

# PRESS CUTTING

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12 COMMENT

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## opinion

**B**uying companies saddled with state aid liabilities can be a risky business. The European Court of Justice (ECJ) has recently given some types of buyers the benefit of the doubt, but those rushing to the conclusion that from now on a buyer will never have to repay unlawful state aid received by the seller should think twice – and carefully.

Under EU rules on state aid, a company that is found to have received state aid that has not been authorised by the European Commission, or does not fall under any of the existing schemes and exemptions, must return this aid (with interest) back to the state. Such aid is not always transparent and easy to quantify.

The Commission has repeatedly held that an obligation to repay unlawful state aid might be directed not only against its direct beneficiary, but also against a subsequent acquirer of the beneficiary's shares or significant assets. The prospect of such an obligation to repay 'inherited' state aid looms over recent and future acquisitions in some of the new EU member states.

As of 1 May this year, the Commission assumed direct and exclusive responsibility for enforcement of state aid rules in the 10 new member states. A transitional regime has addressed part of the problem, but the number of dormant state aid cases in Central and Eastern Europe is probably still very substantial. Moreover, old habits die hard and state aid practices will not change overnight in the new EU member states, as privatisations

and various forms of share and asset transfers continue.

In its recent decision on the System Microelectronic Innovation case (2004), the ECJ has put a limit on the Commission's attempt to assume an almost automatic obligation for acquirers to repay unlawful state aid granted to the acquired target, regardless of the purchase price paid by the acquirer. According to the court, the Commission failed to provide evidence that the buyers had acquired System Microelectronic under insufficiently open and transparent conditions. Instead, the acquisition appeared to have been made at market value and without the intention of avoiding the state aid repayment.

The principles confirmed by the court seem to have got the acquirers off the hook in this case, but other buyers might not be so lucky. Based on the court's decision, the key condition for the exclusion of a buyer's liability is that the purchase of the company or assets be made at 'market price'. According to the court, this corresponds to the highest price that a private market buyer would be willing to pay under normal conditions of competition. If this condition is fulfilled, the benefit of the state aid is factored into the purchase price and stays with the seller, thus discharging the buyer from any obligation to repay the state aid.

It seems clear from the court's decision that an open and transparent tender or similar open procedures will create a presumption that the relevant sale is made at a market price. But what does this say for private sales, with a very limited number

of potential buyers, negotiated under normal commercial (i.e. non-transparent) conditions and involving some form of unquantifiable and unauthorised state aid in the background? In such a situation, the sellers will stubbornly resist any allegation, during their negotiations, that the subsidies or other aid they have received in the past constitute unlawful state aid.

The buyers will probably prefer not to air such state aid issues in the open and they will probably be even less inclined to create a public record that they paid the highest price a private market investor would pay – it is not exactly a great message to bring back home to one's shareholders. Common business logic might, therefore, contribute to legally uncertain future liabilities, especially for the buyer.

EU law and practice in this area is still evolving, and national courts have an increasing and still largely unexplored role to play. The present uncertainties might allow for some margin of cautious creativity on behalf of prudent investors, as well as more aggressive complaints or private actions by their competitors. One way or another, state aid-related risks in European former state economy countries are just too significant a risk for aspiring buyers to ignore.

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