

What rating practitioners need to know about state aid

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What is state aid?

- European Single Market: free market philosophy – free movement of people, services and goods
- Assistance from member states which distorts internal market = prohibited. State aid is an example of this.
- *‘any aid granted by a Member State ... in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market’*: Art.107 of the Treaty on the Functioning of the European Union (“TFEU”)

Relevance to rating practitioners?

- Tax relief is capable of constituting aid: ***Italy v Commission*** [1974] ECR 709. Case 173/73.
- Therefore, business rates relief schemes are capable of falling within the state aid prohibition:
 - Discretionary relief
 - Mandatory relief?

EU law prohibition of state aid



- Codified in Art.107 of the Treaty for European Union
- EU member states are required to notify the European Commission of any plans to grant or alter state aid: Art.108(3).
- There is a formal investigation procedure that is led by the Commission and, if unlawful state aid has been granted, it is subject to recovery (plus interest) from the recipient: see Art.108 TFEU and Council Regulation (EU) 2015/1589.

Exceptions to prohibition on state aid

- Aid could be such that it does not meet definition – e.g. does not favour certain undertakings or distort competition
- Other specified exceptions in TFEU
- **‘De minimis’** aid is not considered to be unlawful state aid
 - Most likely issue to arise
 - Criteria are set out in Commission Regulation 1407/2014 (“the De Minimis Regulation”)

When is aid/tax relief 'de minimis'?

- Total amount is less than €200,000 over three years
- NB other criteria:
 - Assistance to undertakings in road haulage, agricultural production, coal sector or 'undertakings in difficulty' (e.g. in administration)
 - Lower ceiling for undertakings involved in road transport: €100,000

Discretionary business rates relief and state aid



- Power in s.47 of the 1988 Act, as amended by s.69 of the Localism Act 2011
- What is the position if billing authority gives relief in excess of *de minimis* limit?
- Isn't this unlawful? What happens?

What is the position if billing authority gives relief in excess of *de minimis* limit?

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- Where domestic law is in conflict with EU law, the former will be disapplied by the courts: ***R v Secretary of State for Transport, ex p Factortame Ltd*** [1991] 1 AC 603
- Therefore, one possibility: judicial review of discretionary relief decision
 - If challenged before Court, grant of state aid will be quashed
 - Local authority may recover sum paid, with interest

Judicial review of a discretionary relief decision



- Who will challenge?
 - Other ratepayers? Unlikely in practice
 - Most likely: council itself!



What if no judicial review?

- Basic principle of public law: a decision is presumed to be valid until it has been quashed by the Court: see ***White v South Derbyshire District Council*** [2012] EWHC 3495 (Admin) per Singh J (as he then was) at [25]-[36].
- Therefore, irrespective of fact that, if challenged, an above-de minimis decision would be likely to be quashed, it is assumed to be effective until quashed
- Billing authority can **revoke** decision

Revocation of a discretionary relief decision



- Procedure is set out in Non-Domestic Rating (Discretionary Relief) Regulations 1989/1059:
 - Billing authority can only **revoke** a decision or vary a relief decision so as to increase chargeable amount:
 - so that revocation/variation takes effect at the expiry of a financial year; and
 - so that at least one year's notice of the revocation or variation is given
- **Therefore – billing authority in a difficult position if it makes a discretionary relief decision above *de minimis* limit**

Notification requirements imposed by EU law



- Where a member state intends to grant *de minimis* assistance, it is required to
 - (a) inform the undertaking in question of the amount of aid and of its *de minimis* character;
 - (b) make express reference to the De Minimis Regulation; and
 - (c) obtain a declaration from the undertaking ‘in written or electronic form’ about any other aid that the undertaking has received which might fall within the De Minimis Regulation or other regulations providing exceptions to the prohibition on state aid

Art.6(1), De Minimis Regulation

Notification requirements imposed by EU law



- Relevance of these requirements:
 - If billing authority has failed to provide this information before making decision, or has been provided with information indicating a further grant would result in excess of de minimis limit: ratepayer in a stronger position in resisting attempt by billing authority to recover payment
 - If ratepayer has provided false/misleading information: council will be in a much stronger position

Other potential state aid issues that could arise



- No reason in principle why mandatory relief would not be subject to state aid prohibition/procedural requirements
 - De Minimis Regulation excludes undertakings in difficulty, e.g. insolvent companies, from the de minimis threshold. Any aid to such a company is potentially unlawful state aid
 - Empty rates relief for company subject to a winding-up order, in administration, or for liquidators: Reg 4(k)-(m), NDR (Unoccupied Property) Regulations 2008
- Assistance from the state that does not fall within the exemptions in the TFEU or associated regulations may still not constitute unlawful state aid by virtue of its failing to satisfy the definition of state aid.

The future of state aid: Brexit



- Before the House of Lords EU Committee, Ministers recently confirmed that the Government had not yet arrived at a settled State aid policy
- The *EU (Withdrawal) Bill* preserves a general prohibition on State aid without specifying what body would assume the Commission's current role of reviewing and approving compatible measures.
- Leader of the Labour Party has expressed concerns about compatibility of state aid prohibition with Labour plans for nationalisation of certain industries
- Therefore future regime will be [**insert answer here**]

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Thank you