Sponsors of new build projects in the EU need to be aware of state aid regulations, and plan carefully to implement a nuclear development strategy that is consistent with them, say Vincent Zabielski and Elina Teplinsky.

Changing times, changing tactics

Tactics used by those who oppose the construction of new nuclear power plants have changed over the years. In 1975, a proposed nuclear plant in Wyhl Germany was cancelled as a direct result of public opposition, which primarily took the form of physical occupation of the work site by local activists. Ten years after Wyhl, a political campaign was successfully waged against the already-completed Shoreham Nuclear Power Plant in Long Island, New York, in the United States. The plant never reached commercial operation, and the US$6 billion in construction costs were passed on to the ratepayers. Now, 40 years after Wyhl, a new state-sponsored tactic to oppose new build is developing, whereby an anti-nuclear member nation of the European Union (EU) may challenge a new-build project in another member nation based on EU regulations limiting state aid to the project, with the implied objective of promoting its own renewables energy policy on an EU-wide basis.

Challenging state support for nuclear power

Historically, nuclear projects have been financed on the balance sheets of large utility companies or with the aid of some form of government support. Such government support can take the form of government financing, tax incentives, loan guarantees, government grants, export credits or favourable nuclear regulatory regimes.
Practically speaking, as with most large infrastructure projects, some level of government support is needed for nuclear new build projects.

In recent days, state support for new build nuclear projects is coming under increasing scrutiny in the EU, with countries that are non-nuclear or increasingly anti-nuclear using EU state aid regulations to influence events in other EU member countries that wish to establish or expand their nuclear power portfolio. This new tactic not only targets the financial support of the host country, but is also intended to discourage both debt and equity investment. To minimise the potential obstacles to nuclear new build projects due to the application of EU regulations governing state aid to companies, project sponsors of nuclear new-build projects in the EU should be aware of this new challenge and be prepared to respond by employing appropriate mitigation measures.

Understanding European state aid rules

Article 107 of the Treaty on the Functioning of the European Union (TFEU) is intended to ensure that aid granted by a member state or through state resources does not distort competition and trade within the EU by favouring either certain companies or the production of certain goods. The rules are intended to ensure a level playing field in the European market and are not limited to nuclear power or even the energy sector - they apply to almost all forms of commerce. The TFEU, except in very specific and narrowly proscribed circumstances, provides a general prohibition of state aid. The fear is that over time, state aid to industry can develop into a reliance on that state aid, and can stifle innovation and result in industrial ‘wards of the state’. Nonetheless, where there is a genuine market failure, and the desired outcome cannot be achieved absent state aid, the TFEU does allow for mechanisms to achieve certain policy objectives by providing aid to cover the gap in the market, provided such aid does not adversely affect trading conditions to an extent contrary to the common interest. Such exceptions can include matters of importance to the state, such as the encouragement in the development of infrastructure to meet certain goals regarding renewable energy or climate change commitments.

In general, EU state aid requires prior notification of all new aid measures to the Directorate-General (DG) for Competition of the European Commission. The notification triggers a preliminary investigation that has three possible outcomes. The Commission may determine that: (i) there is no state aid; (ii) there is state aid, but the aid is compatible with EU rules; or (iii) there are serious doubts as to the compatibility of the notified measure with EU state aid rules. In the event of the last outcome, the Commission will open an in-depth investigation. At the end of the investigation, the Commission issues a final decision. Member states must wait for the Commission’s decision before they can put the state aid into effect. There are three possible types of final decisions resulting from the investigation. A positive decision is a finding that there is no aid, or that the aid is
compatible with the internal market. A conditional decision means that the measure is found compatible, but its implementation is subject to the conditions stated in the decision. A negative decision reflects a finding that the state aid is incompatible with EU rules and may not be implemented.

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1. Patterson, W.C . (1986) Nuclear Power at 113 (2nd edn)
3. See, e.g., Austria ready to sue over subsidized nuclear plants: minister, Reuters, 27 May 2015 at 8:14am BST
4. Treaty on the Functioning of the European Union - Part Three: Union policies and internal actions - Title VII: common rules on competition, taxation, and approximation of laws- Chapter 1: Rules on competition; Section 2: Aids granted by States; Article 107; Article 8(1) of Directive 2009/72/EC
5. See Article 107.3(c) of the Treaty on the Functioning of the European Union