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Still in primary containment: the European Commission's approach to State aid in the nuclear industry

Gavin Bushell (Baker McKenzie, Belgium) · Wednesday, October 9th, 2013

On 8 October 2013, it was announced that the nuclear industry would not be included in the European Commission's draft Guidelines on environmental and energy aid for 2014-2020 as anticipated. Earlier in the year, a leaked copy of the draft Guidelines (which the author has read) set out six pages on how the Commission would seek to address State measures in the nuclear industry.

Some commentators are claiming victory for the anti-nuclear lobby; others appear to be suggesting that this is a major setback for the nuclear industry, particularly in the UK where a new fleet of reactors is proposed.

But this development should not be overstated. It may in fact be good news for the nuclear industry to have been excluded from the scope of draft Guidelines that would have been binding on the Commission.

Some reasons to support this remark:

- The Commission will now not limit its discretion by issuing guidelines for the nuclear industry. The existing body of State aid law and regulation continues to apply to the nuclear industry in the ordinary course. Any State measure in any nuclear newbuild project may yet be approved – to the extent it can be declared applicable with the existing rules. Politically, Germany (and other States) may be opposed to draft binding guidelines that make broad statements about the role of nuclear power; they are less likely to be opposed to individual decisions in other Member States' cases.
- The draft proposals on State aid for the nuclear industry contained statements as to the Commission's view on certain matters (e.g. the framework of international conventions, NTPL liability, etc). Those views are not likely to be less valid today simply because the proposals will ultimately not be included in the draft guidelines.
- The fact that the draft nuclear proposals have been dropped from the guidelines does not mean that arguments based upon them might not prevail in the course of an individual case in the future. The Commission's thinking in future cases will likely run along the lines set out in the draft guidelines; only it will retain more flexibility as to how it may apply the law in actual cases. Member States may therefore seek to argue along the lines: "what we are intending to do squarely fits into what you set out in the guidelines, so our measure must be compatible".

- Some commentators have suggested that this development means a decision approving State aid for nuclear newbuild may be more difficult because it risks creating precedent. Yet, the Commission has not shied away from creating precedent in previous complex cases in the nuclear sector (e.g. the British Energy Restructuring and the NDA cases).
- In any event, the draft nuclear proposals themselves did not appear to put forward any entirely new or radical provisions. They largely incorporated existing Commission precedent and practice, for example:
 - o The polluter pays principle applies to the nuclear industry. Operators must bear the entire costs of their activities (including decommissioning and waste costs, etc).
 - o Any State measures to support the development of nuclear energy, in particular to support the construction and operations of a nuclear plant, may constitute State aid.
 - o The Commission would assess any measures in accordance with the principles that it set out in the proposals – and these were aligned with the overall State aid principles in any event (e.g. community objective, market failure, incentive effect, no distortion of competition, etc.). The more detailed commentary around market failure did not appear to be a revelation.
 - o The draft proposals addressed historic costs; yet previous Commission precedent already exists in the NDA case.
- The nuclear proposals would have had no effect on certain State measures in the nuclear sector such as the sale of land, buildings or companies. Therefore, this development would have no impact whatsoever on any such project. Any Member State involved will still need to show that it has received market value for its assets in accordance with existing State aid guidelines.

As I wrote in a contribution to the Nuclear Inter Jura 2007 (written with Laurent Garzaniti), it is clear that the European Commission considers that the EU rules on competition and State aid apply to the nuclear sector. That view continues today notwithstanding yesterday's news. Whether the Commission is pro- or anti-nuclear, or neither, is a separate question.

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