

CPI Antitrust Chronicle

May 2014 (2)

State Aid Modernisation— Trying To Do More With Less

Hilary Jennings
CCP, University of East Anglia

State Aid Modernisation—Trying To Do More With Less

Hilary Jennings¹

I. INTRODUCTION

On May 8, 2012 the European Commission launched the State Aid Modernisation (“SAM”), a reform of the whole of the EU’s State aid policy.² These reforms aim to streamline a complex system of rules, increase dialog with Member States, and focus on those cases with the most significant impact on economic growth. The bulk of these new rules are due to come into force by July 1, 2014. This article provides an overview of the objectives of the reforms and the extent to which four key pillars of the reforms are likely to meet these aims and provide a future-proof set of criteria for the enforcement of State aid rules.

The financial crisis changed the State aid landscape. State aid has risen from less than 1 percent of EU GDP in 2007 to around 13 percent in the period 2007-2011 and there are around 900 to 1,000 new State aid cases every year.³ The onset of the financial crisis led to a need to co-ordinate interventions across Member States, speed up those interventions, and co-ordinate policy responses across Member States. The objectives of State aid shifted to include support for sustainable public budgets as well as promoting economic growth. Consequently, the enlargement to 27 member states and the fall-out from the financial crisis left the system overwhelmed with small-scale notifications, with almost 1,000 cases pending at any one time.

This sea change in the volume and purpose of State aid no longer fit with a system which limited the prioritization of cases and involved a complex framework of some 39 regulations, guidelines, and communications. Coupled with a lack of legally binding timescales in many instances, and the fact that the flow of information is typically between the Commission and the relevant Member State, it was time to change the ground rules.

The Commission’s modernization program has three main objectives:

1. To foster growth in a strengthened, dynamic, and competitive internal market;
2. To prioritize enforcement cases on those cases with the biggest impact on the internal market; and
3. To streamline the Commission decision-making process and enable faster decisions.

Vice President Almunia has made State aid reform a cornerstone of his term as European Competition Commissioner. The reforms are intended to align State aid control to the Europe

¹ Visiting Senior Scholar and Research Fellow at the Centre for Competition Policy, University of East Anglia and independent consultant.

² European Commission (2012), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – State Aid Modernisation, COM/2012/0209 final.

³ Oxera, *A brave new world? Implications of State aid modernisation*, OXERA AGENDA 1 (March 2013).

2020 strategy for growth and jobs and to the policies designed to promote growth. They are also intended to help Europe's governments improve the quality of their expenditures.⁴ The Commission's task is therefore "... to allow 'good aid' and block 'bad aid'. This requires rules that are well-designed and easy to apply across 28 Member States."⁵

According to Almunia, examples of good aid include aid that promotes innovation, green technologies, and the development of human capital as well as aid that targets market failures, has a real incentive effect, and does not distort competition. The reforms are intended to steer EU governments away from inefficient or "bad aid," including aid that pays for activities that the beneficiary would have undertaken anyway, or aid that keeps unviable companies on indefinite life support.

However, these reforms have not been without their critics. Doubts have been raised, questioning Almunia's claims that Member States will be helped to fund projects that generate sustainable growth, while unproductive aid will be constrained. Amaud Montborg, the French Minister for Industrial Renewal, loudly criticized Almunia, calling his State aid policy "obsolete, autistic and fundamentalist."⁶ And Commission State aid decisions have drawn sharp criticism from countries in central and Eastern Europe, Spain, and an assortment of airlines, banks, and energy firms.

Nevertheless, the SAM reforms mark a shift in approach. The new and revised regulations and guidelines seek to provide wider exemptions and focus on the most distortive aid. The focus has also shifted from *ex-ante* to *ex-post* control, with greater emphasis on more detailed and comprehensive analysis for the larger, more complex, and "most dangerous" cases.⁷ The new framework also envisages a much stronger partnership with Member States to promote compliance with the State aid rules. Common horizontal principles have been defined that are applicable to the assessment of the compatibility of all State aid measures with the internal market. These have been included in every newly adopted Guideline under the SAM, which makes the soft law instruments more coherent and consistent and avoids any confusion as to which document applies in each case.

The modernization program includes a novel document, the Commission's draft notice on the notion of State aid.⁸ This sets out the Commission's interpretation of the various elements that make up State aid within the meaning of Article 107(1) in line with EU case law.⁹ It fulfils both a pedagogical function, by offering an explanation of Article 107 (1) case law, and it

⁴ Joaquin Almunia, *Developments in EU competition policy*, speech at European Competition Day, 10 (April 2014).

⁵ Joaquin Almunia, *Competition policy for the post-crisis world: A perspective*, speech celebrating ten years of the GCLC Bruges, (17 January 2014).

⁶ *French Industry Ministry assails Brussels on State aid for industry*, FINANCIAL TIMES (22 January 2014).

⁷ Gert Jan Koopman, *Modernising EU State aid policy*, presentation to the Autumn conference on European State Aid Law (30 November 2012).

⁸ Draft Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU, *available at* http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf

⁹ Article 107(1) of the TFEU defines State aid as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States.

streamlines policy developments in the sector. This contrasts with normal Commission practice of publishing communications and guidelines on the compatibility criteria, setting out the conditions under which State aid is allowed.

The concept of State aid has evolved with time, which is reflected by the varied and complex case law that has shaped the application of the rules. Therefore it is perhaps unsurprising that the draft notice does not settle matters definitively; instead, its approach is more akin to a fact sheet for stakeholders. However, the draft notice lacks a clear definition of the four conditions laid down in Article 107(1) at the qualification stage. This leaves in place the existing broad interpretation of the State aid prohibition, whereby it is generally assumed that the criteria of distortion of competition and the effect on trade between EU Member States within the meaning of Article 107(1) TFEU are fulfilled. Therefore the focus of the State aid law continues to rest on the compatibility assessment.

The reform of the General Block Exemption (“GBER”) is key to the Commission’s achievement of its SAM objectives, notably simplification. This, over and beyond the changes to the horizontal and sector-specific guidelines, has been at the heart of the Commission’s reform efforts. The scope of the GBER was extended on the basis of the Enabling Regulation adopted by the Council of the European Union in July 2013.

The revised GBER, adopted on May 21, 2014,¹⁰ increases the notification and aid intensity thresholds and includes new types and categories of aid; for example, innovation aid to large enterprises, broadband, and audio-visual. There are also new forms of exempted aid within existing categories, such as a wider concept of risk finance aid, investment aid for research infrastructures, and new possibilities for energy and environmental aid. Higher notification thresholds and larger aid intensities are in place, including doubling the R&D notification threshold, and risk finance has increased from EUR 1.5 million to 15 million. The Commission estimates that about three-quarters of all new State aid measures, and about two-thirds of the total amount of aid expected to be granted, will be exempted under the revised GBER.¹¹

The previous GBER had been extensively used by EU Member States but was criticized for being overly complex and difficult for authorities to apply in practice. The focus of the revisions to the GBER has been on simplification of the rules, with some relaxation for aid that promotes growth and does not have a distortive effect on competition within the EU. But while the GBER provides some legal certainty for important aid measures, it risks being overly complicated and difficult to apply in practice, certainly with respect to individual aid measures. A measure may be in line with the general scope of the GBER, but the notification thresholds may still not be in line with the State aid rules, meaning the aid may not be covered by the GBER. The substantive requirements of the GBER also have to be fulfilled for the aid to be authorized.

And although the scope of the GBER has been extended, stricter substantive compatibility criteria have also been introduced. For example, aid directed at regional

¹⁰ Commission Regulation declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, C(2014) 3292/3.

¹¹ European Commission (2014), *State aid: Commission exempts more aid measures from prior notification*, Press release IP/14/587, 21 May 2014.

development may, in the future, be granted to large companies in more developed (but still disadvantaged) regions only for investments into new activities. State aid for investments into the extension of existing activities will no longer be allowed.

Enforcing this lighter-touch regime will require the Commission to rely more heavily on Member States for the *ex ante* assessment, which will require much more co-operation than has previously existed between the two in terms of enforcement. Changes are required to ensure that responsibilities for ensuring compliance are taken more seriously. To date the Commission's main remedy against unlawful State aid that had already been paid is that it has to be refunded to the Member State concerned. However, not only does the Commission have a poor track record of enforcing refunds, but the design of remedies lacks strong incentive and deterrent measures.¹²

Consequently, the new GBER also includes transparency measures in an attempt to assist in the monitoring of compliance. Under the new transparency requirements Member States will have to make public the granting of un-notified aid if the amount exceeds EUR 500,000. EU Member States will, for the first time, be required to establish a dedicated website on which they publish the identity of the beneficiary, the amount and objective of the aid, and its legal basis within six months of the granting of the aid.¹³ As a consequence, even if a measure fulfils the conditions of the GBER and is therefore exempted from the notification requirement, it will still have to be made publicly known that the company received aid above the threshold. Furthermore, the Commission will have to be informed directly about aid granted to certain projects. The measures will give greater capacity to other Member States and companies to monitor compliance with State aid rules. Increased transparency is the exchange for fewer notifications of State aid.

The revised *de minimis* Regulation came into force on January 1, 2014.¹⁴ Despite calls during the consultation to increase the financial threshold, the Commission has maintained the limit at EUR 200,000 to a single undertaking over three years, a limit which has attracted considerable criticism.¹⁵ This limit is also out of step with the revised rules for Services of General Economic Interest, which includes a threshold set at EUR 500,000 over three years. A common *de minimis* threshold for all kinds of State aid rules would have been helpful, given the objective of simplifying the existing rules.

It also remains the case that not all sectors are treated in the same way. Some such as fishing, aquaculture, and primary agricultural production are excluded, as are export-related businesses. However, the definition of "single undertaking" has been clarified and the rules

¹² Oxera, *supra* note 3 at 3.

¹³ European Commission (2014), *Communication amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014-2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments and on Guidelines on State aid to airports and airlines*, C(2014) 3349/2.

¹⁴ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L352/1.

¹⁵ See, for example, Sir Jeremy Lever QC (2012), *EU State aid law – not a pretty sight*, lecture delivered at King's College London, 15 November 2012.

applying to loans have been simplified, creating a safe harbor where the loan meets various conditions.

The revision of the Procedural Regulation,¹⁶ which dated back to 1999, was targeted at addressing the problem of lengthy State aid proceedings. The reforms strengthen complaint handling with the requirement for a complainant to provide certain key information before a complaint can be lodged. Furthermore, the introduction of an “interested party” rule limits those that can make a complaint. Finally, the introduction of a refined procedure looks to ease the ongoing regulatory red tape burden.

However, the Regulation has reinforced the bilateral character of State aid assessments between the Commission and the Member State involved. Other interested parties can only intervene in the formal investigation stage and are restricted to submitting comments. The SAM reforms have not included expanded participation rights similar to antitrust rules.¹⁷ Instead they introduce additional obligations and sanctions for third parties (inspired by the EU competition rules), but exclude sanctions for Member States.

The new Procedural Regulation provides for market investigation tools to be used by the Commission once a formal state aid investigation has been initiated. The Commission will now have the ability to request targeted information from specific people, undertakings, or associations if the Member State information provided is insufficient. The introduction of fines for failure to comply or negligent information further strengthens the Commission's position.

The powers to request information are almost identical to the powers under the Commission's competition powers in Article 18 of Regulation 1/2013.¹⁸ This is coupled with the introduction of sector inquiry powers, similar to the power to investigate sectors under Article 17 of Regulation 1/2013, even though the powers to carry out inspections and dawn raids are not available to the Commission in State aid context. However, there is an important limitation to these extended powers in that the Commission can request information only if the formal investigation procedures have been ineffective. Therefore, the Commission must first request information from the granting Member State before using its power to request information from others.

The new powers to request information from sources other than Member States, coupled with the power to impose penalties, is a significant development in the EU State aid regime. The extended powers allow the Commission to request information from aid beneficiaries and others under threat of a fine. This can appear unbalanced given that aid beneficiaries have few, if any, procedural rights in State aid investigations.

The SAM presents opportunities and challenges. It is certainly too soon to pass judgement on how the reforms will play out in practice. What is clear is that the evaluation of

¹⁶ Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty Text with EEA relevance, OJ L 204, 31/07/2013.

¹⁷ Georgios Kamaris, *A critical analysis of the European Union's State aid analysis*, PhD thesis Brunel University, p. 368 (2013).

¹⁸ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 83 of the Treaty [2003] OJ L1/1.

success will not be based on the amount of documents that have been revised since the reforms were launched, but on whether the envisaged benefits of tighter timescales, simplified rules, and greater information-gathering powers result in more robust decisions on the cases that are likely to have the greatest impact on the internal market. This will also need to be balanced against the cost of removing scrutiny from smaller cases and the need for the Commission to rely more heavily on *ex ante* monitoring by Member States. Time will tell if the SAM initiative is fit for purpose in the current regulatory climate.