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I. INTRODUCTION: STATE AID RULES IN THE EUROPEAN UNION

State aid is a broad concept, covering advantages (anything over and above what a functioning market would bear) granted by any State entity to specific beneficiaries. Such aid requires prior Commission approval, otherwise it may have to be reimbursed. State aid rules are aimed at ensuring that, based on different financial resources, Member States do not unfairly compete with one another and undertakings do not derive improper competitive advantages as a result.

The Commission has broad powers regarding State Aid, which it has used in an ever-increasing number of cases and fields. This article highlights a number of current developments in times of economic crisis and a push for modernization of the EU state aid rules.

II. STATE AID POLICY DEVELOPMENTS

A. *State Aid for an Economy in Crisis*

The European Union is the brainchild of the political and economic situation after World War II. The treaties establishing the European Union provided for many escape-, safeguard- or special procedure clauses, designed to deal with economic crisis situations in the Member States. Many of these clauses have survived the various treaty revisions over time. It is therefore not surprising that Article 107 (3) b) of the Treaty on the Functioning of the European Union (the “TFEU”) permits the Commission to authorize State aid to remedy “a serious disturbance in the economy of a Member State.” When the banking crisis hit in 2008, it took the Commission a few weeks before it recognized the real scope of the crisis and began to authorize State aid on that basis (rather than as “regular” rescue and restructuring aid under Article 107 (3) c TFEU).²

The Commission established a framework for dealing with the 2008 crisis on very short notice; this framework has been the basis for numerous decisions aimed at stabilizing the EU banking sector. The framework has permitted aid on more generous terms than would have been possible under the normal rescue and restructuring aid guidelines, but also introduced stringent conditions and limitations (including “burden-sharing” of shareholders and certain subordinated creditors, rigorous viability requirements for the concerned bank, and the possibility to authorize aid only if the bank was put into run-down (i.e. to facilitate an orderly exit from the market)).

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² Commission communication—The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ 2008 C 270/8; as well as a number of additional communications, which are now consolidated into the “new” Banking Communication (*see* footnote 6).

As early as 2010 the Commission saw indications of improvements and issued a communication that suggested that a return to “normal” could be envisaged as of 2012.³ However, the sovereign debt crisis, which once more affected the viability of many EU financial institutions, required the crisis measures applicable to the financial sector remain in place.⁴

By contrast, a crisis-driven, temporary framework aimed to facilitate access to financing for the “real” economy, that was adopted in 2009 and expired at the end of 2011, provided for several measures aimed at improving the “real” economy’s access to finance, in particular through public guarantees and subsidized interest rates.⁵ Some of these crisis features were subsequently integrated into the general rules, and it is perhaps that background which explains why no special rules remain in force for crisis-related aid to the “real” economy.

The Commission consolidated and amended its crisis framework for the financial sector in mid-2013 by means of its new “Banking Communication,”⁶ which continues to be based on Article 107 (3) b, and which confirms that serious disturbances of the economy remain. The new rules make it more difficult to approve aid, and require more burden-sharing on the part of shareholders and certain junior creditors (while no burden sharing is envisaged for “regular” creditors and customers, after the disastrous experience in Cyprus).

The new Banking Communication does not have a fixed expiry date, but will be revised once economic conditions, or the regulatory framework, change. The latter is an implicit reference to the new regulatory banking supervision and bank resolution mechanisms that are currently being put in place (outside the State aid framework). These include supervisory powers for the European Central Bank and various EU and national measures aimed at providing for a better regulatory framework in bank resolution cases.⁷

B. State Aid Modernization

Several years prior to the 2008 economic crisis, then competition commissioner N. Kroes, identified the need for a comprehensive State aid reform and embarked on a modernization process (the “State aid action plan”). A number of changes were implemented, and others were planned for 2008/2009. However, the process could not be completed as planned, as a result of the crisis.

Against that background it was no surprise that Commission Vice-President Almunia, the new commissioner in charge of competition, relaunched the process in 2012. He proposed a full revision of the State aid rules with a threefold objective to: (i) make State aid policy

³ Commission communication, OJ 2010 C 329/7 (“Exit Communication”).

⁴ Commission communication, OJ 2011 C 356/7 (“Prolongation Communication”).

⁵ Commission communication on the Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis, OJ 2011 C6/5.

⁶ Communication on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ 2013 C 216/1 (the new “Banking Communication”).

⁷ See the Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms, COM/2012/0280 final, which was adopted by the European Parliament on April 15, 2014 and by the Council on May 6, 2014, and which is awaiting publication in the Official Journal, Details on the legislative process can be found here:

([http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0150\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0150(COD)&l=en)).

contribute to economic growth by favoring well-designed aid to key growth sectors (environment, R&D, digital agenda); (ii) simplify the rules to allow the Commission to focus on the most distortive cases; and (iii) clarify existing rules and increase the procedure's efficiency.

The Modernization initiative aimed at a comprehensive overhaul of the regulatory framework, and includes, among other elements:

- the review of the Enabling Regulation,
- the review of the General Block Exemption Regulation,
- the review of various State aid guidelines, and
- the review of the Procedural Regulation

1. Enabling Regulation

The Treaty itself does not provide for the ability of the Commission to exempt certain types of aid, on a general basis, from the notification and approval procedure under Article 108(3) TFEU. Rather, pursuant to Art. 109 TFEU, the Council can adopt regulations implementing the State aid rules, including exempting certain types of aid from the notification and prior authorization requirements. The Council used this power in 1998 to authorize the Commission to adopt block exemption regulations for certain types of aid (the “Enabling Regulation”).⁸

On that basis the Commission adopted several block exemption regulations, covering aid for regional development and environmental protection as well as aid to SMEs, R&D, employment, and professional training. Since then the Commission has gained significant experience with other types of aid. As a result, the Council amended the Enabling Regulation in 2013, authorizing block exemptions in additional fields, in order to (i) speed up the process, (ii) enhance legal certainty, and (iii) reduce the case load for the Commission.

These exemptions allow it to focus scarce human resources on more complex and distortive cases or on cases in areas where the Commission has had fewer opportunities to consider the benefits and disadvantages of aid to competition. The new categories of aid that can be block exempted include aid to culture and heritage conservation, compensating damages caused by natural disasters, forestry, the promotion of certain food products, conservation of marine resources, innovation, sports, and certain aid to transport and broadband infrastructure projects.

2. General Block Exemption Regulation

Already in the framework of the first State aid reform package in 2008, and in order to increase coherence between the block exemption rules, all block exemptions were integrated into one “General Block Exemption Regulation,” which is due to expire on June 30, 2014.

⁸ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 (...) to certain categories of horizontal State aid, OJ 1998 L 142/1, as amended by Council Regulation (EU) No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98, OJ 2013 L 204/11.

On May 21, 2014 the Commission adopted “in principle” a new General Block Exemption Regulation (“GBER”),⁹ which block exempts certain aid for most of the categories to which the power to grant block exemption had already been extended by the Enabling Regulation. Moreover, block exemptions for certain aid categories, which were already covered by the previous GBER, are broadened. For example block exemption is now available for (i) a wider scope for risk finance aid, (ii) investment aid for research infrastructures, and (iii) additional categories of environmental aid (such as site remediation).

Moreover, certain “notification thresholds” (above which aid is no longer block exempt, but needs to be individually notified to the Commission) have been increased. For example (i) R&D project notification thresholds were doubled, (ii) annual risk finance limits (EUR 1.5 million) were replaced by a per undertaking limit (EUR 15 million), and (iii) new limits for investment aid for sports and multifunctional infrastructures were established.

While the previous Regulation exempted approximately 60 percent of all aid measures, and slightly more than 30 percent of the aid amounts granted, the Commission estimates that about three-quarters of today's state aid measures and some two-thirds of aid amounts will be exempted under the revised GBER.

3. Revised Guidelines

The Treaty provisions on the criteria for the authorization of aid are very broad and imprecise. They leave the Commission with very broad discretion in authorizing notified aid. To enhance predictability, the Commission has adopted a number of “guidelines” that apply to cases that are not covered by block exemptions, which explain how the Commission intends to exercise its discretion in a particular case. The guidelines are not “binding” legislative instruments, but a form of “soft law.” The guidelines nevertheless have legal effects, in that once the Commission has adopted such guidelines, it cannot deviate from them in a particular case, because such deviation would amount to discriminatory treatment.

The State Aid Modernization initiative includes the revision of numerous guidelines. Several revised guidelines that will apply as from July 1, 2014 have recently been adopted:

- Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks were adopted on December 18, 2012 (OJ 2013 C 25/1).
- The Guidelines for Risk Finance were adopted on January 22, 2014 (OJ 2014 C 19/4), setting out the conditions under which Member States can grant aid to facilitate access to finance by European SMEs and companies with a medium capitalization.
- Guidelines on State aid to airports and airlines were adopted on February 20, 2014 (OJ 2014 C 99/3), which authorize much of the aid granted to airports in the past but provide for a more coherent approach, linked to the size of an airport, for the future.

⁹ Commission Regulation of 21 May 2014 declaring certain categories of aid compatible with the internal market (...), published on the Commission's website at http://ec.europa.eu/competition/state_aid/legislation/block.html (only minor linguistic modifications are expected to be made before publication in the Official Journal..

- The Guidelines for Environmental and Energy aid, adopted on April 9, 2014, aim at strengthening competitive energy markets, but also provide for aid to energy-intensive sectors and encourage cross-border energy infrastructures. Aid aimed at remedying a risk of shortage of electricity generation is now allowed.
- A Framework for state aid for research and development and innovation was adopted on May 21, 2014, aimed at clarifying the rules on R & D & I aid outside the block exemption rules.
- Guidelines on regional State aid for 2014-2020 (OJ 2013 C209/1) were coupled with new regional aid maps of all 28 Member States for the 2014-2020 period.

Revised Guidelines on, *inter alia*, “Rescue and Restructuring Aid to companies in difficulties” and the “Promotion of important projects of common European interest” are still being considered, the adoption of which are planned in the near future.

4. Modernization of the Procedure

The most common concerns that many Member States and practitioners raised in the consultations leading to the revision of the procedural rules were that procedures take too long to complete and that the duration was not predictable. These concerns were only indirectly addressed by expanding the scope of the GBER; furthermore, they were not addressed as part of the modifications to the Procedural Regulation adopted by the Council in July 2013¹⁰ (by, for example, introducing firm deadlines, as in merger cases). The following changes were made:

Improved fact finding capabilities. Previously, the Commission would ask the Member State to provide it with relevant factual information, which often led to delays. The Commission now has the ability to request information from certain other sources (Article 6a). Penalties may be imposed in case of failure to respond appropriately (Article 6b).

Ability of the Commission to deal with complaints. State aid complaints must, in the future, be introduced by interested parties (competitors) based on a mandatory complaint form (Article 20(2)) and can be more easily rejected if a complainant does not diligently pursue the matter.

Sector inquiries. The Commission can now initiate “sector inquiries” (like in traditional competition matters), where it has “a reasonable suspicion that State aid measures in a particular sector (...) distort competition.” The new procedure is a reaction to the fact that the Commission initiated more than 40 individual investigations with respect to regional airports in order to review the situation comprehensively.

The amendment also facilitates cooperation of the Commission with national courts. These modifications are described in their proper context below.

¹⁰ 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

III. STATE AID IN NATIONAL COURTS

Member State Courts have been rather slow in accepting their role in EU State aid proceedings. It is well-established that the national courts have the power to rule on whether a particular measure constitutes State aid and that they can (in fact: must) draw consequences from the stand-still obligation under Article 108(3) TFEU, according to which no aid measure may be implemented unless the Commission have given its approval. By contrast, the Commission has exclusive powers to determine whether a measure (that constitutes State aid) is compatible with the Internal Market and can thus be authorized.

Nevertheless, these shared competences in determining whether a measure constitutes State aid create a potential for conflict. EU law provides for conflict avoidance tools. The best-known and established rule is the right (or obligation) of national courts to refer questions of EU law to the ECJ through preliminary ruling requests (Article 267 TFEU).

In addition, the recent amendment of the Procedural Regulation has added a new “Chapter VIIA—Cooperation with national courts” and Article 23a provides for two new procedural conflict avoidance options:

(1) [T]he courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid rules;¹¹ or

(2) [T]he Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State aid rules.”

If a conflict nevertheless arises, the Commission takes the view that its powers are not affected by the ruling of national courts. In the German *Slaughterhouse* case, the Bundesverwaltungsgericht (Germany’s highest administrative Court) held that certain support measures for a slaughterhouse amounted to a proper public service compensation under the ECJ’s *Altmark* case law, and were therefore not State aid.¹² The Commission disagreed, opened a formal investigation procedure and decided that the measure constituted State aid that had to be recovered, in spite of the German court ruling.¹³ An appeal against the Commission’s decision is pending before the EU Courts.¹⁴

In the opposite case—where the Commission has already taken a final decision that a measure is (or is not) State aid and that it is (in-)compatible with the Common Market—it is well-established that such a final decision is binding on national courts.¹⁵

Moreover, even the decision to open a formal investigation must be taken into account by national courts. Lufthansa had asked the Court of Appeals (OLG) of Koblenz to order Frankfurt

¹¹ The possibility for national courts to ask questions had already been established before, the Commission having published a notice to that effect. However, in the absence of statutory powers, few courts had actually used that procedure.

¹² BVerwG, judgment of 16 Dec 2010, 3 C 44.09, [ECLI:DE:BVerwG:2010:161210U3C44.09.0](https://eur-lex.europa.eu/eli/other/bj/2010/161210U3C44.09.0)

¹³ Commission Decision 2012/485/EU of 25 April 2012 on State aid SA.25051 (C 19/10) (ex NN 23/10) OJ 2012 L 236/1.

¹⁴ General Court, *Germany v Commission*, Case T-295/12.

¹⁵ ECJ, *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, Case C-24/95, ¶34 et seq..

Hahn airport to recover benefits resulting from reduced landing fees from Ryanair, because the reduction was allegedly State aid that had not been notified and authorized by the Commission. The Commission had already initiated a formal investigation procedure, and in that context provisionally considered the reduction to constitute State aid.

In an opinion requested by the OLG, the Commission took the position that the OLG was bound by its assessment. The OLG then referred the case to the ECJ.¹⁶ The Advocate General largely supported the Commission's position, while the ECJ was more cautious: It concluded that national courts must take utmost account of the Commission's position in an opening decision, and that, if they wish to deviate from such position, they should refer the matter to the ECJ under Art. 267 TFEU. The ECJ will thus remain the ultimate arbiter in such cases of conflict between the Commission and national courts.

IV. CASE LAW DEVELOPMENT

European courts have recently rendered a number of important State aid judgments (in addition to those mentioned above). A few highlights are presented below:

A. *Électricité de France ("EDF")—The Notion of State Aid*

France restructured the state-owned electricity company EDF. It converted certain provisions into equity, and provided that certain tax liabilities, that would normally have resulted from the operation, would not become due. France accepted that the measures benefitted EDF, but claimed that a private investor would have behaved in a similar fashion. Therefore, EDF did not receive an advantage over and above what the market would bear. The Commission rejected the argument, taking the view that a private investor test cannot provide guidance in situations in which the state exercises sovereign powers that a private investor would not have (waiving tax claims).¹⁷

Both the General Court¹⁸ and the Court of Justice¹⁹ disagreed. They took the view that the measure's appearance (fiscal measure) is not dispositive, because the question whether State aid exists is not determined by a measure's cause or aims, but based on its effects. Since France wanted to restructure EDF, the recapitalization could have been a rational thing to do. Since the Commission had not analyzed the economic arguments that France advanced under the private investor test, its decision was annulled.

Nevertheless, the ECJ set certain preconditions to apply the private investor test. A Member State relying on the private investor test has to demonstrate that it acted as a shareholder, not in its sovereign capacity, with reference to documentation dating from the time at which the state prepared and implemented the measure.

¹⁶ ECJ, *Lufthansa v Frankfurt-Hahn*, C-284/12.

¹⁷ European Commission, Decision of 16 March 2003 (C 68/2002, N 504/2003 and C 25/2003).

¹⁸ General Court, *EDF v Commission*, Case T-156/04.

¹⁹ ECJ, *Commission v EDF*, Case C-124/10 P.

B. ING: Once State Aid—Always State Aid

The EU Courts partially annulled a Commission decision in *ING*,²⁰ one of the first judgments on State aid to banks during the financial crisis. The Commission decided that an amendment of the terms for repayment by ING of the capital injected by the Dutch state constituted State aid. The Commission took the view that it was not required to analyze the economic logic of the amendment and other economic effects of an early repayment because it had already determined in an earlier decision that the capital injection amounted to State aid.

Nevertheless, the Courts confirmed the applicability of the private investor test in a situation where the State originally contributed capital to a private company in the form of State aid and later agreed to certain modifications of the redemption of the contribution. The ECJ explained that:

What is decisive in the context of that comparison is whether the amendment to the repayment terms of the capital injection has satisfied an economic rationality test, so that a private investor might also be in a position to accept such an amendment, in particular by increasing the prospects of obtaining the repayment of that injection.²¹

The ECJ's judgments in both *EDF* and *ING* are important, because they seem to modify earlier case law in *Bank Burgenland*,²² much relied upon by the Commission, which seemed to suggest that once a measure was granted as State aid, any modification should also be treated as State aid, even if the modification was economically rational.

C. Leipzig Halle Airport—Infrastructure and State Aid

In a judgment of December 19, 2012 concerning the airport Leipzig-Halle, the ECJ²³ confirmed both its previous *Aéroports de Paris* case law²⁴ and the Commission's new policy by holding that the construction of airport infrastructure is an economic activity subject to State aid control. The Court held that regional airports were "undertakings," support of which can constitute State aid. By contrast, public contributions to purely public duties (customs, air traffic control, or security) are non-commercial and cannot constitute State aid.

The Commission has already taken account of this approach, both in its new aviation guidelines and in the draft notice on the notice of State aid. The judgment may have significant consequences for public infrastructure financing because the Court's reasoning would apply to all public infrastructure that is commercially operated. The Commission has therefore suggested that public financing for ports, sports, or multi-purpose arenas; waste treatment plants; and certain R&D, energy, and broadband infrastructures *prima facie* appear to fall within the scope of State aid rules and should be notified to DG COMP.

²⁰ General Court; *Netherlands and ING Groep/Commission*, Case T-29/10 and T-33/10; affirmed by ECJ, *ING v. Commission*, Case C-224/12, ¶¶ 29 et seq, in particular ¶¶ 35-37.

²¹ ¶36 of the judgment.

²² The "Bank Burgenland" approach refers to a Commission decision and resulting judgments of the General Court in Case T-268/08 and T-281/08, *Land Burgenland and Austria v. Commission* and the ECJ in Case C-214/12 *Land Burgenland*.

²³ ECJ, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH / Commission*, Case C-288/11 P.

²⁴ ECJ, *Aéroports de Paris / Commission*, Case C-82/01.

D. Smurfit/Propapier

In *Smurfit*,²⁵ the General Court annulled a Commission decision authorizing regional aid. Germany had an approved regional aid scheme, pursuant to which it planned to grant aid to Propapier for an investment in new production facilities. Since the aid exceeded certain thresholds, it could not be granted based on the approved scheme, but required further assessment under the regional aid guidelines, which in turn differentiated between certain sensitive cases (where the Commission envisaged systematically opening a formal investigation procedure) and less sensitive cases. The aid to Propapier fell in the latter category.

The Commission argued that it understood and had consistently applied its Regional Guidelines so that they prevented it from opening a Phase II investigation if the criteria provided for an in-depth investigation were not met. The General Court held that the Commission could not infer a measure's compatibility from the sole ground that it is below the guidelines' thresholds. The provision in question had merely the effect of making the Phase II mandatory in case the thresholds were met—not to make the Phase II impossible if such thresholds were not met.

The judgment confirms a consistent trend of the EU Courts to treat guidelines essentially as if they were law, even though they are non-binding and only reflect the policy choices of the Commission. The Commission is required to apply them consistently (otherwise it would discriminate) but it is perhaps doubtful whether the Courts can substitute their reading of the guidelines for that of the Commission, in circumstances where the Commission cannot be accused of discrimination, because it applies them consistently.

V. CONCLUSION

The EU State aid rules have been in existence for more than 50 years. They have increased in importance, and are presently undergoing an important overhaul, in terms of the economic framework in which they are applied (“Crisis”), the legislative framework (“Modernization”), and the way they are applied by the EU Courts and their counterparts in the Member States. Practitioners should watch this space!

²⁵ General Court, *Smurfit Kappa Group plc / Commission*, Case T-304/08.