

Directorate-General for Competition
Unit A3
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HT: 6062 - draft amendments to State aid Implementing Regulation and State aid Best Practices Code as regards access to justice in environmental matters

Views of Swedish Enterprise

The European Commission is currently collecting feedback on a matter concerning the Aarhus Convention and the state aid framework.

The proposed changes are primarily implemented in the Implementing Regulation (EC) 794/2004 and the Commission's Best Practice Code (BPC) for state aid control. These amendments establish a new mechanism allowing the public to request a review of certain state aid decisions by the Commission to determine whether they violate EU environmental legislation. In the amended BPC, the Commission outlines the design of the internal review procedure, such as who can request the review, which decisions can be subject to review, and the applicable deadlines.

The Commission's proposal means that most types of state aid decisions by the Commission are included, in cases where the Commission has conducted a formal investigation procedure. The exception is Article 107.3 (b) second part, i.e., aid "to remedy a serious disturbance in a Member State's economy". It is very welcome that this type of aid is excluded from the review, as it is aid granted in times of crisis or war, such as the corona pandemic or Russia's war of aggression against Ukraine, where a swift review is crucial.

Furthermore, the review is limited to cases where a formal investigation procedure has been initiated. This means that aid approved within the framework of the preliminary examination cannot be reviewed. This is a welcome limitation, as it reduces the number of cases reviewed and makes the provision somewhat more proportionate. However, there seems to be a trend that more and more cases are subject to formal investigation. This applies not least to major investments in infrastructure and energy – which are the types of investments that can be expected to be subject to reviews based on environmental considerations, despite these investments already being rigorously reviewed at the national level within the framework of standard permitting processes.

Furthermore, state aid decisions made at the national level, within the framework of the authorization provided by the General Block Exemption Regulation (GBER), are not included. This is entirely natural, as these are not Commission decisions.

A new question about the aid's compliance with applicable rules is added to the notification form used by Member States to notify new state aid. Member States must "confirm that neither the activity subject to state aid nor the specific provisions of aid in the notified state aid measure that are inextricably linked to the aid's purpose violate the Union's environmental legislation".

However, a filled-in "Yes" to this question does not seem to have any consequence for the possibility of requesting a review of the Commission's decision. Therefore, it can be questioned what role this addition plays. The Confederation of Swedish Enterprise believes that a certification as described above should be sufficient to exclude the process from the possibility of review. Since the activities receiving aid are already subject to permitting processes that ensure EU environmental rules are not violated, a corresponding review of parts of the financing constituting state aid becomes a double review and leads to an increased administrative burden in a disproportionate manner.

Given that it will be possible to review certain state aid decisions by the Commission, Swedish Enterprise welcomes the Commission's proposal of the alternative that, of the options indicated in the previous impact assessment, is considered less intrusive. The proposed appeal possibility is indeed broad in terms of the types of cases that can be appealed, but it is limited to cases investigated within the framework of a formal investigation. The formal requirements prescribed in the form of deadlines and otherwise regarding the documentation that needs to be submitted are generally considered reasonable.

As the Confederation of Swedish Enterprise has pointed out in previous responses, there are significant risks in increasing the possibilities of reviewing state aid decisions. Challenged Commission decisions can in themselves delay important investments for years. Including the possibility of appealing decisions to court, investments can be completely paralyzed, as it is not uncommon for legal processes to take 5–10 years, a time horizon during which few, if any, investors can commit to a specific project. What is even more serious is that important investments in new fossil-free energy are such investments that can be expected to be questioned. Environmental organizations have stated that, for example, investments in new hydropower plants are those they would like to see reviewed. We therefore see this initiative as a serious threat to the investment conditions that exist, especially for fossil-free energy, as it creates unpredictability and increased risks for investors and companies.

Overall, there are risks that the initiative will lead to increased administrative burden and legal costs, as well as a deteriorated investment climate. It can impair the possibilities for new extraction of critical minerals in Europe, something that has particular value from a security policy perspective in cases where the EU is heavily dependent on individual third countries. It can counteract the green transition and weaken the EU's competitiveness compared to other parts of the world.

Therefore, further limitations in the proposal presented by the Commission should be considered.

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