BRUSSELS À JOUR

State Aid and the Green Deal – A Green Light for Sustainable State Aid?

Part Two of our Series on Competition Policy and the Green Deal

Markus Röhrig, Joachim Burger and Malcolm Tiffin-Richards report on the latest developments from the European capital of competition law.

In the second instalment of our four part series on EU competition law and sustainability, we look into what State aid policy can bring to the table to achieve the ambitious goals set out in the Green Deal. To meet the challenges ahead, not only the EU itself, but also Member States are called upon to actively promote the transformation into a modern, sustainable economy. But are Member States limited by State aid rules when supporting private sector investments in environmental protection? What is the relevance of the Green Deal in the application of State aid policy?

The recent vindication of Germany's plans to promote the early phase-out of coal power plants as part of the *Energiewende* by the Commission underlines the importance of the Green Deal in State aid. The Commission found that the proposed German compensation mechanism to incentivise the early phase out of coal-fired plants via competitive tenders is compatible with EU State aid rules, explicitly mentioning that the mechanism is *"in line with the European Green Deal Objectives"*.[1] If the role of sustainability objectives in State aid was ever in doubt, the introduction of the objectives of the Green Deal to the Commission's decisional practice would allay these.

Going forward, one senses State aid policy will be presented as a cornerstone rather than merely a supporting pillar of the Green Deal.[2] As part of delivering on the promise of making the EU carbon neutral by 2050, the Commission has identified State aid policy as *"crucial to achieve the transformation to a climate-neutral economy"*, next to other measures such as carbon tariffs, and substantial EU-investments.[3]

1 Press release to Case SA.58181 (not yet published), available under https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2208.

2 See Executive Vice President Vestager, Speech of 22 September 2020, The Green Deal and Competition Policy, available under https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en.

3 Communication by the European Commission titled "Sustainable Europe Investment plan", COM(2020) 21 final, Section 4.3.

However, State aid rules and environmental protection are no strangers. The current legal framework is already comparatively developed, comprising the EU's Guidelines on State aid for environmental protection and energy 2014 – 2020 ("**EEAG**") and corresponding General block exemption Regulation ("**GBER**") rules (Articles 36 to 49). Under this framework, Member States can only compensate additional costs intrinsically linked to a "green" element of projects,[4] smaller investment and operating aids can be exempted under the GBER; and specific categories of environmental aid (e.g. energy from renewable sources) can be approved (Sections 3.3 to 3.11 of EEAG). The Commission assesses such aid under a detailed balancing test, analysing whether any positive impact of such aid towards a defined objective of common interest (for each aid category in Section 3.3 to 3.11 EEAG) exists and if this exceeds potential negative effects on trade and competition.[5]

However, doubts have been raised whether the current framework is up to the task to enable the EU's ambitious climate neutrality goals. In its recently published evaluation results of existing State aid rules (**"fitness check"**), the Commission arrived at the conclusion that EEAG and corresponding GBER rules have *"generally delivered on their objectives"*.[6] Nonetheless, the Commission identified several shortcomings and challenges. Overall, the Commission views the existing rules as not *"entirely suited to face the climate neutrality challenge"*.[7] Particular concerns exist whether the focus of the EEAG on specific aid categories is "too tight" and is not flexible enough to cater for recent and expected technological and market developments and novel State aid designs.[8]

Against this backdrop, 2021 may be a big year for EU State aid law reform. The EEAG will expire by the end of 2021 and is therefore to be revised. The Commission has called for further contributions by stakeholders on how to amend or revise the EEAG and corresponding GBER rules.[9] Without prejudging the outcome of the consultation processes, first remarks by the Commission provide an indication of what such reforms might entail. The Commission has foreshadowed the introduction of a "green bonus" and "green malus" system to stimulate sustainable investments, as part of a carrot-and-stick approach:

— **Green Bonus:** Allowing more State aid or State aid to be afforded on easier terms for projects providing environmentally beneficial effects than for comparable projects which do not bring the same benefits.

— **Green Malus:** State aid for projects entailing negative environmental impact may lead to the Commission refusing its approval.

It remains to be seen how the Commission intends to implement such a green bonus-malus system in practice. Two basic methods come to mind. Firstly, the Commission could take a very granular approach with clear-cut exemptions from State aid control and/or to raising the aid intensity to enable higher support if certain pro-environmental effects exist (green bonus). Further, the Commission could also define explicit prohibitive

4 EEAG, para. 73; GBER, Article 36 (5).

5 EEAG, para. 26 and paras. 30 et seqq.

6 Commission Staff Working Document, Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, SWD(2020) 257 final, Section 6.28.

7 Ibid, Section 6.28.

8 Ibid, Section 6.28.

9 See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12616-Revision-of-the-Energy-and-Environmental-Aid-Guidelines-EEAG-/public-consultation.

provisions or cap the State aid (by lowering the aid intensity in such cases for instance) at a certain amount in case of negative environmental impacts (green malus).

Secondly, the Commission could also adopt a more flexible approach in form of a refined balancing test to reflect a green bonus system. Under this method, the Commission could define contributions to a common objective more broadly (in form of a green bonus concept for pro-environmental effects), which in a balancing-exercise could outweigh potential negative effects of the State aid. A similar approach has been adopted in the recent approval decision of Germany's coal phase out mechanism under Article 107 (3) (c) TFEU, with the Commission concluding *"that the contribution to EU environmental and climate goals of the measure outweighs any potential distortion of competition and trade brought about by the support"*.[10] In light of the Commission's concerns that the current framework may be too tightly focused on specific aid categories, a more flexible approach seems to be the preferred choice.

In our next newsletter in this series we will explore in greater detail the interplay between the sustainability goals of the European Green Deal and antitrust. Until then please feel free to browse our previous editions of Brussels à Jour under www.hengeler.com/en/brussels-a-jour-newsletter

State aid without a green element for projects with an inherent negative environmental impact would not by itself fall within the scope of the current EEAG framework. In order to provide a comprehensive framework under one roof, the Commission might therefore also consider broadening the scope of the EEAG to any aid with (direct) environmental impacts. In this respect, the EEAG so far only touches the surface by simply stating that it should *"consider negative impacts of environmentally harmful subsidies"*.[11] Building on this, a refined balancing test could therefore not only strengthen the importance of pro-environmental effects and facilitate investments, but also enable the Commission to factor in negative environmental impacts into its assessment (e.g. when assessing State subsidies for the winding-down of climate-damaging coal-fired power plants).

The debate on the Green Deal and competition policy has kicked off in earnest and it is already apparent that the Commission is not shying away from putting the instruments at its disposal to best use. State aid will play its part - time will tell on what scale.

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10 Press release to Case SA.58181 (not yet published), available under https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2208.

11 EEAG, para 6.