

欧洲一体化 与 亚欧关系

徐明棋 主编

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“EU State Aid Control: A Model for China to Manage Subsidy Competition?”

Prof. Dr. Christian Koenig

I . Introduction

Professor Xu,
Ladies and Gentlemen,

Good afternoon and thank you for devoting your attention to the EU Competition Law and its impact on EU-Asia relations. The State Aid Law is a basic pillar of the EU Competition Law and a key element to safeguard free and undistorted competition, one of the cornerstones of the European Union. All efforts under the anti-trust rules to ensure that companies do not distort competition and trade within the Union would be to no avail if Member States were allowed to influence and distort competition by granting subsidies or other advantages to certain companies. Thus, one of EU's key objectives is to ensure that state intervention does not interfere with the functioning of the market, or harm the competitiveness of undertakings.

On a larger scale, the problem remains the same: In line with the objective of market integration there is a strict control needed in order to ensure that state intervention is kept to a level where undertakings and markets continue to operate effectively.

II . Subsidy competition in China

In China, subsidies have figured prominently in the government's policy and are increasingly problematic. The main reason for this special situation is the reproach of the government's policy and the governmental efforts to strengthen the Chinese economy. The government is accused of controlling a

third of China's economy and subsidising state-owned enterprises and well-connected private firms. These companies benefit from preferential policies such as privileged access to the banking sector. In some cases, such as the automotive and steel sector, whole sectors benefit from an integrated industrial policy intended to support domestic production and boost exports. China has also developed a taxation system granting tax preferences contingent on the use of local content or export performance. Consequently, China's trade partners find themselves competing on unfair terms in China. The absence of conditions of fair market competition and inadequate legal protection raise serious issues and these issues continue to attract considerable attention in terms of analysing the impact of these trade distortions on global markets. The simulated effects on production and trade are consistent with expectations and supply-demand response parameters. Production and export shrink in countries that eliminate subsidies and the outputs in non-subsidizing countries do not rise enough to offset the large declines in subsidizing countries.

Thus, it is not surprising that Chinese trade partners implement activities to challenge Chinese subsidies to intensify the Chinese government's efforts in monitoring and challenging unfair foreign government subsidy practices.

Levelling the playing field by the EU ...

Where trade irritants arise, the EU always seek to resolve them through dialogue and negotiation. However, where this fails, the European Commission uses the WTO dispute settlement system to resolve trade issues with China to ensure compliance. This is not a question of replacing cooperation with confrontation but of creating a sound relationship based on objective application of agreed multilateral rules. In addition, trade measures remain as an instrument to ensure fair conditions of trade between China and the EU, as with other countries. The EU uses these instruments carefully but rigorously where they are justified.

... and by the US

China is the number one target of antidumping actions *filed by the US Commerce Department on behalf of various domestic industries*. In the beginning

of this year, the US filed a WTO case against nine Chinese subsidy programs that are prohibited under WTO-rules. US exporters and investors face a variety of non-tariff barriers and major impediments to conducting business in China.

As China is already a major beneficiary of the international trading system and would gain even more from a successful cooperation it's a major issue to ensure an orderly correction of the large imbalances and to establish a control mechanism. In its own interest, China should take the lead in offering trading relationships that will be seen as genuinely reciprocal.

As political pressure to resist further openness to Chinese competition is likely to increase, China should address these problems and find a way to control the subsidy programs.

Due to these recent occurrences and challenges, I propose to show you how the EU manages subsidy competition. Being a part of the European Competition Law the EU State Aid Law is a functioning control mechanism.

In the following, I would like to explain how the EU State Aid regime works, what its main features are and what alternative approaches might exist for China to create a "Subsidy Control System". Like any system, EU State Aid control also has its weaknesses. I am pretty sure that Chinese skills can improve the economic conditions by analyzing sharply the Western experiences and developing experienced mechanisms.

III . Control of State Aids and EC Competition Law

1. The rationale of EC State aid control

Free and open markets urge companies to compete on their merits and to become more innovative and efficient. Consequently, they provide consumers with better quality goods and services at cheaper prices. All this contributes to creating a circle of economic growth.

State aid control is important to maintain the level playing field for free and fair competition. It ensures that governments do not engage in granting aid to protect companies from competition while doing nothing to prepare them for competitiveness. Such a policy would end in a subsidy race where Member States

might outbid each other and transfer problems from one country to another, the waste of public money and the risk of weakening Europe's competitive position as European companies would rely very much on state subsidies instead of taking the necessary economic steps themselves.

However, it is true that the market alone does not always deliver the basics of the European model: social justice, environmental protection and investing in sustainable economic prosperity for future generations. That is the reason why the European policy needs to have appropriate, well-targeted state aid tools, such as

- aid directed at disadvantaged regions to guarantee equal opportunities;
- aid which targets innovation, research and development;
- aid that leads to secure and long term employment for the European citizens.

The European set of state aid rules facilitates and safeguards the use of such aid by providing a framework for the Member State governments to focus their aids on measures that will strengthen the European economy and help to achieve the European objectives.

2. Measures covered by State aid rules

The rationale leads us to the question, what the EU control mechanism looks like and what measures are covered by the State aid rules. Art. 87(1) of the EU Treaty provides:

“Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States, shall be incompatible with the common market”.

The term “State aid” is neither defined by Article 87(1) EC — that only lists the conditions under which State aid is incompatible with the Common Market — nor by the European Court of Justice. In this respect, the Court has merely stated:

“the concept of State aid must be understood wider than the one of a subsidy as it embraces not only positive benefits such as subsidies themselves,

but also interventions which, in various forms, mitigate the charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are similar in character and have the same effect"^①.

As a consequence, the Commission and the Court interpret the notion of the term in a wide and flexible way^②. In praxis, the most common forms of State aid are direct subsidies, tax exemptions, preferential interest rates, debt conversions, facilities on payment, indemnities against operating losses, the disposal of publicly owned land and buildings or assets on favourable terms, or the like. However, this list is far from being exhaustive.

Thus, State aid is given, if a measure fulfils the following four conditions;

1. it must favour certain undertakings or the production of certain goods;
2. it must be granted by a Member State or through State resources;
3. it must distort or threaten to distort competition;
4. and it must affect the trade between Member States.

a) Favouring certain undertakings or the production of certain goods

aa) Favouring

Under Art. 87 (1) EC, State Aid exists only when there is a *favouring* of certain undertakings or the production of certain goods. The concept of aid is very wide and includes any advantage of monetary nature conferred by a Member State or the agents of the state, which would not have otherwise been enjoyed by the recipient or otherwise favoured companies or sectors. The actual form of the aid or the intentions and the formal objectives of the public policies of the authority granting the aid, are irrelevant for the purposes of Art. 87 (1) EC. Even if a policy has no formal objective of conferring an advantage or assisting an undertaking, its application may still inadvertently favour certain undertakings over others. Art. 87 (1) bans aid according to its actual or potential effects, rather than the declared intentions of the granting authority.

Member States are considered to favour an undertaking and provide a

① Case 30/59, *De Gezamelijke Steenkolenmijnen v. High Authority*, [1961] ECR 1.

② *D'Sa*, European Community Law on State Aid, 1998, p.54.

relevant advantage when they enter into transactions that are more favourable for the undertaking concerned than could be achieved under normal market conditions. The question here is whether the undertaking is actually “better off” with the State measure than it would be if market conditions prevailed instead.

But often the problem arises, how to assess what constitutes an adequate consideration before the background of “normal market conditions”. To be able to find out the European Commission has developed the “market economy investor principle”. The ECJ has stated that State aid is granted:

“... whenever a Member State makes available to an undertaking funds which in the normal course of events would not be provided by a private investor applying ordinary commercial criteria and disregarding other considerations of a social, political or philanthropic nature.”^①

bb) Undertakings or the production of goods

Article 87 (1) EC applies only if the measure in question is granted to certain undertakings or the production of certain goods.

Following the definition established by the ECJ, the concept of an “undertaking” *“encompasses every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed”*^②.

Thus, the definition of an undertaking for the purposes of EC competition law is independent of the laws of particular Member States. According to Article 86 (1) EC, both, private undertakings as well as public ones, are covered by the rules on State aid. Exception is only made to private households and the exercise of public authority. Besides, the Court of First Instance has also stated that for the purposes of EC competition law, independent natural or legal persons constitute a single undertaking as far as they form an economic unity^③.

As far as the production of certain goods is concerned, the provision covers

① Joined Cases C-278/92 to C-280/92, *Spain v. Commission*, supra footnote 31, Opinion of AG Jacobs at para 28.

② Case C-41/90, *Höfner and Elser v. Macrotron GmbH*, [1991] ECR I-1979, at 2016, para. 21.

③ Case T-234/95, *DSG Dradenauer Stahlgesellschaft v Commission*, [2000] ECR II-2603, at 2645, para. 124.

State aid measures which benefit the whole branch of production, also including independent professions.

cc) Certainty of the aid

"General" measures of economic policy are not aid. Even though such measures provide an advantage for undertakings, they do not constitute State aid, since they do not favour *certain* companies or the production of *certain* goods. Such measures can be the easing of credit controls, levels of interest rates or the lowering of interest rates, the devaluation of the national currency and the levels of taxation on the industry as a whole^①.

General measures must also be distinguished from general aid schemes (such as export aids to all types of products) which result in the exclusion of a large class of producers^②. The ECJ has been reluctant to allow such systems, despite the difficulties in distinguishing between these two concepts^③.

b) Granted by a Member State or through State Resources

A State aid is granted "by a Member State or through State resources" if the measure may be attributed to the state. The Community state aid regime applies to State aids conferred by public corporations of the Member States, especially at state and municipal level^④. Thus, federal, state and municipal authorities are all under a directly effective obligation of Community law to comply with Art. 87 (1) EC when exercising their competences.

This will be the case if the state exerts a major influence on the granting of the aid, especially when the State aid is "granted by a public or private body designated or established by the State"^⑤. As legal subjects of Community law, the Member States are under a duty to observe the principle of co-operation under Art. 10 EC. Consequently, the prohibition on State aids does not only extend to the Member States as parties to the Treaty, but to all constituent

① D'Sa, *European Community Law on State Aid*, 1998, p. 83.

② Hancher, Ottervanger, Slot, E.C. *State Aids*, 1999, p. 29.

③ Cases 6 and 11/69, *Commission v. France*, [1969] ECR 523, at 553.

④ Case 248/84, *Germany v. Commission (Regionalförderprogramm NRW)*, [1987] 4013, at 4041.

⑤ Cases C-52/97, 53/97 and 54/97, *Viscido*, [1998] ECR I-2625, at 2641.

public corporations, public law institutions and institutions placed under state supervision regarding their actions and the question of legality of their administrative acts.

The provision “through state resources” also applies to funds under the condition that they are set up by statutory provisions in order to fulfil particular tasks and entitled to distribute certain resources which became part of their budgets^①. In any case the measure in question must involve an actual or potential reduction in revenue for the state^②.

c) Effect on Competition and Impact on Trade

The conditions under which trade between Member States is affected and competition is distorted for the purposes of Art. 87 (1) EC are inextricably linked and have often been assessed together by the European Commission and the Community Courts.

aa) Effect on trade

Although there is no definition or quantitative measure of when aid is affecting trade, it is settled case law that aid may affect intra-Community trade even if it is of relatively small amount^③. Any aid, in turn, is presumed to affect trade unless:

- it is *de minimis*, i. e. when the total amount of aid over a three-year period does not exceed 200.000,
- trade is affected only at national level or
- the situation is wholly outside the EC.

① Case 78/76, *Steinike and Weinlig*, [1977] ECR 595, para. 20~22; Case 82/77, *Van Tiggele*, [1978] ECR 25, para. 23~26.

② *Hancher, Ottervanger, Slot*, E. C. State Aids, 1999, p. 24; See also the Judgement of the ECJ of March 13, 2001 in Case C-379/98, *PreussenElektra*, English version to be found on the Internet under: www.europa.eu.int.

③ Case T-214/95, *Het Vlaamse Gewest v. Commission*, 1998 ECR II-717, at para. 48~49 and the case law cited therein.

bb) Distortion of competition

The test defined by the Commission and the Courts for determining the effect on competition is not strict. Small effects on trade are sufficient to conclude on distortion. The relevant question is what would be the competitive position of the recipient in the absence of aid? If this would be worse in relation to its rivals, then aid distorts competition.

3. Exemptions from the Ban on State Aid

According to Art. 87 (1) of the Treaty, aid measures that satisfy all the criteria outlined above are, in principle, incompatible with the common market. However, the general prohibition of State aid is not absolute. Articles 87 (2) and 87 (3) of the Treaty specify a number of cases in which State aid could be considered acceptable, so-called "exemptions".

a) Automatic Exemptions under Art. 87 (2) EC

Art. 87 (2) EC provides the categories of aid which are exempted from the prohibition under Article 87 (1) EC. The exemption is automatic if the Commission considers that the aid in question falls within one of these categories. In so far the Commission exercises its own power of appreciation. Due to this reason, any aid to undertakings authorised by Article 87 (2) EC is subject to control at Community level and therefore always has to be notified to the Commission to qualify for automatic exemption^①.

Article 87 (2) EC states 3 objectives of aid which are compatible with the common market:

- *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.* This exemption covers State aid granted directly to individual consumers who benefits indirectly certain undertakings. However, this provision does not authorise a one-sided favouring of a certain part of producers (for instance,

^① Hancher, Ottervanger, Slot, E.C. State Aids, 1999, p.69~70.

only national ones)^①.

- *aid to make good the damage caused by natural disasters or exceptional occurrences*. The aid must be granted only for the compensation of the losses or damages suffered because of natural disasters, and it must not be intended to encourage the industrial development of certain areas affected by them^②.
- *aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division*. This exemption is applied very strictly by the Commission and applies only when disadvantages were purely caused by the fact of the division (for instance, certain infrastructural developments). However, nowadays this provision is only of marginal importance.

b) Possible Exemptions under Art. 87 (3) EC

The Commission does not only exercise its power of appreciation under Article 87 (3) EC, but has also a discretionary power. As regards the procedure, it first considers whether the criteria of the sub-paragraphs (a) to (e) are fulfilled (= margin of appreciation) and subsequently takes a decision on the authorisation of the (notified) aid in question (= margin of discretion)^③. The four categories of aid subject to the Commission's approval are^④:

- (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*

① D'Sa, European Community Law on State Aid, 1998, p. 129~130.

② Hancher, Ottervanger, Slot, E.C. State Aids, 1999, p. 70.

③ D'Sa, European Community Law on State Aid, 1998, p. 134.

④ Art. 87 (3) (e) EC does not deal with specific category of aid. It states that the Council, acting on proposal from the Commission, can specify new categories of exemptable aid.

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 Community contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

The categories that are of major interest are the first and the third, i. e. Art. 87 (3)(a) and Art. 87 (3)(c) of the Treaty. In exercising its powers, the Commission has developed specific approaches depending on the size of the undertaking, its location, the industry concerned, the purpose of aid, etc. In order to ensure transparency, predictability and legal certainty the Commission has made public the criteria it uses when deciding whether aid measures notified to it qualify for exemption. These publications have taken the form of regulations, "communications", "notices", "frameworks", "guidelines" and letters to Member States. Factors that will be considered by the Commission when exercising its discretionary powers are for example:

- The aid must promote or further a project that is in the Community interest as a whole,
- The aid must be necessary for the achievement of this result, and the objective could not have been obtained otherwise in its absence,
- The duration, intensity and scope of the aid must be proportional to the importance of the intended result.

Moreover, we can distinguish three "main aid categories" under Art. 87 (3)(a) and Art. 87 (3)(c) of the Treaty:

- **Regional aid:** it's granted on the basis of regional criteria. It is designed to develop the less-favoured regions by supporting