe v Commission* EU:T:2016:365, [47]; Pascal Cardonnel, "State aids: The General Court of the European Union holds inadmissible the action brought by a competitor of the beneficiary of a State aid decision amended in order to comply with a prior GC ruling in its favor" *(Whirlpool Europe)*, 22 June 2016, Concurrences Nº 3-2016, Art. N° 80971, pp. 145 – 146 .

IV. State Aid – Fairness Between Member States in Tension with Environmental Effectiveness

In the last 10 years, almost 80% of total nominal state aid spending for environmental protection and energy projects has come from five Member States – the third largest of which was the UK.[29] This reflects the large differences in the fiscal strength of the Member States and gives rise to two concerns: first, cohesion issues if only wealthier Member States are able to benefit from the opportunities that energy transition represents; second, that important projects that would contribute to EU policy objectives never materialise due to the difficulties associated with cross-border projects.

This is something the Commission has tried to address in its 2014 state aid rules regarding Important Projects of Common European Interest (IPCEIs) (the IPCEI Communication).[30] The IPCEI Communication sets out criteria for projects to satisfy in order to be compatible with state aid rules. The stated aim of this is to encourage Member States to channel their public spending to large projects that make a clear contribution to economic growth, jobs and the competitiveness of Europe, in line with the Europe 2020 objectives.[31]

The ambitious targets set by the Green Deal mean such projects will increasingly be geared towards sustainable energy and environmentally friendly/green technologies. The latest project, approved under the IPCEI Communication in December 2019, was related to lithium battery technology – an important part of industrial strategy for the automotive supply chain, where the EU currently lags behind China and the US. The project involved seven Member States and up to €3.2 billion of state aid in the coming years.

However, there have only been two such IPCEI projects – partly because they are so difficult to put together. Member States have called to simplify the rules to allow for quicker approval. Political pressure has come from France and Germany, who have stated that "the IPCEI is a useful tool for financing large scale innovative projects, but it is very complex to implement and that consequently "it may be appropriate to revise the implementing conditions to ensure that the IPCEI is easier and more effective to implement".[32] However, the Commission's fitness check, published on 30 October 2020, suggests movement, if any, will be in the opposite direction, increasing the number of Member States that need to participate, requiring the participation of SMEs, and further rules

29 State Aid Scoreboard 2019 (n 6).

30 Commission, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest [2014] OJ C188/4.

31 Commission, "State aid: Commission adopts new rules to support important projects of common European interest, Press release (IP/14/673, 13 June 2014).

32 See "Franco-German manifesto for a European industrial policy fit for the 21st Century" (19 February 2019).

on aid being used to provoke relocation of activities from a country to EEA.[33] These incremental requirements all add to the investigative load of a case, requiring more time, evidence and effort to design aid schemes that comply. It will be interesting to see how quickly and effectively the green hydrogen IPCEI announced in December 2020 with 22 member States plus Norway can be implemented.[34]

Prioritising other policy objectives – such as spreading investment among the largest possible group of Member States – may not create optimal conditions to achieve the goals of the Green Deal. Difficult engineering and technical challenges may be made more so by political imperatives to see jobs and prestige divided between states – rather than allocated to where they are likely to deliver the fastest and greatest environmental dividend.

V. State Aid – Reform to the EEAG

The Commission acknowledges that changes to the EEAG and GBER are necessary and it has launched a call for contributions on what those changes should be.[35] Those changes should consider creating a hierarchy of objectives, with environmental goals placed higher than other EU policy objectives. This would be a major change for the Commission's compatibility assessment, which has not previously created an explicit hierarchy between policy objectives but has rather attempted to cohere all objectives together.

Competition policy has historically had the accepted primary goal of enhancing consumer welfare. While there is currently debate as to whether this is still appropriate, state aid has long been used as a tool to achieve a far wider range of EU policy goals – regional development, cohesion policy, industrial strategy, remedying socially unacceptable market failures etc. This is in part because state aid concerns public spending decisions and must therefore cohere with how democratic governments wish to spend their taxpayers' money; and in part because the Commission lacks tools as potent as state aid to pursue such goals. This means that a state aid measure for environmental purposes must be assessed against industrial, regional, SME development policies etc. Similarly, the Commission uses common assessment criteria to achieve a degree of coherence across its state aid policymaking. This requires evidence of incentive effect and that the aid is limited to the minimum necessary to reduce the competitive distortion created by the aid.

The EEAG guidelines reflect this balancing – and that is to be expected. It is of the essence of the Commission's role in assessing compatibility with the single

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33 Commission Staff Working Document, "Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance »(30 October 2020).

34 See <www.hydrogen4climateaction.eu/ipcei-on-hydrogen>.

35 Commission, "Competition Policy supporting the Green Deal: Call for contributions »(13 October 2020).

market. Nevertheless, there are reasons to believe that the balance is not correctly drawn. Diedrik Samsom, Chef de Cabinet to Commissioner Timmermans, has said recently that “we need to overhaul our state aid strategy as a whole, and especially its regulations for energy and environment”.[36]

Some candidate areas for this overhaul are:

Large companies

The EEAG, like state aid policy generally, favours SMEs over large enterprises. Aid intensities for large companies are lower than for small or medium sized enterprises. Evidentiary burdens placed on large enterprises are also greater. Yet large companies (those with over €50m in revenue or over 250 employees) are much more likely to be able to make investments operate at efficient scale and be able to access the capital required to make investments in energy transition.

Existing standards

The EEAG rules out any aid for complying with existing EU standards. Aid is only possible for going beyond EU standards or achieving them ahead of time. As EU standards tighten, this may be unduly restrictive – not all Member States are starting with industry that is in reality fully compliant with existing standards – and many gains could be made by permitting aid to comply with existing standards. Permitting aid to achieve compliance with EU emissions standards allows those standards to be met sooner – and thus rise faster.

Nuclear

The EEAG did not address nuclear energy at all – the deeply held differences between those supporting nuclear power and those opposed could not be reconciled in 2014. Now, however, the Hinkley Point C decision and CJEU judgments upholding it have established the basis on which state aid can be used to support nuclear, so there is no reason not to include nuclear power support in the next iteration.

Use of counterfactual for assessment of incentive effect

The EEAG, at recitals 51 and 52, requires the incentive effect of aid (i.e. that the aid *caused* the subsidised investment to proceed) to be proved against a counterfactual. Large companies must submit documentary evidence proving what they would have done without the aid. This in practice requires a financial model demonstrating an alternative – more profitable (but less green) – investment scenario. The maximum permissible aid is the delta between the eligible costs of the actual project and the counterfactual – subject to the aid intensity ceilings in EEAG Annex 1.

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36 Diedrik Samson, “Speech» (launch of WindEurope Flagship report: Wind energy and economic recovery in Europe, WindEurope, online, 16 October 2020).

This requirement can be difficult to fulfil and can result in close examination of the assumptions used to create the counterfactual as well as extensive documentary disclosure to support its robustness. The counterfactual may also be somewhat artificial where there is no meaningful alternative project, as may be the case for new technologies such as hydrogen.

The Commission has helpfully already suggested that this could be replaced by the use of a funding gap approach.[37] This would involve looking at the proposed project alone and providing aid to bridge the gap between expected cash flows and those required to justify the investment against the beneficiaries' hurdle rate. This approach creates a greater risk of overcompensation.

However – as the response to COVID-19 has shown – it is necessary in a crisis to move quickly and define your priorities. If state aid is to reach energy transition projects more quickly and in larger volumes than it has up to now, it is likely that both the procedure and substance of the Commission's review need to be reorientated to place environmental sustainability ahead of the many other policy goals that the state aid regime is currently asked to serve.

37 Commission, "Sustainable Europe Investment Plan European Green Deal Investment Plan" (Communication) COM/2020/21 final, 13.

Competition Law, Climate Change & Environmental Sustainability

Simon Holmes, Dirk Middelschulte, Martijn Snoep

Foreword by Frans Timmermans
Introduction by Suzanne Kingston

The consensus is clear - climate change is the defining challenge of our time. Meeting this challenge requires a collaborative and inclusive response from all segments of society - including private businesses. What role then for competition law and policy?

This important and timely book gathers academics, enforcers, economists, lawyers, and industry representatives to explore the applications and limitations of EU competition law in achieving environmental sustainability aims in line with the European Commission's Green Deal as well as the UN's Sustainable Development Goals. They identify the challenges of integrating environmental considerations into competition analysis presented by the existing framework, whether through cooperation by businesses, practices by dominant companies, or consideration of sustainability efficiencies in merger assessments. Practical examples across various sectors are also provided, alongside agency views from different jurisdictions, to illustrate how competition policy can faciliate a sustainable economy.

Simon Holmes is Visiting Professor at Oxford University & Member of the UK Competition Appeal Tribunal.

Dirk Middelschulte is Global General Counsel Competition at Unilever.

Martijn Snoep is Chair of the Netherlands Authority for Consumers and Markets (ACM).

” *This is an excellent collection of essays by experts and deep-thinkers, into whether and how to receive sustainability into competition law and policy.* “

Eleanor Fox, Professor, New York University

” *This innovative book provides rich inspiration for policymakers when defining the important role of competition law in achieving a more sustainable economy.* “

Alan Jope, CEO, Unilever

” *The book is superbly structured and will be indispensable for anyone wishing to engage with this most important of subjects.* “

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