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BAKER & McKENZIE

Steel industry can't rely on state bailout

Edward Fennell

Demands by politicians for state aid to the ailing Port Talbot steel business are being viewed with some scepticism by lawyers because of the constraints on intervention imposed by the European Union. In the run-up to the EU referendum, this is a gift for the Brexiters.

Suzanne Rab, a Serle Court barrister, says: "Payments made by the state on normal market commercial terms are not state aid as the recipient does not receive an advantage." That, she says, reflects the market economy investor principle that allows support to be given where the state is behaving in the same way as a private investor.

If state aid (involving bailouts and subsidies) were involved, however, the government would have to notify the European Commission (EC) well in advance of doing so. "There is also a procedural dimension as it is unlawful for governments to step in with aid before the EC gives its approval even if the aid is approved subsequently," Rab says.

So Sajid Javid, the business secretary, could not just start writing cheques tomorrow without testing whether aid is involved and, if so, whether it would be compatible with the internal market.

There are much bigger obstacles to be overcome before any substantial state assistance could be secured. This was made clear in January when Margrethe Vestager, the European competition commissioner, said: "The European steel industry needs to be competitive globally and it needs to take the steps to ensure that it is. It cannot rely on public funds to survive. It is in this context that EU state aid rules don't allow public support for the rescue and restructuring of failing steelmakers."

Viewed historically, that stance is not surprising. The roots of today's European Union go back to 1951 and the creation by France and Germany of an integrated European Coal and Steel Community that prohibited subsidies and aids granted by states to these industries. In effect, steel and the development of a "level playing field", free of state support, has been the thread running through the European project since day one. Plus, as Totis Kotsonis, of Eversheds, points out, the overproduction of steel in Europe in the early 1990s renewed Brussels' determination to exclude steel producers from state subsidy. Instead it wanted to see market forces driving competitiveness.

This determination was renewed recently when the EC stated: "Steel companies have been acting on the market on the assumption that no further restructuring aid was available to them. If this state of affairs were to change in future, there is no guarantee that steel firms would not relax their efforts towards costs reduction and increased competitiveness, thereby endangering the enormous efforts already made."

How can this be fair compared with the generous treatment of the banks in 2008? "We're not comparing like with like," points out Caroline Ramsay, of Pinsent Masons. "The UK government had to seek emergency permission from the Commission to bail out the banks in the financial crisis but it was permitted to do so because if the banks had collapsed it would have caused a huge disturbance to the whole of the economy. The situation with the steel industry is very different."

Already this year the EC has opposed state subsidies in Belgium and Italy, says Ross Denton, of Baker & McKenzie. "In the case of the Belgian company Duferco, the Commission said that subsidies provided by the Region of Wallonia to the company between 2006 and 2011 were illegal and must now be repaid," he explains. "And the same may well apply to Italian company Ilva, which operates the largest steel plant in the EU at Taranto in southern Italy where the Commission is investigating whether the Italian authorities provided public money to restructure and modernise its plant. If they have, then, again, that is likely to be found to be illegal under EU rules."

So there has to be realism about how far the government can inject state aid into steel — and this is where David Cameron is struggling. "Interestingly, nationalisation would be permitted," Denton says, "but the government would immediately face the problem that under EU rules it still could not subsidise the company and its enormous losses."

Maybe the best hope might lie in marginal initiatives — and that may be where Sanjeev Gupta, the founder of Liberty House, sees a chink of light. For example, some small-scale support would be permitted for research and development in the use of recycled scrap material and the adoption of "best available techniques".

Ironically, in the event of an actual closure, aid would be permitted to cover payments to workers made redundant or accepting early retirement. As to keeping the plant going at full blast, though, only a Welsh wizard could achieve that.

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State subsidy of steelworks, such as those at Port Talbot, are opposed by the EC

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