SQUIRE PATTON BOGGS

Five Minutes On...

EU State Aid Law

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The European Union (EU) State aid rules have received much attention recently in the context of the tax probes into Apple, Google and other multinationals. They are as old as the European Union but typically stand in the shadow of the other competition rules that apply directly to companies. Nonetheless, and leaving aside the major cases, the unique EU State aid rules impact every business dealing with a Member State of the EU – be it as an investor, a taxpayer, a licensee, the private partner in a public-private partnership or as a supplier, customer or competitor of a State-owned entity. Below, we capture the basic concepts and key implications for day-to-day business.

The Motivation Behind the State Aid Rules

At its roots, the State aid regime is designed to ensure that companies can compete on equal terms and on a level playing field throughout Europe by limiting the support that Member States can provide to national champions. As such, it is a central pillar of the creation of a Single Market in the EU, the aim of which is to enable the unrestricted trade in goods and services between and within all EU Member States. Any financial assistance from the State which gives an advantage to one company or industry in a particular country restricts the ability of other companies to trade, particularly in other countries because it puts them at a disadvantage when competing with the recipient of State aid.

State aid law is, therefore, very much specific to the EU and the Single Market project. Unlike other aspects of competition law, such as merger control and antitrust, it has few parallels with other legal systems elsewhere.

What Amounts to State Aid?

The key provisions of EU State aid law are found in Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). They are considered to form part of the competition/antitrust rules of the EU even though they are directed at the EU Member States and not at individual companies.

State aid is defined as follows:

Any State measure …	State aid can be granted "in any form whatsoever", including grants, capital injections, loans at below-market interest rates, tax advantages, reductions of social security contributions, purchases of goods and services at above-market prices, sales of land at below-market prices, etc.
… that grants a selective advantage that distorts competition …	State aid law does not apply to general measures, i.e., measures that benefit all undertakings in a Member State without any distinction being made between them. Any selective measure is likely to be considered to distort competition with companies that do not benefit from the selective advantage. (In the Apple case, the allegation is not based on the very low Irish corporate tax rate of 12.5%; it is based on the allegation that Apple's Irish subsidiary received an advantage that was not open to other Irish companies.)
… and affects trade between Member States.	This criterion is very broadly interpreted – support for a local swimming pool for instance (but not support for an amusement park that attracts many tourists from other States).

"I want my money back": In the typical case, the interests of the Member State and the beneficiary are aligned: both jointly defend their arrangement against the Commission. But remember: the monies recovered go back to the Member State. It is tempting for, say, a new government that is unhappy about how an investment entered into by its predecessor turned out, to "turn themselves in" at the Commission in the hope and belief that the Commission will undo the deal. We have first-hand experience with two of these cases involving very significant amounts. (In the Apple case, there are some in Ireland claiming that the country should not appeal the Commission decision but instead use the €13 billion from Apple to pay off its deficit.)

The State as a Commercial Player

The qualification of a measure as State aid or not is most complicated in situations where the State acts commercially, for instance, as an investor or as purchaser of services. In assessing whether or not measures involve a "selective advantage", the Commission and the courts apply the so-called "Market Economy Investor Principle". The rationale underlying the MEIP is that no advantage is granted if the State behaves in the same way as a private operator would in the market; e.g., if a private market investor would apply the same terms and conditions as the State did, no advantage within the meaning of Article 107 TFEU is conferred and therefore no State aid is granted.

Is State Aid, per se, Illegal?

No. There are numerous Commission notices and guidelines setting out the criteria under which State aid is permitted as compatible with the TFEU. This includes regional aid granted in the poorer regions of the EU, rescue and restructuring aid for companies in distress, environmental aid, research and development aid, aid to support cultural heritage, etc.

If a Member State wishes to grant State aid, it must either (i) fall within a pre-approved set of rules – so-called block exemptions, or (ii) receive prior authorization from the European Commission. However, failure to comply with the notification requirement does not automatically lead to an order of recovery. (Note, however, there can be provisional measures, including provisional recovery.) Recovery will only be ordered if the aid measure does not meet any of the substantive requirements for regional aid, environmental aid, etc.

What Are the EU Commission's Enforcement Powers?

The Commission is under a legal obligation to order recovery of unlawful aid that is deemed incompatible with the common market. Recovery decisions are directed at the Member State that has granted the unlawful aid, which itself is under an obligation to recover the aid from the beneficiary. There are many cases where the Commission has taken Member States to court for failing to implement recovery orders. The Commission does not have the power to prosecute the beneficiary – who, after all, did nothing wrong. It is the Member State that has infringed its obligations under the TFEU.

For instance, the recent Apple decision is technically a decision finding that Ireland has infringed its obligations under the Treaty, and is, therefore, obliged to recover the alleged unlawful aid from Apple. Apple must repay Ireland, not the EU Commission. Technically, Apple is only a third party to the procedure (although, beneficiaries can challenge a recovery decision before the EU Courts and Apple almost certainly will).

The Commission has adopted 254 recovery decisions since 1999. Of those, 95 cases are still open because either Court procedures are still pending or the Member States have not fully recovered the aid. More statistics can be found at http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html#main.

When Does State Aid Law Become Relevant in the Normal Course of Business?

- In an M&A deal: Has the target ever received investments or grants from the State that as a buyer I might have to pay back?
- When entering into a transaction with a Member State or a company controlled by a Member State: Is the State acting like a private creditor, or am I getting preferential treatment?
- When buying State-owned land or assets that are privatized: Is the State receiving market value, or am I getting a special deal?
- When competing with a company controlled by an EU Member State: Does my competitor benefit from favorable treatment, such as loans or guarantees at discount prices?
- And, finally, when setting up my tax structure or my internal transfer pricing guidelines: Is there a risk of future repayment of taxes?

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