

# STATE AID IN PLANNING AND CPO CASES

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# State aid: What? Why? How?



- **What?** Financial assistance (direct or indirect) provided by Government to businesses that meets all the criteria in Art. 107(1) of the TFEU (ex 87);
- **Why?** Should you care that is ...
  - (1) State aid concerned with regulation and lawfulness of actions of public bodies, inc. those responsible for planning, CPO etc;
  - (2) Potentially a very wide scope of application – as the BIS State aid Guide says there are some “*surprising examples*” of things regarded as State aid;
  - (3) Directly effective EU rules giving rise to obligations enforceable in UK Courts – & draconian remedies;
  - (4) A low *de minimis* threshold for State aid;
- **How?** not need to know these highly complex rules inside out; but need to know how to spot a potential State aid issue.

# State aid ... in the news



- 18 December 2013: Commission announce decision to open State aid investigation into proposed Hinckley C investment contract <http://www.bbc.co.uk/news/business-25431160>;
- 31 December 2013: Commission investigate a deal allowing Swansea City FC and the Ospreys rugby club to play at the Liberty Stadium <http://www.bbc.co.uk/news/uk-wales-south-west-wales-25559959> and <http://www.bbc.co.uk/news/uk-wales-south-west-wales-25733929>;
- 8 January 2014: Commission announce investigation into Celtic FC on land deals with Glasgow <http://www.bbc.co.uk/news/uk-scotland-glasgow-west-25658184>;
- 17 January 2014: Brussels will investigate the UK's plans for incentivising shale gas production if needed <http://www.euractiv.com/energy/state-aid-row-engulfs-uk-shale-g-news-532827>
- 25 February 2014 Commission investigation into whether the UK breached state aid rules when it guaranteed a GBP 75 million loan to a Drax power station <http://www.ft.com/cms/s/0/b0f86b7a-9cbc-11e3-9360-00144feab7de.html>

# State aid - structure



- Treaty Provisions:
  - Arts. 107 and 108 TFEU;
- Secondary legislation (many Regulations);
- Guidance documents from Commission (numerous);
- Commission decisional practice: on notifications and complaints: 1000s of these – not always coherent and consistent – and not bound by earlier decisions (!) ...
- General Court and CJEU decisions
- State Aid Modernization 2012+

# Structure (1)

- (1) What is “State aid”? Art. 107(1) - the key criteria.
- (2) When is a State aid *not* a State aid:
  - *De Minimis* State aid;
  - Measures justified by the nature or scheme of the system
- (3) Compatible State aids
  - Art. 107(2)
  - Art. 107 (3)
    - General Block Exemption Regulations (“GBER”)
    - Commission Guidance

## Structure (2)



- Some specific issues, relevant to planning:
  - Sale of public owned land;
  - The grant of planning permission (inc. s. 106 and CIL);
  - CPO procedures and issues;
  - Environmental protection;
  - Infrastructure;
  - Social housing obligations.

# What is a State aid ? The key criteria



- Art. 107 lays down several criteria:
  - (1) there must be an “*aid*” in the sense of an economic advantage;
  - (2) it must be granted directly or indirectly through state resources (government at any level);
  - (3) it must confer an advantage on the recipient by favouring certain undertakings or the production of goods (“selectivity”);
  - (4) it must be liable to distort competition and affect trade between Member States.
- Looking at each (briefly) in turn:

# What is a State aid?

## Criterion (1) “Aid”; economic advantage



- Art. 107(1) “*any aid*”
- Examples:
  - State provision of goods or services on preferential terms;
  - Preferential loans;
  - Guarantees;
  - Indemnities;
  - Tax exemptions;
  - Waiver of sums due;
  - Sale of public land at an undervalue.
- Also:
  - Infrastructure provision (if constructed or managed by private undertakings or dedicated to the use of particular undertakings);
  - Some environmental schemes: e.g. Emissions trading schemes; Feed-in-tariffs etc.



# What is a State aid?

## Criterion (1) “Aid”; economic advantage cont.



- Private Investor (often referred to as the Market Economy Investor Principle, “MEIP”) *and* Private Creditor tests
- In short where the state acts on terms which would be acceptable to a commercial actor; no State aid under Art. 107(1)
  - Could the advantage (e.g. a loan) have been received on such terms in the normal course of business?
  - Can look at long term (not just short term) profitability
  - Need not be evidence of actual private investor in comparable circumstances but it helps ...

# What is a State aid?

## Criterion (2) through state resources

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- Art. 107(1) “*any aid granted by a Member State or through State resources in any form whatsoever*”;
- Includes aid granted by central, regional or local government: see Case 76/76 ***Steinike and Weinlig v Germany*** [1977] ECR 595;
- Includes aid granted by companies and agencies established by the state to distribute public funds

# What is a State aid?

## Criterion (3) Selectivity



- Art. 107(1) “*favouring certain undertakings or the production of certain goods*”
- (1) “Undertakings”:
  - Wide; all entities engaged in economic activity (putting goods, services on market); covers self-employed professionals;
  - Can include non profit bodies, charities, universities etc if offering goods and services on the market;
  - Includes “public undertakings” if public authority involved in commercial activity;
  - Does not apply to individuals; private households or employees.

# What is a State aid?

## Criterion (3) Selectivity cont.

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- (2) Selectivity:
  - A benefit to all businesses is not State aid but a general measure;
  - Must favour some undertakings (or goods) over others e.g. on geographical, sectoral or type of firm basis;

# What is a State aid?

## Criterion (4) – Part I competition



- Liable to distort competition:
  - Potential to distort is sufficient for test to be met;
  - There is no necessity to show actual effects;
  - Small amounts of aid seen as threatening distortion; does not need to be substantial or significant distortion;
  - Commission interprets this very widely;
  - View appears to be almost any intervention in the economy by the state has potential to distort.

# What is a State aid?

## Criterion (4) – Part II inter-state trade



- Art. 107(1) “*in so far as it affects trade between Member States*”;
  - Widely interpreted, most goods and services are seen as tradeable;
    - Sufficient if product or service is *capable* of inter- state trade
    - Even if beneficiary of aid does not export, or exports only outside the EU
  - The **Altmark** case; “ ... [n]o threshold or percentage below which it may be considered that trade between Member States is not affected”
    - Subsidy for local bus service in Germany affects inter-state trade;
    - Why? May keep operator in business, and so provide operators in other Member States with less chance of providing service instead

## When is a State aid not a state aid: (1) *De Minimis* State aid

- Commission Regulation (EC) No 1407/2013 of 18 December 2013:
  - €200,000 per undertaking over a rolling 3 year period;
  - subsidised loans of up to €1 million if certain conditions are met;
  - Different rules for some sectors (e.g. road haulage);
  - SGEI *de minimis* Regulation 2012: aid to undertakings providing *services of general economic interest* - up to €500,000 per undertaking over a rolling 3 year period: What is SGEI?
    - SGEI (Article 106(2) TFEU; and see also the Art. 106(2) Decision and Framework);
    - “*economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. Examples are transport networks, postal services and social services*”
  - If within *De Minimis* Regulation, deemed not a State aid at all under Art. 107(1) and so exempt from notification.

## When is a State aid not a state aid: (2) *Measures justified by the nature or scheme of the system*

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- Something otherwise meeting Art. 107(1) criteria;
- Outside State aid *if* advantage conferred justified by “*the nature or general scheme*” of the system in question; other cases refer to justification from “*nature or structure*” or the “*logic*” of the relevant system;
- Court developed concept: see e.g. Case 173/73 ***Italy v Commission*** [1974] ECR 709, para. 15;
- Burden on Member State; must be proportionate also;
- Case C-279/08 P ***Commission v Netherlands*** - General Court rules Dutch NO<sub>2</sub> emissions trading scheme for large industrial facilities so justified, CJEU disagreed.



# Compatible aids: Art. 107 (2) and (3)



- Art. 107(2) “*shall be compatible with the internal market*”
  - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
  - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- Art. 107(3) “*may be considered to be compatible with the internal market*” (emphasis added):
  - (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
  - (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
  - (c) aid 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;
  - (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
  - (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission

## Compatible aids: Art. 107(3)

- Confers a discretion on Commission to approve State aid via:
  - (i) Block exemptions; or
  - (ii) Outside block exemption on case-by-case basis.
- **(1) BLOCK EXEMPTIONS** under s. 107(3):
  - Most important: the General Block Exemption Regulation (“GBER”)(2008)
  - If covered by block exemption: no need for notification; GBER: a number of block exemptions: including environmental;
  - Current GBER in force until June 2014 (extended);
  - GBER under review; consultation – new GBER anticipated for 2014
  - GBER covers some forms of environmental aid;

# Art 107(3) cont.



- (2) **OTHER CASES (outside block exemption):**
  - Require notification and assessment
  - Case by case decision/balancing exercise either for individual aid *or* a scheme of aid;
  - But many Commission Guides, even if meet guidance must notify and be approved see e.g. Environmental Protection 2008/C 82/01;
- Example of approved scheme: State aid No. N 356/2006 – United Kingdom Historic Environment Regeneration Scheme
  - aims at promoting heritage conservation;
  - the authorities charged with the implementation of the scheme include: English Partnerships, Local Government Offices in England
  - eligible objects are ancient scheduled monuments, registered historic parks and gardens, listed historic buildings and designated, conservation areas
  - The aid takes form of a direct grant for the repair, restoration and rehabilitation of an eligible object of up 100% of the eligible costs
  - Currently runs to June 2014 (been extended).

# State aid Procedures: The Commission (1)



- Summary: key points
  - (1) State aids within Art. 107(1) must be notified to the Commission
    - If outside Art. 107(1); no need to notify;
    - If *de minimis* or subject or GBER no need to notify;
    - If aid granted under an aid scheme already authorised by the Commission no need to notify;
    - But obligation does apply if compatible with internal market under Arts. 107(2) or (3) but not under GBER/already authorised;
    - Slow process; if no response 2 months deemed approved; but BIS say can take 6 – 9 months;
    - **A State aid that is not notified is automatically unlawful;**

# State aid Procedures: The Commission (2)



- (2) Complaints/investigations
  - Initial process; Commission write to the UK and seek views – interested parties limited rights;
  - Can reach preliminary conclusion not a State aid under Art. 107(1) and close the case; not binding can re-open; can take a year
  - Can institute formal investigation under Art. 108(2);
  - Length of investigation; no mandatory period but Procedural Regulation says indicative period - 18 months;
  - Focus of procedure on Member State; interested parties more limited rights;
  - Decision; if unlawful State aid can order recovery plus interest;
  - Can be challenged in the General Court; with appeal to CJEU.

# State aid: domestic challenges (1)



- (1) Judicial Review (or similar) of decisions on basis decision involves unlawful State aid;
  - Limited examples, but increasing
    - NON-PLANNING/CPO:
      - *R v AG, ex p ICI* [1985] 1 CMLR 588 and [1987] 1 CMLR 72 and *R v Commissioners of Customs & Excise, ex p Lunn Poly* [1988] EuLR 438 and [1999] EuLR 653 (tax cases);
      - Tottenham JR of Olympic Park Legacy Company's acceptance of the West Ham Bid for Olympic Stadium (withdrawn following grant of permission); and in September 2013 Leyton Orient failed in a similar challenge

# State aid: domestic challenges (2)



- **PLANNING/CPO:**
  - *Winchester* - not proceeding; challenge under ALA 1981 to Silver Hill CPO – see below;
  - *Bow Street Mall Ltd & Ors* [2006] NIQB 28 (NI, HC) challenge to grants of PP for Sprucefield Shopping Centre – see below;
  - *HFD Construction Limited v Aberdeen City Council* [2013] CSOH 125 (Sc. JR of decision on preferred bidder for redevelopment)
  - *Brown v Carlisle (No. 2)* (forthcoming)
- **(2) Actions for recovery of unlawful State aid;**
- **(3) Damages actions for losses caused by grant of unlawful State aid;**

# Specific Issues: Sale of Land



- Sale of publicly owned land at an undervalue can be a State aid;
- Communication on State aid elements in sales of land and buildings by public authorities C209/3
- 2 alternative conditions which if satisfied mean Commission will not treat as a State aid;
  - (1) A sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid;
  - (2) Independent valuation – market value.
- If best value; no State aid
- If consent to dispose at undervalue (s. 123 LGA 1972) or if dispose under General Disposal Consent 2003 where difference £2,000,000 or less a potential State aid issue;
- See Circular 06/03 paras. 14 – 16 ... Helpful?



# Specific Issues:

## The grant of planning permission (inc. S. 106 and CIL) (1)



- BIS Guide:
  - “*Land and property development/regeneration. There is no formal Commission framework as such for land and property regeneration, but there are several schemes in the UK which have either received Commission State aid approval, or which the Commission confirmed as not involving Article 107(1) State aid*”.
- (1) Grant of planning permission itself: no, see **Bow Street Mall** (above) - no transfer of resources from state; and see **Brown v Carlisle (No. 2)** (forthcoming; enabling development case);
- (2) Accepting less by way of s. 106 contributions than the scheme would otherwise require, because not viable and overall planning balance favours grant of planning permission: I think not -
  - Not a tax; must be agreed;
  - Part of overall planning balance; decision in “public interest”;
  - Viability a material planning consideration;

## Specific Issues: The grant of planning permission (inc. S. 106 and CIL) (2)

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- (3) Variation of s. 106 to release developer from obligations previously agreed to:
  - Similar analysis as above but perhaps more difficult,
  - Some Commission decisional practice;
- (4) CIL:
  - different - it must be levied;
  - Can grant relief; but CLG Guidance warns of State aid issues and sets out criteria to be applied to rely on the GBER in relation to social housing;
  - What about differential CIL rates for say large and small retail developments?

# Specific Issues: CPO Procedures (1)



- CPO a common area for State aid issues; especially objectors to a CPO:
- (1) compensation for expropriation *not* normally state aid:
  - See Case T-53/08 *Italy* and Case T-62/08 *ThyssenKrupp*;
  - Recent Commission decision (SA.3225) no State aid in payment of compensation under Dutch Expropriation Act;
- (2) What are the issues, where CPO in favour of developer:
- (A.) Use of CPO powers itself a State aid: no, if indemnity for costs from developer;

# Specific Issues: CPO Procedures (2)



- (B.) Various arguments re compensation:
  - (i) Arguments re compensation not providing the full market value in some way e.g. “no scheme world”; so LA and in turn the developer obtaining land at an undervalue
  - (ii) The so-called “marriage value” issue:
    - Example 1: LA acquires 6 pieces of land pays statutory compensation; when combined in LA’s hands value increased; but developer under agreement only required to pay LA what it paid in statutory compensation: a State aid?
    - Example 2: LA acquires land paying statutory compensation; adds it to land it already owns: increases in value – what does developer then pay? State aid?
    - Example 3: LA acquires and transfers and land added to other land developer owns thereby increasing overall value: State aid?
  - Turns on terms of indemnity? What must developer pay? Is best consideration being obtained? Must there be a re-valuation? Overage?

# Specific Issues: CPO Procedures (3)



- Link to s. 233 of the TCPA 1990, governs disposal of land acquired for appropriated for planning purposes: disapplies s123 best value duty.
- But S. 233(3) requires best consideration or S/S consent but context different, see:
  - ***R (Safeway Stores Plc) v Eastleigh Borough Council*** [2001] EWHC Admin 457 and ***Standard Commercial Property Securities Ltd v Glasgow City Council*** [2007] J.P.L. 758: Can have regard to planning objectives for which CPO being used; means could reject higher offer if that not deliver those objectives;
- Developer bearing all costs; taking all risks – for a profit – but for that no scheme at all – and no delivery of the planning objectives ...
- To the extent that there is any marriage value could be argued to prima facie be a State aid, but would it be possible to argue having regard to the analysis under s. 233 (above) that it falls outside Art. 107(1) as being a measure justified by the “*the nature of the general scheme*”?

# Specific Issues: CPO Procedures (4)



Does the existence of such a possible State aid (arising from compensation/ sale on) affect the making of CPO anyway?

- Viability/deliverability
- Public interest argument
- **Arsenal CPO 2004**
  - S/S said premature to raise at CPO inquiry issues based on difference between amounts paid in compensation and price land sold to developer for;
- **Winchester Hill CPO 2011**
  - Argument, objector: “*This is a separate issue from concerns about best consideration. The State Aid issue is whether, if [the developer] is granted the proposed leases, the land value that they will receive is greater than the amount that they will be paying for it*” – marriage value argument;

# Specific Issues: CPO Procedures (7)



- Council response: The objector *“make the point without producing marriage values or transfer of value and there is no evidence to support their point. Equally there is no evidential basis for a claim that the [Development Agreement] does not obtain best value. WCC has a duty to obtain the best price reasonably obtainable in its agreement to grant a lease to the Developer in the DA and has taken independent advice in accordance with Commission Guidance”*
- Inspector, conclusions (under heading deliverability & viability) *“There is no detailed evidence indicating that the DA is not ‘best value’ for WCC or that ‘best consideration’ for disposal of land by WCC has not taken place and no firm evidence that ‘State Aid’ has been conferred as alleged. None of these matters are of sufficient substance to indicate that confirmation of the CPO will not be in the public interest”*
- S/S agreed
- Legal challenge not pursued

# Specific Issues: environmental protection



- EU high profile to environmental protection
- 3 stages:
  - (1) is it a State aid at all; meet all criteria?
  - (2) GBER exempts some environmental aid
  - (3) Environmental Aid Guidelines 2008

Example 1: contaminated land; generally polluter pays but if can't be identified or can't bear costs, Guidelines allow costs of remediation minus value of land; up to 100%

Example 2: Guidelines also deal with aid for waste management.



# Specific issues: Infrastructure (1)



- Generally, the provision by public authorities of infrastructure, such as the building of roads or bridges, open to the public has been held by the Commission not to constitute State aid. Thus:
  - (1) Quigley State aid Law and Policy (2nd ed) at p 48 says: “*... investment in infrastructure which benefits undertakings generally, rather than one or more specific undertakings, is regarded as a general measure which does not amount to State aid ... Financing of transport infrastructure, such as roads ... built and maintained by public authorities, does not constitute State aid*”
  - (2) Hancher, Ottervanger and Slot EU State Aids (4th ed) at 3-058: “[t]he general rule is that if the infrastructure is provided for general use as opposed to a dedicated purpose, benefiting no particular user, then there is no selectivity and hence no aid at the level of the user. The construction of a road, for example, is usually regarded as general infrastructure ...”

## Specific issues: Infrastructure (2)



- (3) the CJEU in Case C-164/02 **Netherlands v Commission** [2004] ECR I-1177 at para. 7 and quoting from Commission Decision N 812/2001:
  - *“Financing by the authorities of infrastructure open to all potential users without discrimination and administered by the State does not generally fall within the scope of Article 87(1) of the EC Treaty because it does not favour one undertaking in competition with other undertakings within the meaning of that article. That is the case for most of the funding of transport infrastructure (for example, roads and canals built and maintained by the public authorities)”*
- (4) Commission Decision 2003/227/EC Terra Mitica OJ 2003 L91/23 *“although the increase in traffic may be due to the park, the roadworks carried out affect everyone living in the area”*

# Specific issues: Infrastructure (3)



- Cases T-443/08 and T-455/08 *Freistaat Sachsen v Commission* upheld on appeal by the CJEU in Case C-288/11 P *Mitteldeutsche Flughafen AG and another v European Commission* [2013] 2 C.M.L.R. 18.
- Increased scrutiny of infrastructure?
  - Findings are focused on developments in the airports sector;
  - On the facts of that case the infrastructure consisted of the construction of a runway to an airport which was an integral part of the principal economic activity carried out by the airport operator and which would be commercially exploited by the operator who “*will not make it available without charge to users in the common interest but will charge users for its use*” (see the General Court’s judgment at para. 94).

# Specific issues: Infrastructure (4)



- Position must be different for, for example, a road which is not to be commercially exploited; but rather open to the general public;
  - Roads operated by a concessionaire would be State aid see e.g. Commission decision N134/2007 concerning the Thessaloniki Submerged Tunnel Project and N 151/2009 on aid for the construction and operation of the A1 Motorway, Gdansk-Torun section;
- Guidance since case seems to support: see “State Aid and Infrastructure - Leipzig Halle Guidance ERDF-GN-1-010” produced jointly by the Commission and the UK Government;
- Commission document COMP/03/2011/ NOTE TO DG REGIO entitled “*Application of State aid rules to infrastructure investment projects*”: “*Public, non-commercially operated roads/motorways*”. These are “*Activities falling within the public remit*” and are “[a] *contrario application of the Leipzig/Halle judgment*”

# Social housing (1)



- Cases C-197/11 & C-203/11 *Libert and others v Gouvernement flamand* [2013] 3 C.M.L.R. 35
- Flemish Decree on “*Measures concerning affordable housing*” imposed a “*social obligation*” on property developers to make a contribution towards social housing that could be discharged in different ways, including provision “*in kind*”;
- Also provided the benefit of those discharging the “*social obligation*” in kind, tax incentives and subsidy mechanisms such as the application of a reduced rate of VAT and a reduced rate of stamp duty, a purchase guarantee in respect of the housing developed which no social housing organisation is prepared to purchase and infrastructure subsidies;
- Argued an unlawful State aid.

## Social housing (2)



- *“where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by art.107(1) TFEU”*
- *“ ... the tax incentives and subsidy mechanisms provided for in the Flemish Decree are liable to be classified as State aid within the meaning of art.107(1) TFEU. It is for the referring court to determine whether the conditions relating to the existence of State aid are met and, if so, to ascertain whether, as regards the measures ... whereby compensation is provided for the social obligation to which subdividers and developers are subject, the SGEI Decision is nevertheless applicable to such measures”*

## Useful sources of information

- BIS: <https://www.gov.uk/state-aid>
  - The BIS State Aid Guide (June 2011):  
<http://www.bis.gov.uk/assets/biscore/business-law/docs/s/11-1040-state-aid-guide.pdf>
- Commission: [http://ec.europa.eu/competition/state\\_aid/overview/](http://ec.europa.eu/competition/state_aid/overview/)
- Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU (2013)
- Textbooks:
  - *European Union Law of State Aid* (2ed, 2013) Bacon
  - *European State Aid Law and Policy* (2ed, 2009; - 3<sup>rd</sup> ed forthcoming) Quigley
  - *EU State Aids* (4ed, 2012) Hancher, Ottervanger and Slot

## Some practical tips:

- No need to be a State aid expert; but need to be able to spot a potential State aid issue;
- Increasingly relevant in planning/CPO;
- Consider State aid early:
  - more time and ability to make changes to what proposed to avoid being a State aid; or
  - to notify etc;
- Take specialist advice;
- Be aware of consequences of getting it wrong.