



State aid enforcement in the European Union

with some aspects relevant for the
Energy Community region

Péter Staviczky
Attache responsible for State aid
Permanent Representation of Hungary to the EU

The aim of State aid law

- ▶ State aid law is part of the EU competition law - EU competence!
- ▶ Main objective is to preserve the normal market conditions, does not allow for States to distort markets
- ▶ Helps to maintain and develop the internal market (four freedoms)

The aim of State aid law

- ▶ Limits national spending and prevents subsidy race among member states of the EU
- ▶ State aid - important mean of the industrial and economic policy, can foster economic growth and employment, prevents „bad spending“ with defining „good aid“ (compatible aid)
- ▶ Aid is always an exemption, main rule: aid is incompatible with the internal market

The notion of State aid

- ▶ State measures constitute State aid if:
 1. granted by a Member State or through State resources (in any form whatsoever)
 2. favours (advantage)
 3. certain undertakings or the production of certain goods
 4. distorts or threatens to distort competition
 5. affects trade between Member States
- ▶ Cumulative criteria!
- ▶ In any form whatsoever - effect-based approach

Relation of State aid and the Energy Community Treaty

- ▶ The Energy Community Treaty in its Article 18 considers as *acquis communautaire* the general principles of EU competition law as well as the relevant Articles of the EC-Treaty (now TFEU)
 - State aid law is part of the EU competition law, TFEU 107-109
 - Thus, EU State aid law is part of the ECT acquis
 - Contracting Parties of the ECT undertook to comply with State aid law even not being EU members

Application of State aid law

- ▶ This is a significant limitation of sovereignty, also for ECT contracting parties (with sectoral focus under the ECT)
- ▶ Beside material (like EEAG) and procedural rules it requires an independent authority to check compliance
- ▶ In the EU this is the EU Commission
 - ▶ Dialogue between the MS and the Commission
 - ▶ + third parties, like complainants
 - ▶ Member States have different institutional set up to ensure compliance, and communicate
 - ▶ Usually national State aid authorities are part of the government

State aid law for the ECT Member States

- ▶ State aid law is not binding only through the ECT
- ▶ Stabilization and Association Agreements between the EU and candidate countries also contain a chapter on competition (including State aid) law, mirrors TFEU 107
 - ▶ The Commission DG's monitor
 - ▶ The national legal framework (updates)
 - ▶ Compliance
 - ▶ Administrative capacity and capability
 - ▶ Active dialogue with the candidate State, reports, trainings
 - ▶ Opening and closing of „chapters“, Act of Accession with transitional rules, exemptions

Application of State aid law in practice

- ▶ 2012-2014 State aid modernization
 - ▶ The prior notification is still the basic rule, standstill clause
 - ▶ Compatibility is assessed and established by the Commission
 - ▶ BUT! 97% of the new decisions (schemes, ad hoc aid) is granted without notification
 - ▶ MSs apply the General Block Exemption Regulation (GBER), notification is only for the minority of cases
 - ▶ Bigger responsibility and legal risks for 10 years

Application of State aid law in practice

- ▶ Under the 2014 EEAG the most common decisions are, nuclear is not under the scope
 - ▶ Energy infrastructure development
 - ▶ Aid for energy generation from renewable energy sources
 - ▶ Conversion of fossil plants to renewable-based
 - ▶ Capacity mechanisms
 - ▶ ETS schemes
 - ▶ CHP development
 - ▶ E-mobility
 - ▶ Environmental tax exemptions
 - ▶ Biofuels

Enforcement of State aid rules 1.

- ▶ **Incompatibility** no compliance with the rules and **illegality** - breaching the standstill clause, procedural infringement
- ▶ **Commission** is the main guardian of the TFEU
- ▶ Commission decisions are subject to EU court supervision
 - ▶ Full review as regards the existence of aid
 - ▶ Limited review as regards the compatibility assessment, wide COM margin of appreciation
- ▶ But **national courts** have their fair share for illegal aid, more cases are expected concerning the application of the directly applicable GBER (direct applicability of the standstill)

Enforcement of State aid rules 2.

- ▶ State aid procedure ensures that no incompatible aid is granted
- ▶ However, MS can grant aid in bad faith, without knowing it, believing they are compliant, etc.
- ▶ Commission usually orders the recovery of illegally granted incompatible aid
 - ▶ Two stage procedure: preliminary and formal investigation
 - ▶ Recovery only after formal investigation (2 years long procedure min.)

Enforcement of State aid rules 3.

- ▶ Recovery: ensures the in integrum restitutio
 - ▶ It is the beneficiary who bears the financial consequences at first hand
 - ▶ Legitimate expectations rarely accepted
- ▶ Recovery is not a sanction but the logical consequence of the incompatible and illegal aid
- ▶ Recovery has to be done under national law, basis for difficulties
- ▶ Case law is defining some important aspects

Enforcement of State aid rules 4.

- ▶ Recovery to be done within deadlines set by the COM (usually 2+2 months)
- ▶ Loyal cooperation obligation - delays are accepted if the general procedure is on track
- ▶ Daily interest rate applied from the time of granting
- ▶ The state has to claim the incompatible aid in bankruptcy and liquidation procedures
- ▶ Recovery from indirect beneficiaries

Enforcement of State aid rules 5.

- ▶ If no compliance from the Member State
 - ▶ 1st procedure: COM initiates infringement procedure at Court, if no effective recovery is carried out to establish the breach of EU law
 - ▶ After the judgment the MS can still recover the amount (interest)
 - ▶ 2nd procedure: If no effective steps taken, COM turns to Court for the second time
 - ▶ Second Judgment: penalty, lump sum and daily fine (GR, IT, ES) to be paid into the EU budget
 - ▶ This time national budget is also bearing the consequence of the non compliance
 - ▶ Long procedure

Enforcement of State aid rules 6.

- ▶ Specific recovery unit established in DG COMP
- ▶ Systematic follow up of cases
- ▶ Reacting more quickly in case of failures
- ▶ Still to be recovered fell from 75% at the end of 2004 to around 51% at the end of 2014.
- ▶ In 2014, the Commission adopted 17 new recovery decisions and ensured the recovery of about EUR 300 million by the Member States
- ▶ 59 pending cases, in 17 MS end 2014
- ▶ € 9.6 billion € of illegal and incompatible aid recovered since 2004
- ▶ Apple case (2016): 13 bn € + interest to be recovered

Enforcement in the ETC

- ▶ As in other international treaties: dispute settlement
- ▶ Active involvement of the Secretariat, can also start procedures
- ▶ Ministerial Council decides about breach of the obligations under the ECT
- ▶ Decisions can be revoked, once the necessary steps are taken
- ▶ Sanctions?

Enforcement in the ETC

What is different?

EU State aid law

- ▶ COM tries to be (seen) as functional, Council of the EU is not involved
- ▶ Court supervision with two instances
- ▶ Once the COM decides it is final, if there is no appeal
- ▶ Financial consequences on the beneficiary and later on the Member State

ETC

- ▶ Political decision making
- ▶ No court supervision
- ▶ Decisions can be revoked, if compliance is met
- ▶ Political pressure to comply

Closing remarks

- ▶ Good knowledge of State aid law is a must
- ▶ Politics can overwrite / lead to flexible interpretation of legal considerations
- ▶ Formal and informal contacts with the Commission / ECT Secretariat is important when State aid questions are discussed / compliance with the rules is questioned