



23 July 2019

STATE AID MODERNISATION – FITNESS CHECK

Chapter 1: General Comments

Introduction

State subsidies, market protection, and unfair trade practices that infringe market-based principles give an unfair competitive advantage to competing firms. To counter this, we need effective State aid control to secure fair competition in the internal markets while at the same time avoid competitive disadvantages of EU companies. Clear State aid rules are fundamental to ensure a level playing field and ensure that State aid expenditure is kept at reasonable levels, targeting market failures.

The expansion of the General Block Exemption Regulation and the State aid modernisation has increased discretion for the Member States, allowing them in some situations to take proper account of the specific situation in their countries. However, increased discretion has also increased the risk of a more subjective and less uniform application of the State aid rules. The Commission recently revealed important compliance gaps, especially regarding block-exempted measures that are directly implemented at national level. Hence, Member States need to improve their adherence to the rules and the Commission should continue to support their efforts. It is therefore very important that the application of the new framework is being evaluated.

Other parts of the existing framework are also relevant and should be properly evaluated such as matters related to the recovery of illegal aid, national enforcement, private enforcement, and the lack of clear procedural rules to be followed by the Commission in relation to disputes about new or existing aid. The Commission should review enforcement of State aid rules at national level and focus especially on how private enforcement, involving national courts, could be encouraged.

Overall, we need more coherent application of the EU State aid rules at national level. As mentioned, the Member States need to improve their adherence to the rules and the Commission should support their efforts by providing clear guidance and active monitoring. Moreover, special efforts should be made to raise awareness of State aid rules, especially at local level. This is important, not only to avoid distortions but also to avoid problems related to the recovery of illegal aid.

State aid procedures

Much has been done to clarify and speed-up State aid proceedings, however, more should be done as cases still take a long time and this creates legal uncertainty discouraging investment. Also, private operators lose interest in pursuing a complaint regarding alleged illegal State aid when complaints take many years to be dealt with. Delivering decisions within business-relevant timelines is vital.



As a first step, the Commission could keep running statistics on how long different types of cases take from (pre)notification to decision. This will also increase predictability and focus efforts to further reduce delays. Ultimately, the Commission should consider introducing strict time limits for certain or all State aid case types, comparable to those in merger control proceedings. This would not only increase the predictability for companies but also force Member States to gather and submit the necessary information in a timely manner.

The State aid recovery process should also be modified in order to avoid the creation of distortions in the internal market. The current process, whereby the aid is recoverable as soon as the Commission issues a decision ordering the recovery, ignores the fact that the Commission's decisions on State aid can be challenged before the Court of Justice. This leads to situations where the beneficiary could be forced to undertake drastic measures (e.g. selling off assets) in order to comply with a recovery obligation that could be overturned by the Court. To avoid irreversible damage (e.g. in cases where the beneficiary has been forced to shut down operations and/or sell off assets), the Commission should in such justified cases consider alternative possibilities for a preliminary recovery (bank guarantee etc), prior to the conclusion of a possible appeal.

Monitoring and enforcement

It is important that information about granted State aid is accurate, complete and relevant. The current separate requirements of supplying the Commission with information on State aid being granted, ensuring transparency of large aid decisions and aggregated State aid expenditures, should be coordinated to reduce administrative burdens for businesses and public authorities. It is important that there is updated information about all granted State aid measures (including related individual aid decisions and aid spending) to resolve fragmenting information in different databases and making it easy to use the information.

To further develop the monitoring of State aid being granted and transparency, BUSINESSEUROPE suggests that the Commission clarifies and reports on the nature of cooperation proceedings between the Commission and the Member States, e.g. the selection of monitored cases, suggested measures, conclusions, performed remedies. In particular, the Commission should be more transparent about the recovery of non-compliant aid which it has discovered in the context of a monitoring exercise.

Handling of complaints

Bringing forward complaints, e.g. by a competitor, is a very important part of enforcement. The Commission should therefore encourage potential complainants to provide information. By virtue of Regulation (EU) 2015/1589, the EU has tightened the rules on legal standing regarding complaints. Through introducing the concept of «interested party», the threshold for submitting complaints is lifted. As a result, more complaints are being rejected, and well-substantiated complaints have consequently limited sets of judicial remedies at its disposal. Recent jurisprudence from the Court also demonstrates that a competitor must show that it is substantially affected by State aid approved by the Commission in order to challenge a decision by the Commission. Merely being affected by the aid is not enough. The expansion of the General Block Exemption Regulation and the State aid modernisation has increased discretion applied by the Member States. However, taking into consideration the limited competence on



State aid rules by national courts (standstill-obligation), the system of handling complaints and legal disputes appears to have deteriorated after the State aid modernisation, in disfavour of competitors of granted aid. The Commission should therefore re-examine the need for further decentralised enforcement on State aid rules in terms of judicial review of complaints (see also below).

The new rules in the procedural regulation of interested parties and the use of a mandatory complaint form (Commission Regulation 372/2014) are a positive step forward to avoid frivolous complaints and misuse of the procedure. It is important that the Commission continues to give priority to complaints originating from competitors of the company receiving the alleged State aid and examines all complaints and relevant information thoroughly to prevent misuse of the procedure. Considering that the investigation often targets a listed group or company active in the internal market, the Commission's press release should always be objective and restrained to prevent premature conclusions from the press, negatively affecting the involved entities. Furthermore, directly affected parties, including the alleged beneficiaries, should always be included in a formal manner in the pre-evaluation process. This would align with the Court of Justice case-law on the direct legitimate interest of the "aid beneficiary" to challenge a Commission decision before the Court and would also allow the Commission better understanding of the merits of a case while satisfying the legal right to a proper defence.

Legal certainty

Achieving efficiency through decentralisation of State aid control, as the Commission envisaged with the State aid modernisation, needs to be counterbalanced by ensuring that application of the State aid rules is not subjective, leading to less uniform application. This can be achieved by greater clarity of the rules.

More should also be done to raise awareness of the State aid rules and to help Member States, businesses and citizens interpret the rules. The platform e-State Aid Wiki, the Q&A-portal between the Commission and the Member States, could play a more important role in this respect, for example by publishing the questions and answers (whilst respecting confidentiality) not only for public authorities but for all stakeholders, and by providing clear information about relevant procedures.

National courts

Given the importance of private litigation to increase discipline in the area of State aid control, national courts should be encouraged to enforce the EU State aid rules. Enforcement at national level is still underdeveloped and because of several legal requirements and safeguards (e.g. proving causation and/or quantify losses), obtaining compensation is not easy, which affects the efficiency of national courts as effective enforcers of State aid rules. In addition, the possibility of seeking injunctive relief should be made more realistic by ensuring more transparency on the aid measures that Member States are about to put in place (see also above).

The Commission should provide companies better information about their rights, relevant courts, standing issues, damages actions, and other important enforcement issues. Further guidance in this area and a more proactive stance of the Commission in national State aid litigation would help effective State aid control

State aid at a global level

EU State aid rules have usually arranged for a level playing field within the EU, without also ensuring a level playing field for EU companies competing worldwide, apart from a few exceptions, such as the existence of a so called “*matching clause*” in some situations (e.g. the Research, Development and Innovation framework) to compensate for the distortive third-country subsidy. However, this clause has never been applied because there is a lack of data regarding aid granted to competitors by third countries.

We need to strengthen rules to address market-distorting subsidies, including indirect industrial subsidies in the form of selective tax cuts, cross-subsidisation, cheap sovereign loans to state-owned enterprises and/or inflated procurement prices paid by local public authorities. Such focus on the global dimension should not be detrimental to smaller companies and cases with a national/regional dimension and it should be considered to highlight the global dimension for some commodities, goods or services where prices are normally set on the global market, or for some well-considered areas.

Work needs to be done to improve the scope and implementation of relevant WTO rules and the Commission should address this issue in the context of free trade agreements. The Commission should continue its active work on making trade agreements with substantive provisions on State aid. These are important steps towards better subsidies control which takes the global dimension into account.

Likewise, an overly strict interpretation of the incentive effective criterion or an overly rigid application of the proportionality test in the relevant EU State aid rules, would put EU companies at a competitive disadvantage vis-à-vis their competitors located outside the EU which do not suffer from comparable constraints.

Chapter 2: Specific categories of aid measures

De Minimis Aid

Considering that de minimis aid is not designed to target market failures, it should be kept at its current level. Otherwise, there would be a need have more strict control and follow-up which would increase administrative burdens for both companies and aid-granting authorities. Considering that de minimis aid does not lead to any competition distortions, further simplifications should be considered. For example, the definition of “single undertaking” is difficult to apply and especially the provisions regarding the control of one enterprise over another enterprise through an agreement are difficult to apply (Article 2, para 2, c and d of the Regulation). Also, it should be clarified in Article 3 (7) of the Regulation that the new de minimis aid that exceeds the ceiling should not be prohibited in its entirety but only in relation to the part that exceeds the ceiling.

Energy and Environmental Aid Guidelines

Overall, the Energy and Environmental Aid Guidelines have promoted coherence and clarity at EU level. The amount of granted aid in the energy and environmental field has risen over the last years, often in the form of tax reductions or exemptions. This is at least partly due to more ambitious targets in this area. Existing exemptions in the Guidelines relating to environmental taxes, energy taxation, and the funding of support for energy from renewable sources, but also from cost pass-through of renewable technologies, should be preserved if correctly notified to provide the right framework for

European companies to be competitive vis-à-vis their main global competitors. Having said this, considering that the cost of renewable energy technologies has lowered recently in relation to Member States' choices regarding the renewable support schemes architecture, the Guidelines must ensure that these reductions are reflected in the maximum aid allowed. Designed schemes can be a barrier to a more cost-effective competitive deployment of solutions, such as renewables. The EU should therefore provide guidance on how well-designed national policies should work and monitor the implementation of such guidance. This guidance should also ensure that the Commission does not exceed its powers providing legal certainty and trust in investment protection.

Regarding the circular economy, Member States now must transpose the new Directives and set the right conditions in order to meet the new waste targets. In this context, Member States should be allowed to provide incentives aimed at improving the waste management infrastructures (for both recycling and recovery). The aim is the minimization of waste disposal, with relevant environmental benefits concerning, among others, climate change. Secondly, considering that soil management shall be taken into account: over the last years, investment in soil remediation and reindustrialization has been insufficient, partly due to the relevant State aid rules.

Research, Development and Innovation Framework

Improving financing for research, development and innovation (RDI) and ensuring that innovative ideas can be turned into products and services that create growth and jobs are crucial to strengthening Europe's competitiveness. It is therefore important that any EU funding, centrally managed by the Commission, either directly and indirectly, and not subject to any discretion by Member States, does not qualify as State resources and hence not constitute State aid, and that the relevant State aid rules are consistent with the different instruments.

One of the biggest shortcomings of the RDI Framework is the fact that the global dimension is not getting enough attention. In general, countries outside the EU do not have comparable constraints on RDI support and the Commission should address this more actively (see also above). It should be analysed further if the Commission should be less demanding with respect to the application of the "*matching clause*" to compensate for the distortive third-country subsidy and address the lack of data regarding aid granted to competitors by third countries. This kind of information should be gathered in a systematic way. The global situation should also be particularly taken into account in the context of cluster policy, and especially the fact that other regions of the world, like the US, India and China have very supportive cluster policies, bearing in mind of course that access to State aid is not the only factor that triggers investment (e.g. skilled workforce, infrastructure etc.).

In this context, it should also be considered to relax State aid rules for the incubation of new markets and businesses provided support is limited to address a market failure to avoid that the State acts as a private investor. When it comes to the generation of new markets through the introduction of radically new products and offerings (e.g. the soon-to-be-expected emergence of a Quantum Computing Industry), applicable State aid rules should make it possible to help companies assume early market leadership. Governments should be allowed to help companies in such emerging fields to overcome the so-called "valley of death".

Regarding the incentive effect, in practice it is very difficult to prove that aid for RDI induces a company to pursue research that it would not otherwise have pursued. The investment decision of an R&D project is based on multiple factors that can hardly be distinguished from each other. The subsidy alone often does not lead to a decision to invest, but reduces risks, speeds-up the process, stimulates collaboration with other companies etc. Fulfilling this requirement can be extremely difficult and burdensome for companies and Member States, for example when multiple R&D projects run simultaneously or the firm's contribution to a single project is relatively small compared to the firm's overall R&D budget. There should thus be less strict criteria on evidence related to the requirement that certain RDI activities are carried out in addition to normal day-to-day operations, also in view of the fact that competitors located outside the EU do not suffer from comparable constraints.

Lastly, it is important that the clearance procedure is sufficiently speedy as this directly affects the time-to-market of research and innovation efforts.

Important Projects of Common European Interest

More should be done to encourage public investment in large research and innovation projects of common European interests that contribute to growth, jobs and EU global competitiveness, while fundamentally safeguarding a market and company driven European economy. This is not about "picking winners" but about filling the funding gap and correcting a market failure because the high risks involved with such projects daunt private investors.

In 2014, the Commission developed the framework for funding Important Projects of Common European Interest (IPCEI). The project on microelectronics, approved in December 2018, was the first case of application of the instrument with the involvement of France, Italy, the United Kingdom and Germany and the participation of about 40 companies. The process to develop the operational programme took a very long time (about three years) partly because the Commission insisted on having four separate national notifications with almost identical content and timelines. This required heavy coordination efforts in order to ensure an effective notification process. For the pre-notification phase, regular meetings at different levels had to be organised and an effective managing body had to be set up to ensure a proper follow up. Another challenge was to bring national funding regulations in line with the IPCEI regulation (e.g. common understanding of definitions). Equally complex was the management of enterprises' confidential data within the "integrated" project.

Administrative burdens should be reduced and decision-making speeded-up. For example, requiring a comprehensive description of a counterfactual scenario which corresponds to the situation where no aid is awarded (point 29 of the Communication) is unduly burdensome.

Procedures required to activate the instrument should also be simplified. Although the Commission expects to maintain control over all individual funding from Member States participating in the Common European Project (as this funding is admitted to a greater extent than the ordinary State aid limits), one single notification procedure should be required so all subsequent public funding should be considered as automatically eligible once the Common Project has been approved as a whole. It is also crucial to shorten the timing of the approval procedures, making them faster, especially in fields where innovation cycles are very short.

Although the Commission will take a more favourable approach if the project involves co-financing by a Union fund (see section 3.2.2 letter f of the IPCEI Communication), it is necessary that the combination of the various types of available financing is fostered through greater alignment of rules and procedures to support the IPCEI not only through national resources, but also through funding by European Institutions (Commission, EIB, etc.), both directly managed (such as, for example, those of Horizon Europe) and indirectly (such as those of the structural funds).

Lastly, although this could also be addressed in the Research, Development and Innovation Framework, the requirements for IPCEIs should also allow downstream industrial projects to effectively benefit from the IPCEI characterisation. Downstream application (e.g. last stage development of very innovative industrial products) projects are very useful to bridge the “valley of death” but generally do not allow the same IPR sharing nor trigger the same spill over effects as more upstream/generic research. These projects can nonetheless be very beneficial to EU innovation and to other EU policies.

Regional State Aid Guidelines

It is important that regional aid is not used to attract and relocate jobs from one Member State to another. If this is unlikely, the Guidelines should encourage investment by already existing businesses (so called follow-on investments) that contribute to growth, jobs and EU global competitiveness, and not solely focus on attracting new investors. The General Block Exemption Regulation, allows enterprises in “c” areas, initial investments in new economic activities (so called “greenfield investments”) but “follow-on investments”, such as diversification of existing establishments into new products or new process innovations, is subject to the notification obligation and therefore has to be assessed on a case-by-case basis under the Regional State Aid Guidelines.

During the previous review of the Guidelines in 2013, the energy and transport sectors were exempted from the scope of the Guidelines. Transport and energy sectors in remote regions were unable to benefit from State aid, and consequently many operators had their basic rules for presence in such areas altered at short notice. Such abrupt changes to fundamental rules had a detrimental effect on the industry and led to some national authorities forced to put comprehensive compensation programs in place as a result. Under pressure from various stakeholders, the rules were reintroduced in 2017 through the General Block Exemption Regulation. However, such swift and unexpected changes are disruptive and should be avoided in the future.

Furthermore, the Guidelines should continue to allow operating aid for smaller and medium-sized companies in “a” areas if these are in island areas, in order to compensate additional costs for the transport of goods that these companies also incur. State intervention should aim to re-establish a level playing field between those companies based in the continent with those based in island areas, as well as those in the outermost regions.

Lastly, the Commission should consider improving the rules with respect to aid granted to remedy the damage caused by natural disasters within the General Block Exemption Regulation. The compensation of the damage (material and economic) is not always sufficient to bring the situation of territory back to the conditions preceding the natural disaster. Damage can have long-term effects and can often lead to desertification. It should be possible to assimilate a territory affected by a severe natural disaster to one

that is lagging and to grant incentives aimed at developing and supporting investments in that area.
