State aid for relocating production

The legal questions

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In the past few years, more and more investors are considering implementing their investment projects in Central-Eastern Europe (CEE). Behind this fact, several advantages are playing a key role, including e.g. low wages, a highly developed infrastructure and a welleducated workforce.

Investors may also be interested in state subsidies, since in this region there are still many kinds of incentives available. Since state aid has to comply with EU law, when planning a project and the accessible aid sources, investors have to take care of the state aid legal framework of the EU, and particularly of the General Block Exemption Regulation 651/2014/EU (GBER)) on regional investment subsidies.

In several cases, based on the beneficial factors mentioned above, the investor decides to relocate its production capacities from a location in western-Europe to the CEE region, or, in parallel to the setting-up of a new production site in a CEE country, to simply cut back its capacities in the western part of the EU.

However, the currently applicable GBER introduced in 2014 a new provision regarding relocation of capacities (Article 13d), saying that in case of closing down the same or a similar activity in the European Economic Area at group level, either in the 2 years preceding the application for regional state subsidy or within a period of up to 2 years after the completion of the project to be subsidized (in this latter case it has to be investigated whether the investor had concretely planned the closure at the time of the application for subsidy), the regional investment subsidy related to the investment project falls outside of the scope of GBER. In that case, a more restrictive legal scheme, the Commission's Guidelines on Regional State Aid for 2014-2020, applies, and the prior consent of the European Commission is needed for granting a subsidy (notification procedure).

Since 2014, the interpretation of the above provision has caused several difficulties for EU Member States, including the interpretation of "closing down the same or a similar activity", hence the GBER does not include any definition of "closing down". The generally accepted interpretation at that time was that under "closing down" the total closing down of an establishment with its all capacities is meant.

Taking into account the uncertainty related to the application of this provision, the Commission issued an interpretation in July 2015, stating that "closing down" includes not only total closures, but partial closures as well. In the case of partial closures, the provision applies if the partial closure results in "substantial job losses". The Commission adds that for the purpose of the relocation provision "substantial job losses" are to be defined as losses of at least 100 jobs or as a job reduction of at least 50% of the workforce, compared to the average employment in the given establishment in any of the 2 years preceding the date of application.

Although the above interpretation has been issued as part of the Commission's legally non-binding guide to the GBER (which is a legally binding act of the Commission), the interpretation effectively amends the content of the GBER's provision. Considering this, the Commission is planning currently to officially amend the GBER with the definition of "closure of the same or similar activity", in line with its interpretation referred to above. According to the plans of the Commission, this amendment will be placed in the review of the GBER related to the extension of the GBER's application to the funding of ports and airports (the draft document was under public consultation until 30 May 2016, the final draft may be accessible soon).

Since the relocation of production (as interpreted by the Commission) may be relevant to many investment projects of multinational groups, the provision referred to above may have significant effects on investors' applications for state subsidies.

Therefore, it is really advisable to involve state aid specialized legal support already in the planning phase of such investment projects, in order to avoid negative effects of a possible misinterpretation, including even risking the subsidy itself.

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