





For more than 175 years,
Baker Botts has been among
the leading law firms in the
world. Today, with 725 lawyers
based in 14 offices around the
world, the firm ranks among
the largest global law firms in
scope and influence.

WHY WORRY ABOUT STATE AID CONTROL?

The European Union (EU) has a unique regime of subsidy—also known as State aid—control. Its Member States must obtain European Commission approval prior to granting support to industry or to certain regions of their economy. Once referred to as the 'Cinderella' of European competition law and policy, the impact of EU State aid control has gained headline importance. The Commission has used its State aid powers to strike down national tax incentives and to require multinationals such as Apple and Starbucks to repay billions of Euros of alleged aid. The Commission has also intervened in litigation throughout Europe and in the U.S. to contest the enforcement of damages awards in international investor dispute proceedings. In the last ten years, the Commission has ordered companies to pay back some EUR 50 billion in illegal State aid.

As the EU market has opened up and competition intensifies across sectors, businesses have discovered the value of the State aid regime—whether as a sword to challenge alleged advantages to their competitors—or as a shield to protect their own market position. Air transport is a good example. Baker Botts has been closely involved in over a decade of State aid litigation in this sector.

Baker Botts is renowned globally for its experience and leadership in energy law. State aid control has profound implications for Europe's energy sector. Securing the energy transition towards renewable fuel sources and a low carbon economy by 2030 inevitably involves massive state intervention throughout the entire value chain. Ambitious targets for cutting carbon emissions cannot be guaranteed without financial support not only to power producers, but also to new entrants and energy intensive users. New and smarter infrastructure must be rolled out rapidly to guarantee delivery of non-traditional fuels to customers.

WHAT IS STATE AID?

A raft of government support measures—from promoting research and development, and innovation or arranging specialized employment training to the provision of risk capital or the renewal of ports and other vital infrastructure—can all be caught by the EU State aid regime. The concept of a subsidy is an all-embracing one and

can encompass many types and forms of state support—and not just capital grants or interest free loans. Sales of state-owned land or other assets can involve disguised aid if the transaction is not concluded at market value. Public-private initiatives may also be caught by the State aid rules if the Commission considers that the public partners have assumed too large a share of the project risk.

WHO SHOULD KEEP THE IMPACT OF STATE AID CONTROL IN MIND?

Although it is up to the national public authorities to ensure the notification of their plans to the Commission for clearance, there is a great deal at stake for business. If the approval process is not complied with—it is the recipient of support, and not the national authorities that granted that support—that bears the risk of having to repay the aid. If the right procedures for notification are not followed by the granting authority, the beneficiaries of the measures risk having to repay the entire subsidy with compound interest.

A full awareness of the 'ins' and 'outs' of EU State aid control is key for would-be beneficiaries of government support as well as their potential competitors.

Competing companies who have been excluded from a subsidy scheme, whether individually or acting through a trade association, can lodge a complaint to the Commission. They can also initiate proceedings for injunctions or suspension of a support scheme before national courts. Actions in damages against the aid recipients may also be brought before a national court.

Our Baker Botts State aid team handle the entire spectrum of State aid issues—from pre and final notification of a planned support scheme to the Commission on behalf of government authorities, to representing clients before the Commission and in the national and EU courts.

BREXIT AND STATE AID

Brexit will change the way in which State aid law is enforced in the UK. Pre-Brexit, if the UK public authorities planned to grant aid, they had to go to the Commission for clearance. This will change after the UK leaves the EU. The UK's competition watchdog—the CMA—has been given new powers to enforce State aid control in Great Britain and Northern Ireland. At the same time, EU legal concepts, and the case-law that has grown up around them, will be of continuing relevance to the UK's post-Brexit State aid regime. The Baker Botts team is well placed to assist clients to deal with the Brexit process.

Under the agreement with the EU that is currently before the UK's parliament, the UK is expected to remain within the EU's State aid regime for a transitional period—the Commission will continue to receive and assess notifications from UK aid grantors. The CMA will take on its new role only at the end of the transitional period. In the longer term, more detailed decisions on the UK State aid regime are subject to further discussion with the EU as part of the negotiations on the future EU-UK relationship.

The current government's view is that the UK should be prepared to establish a full, UK-wide subsidy control framework, with a single UK body for enforcement and supervision (the CMA), if and when this is required. In line with this objective, the EU State aid rules will be transposed into national law. This transposition will apply to all sectors, including agriculture, fisheries and transport and will replicate any existing exemptions from state aid rules.

EU State aid law experience will be of continued relevance to UK based clients or clients seeking support from the UK government in the future.

WHY BAKER BOTTS

We care about clients.

Our team represent many of the world's leading companies in State aid investigations and litigation, as well as mergers and acquisitions, complex civil antitrust litigation, international cartel matters and other investigations and proceedings by European, U.S., UK, and other international antitrust enforcement agencies.

We understand business.

We represent clients in a wide range of industries, including energy, technology, transport, life sciences, telecommunications, media, oilfield services, mining, metals, industrial equipment, paper, chemical, grocery products, retail, agricultural products and healthcare.

We are skilled in our field.

Our team has represented clients' interests before the Commission and national agencies, including the UK Competition & Markets Authority (CMA) as well as before the General Court and Court of Justice of the EU and national courts.

We are close to the source.

The Baker Botts State aid team is located in the Brussels office and is ideally situated to benefit from fast access to the European institutions in its vicinity.

We understand public affairs issues.

The Baker Botts team is also experienced in coordinating work carried out by economic consultancies and public affairs consultants during State aid investigations.

OUR EXPERIENCE AND DEPTH

Our team is recognized as one of the world's leading competition law practices, repeatedly named among Global Competition Review's "Global Elite" listing of the 20 leading firms worldwide, as well as one of the Top 10 Competition Litigation firms globally. Our firm has received numerous accolades and has been highly ranked in the Global Competition Review (2013-2019), Chambers (2016-2019), Legal 500 (2015-2019), and a host of other antitrust publications.

Our counselling advice is practical. Clients consistently praise Baker Botts for the real-world usefulness of its antitrust counseling advice. Chambers 2019 cites clients who note our "flexibility to support our needs as the project expanded" and the team's "ability to effectively communicate with business colleagues " who "quickly learned our business, products and services, and the markets in which we compete." We take this to heart and focus on gaining an understanding of our client's objectives and concerns, not just esoteric, theoretical legal concerns or arguments.

Most importantly, our collective experience allows us to deliver practical and effective solutions to the competition challenges faced by Global 1000 companies. We make it our business to learn the challenges confronting our clients and find ways to help with the results they need.

We are well known for our international casework and our thought leadership. Our team have been closely involved in writing the leading handbooks on EU State aid law as well as specialized guides to the application of the EU State aid rules to key sectors such as energy, transport and infrastructure. They have assisted in the preparation of reports leading up to the reform of State aid guidelines and procedures.

OUR STATE AID TEAM'S CAPABILITIES

Representation

We have extensive experience in assisting companies, trade associations and public authorities at all stages of State aid proceedings before the European Commission—including the pre and final notification phases as well as the preliminary investigation by the Commission and, where relevant, the full formal investigation.

Litigation

Our State aid team have litigated major State aid cases and arbitration proceedings before the General Court, Court of Justice of the EU and national courts. This may involve challenging a Commission decision prohibiting what it deems to be a State aid or attacking adverse conditions to its approval of the measure in question.

Litigation in national courts to contest injunctions and recovery orders is also part of the team's practice.

Advisory

Providing fully informed and targeted State aid advice is a trademark of the Baker Botts team. The necessity for state advice can arise in several scenarios.

Companies may need assistance in ensuring a proposed transaction is 'State-aid' proof and not liable to future challenge. Care must be taken when acquiring assets from a company that has received State aid in the past to make sure that there is no risk that the buyer inadvertently becomes the recipient of illegal aid that must be repaid.

Shaping a state support scheme to meet the Commission's requirements requires careful input from a team that stays on top of the Commission's decisions and how it applies its many guidelines in practice. We are regularly advising companies and trade associations on the application of the State aid rules in the energy and environmental field including, for example, compensation linked to the operation of the EU emissions trading scheme.

Influencing and implementing policy

Our team has extensive experience advising and shaping the development of EU State aid law and have assisted in the preparation of reports leading up to the reform of State aid guidelines and procedures. The team has assisted national public authorities to put in place appropriate frameworks to implement ongoing updates to the EU's State aid regime and to meet their procedural obligations towards the Commission.

REPRESENTATIVE EXPERIENCE

- Representing Ryanair in eleven different cases before the General Court and Court of Justice of the EU challenging European Commission State aid decisions concerning Ryanair's relationships with regional airports
- Government of Croatia on state aid issues concerning its shipbuilding industry in the context of the accession negotiations
- ExxonMobil Corporation on State aid aspects of a deep-water exploration project in the Black Sea
- Electricité de France on State aid aspects of nuclear power generation and electricity market regulation in the EU in relation to an investment for the construction of a nuclear power plant in the UK
- TUI Travel in connection with State aid in the aircraft sector
- Assisting AES Corp. in the Commission's investigation into state aid elements of long-term power purchase agreements and in proceedings before the General Court of the EU
- Acted for a major pipeline project on taxation stabilization clauses in host government agreements
- Acted for a major gas supplier before the Commission challenging support mechanisms to a new LNG terminal in Lithuania
- Advising a shipping company in relation to a national tonnage tax regime
- Acted for the European metal industry association advising on Commission guidelines for carbon leakage
- · Advising a major State-owned energy company on the State aid aspects of its IPO

- Acting for a shipping company as a complainant in Commission proceedings against aid granted to a competitor and advising on recovery measures in the national courts
- Acted for one of two buyers in acquisition and carve out of major medical services provider operating hospitals, medical care centers and dialysis sites after insolvency; developed and implemented strategy for regulatory licenses to continue to operate medical centers and to receive State aid
- · Acted for housing associations in the Netherlands and Sweden on support measures for social housing projects
- Acted as arbiters in several proceedings involving state aid questions
- Advising companies and a European trade association on the application of the State aid rules to compensation arrangements linked to the operation of the EU emissions trading scheme
- Advising a European trade association on the legality of subsidies with the de minimis State aid rules and State aid block exemptions
- Advising operators and investors on the application of the State aid rules to the roll-out of next generation telecoms network
- Assisting public authorities to put in place appropriate frameworks to meet their commitments under the State aid rules, including advice on implementing ongoing updates of the rules
- Advising a public agency on the State aid implications of the proposed sale of a public and privately-owned asset
- Advising a public body on the State aid implications of the securitization of a long-term debt portfolio

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