

State Aid

In 12 jurisdictions worldwide

Contributing editor
Ulrich Soltész



2015

GETTING THE
DEAL THROUGH

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State Aid 2015

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Overview

Ulrich Soltész Gleiss Lutz

Isabel Taylor Slaughter and May

EU state aid control as one of the pillars of EU competition policy

EU state aid control has always been one of the major pillars of EU competition policy. The aim of the state aid rules is to create a common framework, in order to ensure a level playing field for all market participants and avoid member states engaging in wasteful subsidy races that would ultimately be financed by taxpayers. The Commission and the courts have emphasised the importance of articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU) as a necessary safeguard for effective competition and free trade.

From an economic point of view, a strict state aid regime is a key factor for the creation and maintenance of effective competition in the internal market. Excessive state intervention in favour of 'national champions' distorts competition, alters the incentives of market players, creates moral hazard and thus leads to considerable inefficiencies. Beneficiaries can use state money to pursue aggressive competitive behaviour that would not be possible without public support. Firms that can ultimately rely on being bailed out by the taxpayer are encouraged to take excessive risks. In addition, excessive subsidies can also reduce investment by other market players (the 'crowding out' of private investment).

Although the state aid rules have existed since 1958, they have become increasingly important due to increasing integration within the EU. If one player strengthens its competitive position by receiving subsidies, this will almost inevitably affect competitors in the internal market.

State aid control is unusual in that, unlike other branches of competition law, there is no sharing of powers with national competition authorities. This reflects the fact that the state aid rules impose obligations on member states, rather than directly on undertakings. This reflects a recognition that there are inbuilt incentives for member states to favour their own national players, and that it is difficult to ask national authorities, who are often themselves stakeholders or at least subject to political pressure in their home countries, to enforce EU level rules against their own member state.

EU state aid rules in legal practice

The EU state aid rules play an important role in all fields of law. Today, private practitioners and in-house counsel have to deal with state aid issues in all kind of areas, such as finance, mergers and acquisitions, public private partnerships, corporate, tax, R&D agreements, infrastructure, transport, real estate, public procurement, energy and environmental law.

Over the past 20 years, the Commission has developed an increasingly activist concept of its role as a guardian of the state aid rules. Competition Commissioners Van Miert, Monti, Kroes and Almunia have successively intensified the control of state aid measures and strengthened the enforcement of negative decisions and recovery orders concerning illegal aid. The new Commissioner Vestager also seems set to follow this trend. Today, state aid law penetrates numerous areas of life, from state-financed infrastructure (airports, football stadiums) and public services of general interest (public banks, railways, hospitals, broadcasting) to the acquisition and disposal of public assets. The ever-growing importance of EU state aid rules became particularly apparent during the financial crisis, when state aid became the de facto vehicle through which the European Commission sought to ensure a level playing field between member states and, in consequence, through which large parts of the European banking sector were restructured. In recent years the Commission has particularly focused on

state aid through the taxation regimes of member states and in the energy sector.

The general prohibition of state aid

The basic rule contained in article 107(1) of the TFEU is straightforward and simple. It provides for a general prohibition of any aid granted by a member state. In order to be caught by this provision, a measure has to fulfil the following conditions:

- the recipient of the measure must be an undertaking, in other words an entity which performs an economic activity;
- the measure must confer an advantage that could not (or not on the same terms) have been obtained from private market participants;
- the measure in question must be attributable to the member state;
- the advantage must be directly or indirectly funded by state resources;
- the advantage must be conferred on certain specific undertakings, as opposed to measures that apply equally to all market participants in comparable circumstances; and
- this must lead to a distortion of competition and must have an effect on trade between member states.

This provision has always been interpreted very widely and encompasses aid in any form. Aid may take the form of a direct grant or subsidy, but it can also take other forms including, for example, the provision of loans or guarantees at discounted rates, tax benefits, the sale of assets at an undervalue or the purchase of assets at an overvalue. However, where the state intervenes on terms that would be acceptable to a private sector operator – for example, through the provision of loans or guarantees at market rates – then it is said to be behaving as a market economy operator (the MEO principle). Where the MEO principle is satisfied then the measure is not regarded as conferring an advantage and so will not involve aid.

If a measure constitutes state aid, it is automatically prohibited. There is one (seeming) exception to this rule which is where the aid measure satisfies all the conditions laid down in the de minimis Regulation. This Regulation establishes that aid to an enterprise that is below the threshold of €200,000 over a period of three fiscal years (and that respects certain conditions) is deemed not to constitute state aid within the meaning of article 107(1) of the TFEU and therefore does not need to be notified.

Standstill obligation

If state aid within the meaning of article 107(1) of the TFEU has not been approved by the Commission, the measure cannot be implemented (article 108(3), TFEU and articles 2 and 3, Procedural Regulation). This 'standstill clause' in article 108(3) of the TFEU has direct effect and can therefore be invoked before the member states' national courts. National courts must give full effect to this obligation.

The European courts have ensured the effectiveness of this ex ante control mechanism by consistently holding that state aid granted without notification or without approval by the Commission approval is 'invalid'. Even a subsequent clearance decision of the Commission does not retroactively validate measures for the period where they were implemented in violation of the standstill obligation.

At this point, national law comes into play. According to the case law, the precise legal consequences of this invalidity are governed by national

law. In this regard, national courts and authorities must ensure the effectiveness of the prohibition laid down in article 108(3) of the TFEU. Aid that was implemented in violation of the standstill obligation must in principle be recovered. Under its CELF case law, the ECJ requires the national courts to draw 'all necessary inferences' from a violation of article 108(3) TFEU under national law 'as regards the validity of the measures giving effect to the aid, the recovery of financial support granted (...) and possible interim measures.'

Notification procedure

EU state aid control is based on a system of ex ante authorisation. Member states are required to notify the Commission of any plan to grant or alter state aid, and, as described above, they are not allowed to put such aid into effect before it has been authorised by the Commission.

Under this system, the Commission is given sole competence to decide whether or not the notified measure qualifies for exemption under article 107(3) of the TFEU.

There are a limited number of mandatory exemptions from the prohibition on aid, but of more practical importance are the discretionary grounds for exemption which give the Commission (very wide) powers to grant exemptions for aid measures serving certain defined purposes that are in the common EU public interest (article 107(3) of the TFEU and article 106(2) of the TFEU). Examples of categories of aid that have been accepted as, in principle, capable of exemption are regional aid, aid for research and development, environmental aid, rescue and restructuring aid, aid for small and medium-sized enterprises, aid for services of general economic interest, and training aid. Essentially, the Commission carries out a balancing assessment, under which it balances the positive effects of the aid against its negative effects. The Commission has developed a voluminous body of decision-making practice which is mainly codified in guidelines and framework.

Investigation procedures

Where a member state notifies a proposed aid measure, there is a preliminary two-month investigation by the Commission, following which the Commission will either approve the aid or open an in-depth investigation. There is no binding time limit for completion of an in-depth investigation although the Commission is obliged to endeavour 'as far as possible' to complete the investigation within 18 months of the opening of the formal procedure. On conclusion of its investigation, the aid measures can be approved, approved subject to conditions, or prohibited.

Where the Commission becomes aware of unnotified aid (whether as a result of a complaint or otherwise), it follows a similar procedure but there is no formal time limit.

Once an in-depth investigation is launched, details are published in the Official Journal and third parties have an opportunity to make representations. Since the revision to the procedural regulation in 2013, the Commission has had the power, once a formal investigation has been opened, to issue formal information requests to third parties as well as to member states.

Block exemption

The Commission has, in recent years, carried out a process of modernisation and simplification of state aid procedures. Council Regulation (EC) 994/98 empowered the Commission to adopt regulations declaring that certain general categories of aid are compatible with the common market and are not subject to the requirement of prior notification and Commission approval. To this end, the Commission has adopted 'block exemption regulations' for state aid. Since 2008 these regulations have been consolidated in the General Block Exemption Regulation (GBER). As a result, member states are able to grant aid that meets the conditions laid down in the GBER without the need to give prior notification to, and secure the agreement of, the Commission. Where this is the case, no individual notification is necessary and the standstill obligation under article 108(3) TFEU (see below) does not apply. Since these Regulations have direct effect in the member states' legal systems, national courts may have to assess whether a certain aid measure meets their requirements. In 2014 the Commission adopted a revised GBER which covers new areas, such as sports infrastructure, innovation clusters, R&D infrastructure, audiovisual works, broadband, culture and local infrastructure. According to the Commission's estimations, about three-quarters of today's state aid measures and some two-thirds of

aid amounts would have been exempted under the new GBER. It is not yet clear what level of impact it is having, but the new GBER should lead to reductions in the number of cases that require notification.

State aid modernisation

In May 2012, the Commission announced the start of an ambitious programme of state aid reform that has become known as the 'state aid modernisation' programme. The Communication aims to foster growth and economic rejuvenation in member states by improving the quality of their public spending at a time when 'the [financial] crisis has increased the demand for a greater role of the State to protect the most vulnerable members of society and promote economic recovery.'

In line with its broader Europe 2020 growth strategy, the Commission identified three main objectives in the Communication, namely:

- to foster sustainable growth in a competitive internal market;
- to focus Commission ex ante scrutiny on cases with the biggest impact on the internal market; and
- to streamline the procedures for decisions in state aid cases.

This has involved a detailed review of nearly all of the secondary legislation and Commission guidance relating to the state aid regime. Specifically, the Commission has:

- revised and streamlined the various state aid guidelines to update them in line with current practice and to try to introduce a greater level of consistency in terms of how the guidelines are expressed and how they approach the state aid assessment;
- revised and significantly extended the GBER to encompass additional categories of aid;
- revised and amended the core procedural regulations applying to state aid cases; and
- consulted on a new guidance note that will seek to clarify and explain the notion of state aid (not yet adopted).

State aid issues in a cross-border context

State aid issues often arise in a cross-border context. Even though there is a uniform EU set of state aid rules, national law still remains of pivotal importance in practice. A number of important questions are still governed by national law both in terms of substance and procedure. This applies in particular to complaints brought by competitors in national courts, and the position of the aid recipient when it comes to granting of the aid and recovery.

Complaints to the European Commission

As described above, the Commission is the only body that is competent to determine whether or not aid is compatible with the common market. Consequently the European courts have held that, unlike in other areas of competition law where the Commission has a discretion whether or not to pursue cases, it is obliged to take a decision on the complaints that it receives. However, the courts have recognised that the Commission is entitled to give different levels of priority to different matters. Under the state aid modernisation programme, the Commission has also sought to take steps to streamline the handling of complaints – which in practice represent a significant burden on its resources – through a greater insistence on the requirement that complaints must be submitted by an interested party within the meaning of the Procedural Regulation, and the introduction of a mandatory complaint form that will require a minimum level of information to be provided.

Complaints before national courts and national authorities

Notwithstanding the possibility of complaining to the Commission, remedies under national law still remain of pivotal importance in practice. In this regard the European Court of Justice has repeatedly emphasised the important role of national courts when it comes to 'private enforcement' of the state aid rules.

Competitors trying to challenge illegal aid granted to competitors before national courts are often faced with a number of obstacles. In a number of member states, there is uncertainty about the appropriate legal basis for such an action. Depending on the respective national system, such actions can be based on administrative (public) law, on unfair competition, tort, or even based directly on article 108(3) third sentence of the TFEU. This is not purely an academic question but one that can have

a great impact on the chances of success. Legal systems also widely differ regarding the question of who would be typically in the defendant role (ie, the state or the beneficiary), on the precise implications of 'invalidity' (pending or definitely null and void), on procedure (burden of proof, possibility of discovery, role of economic evidence, costs, duration, possibility of appeal and availability of injunctions, interim relief or both, among others) as well as on the possibility for competitors to obtain damages in case of a breach of the standstill obligation. The general willingness of national judges to apply European law, as well as their understanding and experience of the state aid rules, can also be very different in the various member states.

In addition, complainants may try to enforce their rights by other means. Some member states have specific national bodies that deal with competitor complaints, but complainants sometimes have to be creative and develop other ways in order to make their point, for example by contacting an insolvency administrator (who relies on an illegal capital injection by the state) or by raising state aid questions in a shareholder meeting (after having become a shareholder). There are also significant variations between member states as to how can competitors find out about illegal aid; in other words, what publicity is given to the granting of aid. National law therefore still has a significant impact in the enforceability of the state aid rules.

The perspective of aid recipients

Companies can, of course, also benefit from state aid measures. In this role as an aid recipient, they are often confronted with state aid issues outside their home jurisdiction, for example, if they receive subsidies for investments or R&D projects in other member states. State aid issues can also occur in the context of acquisitions in other member states (privatisations, acquisition of companies which have received state aid, etc).

In this regard, the national rules in the various member states often differ significantly, in particular as far as the substantive and procedural rights of the aid recipient, possible remedies against negative decisions as well as judicial protection against recovery orders are concerned. In addition, some considerable political, economic and cultural differences between the member states have to be taken into account.

Trends in and differences between member states' state aid policies

There are significant differences between member states in relation to the amount of state aid granted. According to DG Comp's state aid scoreboard 2014 (which contains figures for 2013), the member states that granted the most non-crisis aid as a percentage of GDP were Malta (1.8 per cent), Greece, Hungary and Slovenia (1.6 per cent each). Italy and the United Kingdom (both 0.2 per cent) granted the least such aid that year. The EU-28 figure stood at 0.5 per cent (or €62.7 billion).

However the overall trend shows that the majority of member states granted less non-crisis aid in the period 2011-2013 than in 2008-2010. The member states that reduced non-crisis aid the most were Hungary, Portugal and Ireland. The member states that made the biggest increases in aid were Slovenia, Latvia and Greece.

The long-term trend also shows that member states have generally re-oriented their state aid efforts towards horizontal objectives. In the period 2011-2013, 17 member states earmarked more aid to horizontal objectives than in the period 2008-2010.

In relation to the three largest categories of horizontal aid, there was an increase in the period 2011-2013 in aid measures for environmental protection, but a reduction in aid measures for regional development and R&D&I. When compared to 2008-2010, slightly more aid was granted for environmental protection (approximately 29 per cent of total

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horizontal aid) whereas slightly less aid was granted for regional development (approximately 24 per cent of total horizontal aid) and R&D&I (approximately 19 per cent of total horizontal aid). The member states that allocated the greatest amount of environmental aid in 2011-2013 were Sweden, Romania and Austria. During that same period, the top three for regional development were Greece, the Czech Republic and Slovakia, and for R&D&I Luxembourg, Belgium and Germany.

Recovery of unlawful state aid

In the period from 1 January 2000 to 30 June 2014, the Commission adopted 187 recovery decisions on the recovery of illegal and incompatible aid. The total aid to be recovered in the same period was €19,231.6 million. Of the aid to be recovered, 72 per cent was recovered up to 6 June 2014 (excluding interest), 11 per cent was categorised as lost to bankruptcy and 28 per cent was categorised as outstanding.

Outlook

During recent years, the state aid rules have become increasingly important for private practitioners. Due to the ever-increasing economic integration within the EU, all economic players have become more sensitive to distortions of competition caused by state intervention in the market. State aid law has also developed in an extremely dynamic manner, which is also reflected in the growing academic interest in this field of law. The enormous speed of legislative action which the Commission developed in recent years has indeed been remarkable.

However, differences on a national level still remain significant. Even though EU law provides a comprehensive and sophisticated set of rules, many aspects concerning the practical enforcement of the state aid rules are still governed by national law. As a result the interplay between these domestic rules and the rules at the EU level is often a challenge and can lead to gaps in the system as far as judicial protection is concerned.

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