

British Energy, State Aid, the High Court & the EC Treaty

Introduction

- On 4 September British Energy announced that it had been seeking financial aid from the UK Government to bail out its failing nuclear power business.
- On 9 September the UK Government provided British Energy with a loan of £410 million pounds of taxpayers' money for a period of three weeks.
- On 26 September the Government increased the loan to £650 million.
- On 7 October Greenpeace and renewable energy provider Ecotricity began legal action to get the loan declared illegal, to get the money repaid to the British taxpayer. Ecotricity is also seeking compensation for damage to its business.

This briefing explains:

1. Why Greenpeace & Ecotricity are taking the UK Government to Court
2. What is State Aid?
3. Why Greenpeace believes the loan to British Energy is illegal
4. The role of the UK Courts and the European Commission
5. Why Greenpeace believes the loan is incompatible with the EC Treaty
6. Potential outcomes

In writing this document we are indebted to the authors of the DTI's guidance booklet¹ for officials on the European State aid rules (European Community State Aids: Guidance for all Departments & Agencies, June 2001) extracts of which are reproduced below.

1. Why Greenpeace and Ecotricity are taking the UK Government to Court

DTI guidance: complaints from industry

"...the UK actively supports the Commission in its efforts to apply the State aid rules rigorously throughout the Community. The suspicion that others may be getting away with bending or ignoring the rules is no justification for trying to do likewise...The effects of unfair aid on the competitiveness of companies are, however, very real and we should take seriously opportunities to pursue allegations as vigorously as possible."

Greenpeace takes the view that nuclear power poses unacceptable risks to the environment and human health through the radioactive pollution it creates, its vulnerability to catastrophic accidents or sabotage and the threat of nuclear proliferation it creates. It is also expensive and relies on massive public subsidy to survive.

In this case, the Government's fixation with maintaining the nuclear option has led it to grant a series of illegal loans to prop up British Energy's failed business.

The consequence of the loan is a distortion of the electricity market, damaging renewable energy companies like Ecotricity – the very businesses we need to meet our energy needs without adding to climate change or the accumulating radioactive waste problems.

¹ Copies of the booklet are available from State aid policy unit (020 7215 4472 <mailto:sapu@dti.gsi.gov.uk>) on the DTI's website <http://www.dti.gov.uk/europe/stateaid>

British Energy, State Aid, the High Court & the EC Treaty

In directly confronting the Government in Court, Greenpeace and Ecotricity aims to seek legal redress for the illegality. Moreover, it is hoped that this case can, in some small way, help direct the Government's focus on the fact that the UK has the best natural energy resources in the region and the engineering expertise to harness it. Until the time that the Government accepts that we can do without nuclear power it will never address the challenge of how to provide affordable, clean electricity and reap the benefits of modern new industries.

British Energy, State Aid, the High Court & the EC Treaty

2. What is State Aid?

DTI guidance: aid “distorts competition”

“There is no definition given of what constitutes a State aid. Instead, there is a very clear statement of principle that any form of aid – whether provided directly by the State or indirectly “through State resources” – is incompatible with the Common Market if it distorts or threatens to distort competition within the Community.”

Examples of aid as seen by the Commission

- loans and guarantees eg the £650 loan to British Energy
- deferral of tax, social security or other payments to the State eg British Energy's non-payment of its Council Tax
- provisions to help prepare a public enterprise for privatisation eg the £50 billion radioactive waste Liabilities Management
- legislation to protect or guarantee market share eg the Nuclear Energy Agreement that obliges Scottish electricity suppliers to buy nuclear electricity from British Energy
- tax exemptions eg British Energy's desire to be exempt from the Climate Change levy

The EC Treaty says that, unless it falls within an exception provided for by the Treaty, state aid is incompatible with the common market.

2.1. What exceptions are there?

Exceptions include “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.” If state aid was deemed to fall within this definition, then it would be compatible with the common market.

3. Why Greenpeace believes the loan to British Energy is illegal

DTI guidance: be aware of the risks of implementing unapproved aid

“Aid is illegal unless and until the Commission has approved it. Companies placed in this situation risk having to repay the illegal aid plus interest from the date of first payment, and also may face actions for damages from third parties. You should alert Ministers to these risks at an early stage”.

The Government granted the first loan to British Energy on the 9 September. It formally notified the Commission on the 11 September. At the time of writing, the loan has still not been approved. Prior notification was not given by the Government and approval not received from the Commission. This is a clear breach of EC law and has been confirmed as such by the European Commissioner, Mario Monti.

3.1. Isn't this illegality just a “technicality”?

Some officials and commentators dismiss the illegal loan as a mere “technicality”. Naturally, all breaches of the law are “technical”. This particular illegal act infringes a fundamental principle of European competition law. A great deal of damage could be done to the market and competitors during the time it takes the Commission to come to a decision. The Commission is explicit about the importance keeping within rules:

“The authors of the EU Treaties were well aware that the advantages of the integration of the different national markets into a single European market could be undermined by financial support given by national governments. They thus imposed a general prohibition on the granting of State aid without prior notification and approval by the Commission. I truly believe

British Energy, State Aid, the High Court & the EC Treaty

that these rules, and the Commission powers to ensure that Member States respect them, are more relevant for the well being of the overall EU economy... than the antitrust and merger rules and the powers of the Commission with regards to private economic operators.²

This is why the Commission is obliged to take this case seriously and why the DTI warns its officials:

“First, the Commission can insist and has insisted that any aid be halted if it is judged not to have been properly notified in advance... To ensure Member States abide by this obligation it has also recently made clear that, where unnotified aid has been given but is only later judged to be in the common interest, the Commission may require a Member State to seek repayment of the interest on the aid that could be said to have been accrued between the aid being given and being formally approved... The risks involved in not notifying assistance are great. You leave yourself exposed to challenges by the Commission and by aggrieved competitors who can pursue their case in the national courts.”

4. The role of the UK Courts and the European Commission

4.1. The UK Courts enforce the procedure

DTI guidance: actions in the national courts over unnotified Aid

“... it is worth highlighting that an aggrieved competitor can bring an action in the national court challenging an aid which has not been notified or which has been paid without waiting for approval from the Commission. The national court has the power to declare the aid illegal and to order its recovery. If there is a dispute about the nature of the aid, it may make a reference to the European Court of Justice, possibly suspending payments until the case is finally resolved. The national court would not have the jurisdiction to rule on whether an aid is compatible with the common market, but the mere fact that an aid had not been notified properly in advance could leave you seriously exposed to a potentially damaging legal challenge.”

The rule prohibiting the grant of state aid unless and until it has been approved by the Commission has direct effect in member states. The national Courts are required to enforce the rule. This could mean granting an injunction to stop the aid, ordering it to be paid back or awarding damages to parties who can prove that they have suffered loss caused by the unlawful implementation of state aid.

The UK Courts cannot decide whether or not aid is compatible with the EC Treaty. For that reason, the Treaty says that state aid must not be given unless it has first been notified to the Commission and approved by the Commission.

4.2. The Commission decides whether aid is compatible with the Treaty

The Commission's role is to decide whether the loan is compatible with its guidelines on “rescue and restructuring aid”.

The guidelines suggest that “rescue aid” may be compatible with the state aid rules if:

- it is accompanied by a restructuring plan
- it does not adversely affect trading conditions contrary to the common interest
- be warranted on the grounds of serious social difficulties

² Prof. Mario Monti, European Commissioner for Competition Policy, EU Competition Policy, Fordham Annual Conference on International Antitrust Law & Policy, New York, 31-10-2002

British Energy, State Aid, the High Court & the EC Treaty

- be restricted to the amount needed to keep the firm in business for the period during which the aid is authorised
- be a “one off” operation

The Commission can decide that the state aid is compatible with the EC Treaty or, if it has doubts, then it can order a formal investigation.

In addition, as the DTI guidance points out, the Commission has the powers to require repayment of a loan which it considers to be illegal:

“... the Commission can require and has required aid which it considers to be illegal to be repaid. The Commission now requires Member States to seek repayment of interest on top of recovery of any aid judged to have been illegally given, with the interest dating from the first payment. Furthermore, the Commission has made clear it will insist on aid repayment even when this jeopardises the viability of a company.”

5. Why Greenpeace believes the loan is incompatible with the EC Treaty

As stated above, whether or not the loan is deemed compatible with the EC Treaty is for the Commission to determine. Commissioner Monti offers some insights into how the Commission would reach a decision:

“The Commission should also be vigilant with regards to aid to rescue or restructure companies in difficulty. In times of economic slowdown, as the present ones, there is a strong temptation by governments to help national companies to overcome difficulties... Rescue aid, providing short-term financial support while a company assesses its options and puts in place a more detailed restructuring plan is generally approved, provided it is limited to what is necessary. Longer-term restructuring aid, however, is subject to very strict conditions designed to ensure that the company sheds excess capacity and is able to return to viability.”³

From the above we can make an assessment of how the loan to British Energy will be viewed by the Commission:

i) Can the loan be defined as “rescue aid”?

The Government states that the loan has been made in respect of British Energy’s “working capital requirements and cash collateral for trading in the UK and North America”.⁴ This indicates that the support is in fact Operating aid and not Rescue aid. The DTI advice to its officials about seeking Commission approval for Operational aid is not encouraging:

“... “Operating aid” which gives assistance for the normal everyday production or distribution of a business, helping reduce costs and final selling price, is also viewed very restrictively. Operating aid can normally only be approved in the worst off regions and even then it must be progressively reduced.”

ii) Is the loan “limited to what is necessary”?

Despite its financial problems, British Energy has carried on its business as though nothing is wrong. Its financial troubles stem from the fact that the company’s costs for generating electricity are more than the price it can get for selling it. The obvious way to reduce operating costs is to trim its operations by shutting one or more of its

³ Prof. Mario Monti, op.cit.

⁴ DTI statement to the press, 26-09-2002

British Energy, State Aid, the High Court & the EC Treaty

stations. This is particularly true when the electricity supply industry has cheaper generating capacity and more than is required to meet demand.

With the exception of seeking shareholder approval to increase its borrowing limit, British Energy has not stopped generating, sold assets⁵, laid off workers or cut costs in any other way that would be normal for a company in financial difficulty.

An assertion that the loan is limited to what is necessary would therefore be highly contentious.

iii) Does the loan affect trading conditions contrary to the common interest?

Ecotricity is taking legal action on the basis that its business is being damaged by the favoured treatment of British Energy. Other electricity companies are also suffering from tough market conditions resulting in generating capacity being 'mothballed' and one company (TXU), with a strong commitment to renewable energy, pulling out of the UK.

iv) Is the loan warranted on the grounds of serious social difficulties?

The Government justifies the loan on grounds of safety and security of supply. Aside from the fact that this ignored the unjustifiable damage caused to other companies, both reasons are absurd:

- when safety is in doubt, nuclear power stations are shut down not kept running;
- the UK has about 25% more electricity generating capacity than is required to meet peak demand. Even if all of British Energy's stations stopped generating there would still be around 10 large power stations' worth of generating plant in reserve to keep the lights on⁶.

v) Is the loan a "one off"?

- The "one time last time" principle rules out a second restructuring aid for a company for ten years after the end of its first restructuring. It is arguable that British Energy has already received two loans: £410 million pounds on 9 September and an additional £240 million on 26 September.

Greenpeace and Ecotricity's view is that the loan is incompatible with the EC Treaty. Whether or not the Commission agrees remains to be seen. Nevertheless, it is hard

⁵ This is true at the time of writing although it has recently been reported (16 November) that British Energy may be poised to sell its Canadian assets.

⁶ Why the lights stay on without British Energy:

- For comparison, the capacity of a single large power station is around 1 GW
- Total electricity generating capacity in Great Britain for 2002/3 is 76.6 GW
- Of the 76.6 GW, British Energy contributes 9.82 GW (12.8%)
- The peak electricity demand for 2002/3 is projected to be 61.11 GW
- Excess generating capacity for this period is 15.5 GW (25.3%)
- Without British Energy's stations, excess capacity would be 5.68 GW
- The above figures take no account of 'mothballed' generating plant that could be returned to service (for example, the National Grid Company reported that there is 5 GW of plant held in reserve in England)

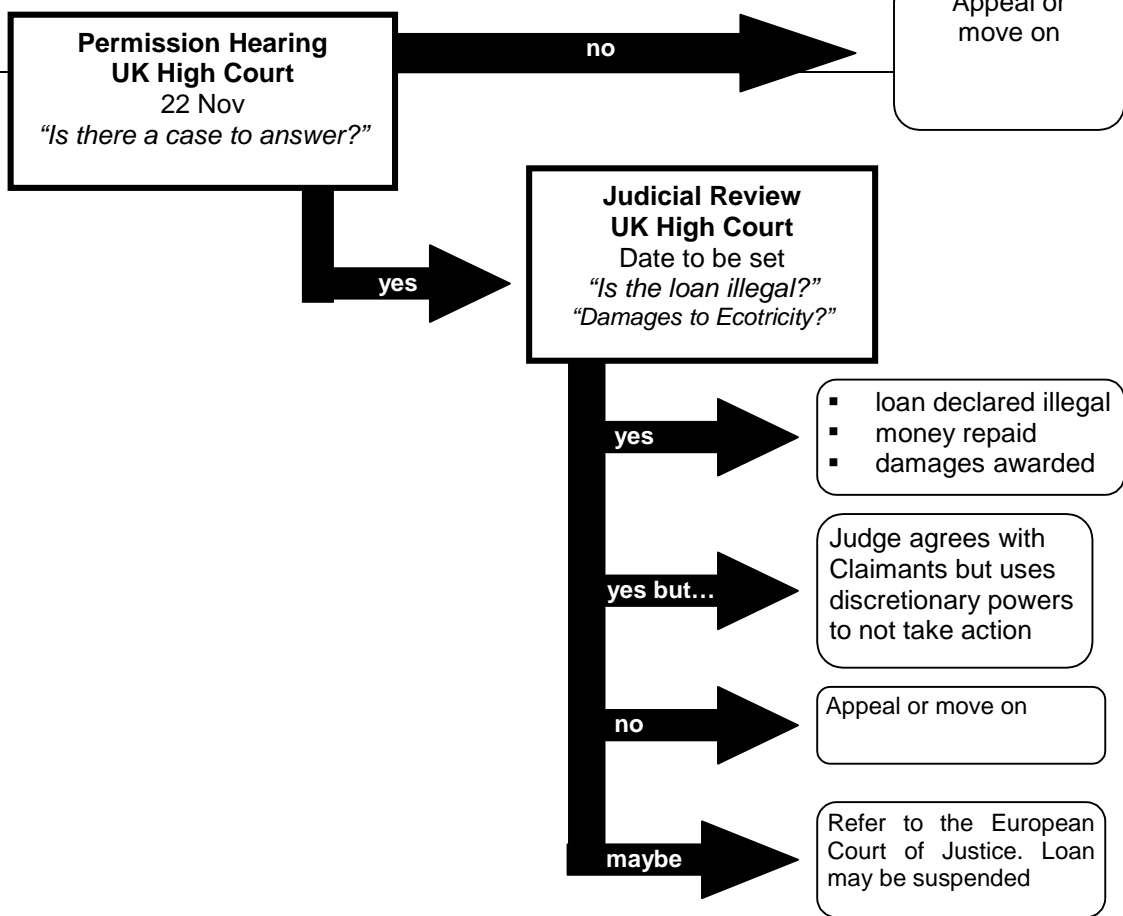
Sources: National Grid Company; Scottish Power UK plc, Ilex

British Energy, State Aid, the High Court & the EC Treaty

to escape the conclusion that there must be serious doubts as to its compatibility. In view of this and the fact that a number of British Energy's competitors, another national government, politicians and members of the public have formally complained to the Commission, it seems incumbent on the Commission to investigate as described in the DTI guidance:

"At any point, if the Commission has doubts about the compatibility of an existing or proposed aid with the Single Market, remaining unconvinced by the arguments that might be put by the Member State concerned, it is obliged to open the procedure allowed for ... The Commission may also feel obliged to open the procedure if a competitor has lodged a formal complaint."

British Energy, State Aid, the High Court & the EC Treaty



6. Potential outcomes

6.1. UK High Court decisions

6.2. What can the national courts do if the Commission decides that the state aid is compatible with the Treaty?

DTI Guidance: actions in the national Courts over unnotified aid
“...The national court has the power to declare the aid illegal and to order its recovery... The national court would not have the jurisdiction to rule on whether an aid is compatible with the common market, but the mere fact that an aid had not been notified properly in advance could leave you seriously exposed to a potentially damaging legal challenge.”

Even if the Commission decides that the illegally introduced loan is compatible with the EC Treaty, the national court can declare its unlawfulness and order the UK Government to recover the taxpayers’ money, with interest.

British Energy, State Aid, the High Court & the EC Treaty

6.3. Commission decisions

First, the Commission has to decide whether to unconditionally approve the measure as aid compatible with the Treaty

or

approve the loan with conditions attached

or

open the formal investigation procedure.

Second, the Commission can choose to decide whether or not to require the UK Government to repay the illegally given aid, with interest dating from the first payment.

6.4. Possible challenges to the Commission decision

Any Member State has an automatic right to challenge a Commission decision to approve aid in the European Court of Justice. In addition, an interested party (for example a competitor company of the recipient) can also challenge the decision providing it has demonstrated a legitimate interest.