

Public Consultation

Notice on the Enforcement of State Aid Rules by National Courts (Draft Notice)

- Confidential -

16 April 2021

Dear Sir or Madam

[REDACTED] welcomes the opportunity to comment on the Draft Notice and supports the European Commission's initiative to increase the effectiveness of EU State aid enforcement at national level.

We are a German telecommunications company with a focus on the provision of telephone and DSL lines in rural areas not supported by broadband infrastructure. As you will imagine this is a field where State aid plays an important role for all the actors in the market even if they are not the beneficiaries of the aid. Following state support over the years, court actions have come up, and as a long-time market participant, we know about the problems, risks and challenges that companies encounter when they want to attack State aid related issues. In light of this, we would like to call the European Commission's attention to an issue that is not mentioned in the draft notice, i.e. the cost uncertainties associated with State aid cases as this one of the reasons why companies are reluctant to challenge aid measures. We feel in this respect that Section 2 of the Draft Notice deserves some amendment.

In more detail:

Parties are often reluctant to resort to national courts for private enforcement of State aid rules, due to the risk of considerable legal costs associated with national proceedings. Surely, each Member State has a different legal system. However, it is a common problem that parties are cautious when it comes to starting proceedings before the national courts due to its costly nature and instead they prefer to submit a complaint to the European

Commission. This has been already identified in a recent study published by the European Commission¹.

In Germany, for instance, the costs depend on the disputed value of the case, which is preliminarily set at the beginning of the proceedings - typically on basis of the parties' information to calculate upfront fee payments - and finally fixed by the court when issuing the judgment. Principally, the plaintiff's financial interests determine the disputed value, which leaves the court with some discretion².

Administrative courts in Germany even tend to follow the so-called disputed values catalogue by the German Administrative Supreme Court⁴. This catalogue initially came from 1991⁵, i.e. a decade when the Court of Justice of the European Union just started to evolve its competitor friendly approach with judgments in FNCE⁶, SFEI⁷ and others. Accordingly, Article 44.1.2 of the catalogue only says that the disputed value should be half of the amount of the subsidy. There is neither reference to the concept of State aid in the meaning of Article 107 AEUV nor to today's allocation of tasks between the European Commission and the national courts. Further, no segmentation is made between the two main requests for actions, which follow however, a fundamental different nature and logic: i.e. to become equally awarded or to eliminate the other's benefit. Although the catalogue is restricted to plain recommendations to ensure an aligned cost approach by administrative courts, it nevertheless serves as a benchmark in legal practice, also with respect to most recent private action to enforce state aid rules⁸. Eventually and of course, national courts might exercise their discretion and adjust the disputed value depending on the merits of the single case, but the general principle remains untouched, i.e. the calculation mechanism is linked to the amount of the State aid.

1 2019 Study on the enforcement rules and decisions of State aid by national courts, p. 63.

2 § 52 (1) GKG says as a general rule that in proceedings the amount in dispute shall be determined at the discretion of the court in accordance with the importance of the case to the plaintiff as shown by the plaintiff's application.

3 § 39 (2) GKG caps the disputed value only at EUR 30 million.

4 www.bverwg.de/user/data/media/streitwertkatalog.pdf.

5 The 1991 version can be found in the 12/1991 issue of the *Neue Zeitschrift für Verwaltungsrecht* at 1156.

6 Case C-354/90, judgment of 21 November 1991 - FNCE.

7 Case C-39/94, judgment of 11 July 1996 - SFEI.

8 For example Higher Administrative Court of Baden-Württemberg, judgment of 10 April 2019, case 9 S 75/15.

Accordingly, if the amount of the aid is higher, so is the legal cost associated with lawsuits dealing with that aid. This means that, if a company would like to challenge a high amount of aid given to its competitor, the company has to take the risk that it might end up paying a considerable amount of court fees and as well as to cover the lawyers' fees of the other party or even parties. State aid cases are never straightforward and they require complex legal and economic assessments. Therefore, companies often prefer not to take this risk in light of the very uncertain outcome and refrain from challenging State's measures altogether, although these measures might be distorting the competition in the market.

Despite the principle of procedural autonomy in the enforcement of State aid rules, the Court of Justice of the European Union already confirmed that the principle of effectiveness also applies to national procedural rules on the payment of costs incurred by the parties in the proceedings⁹. This means that Member States must ensure that procedural rules on the payment of costs do not lead to the conclusion that competitors cannot challenge unlawfully granted State aid before national courts. In another judgment, the Court of Justice of the European Union even analyzed the standard fees paid in public procurement procedures whether they are likely to make the exercise of rights conferred by EU public procurement law practically impossible or unduly difficult (in a case, however, in which the plaintiff wanted to become awarded instead of the chosen company¹⁰). Accordingly, the Court reviewed the substance of the amounts and made an assessment as to whether they were proportionate or not¹¹.

The objective of EU State aid law is to make sure that Member States do not distort competition in the internal market. Therefore, when third parties or competitors challenge the aids given to a beneficiary, they do not seek for additional financial gain; they merely ask from the Court to restore the competitiveness in the market and remove any distortions due to measures by the Member States. Therefore, we would like to note that, State aid cases are different from the above-mentioned judgments: here, the applicant has to take the risk of legal costs not for the sake of being potentially rewarded with any financial benefit in the end; instead, the risk is taken only to fix what was distorted unlawfully by a State measure.

The national courts have a responsibility to provide effective legal protection to third parties. Together with the European Commission, they have complementary tasks. However, due to high legal costs, the companies are generally prevented from taking the matter to the

9 Case C-472/99, *Clean Car Autoservice*, Judgment of 6 December 2000 at 29.

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national courts. This means unnecessarily increased administrative burden for the European Commission, since companies try to approach to the European Commission instead, as they cannot afford to file a lawsuit in their national legal system. However, the European Commission cannot replace or substitute the national courts; as their functions are entirely different. Furthermore, in most of the cases, the relevant parties will just refrain from doing anything. In this case, these parties are deprived of any effective legal protection against the unlawful State aid.

Section 2 of the Draft Notice contains general principles on enforcement of State aid rules in the national courts. Section 2.2 refers to the principles of equivalence and effectiveness applied to the national procedures and covers issues such as legal standing, jurisdiction and the principle of res judicata. We think that Section 2.2 needs to be expanded and it should also include the application of principle of effectiveness to the legal costs occurring in the legal proceedings. In light of the foregoing, we respectfully request from the European Commission to include an additional sub-section to Section 2.2.4. For ease of reference, please find a draft:

2.2.4. Legal costs

The legal fees imposed by national courts in the field of the State aid should not make the exercise of rights conferred by EU State aid law practically impossible or unduly difficult. National courts must ensure that procedural rules on the payment of costs do not lead to the conclusion that competitors and/or third parties cannot challenge unlawfully granted State aid before national courts.

It is for the Member States to design their own procedural rules and calculation methods. However, the calculation methods should not be linked on the amounts of the aid in question, as this could lead to the conclusion of high amounts of aids being less challenged in the national courts.

Please do not hesitate to contact us if you need further information and / or details. We are happy to assist and to discuss the matter with you.

