
Session 4: EU State aid approval

The Phoenix Deal

BNLA Conference, 21 May 2025

Setting the scene - the applicable EU State aid rules

■ General EU State aid rules

- As a rule: State aid is prohibited, unless specifically allowed by the Treaty or approved by the European Commission (EC)
- Substantial assessment (Article 107 TFEU)
 - Aid is considered State aid if it:
 - Is granted to an undertaking
 - Involves State resources
 - Provides an advantage
 - Is selective
 - Distorts or threatens to distort competition
 - Affects trade between Member States
 - EC can declare State aid measures compatible with the internal market to support certain policy objectives, listed in Article 107(2)-(3) TFEU
 - E.g. 107(3)(c) TFEU: *“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;”*

Setting the scene - the applicable EU State aid rules

- General EU State aid rules

- Procedure (Article 108 TFEU)
 - **Standstill:** State aid measures must be notified to the EC and may not be implemented before EC approval
 - EC approval decision may follow preliminary investigation or in-depth investigation in complex cases
- Possible **exemption:** no notification needed a.o. where
 - the aid measure complies with compatibility conditions set out in EU block exemption regulations
 - *De minimis* aid
 - Aid granted under an approved aid scheme

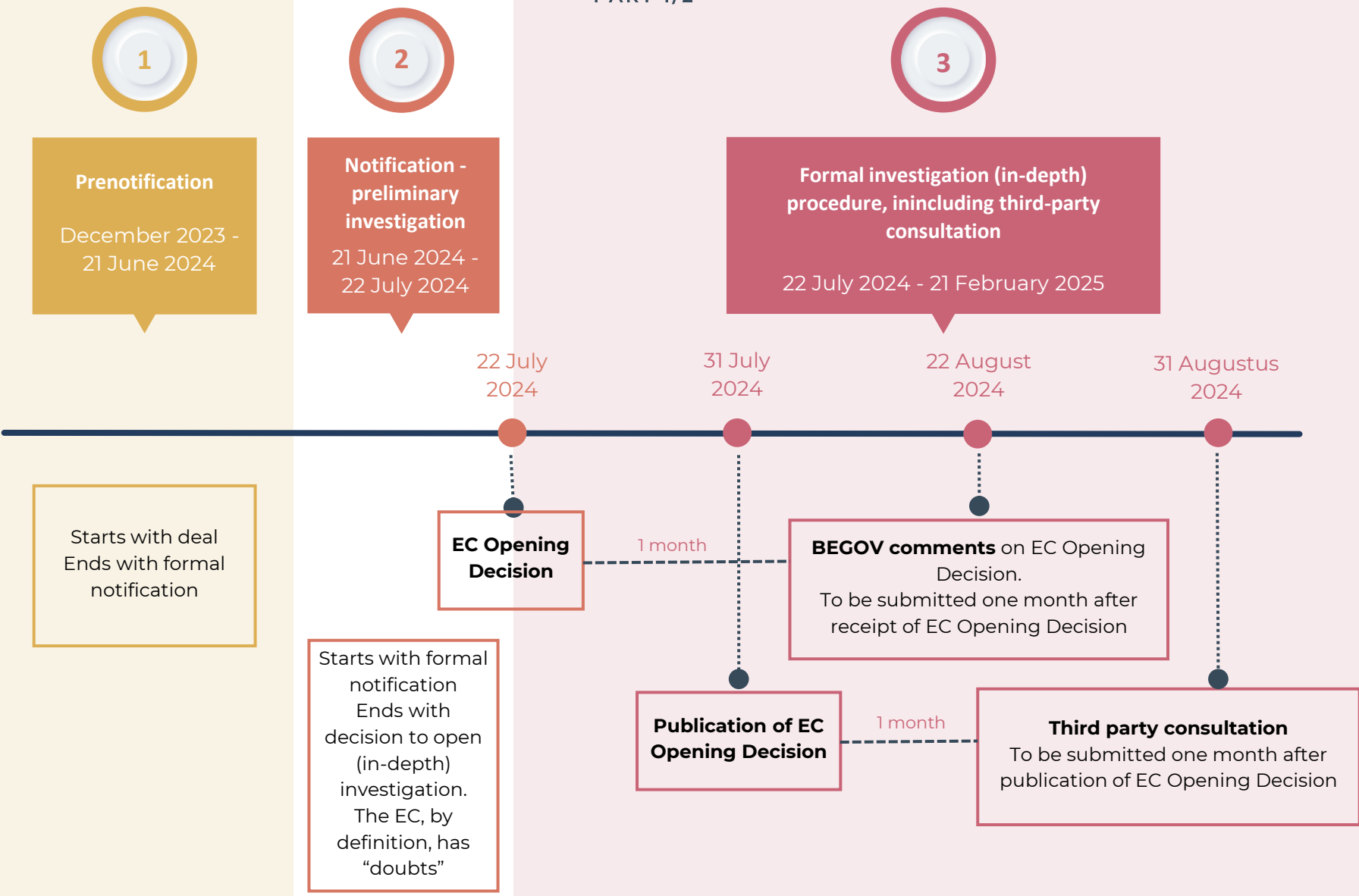
Setting the scene - the applicable EU State aid rules

▪ Specificity of nuclear projects

- **Substantially** (assessment of compatibility with EU internal market under Article 107 TFEU)
 - No block exemption regulation
 - No EC guidelines applicable to the nuclear sector
 - Explicit exclusion from Guidelines on State aid for climate, environmental protection and energy ('CEEAG')
 - the framework for public authorities to support the European Green Deal objectives efficiently and with minimum distortions of competition
 - EC assessment based on Article 107(3)(c) TFEU directly
 - Positive condition: aid facilitates the development of an economic activity
 - Cumulative criteria: necessity, appropriateness, proportionality...
 - Negative condition: aid does not distort competition and trade between the Member States
- **Procedurally** (notification procedure under Article 108 TFEU)
 - Typically, EC formal investigation ("in-depth") procedure (see next slide)
 - Parallel Euratom Notification (DG ENER)

PHOENIX PROCEDURAL TIMELINE

PART 1/2



PHOENIX PROCEDURAL TIMELINE

PART 2/2

3

**Formal investigation (in-depth)
procedure, including third-party
consultation**

22 July 2024 - 21 February 2025

31 Augustus
2024

**Third party
comments**

1 month +
1 month

30 October
2024

**BEGOV Observations on
third-party comments**

Further exchanges with EC
28 submissions / meetings
with EC case team between 2
September 2024 and 1
February 2025

21 February
2025

**EC (final)
Compatibility
Decision**

4

Post-decision

13 May
2025

**Publication
on DG COMP
Website**

Publication OJ

Possible annulment
proceedings before
the CJEU?

Notified aid measure

Components	Definition/sub-components	(Most) relevant EC precedents
1: CfD, financial and structural arrangements	“the set of sub-measures related to the remuneration and financial arrangements allowing stable revenues for the two nuclear reactors, as well as the changes in the shareholder structure through the creation of BE-NUC” (JDA, JV, Equity injection and Shareholder Loans, CfD, MOCP/WCF, SDC Loans, Tender procedure, EMSA...)	Hinkley Point C (UK, 2014), Dukovany (CZ, 2024)
2: Waste cap	“the set of sub-measures related to the decommissioning of the nuclear power plants and the long-term storage and final disposal of transferred nuclear waste and spent fuel (including the amendment of the security package to monitor the financial situation of the nuclear operator against the risk profile modified due to the agreed cap)”	“German Deal” (DE, 2017)
3: Legal protections (“Change in Law”)	“the agreements on risk-sharing and indemnification in case of certain legislative changes”	Belgian NPP lifetime extensions (BE, 2017)

Selected legal issues and main take-aways

- **One notified aid measure**

- Unsuccessful legal argument of “no aid” for specific (sub-)components (pari passu...)
 - **EC: all components involve aid**

- Approved as a package deal

- **“one single intervention”**

“Since the three components of the measure were planned together, have the same objective, are established by the same agreement and law, are granted by the same granting authority, and were all three necessary to convince Engie and Electrabel to participate in the LTO Project, the Commission considers that they are part of a single intervention and should be examined together as a single intervention.”

Selected legal issues and main take-aways

■ CfD design

- **EC “doubts”** in Opening Decision
 - Lack of appropriate incentives to react to market circumstances and to schedule maintenance in the most efficient way (including the use of the DAM price used as reference market price in the CfD design)
 - Combination of remuneration measures could relieve the beneficiaries from too big a share of the market and operational risks
 - Target rate of return of 7%
- **Adjustments**
 - Transfer of the decision-making authority regarding economic modulations from BE-NUC to the EMSA partner
 - Introduction of financial incentives in the remuneration of the EMSA partner (optimization of modulations)
 - Removal of the fixed pre-set modulation threshold of minus 20 EUR/MWh
 - Modified remuneration structure has also been taken into account in the revised Bidding and Imbalance Strategy (‘BIS’)
 - Intensification of the pain/gain sharing mechanism (MPRA) - adjustment of the de facto rate of return of the project)
 - Cap on the amount of the Minimum OPEX and capital payment (‘MOCP’)

Selected legal issues and main take-aways

■ CfD design

■ Interaction with **EMD Regulation**

■ Substantial/material interaction: CfD design principles foreseen by Article 19d(2), a.o.

- *preserve incentives for the power-generating facility to operate and participate efficiently in the electricity markets, in particular to reflect market circumstances;*
- *prevent any distortive effect of the support scheme on the operation, dispatch and maintenance decisions of the power-generating facility or on bidding behaviour in day-ahead, intraday, ancillary services and balancing markets;*

- Also: CfD proceeds, penalty clauses...

■ Procedural interaction

- Joined meetings DG COMP/DG ENER

Selected legal issues and main take-aways

■ Waste cap

- EC “doubts” in Opening Decision
 - Amount of the lumpsum payment of EUR 15 billion for the transfer of the nuclear waste and spent fuel liabilities
 - Amount of the additional decommissioning liabilities
- Discount rate and risk premium – challenging comparisons with *German Deal*

Selected legal issues and main take-aways

■ Compliance with relevant provisions of EU law

- *Hinkley Point C* judgment of CJEU: aid measures that violate other provisions of EU law are incompatible
- *In casu*, Phoenix complies with a.o.
 - Environment protection rules
 - Mainly obligation of prior environmental impact assessment
 - Article 194(2) TFEU: Member States are free to include nuclear energy in their energy mix – hence, environment protection does not preclude “in all circumstances” the grant of State aid for nuclear projects (*Hinkley Point C*)
 - Public procurement rules (EMSA)
 - See pending CJEU *Paks II* case
 - Euratom rules
 - Merger Regulation
 - JV is not fully-functional (i.e. not reportable to the EC)
 - EMD Regulation (see above)

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Kim specialises in European and Belgian competition law, including European State aid. She has broad experience and advises public bodies as well as Belgian and international companies on competition law and regulatory matters in a broad range of industries. She also represents clients before European and Belgian courts in these matters.

Kim was part of the Eubelius team working on Project Phoenix. She assisted the Belgian State on merger control and State aid aspects.

She has been a member of the Dutch-speaking association of the Brussels bar since 2013 and joined Eubelius in 2021.

Kim graduated with a Master's degree in law from Universiteit Gent and obtained an LL.M. at the College of Europe in Bruges in 2012.

She handles cases in Dutch, French, English and Spanish.



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Practice areas

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