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37/2018

State aid policy – analysis of the impacts of the new state aid law with regard to the implementation of ex post evaluation

Summary

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State aid policy – analysis of the impacts of the new state aid law with regard to the implementation of ex post evaluation

Summary

by

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Summary

The European Commission has introduced new obligations for the evaluation of state aid schemes for the member states of the European Union in the Guidelines on State aid for environmental protection and energy (EEAG) and the General block exemption Regulation (GBER). Thereby, systematically assessing the impact of especially large respectively novel state aids by means of an ex-post evaluation plays a key role. For this reason, the Federal Environment Agency together with the Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (BMUB) has made the ex-post evaluation of environmental state aid schemes subject to a research project.

The project's aim is to examine the **scope of application for ex-post evaluations in the field of environmental state aid law** and to critically evaluate the results. Additionally, the research project shall provide **work aides** for **ex-post evaluations**. Therefore, the Commission's relevant provisions and documents are analysed and **strategies** for **handling** and **conducting** ex-post evaluations are developed – also from an **economic** point of view. Finally, the requirements regarding an **evaluating expert's independence** are carved out and the **data protection framework** for ex-post evaluations is outlined.

1 The ex-post evaluation's function and object within the GBER and EEAG

By performing ex-post evaluations, it is empirically reviewed whether the aims of implemented state aid schemes have been met and which effects they had on competition (positive and negative effects). An ex-post evaluation therefor serves the ex-ante evaluation of a respective aid scheme's extension or a future aid scheme pursuing similar purposes.

Whenever the European Commission presumes a state aid scheme having to be evaluated, the evaluation duty regularly comprises of following "partial obligations" for the member states:

- „notification" of an **evaluation plan** respectively submission of a draft evaluation plan to the Commission,
- **carrying out** the evaluation,
- **releasing** the evaluation to the **public**
- and **submitting** the evaluation to the Commission.

There is strong evidence that these obligations shall basically apply to both the GBER and EEAG, even though the two latter obligations cannot be explicitly found in the GBER.

2 Evaluation duties in the scope of GBER

The obligation to evaluate **exempted environmental state aid schemes** (cf. Art. 36 ff. GBER) is exercised pursuant to Art. 1 sec. 2a) GBER. Accordingly, not only shall an evaluation be "notified" to the Commission, but it shall also be carried out, if the annual budget for a state aid scheme exceeds the threshold of 150 mio. EUR. Such schemes are provisionally exempted for six months (Art. 1 sec. 2 a) GBER). On grounds of the notified evaluation plan, the Commissions decides whether the exemption shall continue to apply for a longer period. By contrast, the obligation to evaluate **alterations of such state aid schemes,** which may affect the state aid scheme's compatibility with the GBER or which may have essential effects on the content of an already approved evaluation plan, is determined by recitals 243 et seq. EEAG, since such schemes have to be notified (Art. 1 sec. 2b) GBER).

Introducing Commission's decisions on continuing the exemption in the scope of the GBER basically has to be considered as **"alien to the system".** For, as a matter of principle, it is not (any longer) the

Commission itself who decides within the scope of the GBER. However, via deciding on whether to continue the exemption, the Commission can attract decision-making powers once more and bring about a notification procedure. Therefore, this new form of decision making in the scope of the GBER aims at controlling, steering and enhancing the member states' relevant self-regulation by evaluations and those evaluations being considered for future state aid schemes.

If the Commission does not decide that a schemes continues to be exempted, it has to be notified, even though it regularly had already come into force on grounds of the at least preliminary exemption. The GBER does not provide a special provision for that case with regards to the **prohibition of putting measures into effect.** It seems reasonable to suppose that the prohibition applies as long as a state aid scheme has not (no longer is) preliminary exempted and has not (yet) been notified. The state aid scheme may possibly not be put into effect for an interims phase.

3 Evaluation duties in the scope of EEAG – a challenge for the member states

An evaluation according to recitals 242 et seq. is naturally only applicable to such environmental state aid schemes which have to be notified. Basically, these are environmental state aid schemes which have not been exempted and which fall in the scope of EEAG according to recital 13. However, there is strong evidence that the obligation to evaluate shall also be applicable to environmental state aid schemes which do not fall within the scope of EEAG according to recital 13, but which are notified respectively approved directly on a primary-law level.

Pursuant to recitals 242 et seq. EEAG, the Commission generally disposes of **discretion,** which could be called bound discretion according to the principles of German Law. Besides, the discretionary decision significantly depends on the **interpretation of undetermined legal notions.** At the same time, regulation (EU) 2015/2282 and recitals 243 s. 3 EEAG rule that the member states shall already indicate in the **notification of a state aid scheme** whether it includes an evaluation. Respectively, aforementioned provisions stipulate that the member states shall notify a draft evaluation plan. Therefore, in the course of a self-assessment on the grounds of diligently interpreting the relevant provisions, it falls upon the member states to anticipate the Commission's decision on whether a state aid scheme has to be evaluated.

The interpretation of the relevant provisions in recitals 242 et seq. EEAG in the light of wording, history and rationale leaves one with legal uncertainty for this self-assessment and poses a challenge in this respect:

- On the one hand, the interpretation of the criterion **"significant distortion of competition"** according to recitals 242 et seq. EEAG shows that the Commission is given leeway. However, according to the wording of recital 242 EEAG, this term is of **greater importance** for the Commission's discretionary decision. The fact that the level of impending distortion of competition is the central legal test within the compatibility assessment pursuant to Art. 107 sec. 3 TFEU confirms this.
- On the other hand, recital 243 s. 1 EEAG rules that the evaluation shall be limited to the case groups "**large aid budgets", "novel characteristics"** and **"significant market, technology or regulatory changes"** for reasons of proportionality. In detail, these three case groups hold certain legal uncertainty as to when the prerequisites in each case could be met. Besides, considering the wording of recital 243 EEAG, it remains unclear whether the assessment should be limited to these three case groups, and therefore, if so, a further examination of a **"significant distortion of competition"** does not have to be carried out beyond that.

In contrast, a separate examination of a „significant distortion of competition" could ensure

- that one given case group would not be an essential, but only a **sufficient condition** for an obligation to evaluate. If applicable, an obligation to evaluate could consequently also be established by assessing the distortion of competition without a case group given.
- that, if applicable, a conceivable assumption of an obligation to evaluate could be refutable given a case group respectively ensure such assumption **not arising at all,** if a "significant distortion of competition" did not impend. As a consequence, an evaluation could be considered as unnecessary in the absence of a "significant distortion of competition" even given one or more of the case groups.

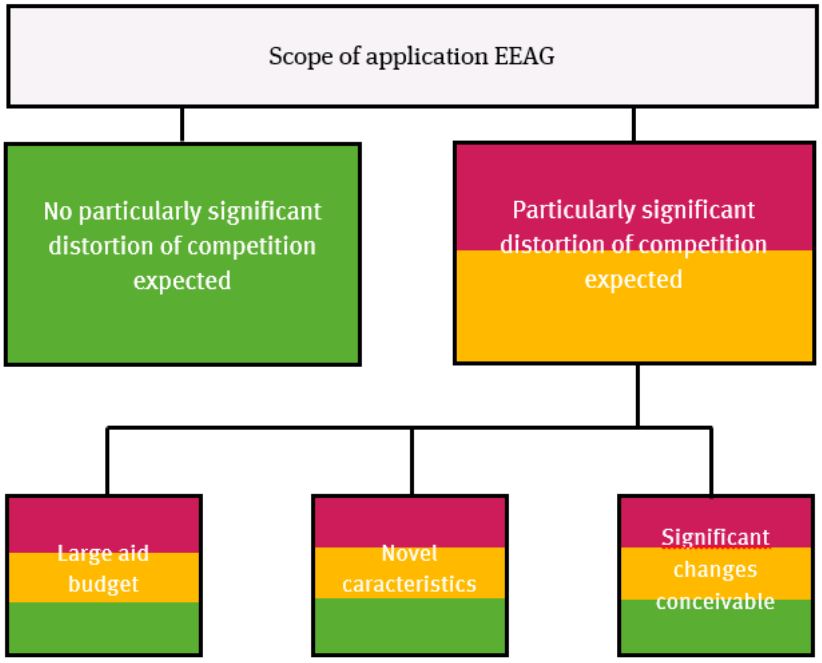
A comparison with annex I part 1 number 8 Regulation (EU) 2015/2282 containing the details for the notification as to if and why an obligation to evaluate is included by the member state, insofar does not contribute to clarity for not only does it name the case groups established in recital 243 EEAG as priority reasons for an obligation to evaluate, but also does the Commission enquire whether there is a significant distortion of competition as a catchall element. This suggests that an obligation to evaluate eminently may persist, even if none of the case examples may be given, because a "significant distortion of competition" (as the case may be for other reasons) is expected. The reverse question, whether an evaluation may be considered unnecessary in spite of a given case group, however, remains unanswered.

Meanwhile, statements made by the Commission in the relevant working document "Common methodology for State aid evaluation" (http://ec.europa.eu/competition/state_aid/modernisation/state_aid_evaluation_methodology_en.pdf) reflect this case. With regard to the case group "large aid budget" it is elaborated that state aid schemes need not be evaluated, if they do not show any problematic aspects despite their large budget. Schemes with a high number of aid beneficiaries of a low aid amount or other cases where the danger of significant changes or significant distortions of competition are unlikely are mentioned as an example. These statements confirm that the examination of a "significant distortion of competition" is of great significance in its own right, which may lead to an evaluation being considered unnecessary despite of a given case group.

Therefore, it is probable for the Commission's decision-making practice that the Commission will take a **state aid scheme's "overall picture"** into account in the scope of its discretionary decision. As soon as a certain degree of distortion of competition has to be feared, this could lead to interdependencies between the likely degree of distortion of competition and the case groups mentioned in recital 243 s. 1 EEAG:

- The sooner and the more definite one of the criteria mentioned in recital 243 s. 1 EEAG is given, the more the Commission is to be expected to take an involved distortion of competition as a reason to affirm an obligation to evaluate, even though the distortion as such may not necessarily seem especially significant.
- At the same time it is obvious that different emphasis may be laid on the mentioned case groups, if a very significant distortion of competition is to be expected. In such a case it has to be assumed that, where appropriate, the requirements concerning "large aid budget", "novel characteristics" and "predictability of changes" for requesting an evaluation may be lower or even non-existent.
- Additionally, it has to be presumed that it will not be insignificant for the Commission's discretion whether to assume an obligation to evaluate, if more of the case groups were given (possibly gradually to varying degree).

The Commission's decision on an obligation to evaluate could therefore be depicted as follows:



Therefore, it is notable for the decision regarding the obligation to evaluate outlined by this scheme that the combination of indeterminate legal concepts, the Commission's discretion and unclear wordings in recitals 242 et seq. EEAG respectively the interaction with afore mentioned regulation (EU) 2015/2282 may lead to uncertainties respectively may not eliminate uncertainties. Overall, this renders the member states' "self-assessment" regarding the obligation to evaluate a challenge.

If a draft evaluation plan is submitted with the notification of a state aid scheme in the scope of a member state's self-assessment, the draft evaluation plan will explicitly be an integral part of the Commission's assessment of the scheme. A member state's decision to carry out an evaluation and therefore to submit an evaluation plan with the notification may intercept uncertainties regarding the ex-**ante** evaluation of the relevant state aid scheme (which has to be carried out within the notification procedure). For a comparatively briefly time-limited aid scheme, which is subsequently evaluated and therefore assessed with regards to its effects and efficiencies, could readily be adapted for a possible extension according to the results of the evaluation. In this respect, a member state's decision in favour of an evaluation may (already) lead to a more "generous" decision by the Commission when assessing the relevant state aid scheme. Then again, from the member states' point of view, when in doubt, this could commend a lot to rather opting for than against the submission of the evaluation plan.

4 A traffic light system for the member states' „self-assessment" in the scope of EEAG

In order to meet the outlined challenges for the member states regarding the "self-assessment" on the existence of an ex-post obligation to evaluate, a traffic light system is developed on grounds of the aforedepicted system in the scope of this research project. The traffic light system aims at:

- **preparing a holistic considered decision,**
- in a manageable system, which includes **gradual downgradings** with regards to the individual relevant parameters as well as **interdependencies** between them,
- which considers a certain **presumption of conformity** of the **case groups,**

- supporting a **decision regardless of the results** on grounds of **consistent standards**
- and therewith granting certain **comparability between decisions across different aid schemes.**

In the traffic light system, these objectives are implemented by

- a set of **test questions**,
- a **level system** with levels from 1 to 5 for each parameter (for the "significant distortion of competition" as well as for the three mentioned case groups).
- a **calculation formula**
- and a **scoring** leading to the traffic light colours „green", „yellow" or „red" as a result.

All of the processing steps are clearly summarised in an **assessment sheet** "guiding the operator through" the procedure.

Thus, the traffic light system tries to meet the holistic considered decision the Commission will take in the end by setting assessment standards for each parameter in the set of test questions. The level system considers gradual differences as to which the single relevant decision-making parameter is fulfilled. The calculation formula leads to weightings, which include imponderabilities and interdependentities between the parameters. Moreover, in practice, the level system also has the advantage that the "decision-maker" can make his or her decision on each level regardless of the result, since the result whether there is an obligation to evaluate is only given after having applied the scoring. This uniform application of the traffic light system grants a certain comparability between decisions across different aid schemes. The implementation of the traffic light system is guided step by step by the **"assessment sheet"** integrated in the research report. Therefore, it is well manageable in praxis.

5 Organisational aspects of the evaluation

The organisational aspects comprise of the extent of the evaluation, determining factors therefor as well as the time phases and allocation of tasks within planning and conducting the evaluation.

5.1 Determining the necessary extent of evaluation

The necessary extent of evaluation can be estimated on grounds of the following factors:

- An **extensive evaluation** is especially necessary, if an aid scheme reaches a (very) high scoring in estimating the **probability of an obligation to evaluate** by means of the traffic light system, thus scoring a result (high) above the threshold leading to the traffic light colour red.
- Regarding projects with an **annual budget** exceeding 150 mio. EUR, one should additionally consider the amount to which the annual budget exceeds 150 mio. EUR. The higher the aid amount is, the more an extensive evaluation becomes necessary.
- Ultimately, when estimating the necessary extent of evaluation it should be considered whether an aid scheme is designed for **extension** respectively **continuation.**

5.2 Determining factors regarding the extent of evaluation

The extent of evaluation may be adjusted by numerous factors. For example, the extent of evaluation can be limited, if

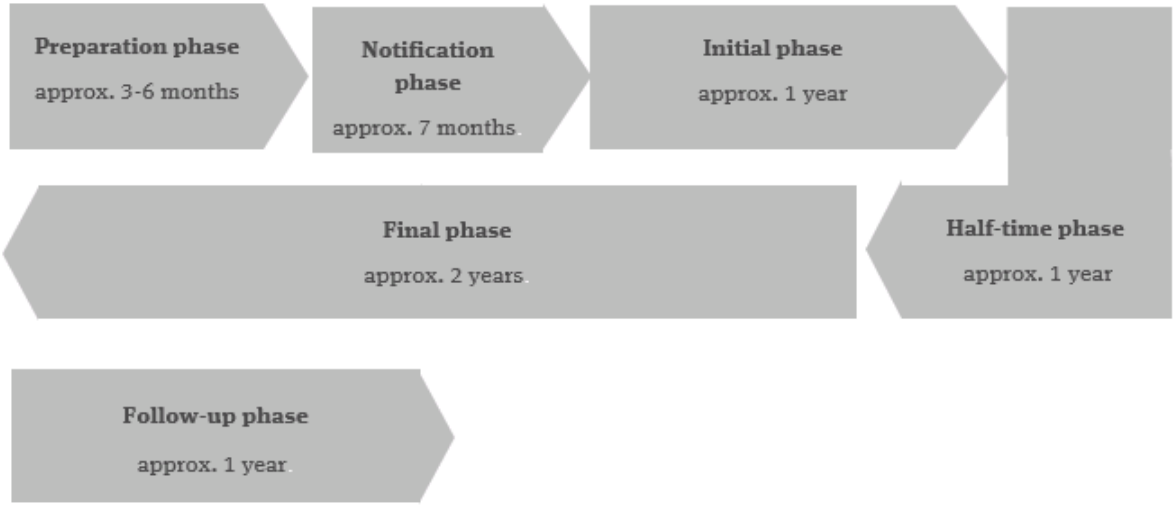
- sufficient **internal know-how on drawing up an evaluation plan** is at hand and if it is not necessary to engage an external independent expert,

- **results of the evaluation of similar aid schemes** are available,
- one merely falls back on **publicly available data** and if it is not necessary to collect data especially for the evaluation,
- the **data is collected for a subpopulation only,** i.e. not for all undertakings active in the market and with low frequency, i.e. at yearly intervals instead of monthly intervals,
- aid is granted by ways of a **tender procedure** (such as a scoring system), which is able to provide **data** for the application of a precise, feasible and rather less elaborate **evaluation method,**
- merely direct effects are evaluated without also taking indirect effects into account nor the aid amount's proportionality and the aid instruments' appropriateness and
- only the **direction** is determined without considering the extent of the **effects.**

Not only do the mentioned determining factors influence the **robustness** and the **time frame,** but also the **evaluation's budget.** Normally, the budget for an evaluation does not increase linearly with the volume of a project meaning that a certain minimum amount also has to be calculated for smaller projects.

5.3 Time phases and allocation of tasks within planning and carrying out the evaluation

Assumed a state aid scheme shall last for about four years, the time phases of the evaluation could be organised as follows:



The **preparation phase** is essential for an appropriate evaluation. Timely and comprehensive planning facilitates the organisation in the longer term (e.g. precise budget and staff planning) as well as the future implementation (e.g. by collecting suitable data) and allows for recognising difficulties in a timely manner (e.g. confidentiality issues when collecting data).

The evaluation should be organised by an **internal steering group** compiled of the authorities' employees who are familiar with the aid scheme and particularly have basic methodical knowledge. The internal steering group is especially responsible for launching the evaluation, supervising the course of the evaluation, i.e. the evaluation team's qualification, correctness of the applied method, the usability of the evaluation results and the observation of the time schedule.

6 The requirements regarding the expert's independency

The evaluation has to be carried out by an expert who is independent "from the aid granting authority" (recital 243 s. 2 EEAG). The rationale of the **expert being independent** lies in assessing an environmental state aid scheme's effectiveness and consequences from a **technical point of view** only. When choosing the independent expert, besides also considering qualifications such as **methodical knowledge and knowledge on economic sectors, knowledge on the relevant administrative acts** may also be taken into account.

Neither the responsible authority nor the internal steering group must influence the evaluation results. Yet employees of other authorities or public bodies may be considered as independent experts, if they are **not subject to directives.** In any case, an authority is not subject to directives when it is **not technically supervised.**

Though, with regard to Art. 5 sec. 3 Basic Constitutional Law in terms of regulatory departmental research, the core area of scientific work is partially seen as **deprived from the right of instruction.** If an ex-post evaluation were to be assigned to this core area of scientific work, it could thus exceptionally be possible to also regard employees of a technically supervised authority as "independent" in the sense of recital 243 EEAG for the implementation of an evaluation. As far as can be seen, (so far) there is no decision-making practice by the Commission or the European Courts on that topic.

The aforementioned criteria concern the choice of an independent expert. A different question is whether and to what extent the expert could be provided with specific official knowledge, information or data for carrying out an evaluation. It seems to be decisive for making information available to the expert that doing so may not permit systematically steering at a certain outcome of the evaluation. Should official information or data seem to be necessary for an evaluation, this could, by the way, be anticipated as much as possible when planning the evaluation. For when the Commission assesses respectively approves an evaluation plan including the use of official data, this approach is unlikely to be objected in retrospect.

7 Principles of the evaluation methodology

The **evaluation design** is basically determined by the following factors:

- Which questions shall be answered in the scope of the ex-post evaluation? These **evaluation questions** should be derived from the aid scheme's aim(s).
- Which **quantifiable result indicators can** be used for answering the evaluation questions?
- Is it necessary to, besides evaluating direct effects of the aid scheme, also evaluate **indirect effects of the aid scheme?** The evaluation of indirect effects is especially necessary if imitator effects are expected. This is often the case for so-called „lighthouse subsidies". Such pioneer projects of one firm can be expected to affect other firms' investment decisions.
- Shall the **funding intensity's appropriateness** and the **chosen aid instrument's suitability** be evaluated?
- Which **evaluation methods** seem to be most suitable?

As for evaluation methods, a whole range is at hand differing with regard to practicability and precision. Expert interviews or surveys, for example, are quite practicable methods for determining an aid scheme's effectiveness. At the same time, however, these methods are prone to manipulation. Moreover, they often do not allow to take a closer look at indirect effects or questions regarding the aid scheme's appropriateness and proportionality. Yet this can be achieved by **statistical procedures** with

a higher precision. Statistical procedures especially allow for addressing possible **endogeneity problems** and **anticipation and deadweight effects** as well as **crowding-out effects** and thereby allow to determine the **reference scenario,** which is not observable, more precisely.

7.1 Difference-in-differences approach

At present, the difference-in-differences approach (DiD) is the **most common statistical method.** In the evaluation plans approved so far, this is the most commonly included method. When applying this approach, the difference within the state aid recipients' result indicators before and after receiving the aid is compared to the difference within the **control group's** (a group, preferably similarly structured, which did not receive state aid) result indicators. The difference in the differences shows an aid scheme's effect.

This approach considers that also **non-observable factors** (such as a varying strong ecological company focus) can influence the result indicators. **Non-observable differences** between **state aid recipients and the control group** with regards to such factors may already lead to a difference in the state aid recipients' and the control group's result indicators before receiving the aid. In the frame of this methodology it is assumed that differences within the result indicators, already given before introducing the aid scheme, would have continued to exist without the aid scheme. Merely the difference in the differences of the result indicators of the state aid recipients and the control group before and after receiving the state aid is interpreted as the aid scheme's effect. Thus, the result is not affected, if **non-observable factors equally influence the result indicators of both the state aid recipients and the control group.** The effect non-observable factors have is not misunderstood as an effect from the aid scheme. By this means it is possible to identify those effects respectively those developments within the group of state aid recipients which are exclusively attributed to the aid scheme. Therefore, by applying the DiD approach, an aid scheme's effects can be estimated rather precisely.

7.2 Regression discontinuity approach

In the evaluation plans approved so far, the regression discontinuity approach (RD) is the second most commonly proposed approach. This approach is fit to be applied when the selection of the aid recipients is carried out by a scoring system and the applicants are awarded the aid upon achieving a certain scoring result. The estimate approach provides for a comparison of the development of undertakings which did not receive state aid with a scoring result **just below** the threshold and of undertakings which did receive state aid with a scoring result **just above** the threshold. Due to the state aid recipients' and the non-recipients' similar scoring result, one assumes both groups to be comparable, which is why systematic differences in the groups' development can be attributed to the respective aid policy as its effect.

7.3 Randomized experiments

So-called randomised experiments consider random elements for the selection of the state aid recipients. This allows for the state aid recipients being a random sample. The estimate approach provides for a comparison of the development of undertakings which received state aid and of undertakings which did not receive state aid. This approach's advantage is that it is **not biased because of the selection,** which is why systematic differences between aid recipients and non-recipients can be attributed to the respective aid policy as its effect. This is why randomised experiments offer comparatively precise results. Therewith, this approach offers significant advantages and even is the best approach according to the Commission's opinion. However, a random selection of aid recipients is par-

tially also seen critically, since it opposes the aim of lots of schemes to select the most suitable recipients on the bases of objective criteria.

8 Data base

For an ex-post evaluation it already has to be outlined in the scope of the evaluation plan which data is necessary to which extend and which data already is available:

- Data which, where appropriate, could be collected by the authority in the scope of the **selection procedure for awarding the aid:** This offers the possibility to collect data both regarding the aid recipients as well as the reference group consisting of the non-recipients directly via the state aid proceedings (i. e. also data from applicants not being awarded subsidies as a result).
- Data collection through **surveys:** After the selection process, data can be collected through surveys conducted on a voluntarily bases by the granting authority or external companies (such as TNS Infratest for example).
- **Own internally available data:** These data have been collected by the granting authority in the course of preliminary studies on the aid schemes. Furthermore, one should verify whether data, which were collected in another context by the authority and which could be of relevance for the present evaluation, are possibly available.
- **Other authorities' or public/private bodies'** data: Other authorities or public/private bodies (such as research institutes) may have, for example, collected valuable date in the course of own studies or aid schemes, which could be placed at the granting authority's disposal where applicable.
- **Data in the public domain:** E. g. data obtainable from the Federal Statistical Office or umbrella associations (regularly free of charge).
- **Commercial data:** There are several providers, such as Nielsen (www.nielsen.com/de/de.html), GfK (www.gfk.com/de/) or IRL (www.iriworldwide.com/de-DE), who collect and process data as a business model. Those providers charge fees for those data.

9 Data protection framework

The depicted possibilities are conditional to meeting the needs of trade and business secrets respectively complying with the data protection legal framework. However, the latter only has to be respected, if relevant data (at least also) are **personalised.** Therefore, with regards to an evaluation, it may be worthwhile checking on a case-by-case-basis whether personal data may, where required, be excluded from the beginning (e. g. as is the case with all-business-related data) or could be avoided otherwise (e. g. by anonymization or aggregation).

Yet, if data protection law is applicable, the legal situation is unclear due to **data protection law's federal structure** and various **specific legal provision. The EU General Data Protection Regulation (GDPR)** only applies from May 25 2018 within the EU. It will replace the Federal Data Protection ACT (FDPA) applicable today. However, besides the GDPR a new FDPA and new acts on data protection by the federal states will be applicable. These acts are bound to contain supplementary respectively deviating provisions, since the GDPR insofar contains so-called flexibility clauses.

Basically, the **data protection ban with permit reservation applies,** cf. sec. 4 par. 1 FDPA. This means any handling of personalised data either requires the **consent of the person concerned** or **another legal basis.** There is no specific legal basis for carrying out ex-post evaluations of aid schemes at present. This is why the given possible legal basis has to be examined at a federal level as well as at

a federal state level, if necessary. Not only has this examination to consider any **handling of data** – e. g. collecting, transmitting, storing, using – in the scope of an evaluation, but also the **varying data** (i. e. information) and **data processing bodie**s concerned. This examination is challenging, complex and strongly case-related especially for comprehensive data flows as expected for evaluations. Nonetheless, regarding the ban with permit reservation, certain general statements can be made for ex-post evaluations, especially on the legal grounds which have to be considered for handling data:

- The respectively relevant legal grounds decisively depend on the **sources** the respective **data** stem from and on the **body receiving the data** and **processing** and **using** the data for the evaluation. Since, in the scope of an evaluation, the data sources may be eminently different, for that reason alone **various legal grounds** can be relevant for one single evaluation. Besides, on a case-by-case-basis, further provisions respectively data protection principles, which apply specifically to the body receiving the data (i. e. the evaluating authority), may become relevant. The research report differentiatedly comments on this in each case.
- As depicted, in the scope of an evaluation, the legal basis for each of various possible data treatments may not only arise from applicable law, but also from **the consent given by the parties concerned.** In the scope of evaluations, attention is pointed at the consent since it could provide for collecting and using data from aid recipients as well as from the reference group composed of such applicants who were not granted any aid in the end. In addition, therewith **high data granularity** could be obtained, because data could be collected directly at company's level, regardless of the data being personalised – as it often is the case. In this case, however, consent is subject to rather **strict legal requirements.** The research report comments on this in detail.

The investigation therewith also shows that legal uncertainties respectively the necessity of complex case-by-case analyses of, if so, various legal standards could be met, if **specific legal grounds** for data treatment were created for the purpose of evaluating environmental state aid schemes. This could be done by a legislative decree issued by the ministry in charge, whereby the former can constitute an "other legal provision" in the sense of sec. 4 par. 1 FDPA. Such a legislative decree could justify specific data collections and data processings at aid recipients and applicants not granted any aid (in order to gain data for a so-called reference group, for example). Such a conceivable decree issued on the basis of an appropriate – if necessary to be adopted – legal authorisation could name the responsible body in charge, the single processing treatments and the purposes – namely the evaluation of state aids - as precisely as possible. However, the decision on whether to possibly introduce such specific legal grounds for simplifying the data protection manageability of evaluations, is naturally left to the political field.