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The Modernization Process of EU State Aid Law:
"The Search For The Right Balance Between State Intervention And The Invisible Hand"

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The Modernization Process of EU State Aid Law: "The Search For The Right Balance Between State Intervention And The Invisible Hand"[1]

Stefano Grassani[2]

I. INTRODUCTION

One of the distinct and unique features of European antitrust law is (and has always been since its enactment in 1957) that the rules on restraints of trade and monopolization are complemented by a set of provisions, as embedded in the Treaty on the Functioning of the European Union ("TFUE"), which, while not strictly related to the pursuit of anticompetitive conducts *per se*, nevertheless aim at effectively ensuring level playing fields as a pre-condition for fair competition across Europe.

An undertaking that obtains governmental "support," be it in terms of subsidies or any other form of relief/incentive/contribution, gains an advantage over its competitors. Such an advantage not only distorts competition between companies (often causing less efficient businesses to prevail) but, at the same time, risks affecting the achievement of the fundamental goal of a true market integration. As EU Commissioner Joaquin Almunia recently underlined, "State aid control is an instrument of economic integration that underpins the good functioning of the single market, which is Europe's best asset in the global economy."[3]

Articles 107-109 of the TFUE, under the same heading which sets forth "classic" antitrust rules ("Chapter I: "*Rules on Competition*"), therefore generally prohibits State aids granted by Members States (or any public authority) in the European Union unless they are justified by reasons of general economic development. To ensure that this prohibition is respected, the European Commission—in addition to enforcing antitrust provisions—is also in charge of ensuring that State aids comply with EU rules.

One could certainly question (and many do) whether, 60 years after the signature of the Treaty of Rome, Europe can still afford to be the last strenuous defender of utmost competition or whether living with self-imposed State aid rules—which bring antitrust enforcement to higher standards not witnessed elsewhere in the world—has become an untenable proposition. At times where global competition acknowledges the increasing presence of sovereign funds and State-driven economies, what could have been perceived in the past as a trivial intellectual proposition has now become a serious and extremely realistic problem.

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[1] *Doing more with less—State aid reform in times of austerity: Supporting growth amid fiscal constraints*, Speech of Commissioner Joaquìn Almunia at King's College, European Commission press release SPEECH/13/14.

[2] Pavia e Ansaldo – Milan, Italy

[3] *Modernizing State aid control*, Speech of Commissioner Joaquìn Almunia at European Economic and Social Committee, Brussels, 23 February 2012, European Commission press release SPEECH/12/117.

However, the abolition of State aid rules altogether is clearly an unrealistic option, at least at present. Yet, a debate has came to surface as to how to modernize State aid law, knowing that the European model of enforcement requires the Commission and European institutions to strike the right and delicate balance between the need to avoid distortion of competition and the willingness (and nowadays, more often than not, the legitimate interests) of Member States to support their corporations so as to sustain the ever increasing competitive pressures stemming from emerging countries and their State-owned/subsidized economies.

This need for balance is nothing new; to some extent, the development of State aid law in Europe is a story of "adaptation and resilience."[4] Recently, for example, the unprecedented economic crisis that affected the European Union, like elsewhere, implicitly called for a loosening of State aids control, causing the release of an emergency package targeted at rescuing financial entities in difficulty.[5]

Thus, if nothing is to be expected in terms of outright modification of the key substantive rules of the TFUE, much was done—and is being done—by the Commission so as to bring State aid law in line with changes in the economy. Through appropriate procedural innovations, the Commission can indeed steer enforcement towards more workable targets.

II. REWORKING STATE AID

A. First Attempts

A first major string of evolutionary changes to State aid procedures had occurred between 1998 and 2001, with the adoption of the Enabling Regulation[6] and of the Procedural Regulation.[7] These regulations set forth a comprehensive legal scheme for the enforcement of State aid rules, based upon the well-established principle that State aids must be preliminarily notified to the Commission and cannot be implemented by Member States until cleared by the latter, as provided for under Article 108(3) TFEU.

Thereafter, a number of block exemption regulations ensued,[8] while—between 2005 and 2009—the so-called *State aid action plan*[9] brought further changes, including the revision of all major guidelines and frameworks and the adoption of the first General Block Exemption

[4] *See* Joaquìn Almunia, *supra* note 1.

[5] *See*, for instance, the EC Communication on the application, from August 1, 2013, of State aid rules to support measures in favor of banks in the context of the financial crisis ('Banking Communication'), OJ C 216, 30.07.2013, which is the latest of six *ad-hoc* Communications adopted by the Commission in the banking sector starting from the beginning of the financial crisis in 2008.

[6] Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ L 142, 14.5.1998.

[7] Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 83, 27.3.1999.

[8] *See* Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid, OJ L 10, 13.1.2001; Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ L 10, 13.1.2001; and Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, OJ L 10, 13.1.2001.

[9] State aid action plan—Less and better targeted state aid: a roadmap for state aid reform 2005-2009, COM/2005/0107 *final*.

Regulation (giving automatic *ex-ante* approval for a range of aid measures and so allowing Member States to grant such aids without prior notification to the Commission),[10] as well as the clarification of the role of national courts in the implementation of the State aid rules.[11]

B. The 'Big Bang': The 2012 State Aid Modernization

This initial program of reforms was certainly effective but, probably, not sufficiently incisive. Or, said in other terms, it has proven not to be bold enough to bring about a real change in the way State aid law is applied throughout the European Union. Further evolution was needed.

This is why, in May 2012, the Commission embarked in the brand new, and thoroughly revolutionary, *State Aid Modernization* project ("SAM").[12] With it, the Commission envisaged a review of the entire European legal framework on State Aid.

The basic assumption and mission underlying SAM is that, plainly stated, European institutions and Member States alike have no money to waste: "in times of shrinking budgets EU countries have to do more with less. This is why State aid policy needs to change tack and become more strategic."[13] This requires that "National governments make more efficient use of scarce resources"[14] and that, in this renewed quest for efficiency, the Commission takes the responsibility to guide Member States through a new way of enforcing State aid law.

SAM singles out three key objectives:

1. to foster sustainable, smart and inclusive growth in a competitive internal market;
2. to focus Commission ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement;
3. to streamline the rules and provide for faster decisions.[15]

Interestingly, these objectives are partly similar to those underlying the overhaul of EU antitrust rules in 2003. There, too, the Commission wanted to focus on certain key areas of antitrust law, leaving to Member States the task of carrying out any residual enforcement. In the context of State aids, where decentralization is less relevant (as most of the activity needs to rest with the Commission and where private enforcement is still minimal), the common theme is that of prioritizing Commission's intervention, with the goal to deliver more efficient enforcement at times where Commission's resources and staff are scarce.

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[10] Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation), OJ L 214, 9.8.2008.

[11] *See* Commission Notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009 and Notice from the Commission—Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007.

[12] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *EU State Aid Modernization (SAM)* COM(2012)0209 final.

[13] *See* Joaquìn Almunia, *supra* note 1.

[14] *See* Joaquìn Almunia, *supra* note 1.

[15] Communication *EU State Aid Modernization (SAM)*, *supra* note 12 ¶ 8.

III. SAM IN A NUTSHELL

SAM essentially consists of a number of statutory and soft-law provisions that have been (or are about to be) adopted by the European Institutions.[16] A good portion of the regulatory acts envisaged by SAM has been already implemented, while some are due to be released by the forthcoming summer.

Four new Regulations have been adopted so far, namely:

1. Pursuant to EU Council Regulation of July 22, 2013,[17] SAM entailed a review of the Procedural Regulation, to wit the fundamental piece of legislation which governs how Member States should notify State aids and how the Commission should assess their compatibility under the TFEU (discussed in more detail below);
2. In July 2013 the EU Council likewise amended the so-called Enabling Regulation,[18] thus empowering the Commission to broadening the list of State aids which could be *ex-ante* considered compatible with the internal market and are therefore exempted from prior notification by Member States;[19]
3. Thanks to the powers conferred to it by the above-mentioned Enabling Regulation, the Commission indeed considerably enlarged the number of exemptions from prior notification of State aid granted by Member States. This was done with the adoption—on May 21, 2014—of a new so-called *General Block Exemption Regulation* ("GBER").[20] The new GBER, which the Commission itself defined as "another milestone of State aid modernization initiative," allows Member States to grant more aids and higher amounts without having to wait for prior authorization by the Commission. Such allowance assumes that certain aids need not be notified any longer as "they are less likely to lead to undue distortion of competition."[21] GBER carries with it two fundamental elements:
   - it "covers" a very large number of categories of aids (such as aid for local, broadband, research and energy infrastructures, innovation clusters, regional urban development fund culture and heritage conservation, audio-visual works, sport and recreational

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[16] For a more comprehensive and detailed description of the substantial changes to State aid legislation, *see* Conor Quigley Q.C., *The European Commission's programme for state aid modernization*, MAASTRICHT JOURNAL, No. 1/2013.

[17] 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, OJ L 204, 31.07.2013.

[18] Council Regulation (EU) No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ L 204, 31.07.2013.

[19] As already stated, the basic rule of European State aid control is that aids granted by Member States, except for those of a very low amount, must be promptly notified to the European Commission for prior approval. The Enabling Regulation, as amended on 2013, has allowed the Commission to adopt regulations identifying the criteria under which a higher number of categories of aids—such as innovation aid for large companies, certain aid for broadband infrastructures, aid for culture including audio-visual works, aid for sports, aid to make good the damage caused by natural disasters, social aid for transport of residents of remote regions, and aids for certain agriculture, forestry and fisheries issues—are "in line" with the internal market and are not subject to prior notification.

[20] The new GBER will enter into force the 1st July 2014 and has not yet been published in the OJ. *See* European Commission press release IP/14/587 and MEMO/14/369.

[21] *See* IP/14/587.

infrastructures, and aid to damages of certain natural disasters) which were not included in the scope of the previous GBER (Regulation No. 800/2008); and

- it has significantly raised the exemption thresholds for many categories of aid that were already exempted under the previous GBER.

According to some Commission studies, under the new GBER about 75 percent of current State aid plans (in volume) and 66 percent of their amounts (in value) will be exempted from prior filing; and even more aids could be exempted if Member States were to resort to the possibilities offered by the Regulation, i.e. "designing" their aid schemes so that they meet GBER's requirements.[22] Aid measures that are not covered by the new GBER will obviously continue to be assessed by the Commission under the relevant guidelines.

4. On December 18, 2013 the Commission adopted a revised *de minimis* Regulation on aids of small amounts, which would fall outside the scope of EU State aid control because they are deemed to have no impact on competition in the internal market.[23.] According to this Regulation, aids that fulfil the criteria established therein are not to be considered as State aids and do not request for prior notification to the Commission. The main quantitative criterion of the new regulation remains the same as before, as it exempts aid of up to EUR 200,000 per undertaking over a three-year period.[24] Nonetheless, the said new Regulation contains some relevant improvements:
   - companies undergoing financial difficulties are no longer excluded from the scope of the Regulation and will therefore be allowed to receive *de minimis* aid, and
   - the definition of what constitutes an "undertaking" has been simplified and clarified.

In addition to the said statutory acts, SAM has seen the release by the Commission of a body of new soft-law, in the form of guidelines and notices. From the launch of SAM, the Commission has adopted guidelines in the following sectors: environmental protection or energy objectives;[25] promotion of economic development of certain disadvantaged areas within the European Union (so-called regional aid);[26] research, development, and innovation;[27] promotion of risk finance investments;[28] broadband networks;[29] and airport and airlines.[30]

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[22] Conversely, the previous GBER—i.e., Reg. No. 800/2008—covered no more than 60 percent of all aid measures and about 30 percent of the aid amounts granted each year in the European Union.

[23] 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 L 352, 24.12.2013, in force as of 1st January 2014.

[24] During the procedure for the adoption of the new *de minimis* Regulation, many Member States pushed the Commission to increase the threshold up to EUR 500,000 or further. Nevertheless, based upon the consideration that "increasing the ceiling would bear important risks for competition and trade in the Single Market, in particular because of the aggregate effects of a potentially widespread use of the exemption in the current economic and financial context where Member States' budgetary capacities also vary widely," the Commission decided to maintain the same threshold as before.

[25] Communication from the Commission *Guidelines on State aid for environmental protection and energy 2014-2020* C(2014) 2322.

[26] Guidelines on regional State aid for 2014-2020, OJ C 209, 23.7.2013. Areas eligible for regional aid under Article 107(3)(a) of the Treaty, commonly referred to as "a" areas, tend to be the more disadvantaged within the

By the end of July 2014, three further specific sector guidelines are expected, specifically: (i) State aid for rescuing and restructuring non-financial undertakings in difficulty, (ii) State aid in the agriculture and forestry sector and in rural areas, and (iii) State aid for the promotion of important projects of common European interest.

And, last but not least, the Commission is soon expected to adopt a notice aimed at providing further clarification on the fundamental issue of what is State aid under EU law.

IV. A SNAPSHOT OF THE MAIN CHANGES INTRODUCED BY THE NEW PROCEDURAL REGULATION

If the new regulations and guidelines described above are, from a global perspective, an overall scenario of the new legislative framework, a key element of SAM is certainly the review of the procedural rules governing State aid control in Europe. As already mentioned, the underlying objective of SAM in this respect is to allow the Commission to concentrate its efforts on the most relevant cases (i.e., cases with a bigger impact on the internal market) and prioritize enforcement, thus improving the efficiency of the State aid control throughout the European Union. Here's a brief review of the main changes to this effect enacted.

A. Handling Of Complaints

A considerable innovation is the introduction of a more structured pattern for complaints of alleged illegal and incompatible State aid. In the recent past, the enforcement activity of the Commission was affected by a great number of complaints which were either lacking merits or were not sufficiently proven, yet caused the Commission to investigate and take action for fear of appeals by complainants before the EU Courts for failure to act. This risk was somewhat strengthened by judgments of the EU Courts in *Ryanair*,[31] where it was stated that "unlike the competition rules laid down in Articles 81 EC and 82 EC, in relation to which the lodging of a complaint is regulated by Regulations Nos 1/2003 and 773/2004, in the case of State aid no specific formal requirement attaches to the lodging of a complaint."[32] In *Ryanair*, the General Court e.g. declared that the Commission acted illegally in failing to adopt a decision with regard to each and every complaint submitted by Ryanair against competing airlines.

The new rules now provide for a structured filter system. According to the new text of article 20 of the reviewed Procedural Regulation, complainants are requested to demonstrate that

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Union in terms of economic development. Areas eligible under Article 107(3)(c) of the Treaty, referred to as "c" areas, also tend to be disadvantaged but to a lesser extent.

[27] Communication from the Commission *Framework for state aid for research and development and innovation* C(2014) 3282.

[28] Communication from the Commission *Guidelines on State aid to promote risk finance investments*, OJ C 19, 22.01.2014.

[29] Communication from the Commission *EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks*, OJ C 25, 26.1.2013.

[30] Communication from the Commission *Guidelines on State aid to airports and airlines*, OJ C 99, 4.4.2014.

[31] Judgment of 29 September 2011, Case T-442/07, *Ryanair Ltd/European Commission*, [2011] II-00333. In this judgment the General Court declared that the Commission failed to fulfill its obligations under the treaty by failing to adopt a decision in respect to some complaints received, while dismissed the action with respect to other complaints.

[32] Judgment of 29 September 2011, Case T-442/07, ¶ 33.

they are true "interested parties;" if they want to submit a complaint, claims must be fact-specific and proven to a reasonable degree. In other words, complaints can no longer serve as mere fishing expeditions.

This filter system will help the Commission to better prioritize the handling of complaints, focusing solely on those sufficiently substantiated. The advantage for the Commission is two-fold, since—on one hand—it will no longer waste resources in handling unwarranted complaints and—on the other—the possession of a substantiated submission will eliminate to a greater extent the need to send many subsequent requests for information to Member States or complainants themselves.

B. Market Investigation Tools

Prior to SAM, Commission's investigations in State aid matters had to essentially rely on information submitted to the latter by Member States themselves. This has proven to slow proceedings and, in any event, not to allow the Commission to properly assess the facts at stake. In relation to this aspect, SAM turned to antitrust procedural rules, and now vests the Commission with the power to run so-called Market Investigation Tools, seeking information from the undertakings directly and not necessarily having to wait for Member States' responses.

The use of Market Investigation Tools will enable the Commission to receive reliable data in order to conclude its compatibility assessment. At the same time, Member States will substantially reduce the administrative burden in the information-gathering phase.

C. The EC Vis-à-Vis National Courts

SAM also greatly innovated the connection of EU State Aid law with private enforcement of State aid law, (i.e., proceedings pending before national courts of the Member States, especially as regards to connecting with requests for damages by companies which claim that a competitor has received unlawful aids). The Commission now is empowered to intervene as *amicus curiae* before national courts, when they rule on State mid matters. Such a new role has been recently tried for the first time in *Micula_Brothers,*[33] a case pending in Rumania.

V. CONCLUSION

It is widely perceived that procedural law is neutral and, as such, cannot change the scope and extent of underlying provision of substantive law. In the context of State aids, while this continues to be technically true, one has to acknowledge that, with SAM, EU institutions have shaped the mechanisms designed to enforce the provisions of the TFEU in a way that procedural law *de facto* resembles substantive law.

SAM is not only a full-fledged package of new procedural rules that give important new powers to the Commission. The European Union has given itself a body of law that consistently seeks efficiency of enforcement. These two elements are essential for modern enforcement of State aid law: Enforcers need powers to investigate and need to focus on doing better rather than

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[33] In this case, the Romanian tribunal held that Romania's decision to revoke the incentives was reasonably tailored to the pursuit of a rational policy, specifically EU accession. For a short resume of this case *see* http://youngarbitratorsbelgium.com/2014/01/08/micula-brothers-vs-romania-a-road-map-for-future-investors-in-europe/.

necessarily doing more. With SAM, the Commission has more enforcement tools and is enabled to focus on what matters most.

Only time will tell if SAM shall have been effective. For the time being, per Humphrey Bogart's famous quote from *Casablanca*, we can only say "Play it Sam!."

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State Aid Modernisation—Trying To Do More With Less

Hilary Jennings[1]

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

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[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

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[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.

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Developments In EU State Aid Law

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Developments In EU State Aid Law

Till Müller-Ibold [1]

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

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[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).

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.

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[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.

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[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 2013[10] (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 Bundes-verwaltungs-gericht (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

[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 Court[18] and the Court of Justice[19] 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 ECJ[23] confirmed both its previous *Aéroports de Paris* case law[24] 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.

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[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 *Smurfi*t,[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.

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Commissioner *Almunia*'s State Aid Modernization Project—Taking Stock

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Commissioner *Almunia's* State Aid Modernization Project—Taking Stock

Ulrich Soltész[1]

I. INTRODUCTION

Over the last few years many attempts have been made to modernize the European State aid rules, such as the ambitious "State Aid Action Plan" of Commissioner Kroes and the various ideas put forward by her predecessors Monti and Van Miert. While the impact of these previous reform projects was rather limited, it seems that Commissioner Almunia has now got it right. With its "State Aid Modernisation" project ("SAM"), pushed by Director-General Italianer and his very dynamic Deputy Director-General for State aid Koopman, DG COMP has set a clear course which, in the long term, will change many areas of State aid law over the coming years.

The reform, using catchwords such as "streamlined procedures" and "focus" is intended to concentrate State aid control on cases that really do have an impact on competition in the European Union.[2] The SAM project, which has the potential to change the way in which State aid law will be applied in the future, consists of a number of pillars, as described below.

II. NEW INVESTIGATIVE POWERS—REFORM OF STATE AID PROCEDURE

One major breakthrough was certainly the entry into force of the new procedural regulation in July 2013.[3] The procedural rules have frequently been the object of (unsuccessful) deliberations on reform, but now the Commission would appear to have finally achieved some major changes.

The most radical—and initially controversial—change concerns the Commission's powers of investigation. It is generally known that State aid procedures are extremely lengthy and often inefficient. In the view of the Commission, one of the main reasons for this was the outdated method of fact-finding investigation that mainly drew on submissions made by the Member State concerned. The players really affected—above all the State aid beneficiaries and their competitors—traditionally merely played a lesser role in the process.

Although the Commission long had similar powers in other areas of competition, it came as a minor sensation when, in 2012, the Commission proposed that it be empowered to pose direct questions to third parties such as competitors, associations, aid beneficiaries, customers, etc. Although these plans had initially met with fierce opposition from some governments, who perceived the bilateral nature of the procedure between Commission and Member State as being

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[2] Commission, Press Release of 8 May 2012, IP/12/458; Commission, Communication of 8 May 2012 –State aid Modernisation, COM(2012) 209 final.

[3] 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, OJ, 2013, L204, 31.7.2013, p. 15.

jeopardized, the Commission was finally able to prevail, at least in part. Article 6a of the new Procedural Regulation gives the Commission the right to send out questionnaires to third parties, subject to strict conditions. Pursuant to Article 6b of the Procedural Regulation, as amended, the Commission may even impose fines and periodic penalty payments in cases where information is not supplied or the information supplied is incorrect.

Furthermore, the Commission is now also authorized to conduct *ex officio* "sector inquiries." allowing sectors or aid instruments to be scrutinized where the unlawful use of aid is strongly suspected. However, given the Commission's high workload (a fact which has always been emphasized very strongly by DG COMP) it is unclear whether it will have adequate resources to achieve these ends.

The (potentially) affected addressees are understandably not exactly enthusiastic about the two reform steps outlined above. The Commission's extremely comprehensive requests for information in the field of mergers and antitrust are already causing a considerable amount of work and are frequently perceived by addressees as chicanery rather than as a legitimate means for gathering information.

As far as dealing with complaints is concerned, the Commission was unable to achieve all the "improvements" on its original wish list. DG COMP originally wanted to obtain a far-reaching right to pick and choose its cases. However, such a "cherry picking" approach might have led to a vacuum in legal protection for competitors; for, in its capacity as a supervisory authority, the Commission is often the only contact point for competitors who feel placed at a disadvantage by subsidies distorting competition. The Member States were therefore right in not unrestrictedly following the Commission on that point.

To stem the flood of complaints, the requirements on providing sufficient grounds for the complaint were merely made more stringent. In addition, Article 20, paragraph 2 of the Procedural Regulation, as amended, now provides for the introduction of a compulsory complaint form (which was recently published on DG COMP's website).

III. OVERHAUL OF EXISTING FRAMEWORK

The existing State aid framework consists of a vast number of guidelines and frameworks that were largely outdated and about to expire. The overhaul of this set of "soft law" rules is certainly a Herculean task that the Commission has taken on itself. Some of the major examples are set out below.

Following tough negotiations, the Commission and the Member States agreed on new Regional State aid guidelines that will enter into force on July 1, 2014.[4] With this new package the Commission will fundamentally restructure large parts of the aid landscape in the old Member States. Many areas eligible for aid will lose their status entirely.

These cutbacks are coupled with a massive increase in the requirements to prove the "incentive effects" of aid, aimed at preventing windfall profits. This is intended to avoid subsidizing investments that the recipient would have made anyway (that is, without subsidies).

[4] OJ, 2013, C209, 23.7.2013, p. 1.

The compatibility assessment as such becomes far more complex, economics playing a fundamental role throughout the whole procedure.

Overall, applicants for aid under the new regional guidelines will encounter a substantial increase in the administrative process. The growing complexity of the new rules will ultimately lead to a certain prohibitive effect; that is, undertakings will dispense with regional aid from the outset. This was probably a desired side effect on the part of the Commission.

Cases concerning banks in connection with the financial crisis still top the Commission's agenda. With its latest (seventh) Banking Communication,[5] the Commission has significantly tightened the requirements for the approval of State aid packages. First, as demanded by large parts of the public, certain caps have been imposed on the remuneration of company directors. Another central pillar is the streamlining of proceedings. Finally, Brussels intends to make the shareholders and hybrid creditors of "rescued" banks more accountable, in that they make higher own contributions in terms of "burden sharing."

The long announced reform of the (general) guidelines on State aid for rescue and restructuring (outside of the financial sector) is not likely to lead to any major disruption. According to the new draft[6] the special treatment of the financial sector will remain in place; that is, the relevant provisions will not be integrated into the general guidelines for the time being.

The draft provides for a new concept of "temporary restructuring support" (loans and guarantees) for SMEs. A further focal point aims at the improved targeting of State aid, that is, "better filters" are to ensure that State aid measures really do serve the common interest. To that end, Member States will need to set out special circumstances, such as social hardship, market failure, etc., in order to justify aid being granted. Such a "material" test, by which an undertaking's eligibility for State aid is ultimately judged, will be a novelty. In addition, the Commission has expressed its wish for improved "burden sharing" (already familiar from the financial sector). In the view of the Commission, investors in the undertaking will be required to share the burden by making a maximum contribution of their own to the costs of restructuring.

The new Guidelines on State aid for environmental protection and energy were just adopted in April 2014 following some (very controversial) formal investigations into some national schemes in support of renewable energy sources. The new guidelines are more comprehensive than the previous set of guidelines in that they also cover energy, in particular on how Member States can relieve energy intensive companies that are particularly exposed to international competition from charges levied for the support of renewables ("carbon leakage effect").[7] The Commission expects to close the ongoing investigations into the national schemes very quickly.

In May 2014, the Commission also adopted a new Framework for State aid for Research, Development and Innovation[8] which will replace the existing rules dating from 2006. The

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[5] OJ, 2013, C 216, 30.7.2013, p. 1.

[6] The draft is accessible on http://ec.europa.eu/competition/consultations/2013_state_aid_rescue_restructuring/index_en.html.

[7] http://ec.europa.eu/competition/sectors/energy/legislation_en.html.

[8] http://ec.europa.eu/competition/state_aid/modernisation/index_en.html#rdi.

Framework is primarily to be used in those cases where the ceilings specified under the General Block Exemption Regulation are exceeded, resulting in the Commission being required to make an individual assessment before State aid is granted. The reform of the Framework therefore goes hand-in-hand with the reform of the General Block Exemption Regulation (see below). The new rules are to simplify innovation aid as well as foster pilot and demonstration projects. In particular new rules have been introduced on aid for the construction and development of research infrastructures. The ceilings above which aid is no longer covered by the General Block Exemption Regulation have been raised (doubled in some cases) and the aid intensity has been enhanced.

In the area of airport financing the Commission has presented new guidelines[9] to replace the preceding rules dating from 2005, which proved hardly workable in practice. Under the new rules, the aid intensity to finance airport infrastructure is to be more dependent on the size of the airport. Operating aid for airports that, in general, were hitherto excluded is to be allowed subject to strict preconditions. Aid granted by airports to airlines ("*Ryanair* type cases," i.e. reduction of fees, etc.) is still regarded as problematic. All in all, it remains to be seen how the Commission intends to handle the mass problem ensuing from the application of State aid measures to several hundred airports and their various fee systems. The past few years have shown that the Commission hardly has the resources to deal with such matters.

With its revised guidelines on the application of State aid rules in relation to the rapid deployment of broadband networks,[10] the Commission has placed the (extremely important) promotion of the expansion of next-generation broadband and high-speed networks (so-called "NGAs," i.e. Next Generation Access networks) on a new footing. The guidelines cover public funds for undertakings that expand networks and are based on the principles of technological neutrality. To prevent any crowding out of private investors, they stipulate that public investments must in any event lead to a "step change." Above all, the guidelines generally provide for a tender procedure in order to minimize the extent of the aid and hence the distortion of competition.

A (minor) revolution is the Commission's proposal for a Communication on Important Projects of Common European Interest ("ICEIs") which the Commission intends to base on Article 107(3)(b) TFEU. To date, this special provision in the Treaty has only been used very rarely (one historic example was the setting-up of the Airbus group in the 1970s). The provision allows the support of transnational projects that are of a strategic dimension for the European Union, in particular for the realization of the Europe 2020 objectives. The new Communication might be used to support major pan-European industry projects in sectors where European industry is lagging behind, in particular in the field of so-called "key enabling technologies" ("KETs").[11]

Shortly before Christmas, the Commission launched a new *de minimis* regulation with effect to January 1, 2014 in place of the preceding regulation dating from 2006.[12] State funding

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[9] OJ, 2014, C99, 4.4.2014, p. 3.

[10] OJ, 2013, C25, 26.1.2013, p. 1.

[11] http://ec.europa.eu/competition/consultations/2014_state_aid_cei/index_en.html.

[12] OJ, 2013, L352, 24.12.2013, p. 1.

measures have hitherto been exempted from European State aid below a certain ceiling, which is generally EUR 200,000 over a period of three years. Contrary to earlier suggestions, this ceiling of EUR 200,000 over three years has not been raised after all. Surprisingly, however—and this is a minor revolution—the new *de minimis* Regulation no longer generally excludes State aid being granted to "undertakings in difficulty."

IV. WIDENING OF THE "SAFE HARBOUR:" THE REVISED GENERAL BLOCK EXEMPTION REGULATION (GBER)

The reform of the General Block Exemption Regulation ("GBER"),[13] which was adopted on May 21, 2014, deserves to be called a real milestone. In particular the Commission's efforts to broaden the scope of the GBER are certainly aiming in the right direction. The overall intention of the reform is to be relatively generous in exempting "unproblematic categories of aid" from the prohibition of State aid. This would affect areas such as culture, broadband support, innovation clusters, sporting and leisure facilities, relief from natural disasters, etc. This is somewhat surprising, given that the Commission had hitherto insisted that "trifles" such as the public funding of public libraries, museums, swimming pools, community centers, or local sports facilities should always be notified and approved by DG COMP. Fortunately, this will no longer be necessary. The Commission's new thinking in this regard is a breath of fresh air.

This will have a positive effect above all on local authorities who understandably have no wish to notify every single financing of local infrastructural measures to the Commission. The ceilings contained in the new GBER are certainly generous and therefore quite likely to make life easier in towns and municipalities. The Commission expects that three-quarters of the current State aid measures and approximately two-thirds of the State aid amounts may possibly be exempted from the notification requirement. The new GBER is therefore quite likely to have a real impact.

The generous exemption planned under the new GBER is the inevitable consequence of constantly extending the notion of aid and expanding State aid control to include increasingly more new areas. The Commission, which has always single-mindedly argued in favor of a wide scope of State aid for decades, seems to have finally realized that it is not able to process all these cases. This insight is, in itself, a positive development. It would not be surprising if the scope of the GBER were extended even further in the future.

V. DRAFT NOTICE ON THE NOTION OF STATE AID—VERY WIDE SCOPE OF THE STATE AID RULES

In addition, the Commission has proposed a new draft notice designed to give practical guidance on the interpretation of the notion of State aid.[14] It goes without saying that the question whether a measure constitutes State aid or not is of pivotal importance as it determines whether a measure is subject to the Commission's approval before it can be implemented.

The new draft notice is certainly a very sophisticated, comprehensive, and thorough summary of the existing case law, written largely in the style of a (high quality) textbook.

[13] http://ec.europa.eu/competition/state_aid/legislation/block.html#gber.
[14] http://ec.europa.eu/competition/consultations/open.html.

However, in general, the draft notice adopts a very broad scope of the notion of State aid when interpreting the case law of the Courts. While this approach may be partly a reflection of the case law in this area, the Commission still seems to take the widest interpretation possible which aggravates the problem described above, namely that the Commission will not be able to process all these cases.

VI. OUTLOOK

During the last few years State aid law has developed in an extremely dynamic manner, which is also reflected by the growing academic interest in this field of law. The enormous speed of legislative action that the Commission developed last year has indeed been remarkable.

However, realistically speaking, the Commission will ultimately need to keep up this pace of reform since—given the constantly broadening scope of State aid control—the Commission can certainly expect more work in the future, including in its function as a (quasi) legislator.

One of the key challenges facing the Commission will therefore lie in finding ways and means of "handling" the rising flood of cases in the future—also against the backdrop of further EU expansion. The problem can certainly not be solved by creating increasingly complex regulations. Sooner or later the Commission will need to take the bull by the horns again and radically extend the scope of the GBER to avoid being submerged in a deluge of cases.

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The State as a "Mere Vehicle" for Aid? Or How the CJEU Has Opened the Door to Uncontrolled (Pseudo) Fiscal State Aid Measures

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The State as a "Mere Vehicle" for Aid? Or How the CJEU Has Opened the Door to Uncontrolled (Pseudo) Fiscal State Aid Measures

Albert Sanchez Graells[1]

In its Judgment of May 30, 2013 in *Doux Élevages and Coopérative agricole*[2] the Court of Justice of the European Union ("CJEU") carried on with its line of case law in *Pearle and Others*[3] by stressing that, according to Article 107(1) TFEU, State aid cannot exist if the economic advantage under analysis is not funded by "State resources" and there is no "imputability to the State." As a general point of law, the finding may not seem surprising (for this is in line with the general approach to the notion of aid, also in the 2014 Draft Commission Notice on the notion of State aid[4]). However, in the specific circumstances of the case, I find it very hard to swallow that there was no "imputability" to the French State of the measure contended.

In the case at hand CIDEF, a French agricultural inter-trade organization (for poultry), introduced the levying of a "cotisation volontaire obligatoire" (sic) ("CVO") for the purposes of financing common activities decided on by that organization. The contribution was initially introduced in 2007 as a voluntary measure for the members of CIDEF, but it was extended in 2008 to all traders in the sector on a compulsory basis and renewed in 2009 by a tacit Ministerial decision to accept that extension, later made express by virtue of a public notice.

The CVO imposed a payment of 14 Euro per 1,000 turkey poults. In a rough estimate, considering that the French production of turkeys in 2009 was around 400,000 metric tonnes in carcass weight equivalent ("tcwe"), and that a reasonable average weight for a turkey is about 11 kg, the overall value of the measure could be estimated at 500,000 Euro/year. This is a non-negligible sum if it is to be used by the agricultural organization at its own discretion and, consequently, it was a measure bound to be litigated.

Indeed, two complainants challenged the 2008/9 extension of the CVO on the basis that making it a mandatory payment for all traders in the sector (*i.e.* going beyond the group of members of CIDEF and, even within them, making it compulsory) involved State aid and, accordingly, it ought to have been notified to the European Commission under Article 108(3) TFEU. The French Conseil d'État referred the matter to the CJEU for a preliminary ruling, which has now decided that there was no element of State aid in the mandatory extension of the CVO to all traders in the industry concerned.

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[2] C-677/11 *Doux Élevages and Coopérative agricole UKL-AREE* (EU:C:2013:348)

[3] C-345/02 *Pearle and Others* (EU:C:2004:448)

[4] Pursuant to Article 107(1) TFEU, ¶¶42-45

The reasoning of the CJEU indeed follows its previous line of case law in the area of State aid and adopts a very narrow approach to the concept of economic advantages "granted by a Member State or through State resources." On the point of the involvement of State resources, the CJEU finds that:

> **the contributions [...] are made by private-sector economic operators—whether members or non-members of the inter-trade organisation involved—** which are engaged in economic activity on the markets concerned. That mechanism does not involve any direct or indirect transfer of State resources, **the sums provided by the payment of those contributions do not go through the State budget or through another public body and the State does not relinquish any resources, in whatever form** (such as taxes, duties, charges and so on), which, under national legislation, should have been paid into the State budget. **The contributions remain private in nature throughout their lifecycle** and, in order to collect those contributions in the event of non-payment, the inter-trade organisation must follow the normal civil or commercial judicial process, not having any State prerogatives.[5]

This should come as no big surprise, since this has become the standard position in the case law of the CJEU (*i.e.* that if the State "does not touch" and "should not have touched" the money, it cannot constitute a "State resource"). However, one may wonder why the Court has not addressed the point of the (pseudo) fiscal nature of the imposition of a contribution (*i.e.* a levy) on undertakings that do not belong to the private organization charging it.

In the absence of a voluntarily established association (via membership) within which confines decisions on charges and contributions remain, the prerogative of an inter-trade association to require payments from undertakings (even from those not associated) surely goes beyond the sphere of powers created by private law since taxation is one of the very exclusive powers of the State. In that regard, the reasoning followed by the CJEU on the point of "imputability to the State" requires some close scrutiny.

The Court first goes back to the general criterion for finding "imputability to the State" and reminds us that:

> Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, **the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources** (see [France v Commission, C-482/99, EU:C:2002:294], paragraph 37 and the case-law cited).[6]

This approach will prove itself problematic because the CJEU will engage in an *a contrario* analysis of the CVO.

In fact, the CJEU tries to apply the criteria laid down in *Commission v. France* to the CVO and considers that:

[5] C-677/11, *supra* note 2, at ¶32, emphasis added.

[6] C-677/11, *supra* note 2 at ¶35, emphasis added.

> the conditions laid down [therein] are not met. It is clear that the national authorities cannot actually use the resources resulting from the [CVOs] to support certain undertakings. **It is the inter-trade organisation that decides how to use those resources**, which are entirely dedicated to pursuing objectives determined by that organisation. Likewise, **those resources are not constantly under public control and are not available to State authorities**.[7]

This would in itself be problematic, given that the use of those resources in an activity subject to intense regulation as part of the Common Market Organisation ("CMO") for poultry meat would require some State control—although this falls outside the scope of State aid control. However, even exclusively from the State aid perspective, the CJEU finding does not hold water.

It must be stressed that, in my view, the CJEU's assessment went astray from the point when it determined that:

> there is nothing in the case-file submitted to the Court permitting it to consider that the initiative for imposing the CVOs originated with the public authorities rather than the inter-trade organisation. It is important to emphasise […] that **the State was simply acting as a 'vehicle'** in order to make the contributions introduced by the inter-trade organisations compulsory, for the purposes of pursuing the objectives established by those organisations. Thus, **neither the State's power to recognise an inter-trade organisation […] nor the power of that State to extend an inter-trade agreement to all the traders in an industry […] permit the conclusion that the activities carried out by the inter-trade organisation are imputable to the State** (sic).[8]

The reasoning followed by the CJEU could not be more puzzling, particularly at paragraph 41 of C-677/11, which to me seems plainly wrong. Given the literal tenor of Art 107(1) TFEU, which sets that the prohibition of State aid covers "any aid granted by a Member State or through State resources in any form whatsoever" it is clear that the analysis of the "imputability to the State" must cover the aid measure and not the activities of the beneficiary of such measure. Therefore, the conclusion reached in paragraph 41 simply a *non sequitur*.

After having recognized that "the State was simply (sic) acting as a 'vehicle' in order to make the contributions introduced by the inter-trade organisations compulsory, for the purposes of pursuing the objectives established by those organisations"[9] it is an illogical step to conclude that such (vehicular) intervention is not imputable to the State. In my opinion, this plainly makes no sense. The implications of the Judgment in C-677/11 are likely to be far-fetched, since they open the door to a floodgate of (pseudo) fiscal measures designed by Member States (by indirect influence to the relevant inter-trade or similar organizations, which should not be readily proven).[10]

The only remaining hope at this point is that, under the relevant constitutional law of the Member States, such (pseudo) fiscal levies are considered unconstitutional limitations to the right to property, since the State is the only entity vested with powers to extract money payments

[7] C-677/11, *supra* note 2 at ¶36, emphasis added.

[8] C-677/11, *supra* note 2 at ¶¶40 and 41, emphasis added.

[9] C-677/11, *supra* note 2 ¶40.

[10] *See* C-677/11, *supra* note 2 ¶40 *ab initio* to compensate for the stricter (?) controls on aid directly granted by public authorities.

not voluntarily accepted by undertakings—accepted at least as a general implication of their membership of an association (as was the case in C-345/02 *Pearle*, although any element of mandatory membership obviously would grant the same conclusion). Consequently, this (pseudo) fiscal structure that allows non-State entities to extract mandatory payments can be seen as an excessive restriction of the right to property under some Member States constitutional law—such as in Spain, for instance.

Maybe with the accession of the EU to the European Convention on Human Rights and a stronger duty to protect the right to property under Art 1 Protocol No. 1 ECHR (which includes rules on taxation, not mentioned in the right to property recognised in Article 17 of the Charter of Fundamental Rights of the EU), the CJEU will need to revisit this line of case law. Otherwise, the doors are open to uncontrolled State aid granted by means of (pseudo) fiscal measures, which is an undesirable outlook.

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EU State Aid and the Financial Sector—Is the Crisis Over Yet?

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EU State Aid and the Financial Sector—Is the Crisis Over Yet?

Andreas von Bonin[1]

I. INTRODUCTION

Since the start of the worldwide financial crisis in 2008, EU governments have used more than EUR 1.6 trillion to reduce the adverse effects of the shock on banks and financial institutions.[2] Between October 2008 and October 2013, the European Commission ("the Commission") took more than 400 decisions authorizing State aid measures for the financial sector. This included government guarantees as well as direct liquidity support in the forms of recapitalization and impaired-asset support.[3] In response to the immediate crisis, the Commission's efforts were set to reduce systemic risks and to increase the transparency of financial markets. EU State aid rules were used as an emergency tool to co-ordinate the responses of Member States and preserve a level playing field in the banking sector.

Following the collapse of Lehman Brothers in 2008, the Commission produced an emergency set of guidelines on measures to support banks during the crisis ("the Temporary Framework"). The Temporary Framework consisted of the following communications:

1. Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ("the Banking Communication"),
2. Communication on the recapitalization of financial institutions in the current financial crisis ("the Recapitalisation Communication"),
3. Communication from the Commission on the treatment of impaired assets in the Community banking sector ("the Impaired Assets Communication"), and
4. Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ("the Restructuring Communication").

The measures contained in the Temporary Framework were based on Article 107(3)(b) Treaty on the Functioning of the European Union ("TFEU"), i.e. to "remedy a serious disturbance in the economy of a Member State," and set out the conditions under which State aid could be granted to financial institutions. The Temporary Framework was prolonged twice and is currently in force for an indefinite period.

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[2] *See* EUROPEAN COMMISSION, REPORT ON COMPETITION POLICY 2012, page 4.

[3] http://ec.europa.eu/competition/state_aid/scoreboard/financial_economic_crisis_aid_en.html.

Since the crisis, financial markets in many Member States have undergone deep restructuring and consolidation processes under the EU adjustments programs. Under these programs, certain "Programme countries" (Greece, Portugal, Cyprus, Spain, and Ireland) have received loans from other Eurozone countries via the European Financial Stability Facility ("EFSF"), the European Stability Mechanism ("ESM"), and the International Monetary Fund ("IMF"). As a result, private recapitalization of banks in these Programme countries is possible again for the first time in years. For example in Greece, systemic banks have raised a total of EUR 8.3 billion equity capital from the private sector in the latest share capital increases. In addition, the third out of five Member States under European adjustment programs to announce its exit from the program—Portugal—has announced its exit will occur by May 17, 2014. Ireland announced its exit in December 2013 and Spain in January 2014.

According to Commissioner Almunia, the European Union will be faced with a transition period over the next few years before a fully functioning EU Banking Union enters into force.[4] For this period, the Commission has adopted a new Banking Communication on the application of State aid rules to support measures in favor of banks in the context of the financial crisis ("the New Banking Communication"), which replaces the Banking Communication of 2008. The New Banking Communication aims at tackling the future challenges of the EU financial sector from a State aid perspective. This article summarizes the main features of the New Banking Communication and gives an overview of new regulatory challenges that lie ahead.

II. THE NEW BANKING COMMUNICATION

As part of the Commission's State Aid Modernisation programme ("SAM"), the Commission adopted the New Banking Communication in August 2013. According to Commissioner Almunia, the reform of the State aid rules under the SAM programme is the most comprehensive reform of competition policy undertaken during the term of the present Commission.[5] The New Banking Communication is aimed at remedying the shortcomings of the Temporary Framework. The Temporary Framework provided for emergency rescues, which were approved temporarily on the basis of their compliance with the framework. This approval was then followed by a final decision authorizing the State aid received on the basis of a full restructuring plan.

However, the previous rules often failed to adapt to the increasing divergence in economic recovery between Member States and burden-sharing requirements across the European Union. The Commission therefore revised the rules and adopted the New Banking Communication. The most important changes as compared to the previous regime are the improvement of the restructuring process and the strengthening of the burden-sharing requirements.

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[4] Joaquín Almunia, *Banking crisis, financial stability and State aid: The experience so far*; remarks delivered at an event from Bruegel, *available at* http://www.bruegel.org/nc/blog/detail/article/1040-banking-crisis-financial-stability-and-state-aid-the-experience-so-far/.

[5] Joaquín Almunia, *Developments in EU Competition policy*, Speech, Athens 10 April 2014, *available at* http://europa.eu/rapid/press-release_SPEECH-14-312_en.htm.

A. Improved Restructuring Process

The New Banking Communication adopts a new approach for the overall restructuring process. Under the previous rules, banks were typically granted State aid prior to the approval of a restructuring plan by the Commission. Although this model proved to be efficient in ensuring a quick stabilization of financial markets and preventing contagion at the beginning of the crisis, it sometimes led to long delays in discussions on the restructuring of aid beneficiaries.

Moreover, once the rescue plan had been achieved, the rescued bank did not always have sufficient incentives to implement necessary restructuring measures aimed at limiting the use of public money. For these reasons, the New Banking Communication establishes the principle that recapitalization and impaired asset measures will be authorized only once a convincing restructuring plan has been approved by the Commission. By way of exception, however, the Commission will still be able to temporarily authorize structural aid before the full restructuring plan is approved.

The New Banking Communication encourages Member States to discuss restructuring plans with the Commission as soon as capital shortages have been identified. These pre-notification contacts are aimed at improving and accelerating the restructuring process. The basis of the pre-notification discussions will be a capital-raising plan established by the Member State and the bank.[6]

B. Stricter Burden Sharing Requirements

Another key aspect of the New Banking Communication concerns the burden-sharing requirements. In order to limit the amount of State aid to the minimum necessary and to reduce moral hazard, the aid beneficiary shall share the burden of its own restructuring to the maximum extent possible.

The new rules increase burden-sharing requirements by establishing that losses are first absorbed by equity, hybrid capital, and subordinated debt holders. Senior debt holders are not required to contribute to burden sharing. The new mechanism can broadly be described as a two-step procedure. At first, banks with a capital shortfall have to carry out all possible capital-raising measures by private means. These capital-raising measures can include rights issues and sales of capital-generating assets and portfolios, as well as voluntary conversions of subordinated debt instruments into equity.[7] In a second step, taken only if those capital raising measures were not sufficient, shareholders and subordinated creditors will be required to contribute to the burden-sharing exercise. Such contribution can, for example, include the conversion of debt into equity or a write down.[8] Similar bail-in rules have been introduced in the Banking Recovery and Resolution Directive ("the BRRD"), which will need to be transposed into national (regulatory) laws of the Member States by January 1, 2015.

[6] New Banking Communication, ¶32.

[7] *Id.* ¶35.

[8] *Id.* ¶.41.

Hence, the new regulatory obligations, as well as the State aid rules, aim at ensuring that the granting of State aid to a bank should be employed only as a last resort to ensure return to long-term viability of the beneficiary, based on a profound restructuring plan.

III. NEW CHALLENGES AHEAD

The EU institutions recently adopted in April 2014 three key texts to wrap up the legislative work regarding the EU Banking Union: (i) the Single Resolution Mechanism ("the SRM"), (ii) the BRRD, and (iii) the Deposit Guarantee Schemes Directive ("the DGS") under which EU Member States will be obliged to set up their own bank-financed schemes to reimburse guaranteed deposits of up to EUR 100,000 should a bank be unable to do so.

The EU Banking Union aims at completing an economic and monetary union allowing for a centralized application of EU-wide rules for banks in the Euro area, i.e. in the 18 Member States that have adopted the euro as their currency (non-Euro Member States also have the possibility to join if they so wish). The idea is that the European Central Bank ("the ECB") would do a better job than national supervisors of preventing financial problems so that EU governments would not need to resort to bank bailouts that destabilize the euro and require taxpayers' money.

For banks and financial institution, the EU Banking Union will bring about centralized systems for supervision as well as for resolution.

A. Centralized Supervision

As of November 2014, the ECB will be the supervisor of all (approximately 6,000) banks in the Euro area within the framework of the Single Supervisory Mechanism ("the SSM"). Using the SSM, the ECB will have the ultimate responsibility for specific supervisory tasks related to the financial stability of all Euro area banks.

In order to ensure that the ECB has a clear view of the situation of the banks it supervises, a comprehensive review of the banks' financial health is currently being carried out. The review aims to enhance the transparency of the balance sheets of significant banks and to rebuild investor confidence prior to the ECB taking over its supervisory tasks in November 2014. It is deemed to be an important step in preparing the SSM and, more generally, towards bringing about greater transparency of the banks' balance sheets and consistency of supervisory practices in the Euro area. In doing so, the review should trigger balance sheet repair where necessary.

The review is comprised of two main pillars: (i) a backward-looking Asset Quality Review ("the AQR") covering 128 banks, to be carried out by the ECB; and (ii) a forward-looking stress test to be conducted in close cooperation with the European Banking Authority ("the EBA"). The latter will assess the resilience of financial institutions to adverse market developments, as well as contribute to the overall assessment of systemic risk in the EU financial system.[9]

The AQR is a preliminary examination to ensure that the ECB understands what is on banks' books in the first place. Together with the stress test, the AQR forms part of the strong efforts by EU governments to create a EU Banking Union. The methodologies applied for both

[9] http://www.eba.europa.eu/risk-analysis-and-data/eu-wide-stress-testing.

the AQR as well as the stress test have been developed in cooperation between the ECB, the EBA, and the Commission. The EBA expects to publish the final results of the stress test in October 2014. The AQR will be completed in August this year.

This comprehensive assessment will conclude with an aggregate disclosure of the outcomes, at both country and bank levels, together with any recommendations for supervisory measures. The comprehensive outcome will be published prior to the ECB assuming its supervisory role in November 2014.

It remains to be seen what will eventually be disclosed by the review and whether further capital requirements and other hidden problems will, in fact, be revealed. Notably, the ECB stated that the risk-weighted assets subject to review amount to approx. EUR 3.72 trillion.[10] Estimates for non-performing loans in Europe range between EUR 1 trillion and EUR 1.5 trillion.[11] All State aid required as a result of the AQR will need to be treated under the New Banking Communication, including the application of the bail-in rules.

B. Centralized Resolution

In addition to the SSM, the EU institutions have also provided for a centralized mechanism to be applied for resolutions of bank difficulties. The recently adopted Single Resolution Mechanism ("SRM") will allow for resolutions of these difficulties to be managed more effectively through a Single Resolution Board ("SRB") and a Single Resolution Fund ("SRF"). The SRB assesses, in cooperation with national resolution authorities, the resolvability of Member States' banks participating in the Banking Union and draws up their resolution plans. Banks need to make *ex ante* contributions to the SRF so that within eight years (at the latest) contributions amount to 1 percent of the protected deposits of all banks within the Banking Union (approx. EUR 55 billion).

The SRM is one of the pillars of the EU Banking Union complementing the SSM and ensures that, if a bank subject to the SSM faces serious difficulties, its resolution can be managed efficiently with minimal costs to taxpayers and the real economy. This mechanism will allow for troubled banks from sovereign nations to receive bailout funds from centralized sources in order to reduce the impact at the national level. With the SRM, EU financial market regulation takes over from DG Competition, which has played the role of the European banking resolution authority during the crisis: In the context of State aid proceedings, more than 20 banks have been resolved or sent into run-off mode over the last years.

In the future, under the SRM, the ECB, the Commission, and the SRB will assess a bank's health and decide what action to take to resolve the problem. This could involve insolvency, or using money from the SRF to support the bank. A takeover of the bank's control and managing its resolution is only seen as a last resort. How well this works in practice will be determined by how well the European and national supervisors and resolution authorities across the European Union work together.

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[10] http://www.ecb.europa.eu/press/pr/date/2014/html/pr140311.en.html.

[11] http://www.ey.com/Publication/vwLUAssets/Flocking_to_Europe/$FILE/Flocking_to_Europe.pdf, page 11.

The SRM will apply from January 1, 2015, together with the BRRD, which will constitute its rulebook. Before the SRM and the BRRD enter into force, any bank crises will continue to be managed on the basis of national regimes. However, these regimes are set to converge increasingly towards agreed principles of resolution, namely the allocation of bank losses to shareholders and creditors instead of taxpayers.

IV. CONCLUSION

As discussed above, the first signs of recovery from the financial crisis can be seen in some parts of the European Union. The Commission's New Banking Communication can therefore be understood as a more permanent post-crisis regime, which takes account of the lessons learned from the application of the Temporary Framework in response to the worldwide financial crisis. The new rules establishing a centralized supervision and resolution of troubled banks in the Euro area also reflect the teachings from more than six years of State aid enforcement in the financial industry.

State aid rules are fully embedded in the EU Banking Union. And before these rules enter into force, the financial sector will need to cope with the results from the AQR later this year. For the foreseeable future, the role of State aid control will remain very important as an instrument to protect financial stability in the internal market. In that sense, the crisis is not over, yet.

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Apps, Ads, and Antitrust: A Retrospective on Google's Purchase of AdMob

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Apps, Ads, and Antitrust: A Retrospective on Google's Purchase of AdMob

Logan M. Breed & Justin Bernick [1]

I. INTRODUCTION

Google announced its acquisition of AdMob in November 2009 when the "mobile revolution" had just begun. Since then mobile device use has exploded. One in five people worldwide now own a smartphone, and more people worldwide now own a smartphone than a personal computer.[2] The number of software applications ("apps") developed for mobile devices has also skyrocketed, increasing from about 100,000[3] in 2009 to about one million[4] today in the Apple App Store alone. Over 50 billion apps have been downloaded from the Apple App Store,[5] and another 50 billion apps have been downloaded from Google Play.[6]

App developers "monetize" their apps in many ways, one of which is advertising. AdMob was one of several startup mobile advertising networks. After Google announced its acquisition of AdMob, the Federal Trade Commission ("FTC") began an investigation to assess whether the transaction would eliminate competition between the companies, resulting in too much market concentration. But the mobile industry shifted even as the FTC's investigation was pending. In January 2010 Apple announced its $275 million acquisition of Quattro Wireless ("Quattro"), another startup in-app advertising network that Apple subsequently rebranded iAd. The FTC closed its investigation in May 2010, noting that Apple's entry and other developments made AdMob's historical success an "[in]accurate predictor of AdMob's competitive significance going forward."[7] Google and AdMob then closed the acquisition.

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[1] Logan Breed is a partner and Justin Bernick is an associate at Hogan Lovells US LLP. Both Logan and Justin represented AdMob in the Federal Trade Commission's investigation of the acquisition. Google compensated Hogan Lovells for the time spent preparing this article, but the views expressed are our own and are not attributable to Hogan Lovells or Google.

[2] John Heggestuen, *One In Every 5 People In The World Own a Smartphone, One In Every 17 Own a Tablet,* BUSINESS INSIDER (Dec. 15, 2013), http://www.businessinsider.com/smartphone-and-tablet-penetration-2013-10.

[3] *Apple Announces Over 100,000 Apps Now Available on the App Store,* Apple Press Info (Nov. 4, 2009), http://www.apple.com/pr/library/2009/11/04Apple-Announces-Over-100-000-Apps-Now-Available-on-the-App-Store.html.

[4] Chuck Jones, *Apple's App Store About to Hit 1 Million Apps,* FORBES (Dec. 11, 2013), http://www.forbes.com/sites/chuckjones/2013/12/11/apples-app-store-about-to-hit-1-million-apps/.

[5] *Apple's App Store Marks Historic 50 Billionth Download,* Apple Press Info (May 16, 2013), http://www.apple.com/pr/library/2013/05/16Apples-App-Store-Marks-Historic-50-Billionth-Download.html.

[6] Michael E., *Google Play Tops 50 Billion App Downloads*, MOBILE MARKETING WATCH (July 19, 2013), http://www.mobilemarketingwatch.com/google-play-tops-50-billion-app-downloads-34516/.

[7] *Statement of the Commission Concerning Google/AdMob,* FTC File No. 101-0031 (May 21, 2010), *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/google-inc./admob-inc/100521google-admobstmt.pdf.

This article explains why the FTC made the right decision. Pre-merger review under Section 7 of the Clayton Act is inherently prospective, requiring the FTC to predict whether an acquisition "may" reduce competition. However, it can be difficult to predict the effects of acquisitions in industries characterized by rapid change and innovation. That is perhaps more true of mobile advertising than any other industry, and the FTC's regulatory restraint in the AdMob transaction was clearly justified in light of the rapid innovation and fierce competition that has occurred in the ensuing years.

Disruptive new competitors and new technologies have changed the way advertisers and publishers approach mobile advertising—and monetizing mobile content more generally—since 2009. Moreover, large publishers like Facebook have bypassed entirely, and now dwarf, their ad network competitors. Finally, while iAd may not have been exactly what the FTC predicted, competition between AdMob and iAd—and between the iPhone and Android platforms—is robust.

The FTC was correct that predicting AdMob's future competitive significance in 2010 was nearly impossible. But even more importantly, subsequent industry developments discussed below show that the acquisition did not reduce competition or stifle innovation.

II. MOBILE "IN-APP" ADVERTISING

Mobile devices permit users to access both the internet and software applications ("apps"). "Publishers" of websites and apps may charge users directly to access content, or may monetize content through advertising. Advertising networks like AdMob connect those publishers with advertisers. There are various alternatives for mobile advertising, including mobile web advertising, mobile in-app advertising, and mobile search advertising.

AdMob's business focuses on mobile in-app advertising. In-app advertiser prices are generally set through an auction model in which an advertiser specifies a maximum price it is willing to pay for a given unit of "ad inventory," or a piece of real estate on an app that has been devoted to advertising. Publisher prices are generally determined by the "revenue share," or the split of advertiser revenue between the advertising network and publisher. Once an advertiser sets a maximum price, the ad network serves ads to the apps that are likely to maximize both the publishers' revenue and the advertisers' return on investment. Publishers and advertisers can integrate with multiple ad networks through "mediators" or "exchanges." As discussed below, these platforms have evolved to give publishers and advertisers increasingly sophisticated tools.

III. FTC CLOSING STATEMENT

The FTC's Closing Statement accompanying the end of its investigation expressed its initial concern that Google and AdMob were the "two leading mobile advertising networks," and the transaction would eliminate "head-to-head competition between them" on the iPhone and Android platforms.[8] The FTC cleared the transaction based upon two observations:

First, the FTC found that Apple (through its acquisition of Quattro) would be a "strong" competitor because of its "relationships with application developers and users;" its ability to offer "targeted ads" using "proprietary user data;" and its ability to control app developers' access to

[8] *Id.*

the iPhone platform, which gave Apple the "ability to define how competition among ad networks on the iPhone will occur and evolve."[9] In short, the FTC found that "AdMob's success to date on the iPhone platform is unlikely to be an accurate predictor of AdMob's competitive significance going forward."[10] In speeches and interviews, Commissioners Edith Ramirez, Julie Brill, and J. Thomas Rosch each separately noted that Apple's entry was a "game-changing development" that contributed to the Commission's decision to close the investigation.[11]

Second, the FTC found that Google had a "strong incentive" to encourage the development of "free or low-cost" apps "to maintain the competitiveness of Android."[12] If Google were to "exercise market power" with AdMob post-transaction, it would reduce the competitiveness of Android because these apps were "made available" using revenue from ad networks like AdMob.[13] In addition, other firms were developing platforms to compete against iPhone and Android, and these firms "would have a strong incentive to facilitate competition among mobile advertising networks, including through self-supply."[14]

IV. THE EVOLUTION IN MONETIZING MOBILE

The FTC's conclusion that the AdMob transaction would not undermine competition or innovation proved prescient. In addition to competition from iAd, mobile advertising has undergone a rapid evolution in the few short years since the AdMob acquisition. Competition has flourished, with new innovations that leapfrog existing technology. Ad networks like Millennial Media (which acquired JumpTap), Greystripe (acquired by ValueClick/Conversant), InMobi, LeadBolt, and Tapjoy have expanded their business and introduced new products to serve growing demand as Quattro and AdMob has focused on post-acquisition integration. AdMob even lost important employees to competitors like MoPub and Mojiva. But most importantly, other companies have pioneered new technologies that represent the future of mobile advertising.

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[9] *Id.*

[10] *Id.*

[11] *See* Edith Ramirez, Commissioner, FTC, Address at the 20th Annual Golden State Antitrust and Unfair Competition Law Institute (Oct. 21, 2010) *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/address-commissioner-ramirez/101021goldenstate.pdf; J. Thomas Rosch, Commissioner, FTC, Remarks before the ABA Antitrust Section Fall Forum: Intel, Apple, Google, Microsoft and Facebook: Observations on Antitrust and the High-Tech Sector (Nov. 18, 2010) *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/intel-apple-google-microsoft-and-facebook-observations-antitrust-and-high-tech-sector/101118fallforum.pdf; Interview by Howard Morse with Julie Brill, Commissioner, FTC, in Federal Civil Enforcement Committee Newsletter (Nov-Dec 2010) *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/aba-federal-civil-enforcement-committee-interview-commissioner-julie-brill/101221abainterview.pdf; *see also, Antitrust in the Digital Age: How Enduring Competition Principles Enforced by the Federal Trade Commission Apply to Today's Dynamic Marketplace: Hearing Before the H.R. Comm. on the Judiciary Subcomm. On Courts and Competition Policy* (2010) (Statement of Richard Feinstein, Director of the Bureau of Competition at the FTC), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-antitrust-digital-age-how-enduring-competition/100916digitalagetestimony.pdf.

[12] *Statement of the Commission Concerning Google/AdMob, supra,* n. 7.

[13] *Id.*

[14] *Id.*

At the time of the acquisition, mediators permitted shifting inventory across multiple ad networks, eliminating any benefits an ad network may realize from its size. These platforms have continued to evolve, and now provide significantly more transparency and efficiency, as well as an increasingly robust competitive constraint on individual ad networks like AdMob.

On the publisher side, supply-side platforms ("SSPs"), ad servers, and ad exchanges[15] have developed sophisticated new technologies that broaden publisher access to a variety of advertisers and other revenue sources and offer a range of tools that enable publishers to optimize yields and maximize revenue. Examples of companies offering these tools include Nexage, MoPub, MobClix, AdMarvel, and Smaato.

On the advertiser side, demand-side platforms ("DSPs")[16] and real-time bidding ("RTB") platforms help advertisers maximize their return on investment. For example, tools may analyze publisher data to help advertisers calculate appropriate bids and allow advertisers to target users based on various criteria like location, device, app categories, etc. Certain companies, such as Drawbridge and Tapad, also now offer solutions that enable advertisers to target users across multiple devices (smartphone, tablet, desktop, laptop, television, etc.). Evolving bidding technologies allow advertisers to bid on publisher inventory in real time. Examples of companies offering these tools include MetaResolver (acquired by Millennial Media and rebranded mMedia), MdotM, Adfonic, Turn, OpenX, and many others. With increasingly transparent and efficient bidding, less innovative ad networks that generate less revenue lose bids.

Innovation also has led to entirely new monetization methods that pose an even greater competitive threat to ad networks, including in-app purchasing ("IAP"), engagement advertising, affiliate marketing, and native advertising. IAP involves a user paying for virtual goods within an app. An increasing number of publishers choose to monetize their content with IAPs rather than in-app advertising. IAP generated over 75 percent of App Store revenues in early 2013.[17] Various competitors like Tapjoy and Amazon offer IAP solutions, and publishers like Supercell (which recently sold a 51 percent stake for over $1.5 billion) have had enormous success monetizing using IAPs. These IAPs are a significant competitive constraint on ad networks like AdMob that simply did not exist in 2009.[18]

Similarly, engagement advertising incentivizes users to interact with the advertisement, often in exchange for actual or virtual rewards. Competitors offering engagement solutions include Super Rewards, Kiip, Adquant, and Session M. With affiliate marketing, a third-party pays the publisher every time the app user is directed to the third-party's product or service.

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[15] Christopher Reynolds, *Increasing Mobile App Revenue with Mobile Ad Servers,* Moby Affiliates (Sept. 25, 2012), http://www.mobyaffiliates.com/blog/increasing-mobile-app-revenue-mobile-ad-servers/.

[16] Christopher Reynolds, *Buying Mobile Advertising using Mobile Demand Side Platforms (Mobile DSPs),* Moby Affiliates (Oct. 15, 2012), http://www.mobyaffiliates.com/blog/buying-mobile-advertising-using-mobile-demand-side-platforms-dsps/.

[17] Chris Royd, *In-app purchases now account for a staggering 76% of App Store revenue according to report,* iMore (Mar 31, 2013), http://www.imore.com/app-purchases-now-account-staggering-76-app-store-revenue-according-report.

[18] Apple changed its developer agreement to permit in-app purchases for free applications in October 2009. Erica Sadun, *Apple Relents: In-app Purchase for Free Apps Allows Demo-to-Paid*, TUAW (Oct. 15, 2009), http://www.tuaw.com/2009/10/15/apple-relents-in-app-purchase-for-free-apps-allows-demo-to-paid/.

Various competitors offering these solutions include LinkShare, Commission Junction (acquired by ValueClick/Conversant), ClickBank, and ShareASale.

Native advertising involves integrating ads into the app experience. Revenue from native ads has increased substantially, and is facilitated by various networks, such as NativeX. Publishers like Facebook and Twitter have had large success embedding native ads into their apps.

Finally, the FTC was correct to predict that iAd would remain a strong competitor with AdMob going forward. Initial reports of iAd were highly favorable as Apple secured significant contracts with major brands like Campbell Soup, DirecTV, General Electric, and Sears. While Apple originally focused primarily on high-dollar advertising campaigns, it has subsequently expanded its reach. Apple recently launched iAd Workbench, which reportedly allows publishers to launch ad campaigns for as little as $50. Apple is also launching new innovations, such as an RTB platform and advertising on iTunes Radio.

V. PUBLISHERS ON THE RISE

Perhaps the most important development in mobile advertising is the increased significance of large publishers, which are bypassing ad networks to monetize their extensive new mobile inventory. By 2012, publishers controlled more than half of all mobile display advertising.[19] Large publishers have far more information about their users than ad networks, and the trend toward displacing ad networks like AdMob is likely to continue.

Perhaps the best example of the rapid pace of change in mobile advertising is Facebook. Facebook started with zero mobile advertising revenue in 2011,[20] but in 2013 the company earned $3.1 billion from mobile advertising alone, driven primarily by native ads served in users' newsfeeds.[21] The company reportedly accounted for 16 percent of worldwide mobile ad spending in 2013, up from 5 percent in 2012.[22] The trend continued into 2014, with Facebook earning $1.3 billion in revenue (or 59 percent of the company's total advertising revenue) from mobile newsfeed ads alone in the first quarter.[23] Facebook's rapid growth is the result of targeting ads using its extensive proprietary data on over one billion mobile users.

But this is only the beginning. In 2008 Facebook launched Facebook Connect, which allows users to use their Facebook logins to access third-party apps and permits Facebook to integrate with the app. Facebook can use its relationships with third-party apps to improve targeting of ads, and also to compete directly with ad networks. In 2012, Facebook tested a new

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[19] *IDC: For Mobile Advertising Networks, Era of Dominance is Over,* Press Release, IDC (Apr. 9, 2013), http://www.idc.com/getdoc.jsp?containerId=prUS24063113.

[20] Facebook 10K (Feb. 1, 2013) at 47, *available at* http://www.sec.gov/Archives/edgar/data/1326801/000132680113000003/fb-12312012x10k.htm.

[21] Facebook 10K (Jan. 31, 2014) at 46, *available at* http://www.sec.gov/Archives/edgar/data/1326801/000132680114000007/fb-12312013x10k.htm.

[22] Natasha Lomas, *Facebook to Capture 15.8% of Global Mobile Ad Revenue This Year, Predicts eMarketer, Up From Just 5.35% In 2012,* TECH CRUNCH (Aug. 28, 2013), http://techcrunch.com/2013/08/28/facebook-global-mobile-ads/.

[23] Facebook 10Q (Apr. 25, 2014) at 26, *available at* http://www.sec.gov/Archives/edgar/data/1326801/000132680114000023/fb-3312014x10q.htm.

ad network that used Facebook's proprietary user data to target advertisements more effectively for third-party publishers in direct competition with ad networks. Although Facebook temporarily "paused" the development of its new ad network, Facebook has since restarted the project.[24]

Other publishers are expanding their mobile advertising capabilities as well. For example, Twitter acquired MoPub in September 2013 for $350 million, permitting Twitter to implement RTB for Twitter ads and to improve use of Twitter's social data for targeting. Pandora also is generating substantial advertising revenues without an ad network.

VI. THE MOBILE WARS

Furthermore, as the FTC anticipated, competition between the iPhone and Android platforms has intensified since 2009. Although Apple appeared poised to extend its lead in the smartphone industry at the time of the AdMob acquisition, Android smartphones have since become a significant competitor. Nevertheless, Android still lags behind iPhone generating revenue for advertisers and publishers. With respect to advertisers, iPhone had a higher share of global mobile advertising revenue in 2013 despite Android's higher market penetration.[25] With respect to publishers, the top 200 grossing apps in the Apple App Store generated almost five times the revenue of the top 200 grossing apps in Google Play in 2013.[26] One reason cited for the discrepancy is that less expensive Android devices are purchased by consumers who are also likely to spend less on apps and other purchases.[27]

This evidence suggests that Google will continue to face significant pressure to increase the profitability of Android for publishers and advertisers if Android is to succeed. And Google has a strong interest in ensuring the success of Android, even though Google does not directly profit from sales of the free operating system. In fact, the availability of an open platform is critical to Google to ensure that it can distribute its products and services like Google Maps or Google Search on mobile devices.[28]

Competition between iOS and Android is intense, and publishers must design their apps specifically for particular platforms. If Google provided insufficient incentive for publishers to design apps for Android, those publishers—and smartphone consumers—would look elsewhere.

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[24] Cade Metz, *Facebook Challenges Google With Its Own Mobile Ad Network*, WIRED (Jan. 22, 2014), *available at* http://www.wired.com/business/2014/01/facebook-mobile-ad-test/.

[25] John Heggestuen, *Charts: Apple's Phones and Tablets Still Handily Beat Android Devices in Generating Global Ad Revenue,* BUSINESS INSIDER (Oct. 2, 2013), http://www.businessinsider.com/mobile-ad-revenue-by-platform-2013-10; *see also* John Koetsier, *Facebook Ad Profit a Staggering 1,790% More on iPhone than Android,* VENTURE BEAT (Oct 16, 2013), *available at* http://venturebeat.com/2013/10/16/facebook-ad-profit-a-staggering-1790-more-on-iphone-than-android/.

[26] Tirui van Agten, *A Granular App Level Look at Revenues: Google Play vs. Apple App Store*, DISTIMO (May 2013), *available at* http://www.distimo.com/publications; Harry McCracken, *Who's Winning, iOS or Android? All the Numbers, All in One Place,* TIME TECH (Apr. 16, 2013), *available at* http://techland.time.com/2013/04/16/ios-vs-android/.

[27] *See, e.g.,* Harry McCracken, *The Smartphone App Wars Are Over, and Apple Won*, TIME (Feb. 21, 2014), *available at* http://techland.time.com/2014/02/21/ios-vs-android-2/.

[28] Charles Arthur, *Apple maps: how Google lost when everyone thought it had won,* THE GUARDIAN (Nov. 11, 2013), *available at* http://www.theguardian.com/technology/2013/nov/11/apple-maps-google-iphone-users.

Incentivizing publishers is particularly important given the wide variation in Android operating systems use by smartphone manufacturers, which makes developing apps for the fragmented Android market more difficult. The ability to monetize an app on a particular platform is the most important factor for publishers, and Google would risk the overall viability of Android if it deliberately decreased advertiser or publisher profits in the AdMob network. Given the intense competition between iPhone and Android platforms, this competitive pressure on AdMob is even more significant today than it was when the FTC considered the issue in its Closing Statement in 2010.

VII. CONCLUSION

The years since the AdMob acquisition have vindicated the FTC's decision to close its antitrust investigation. It is extremely difficult, if not impossible, to anticipate perfectly the competitive effect of acquisitions in a rapidly evolving industry, but the FTC was correct to conclude that AdMob's historical success did not predict its competitive significance going forward. Apple's iAd continues to be a significant competitor to AdMob, and vigorous competition between the iOS and Android platforms eliminates incentives for Google to disadvantage its advertisers or publishers.

But the history of mobile advertising since 2010 reveals even more fundamental shifts that underscore the FTC's conclusions. Following the AdMob and Quattro acquisitions, existing competitors and new entrants have gained increased traction in the marketplace, and have leapfrogged each other with new technologies like exchanges, RTB, "native" ads, and IAPs that provide sophisticated new ways for publishers and advertisers to maximize their revenue. Companies that are pioneering these new technologies are driving the industry forward.

Perhaps even more significantly, large publishers like Facebook pose a new competitive threat. Within a mere 18 months, Facebook went from zero mobile revenue to a mobile business that dwarfs AdMob and other ad networks. Facebook has user data for targeting that no independent ad network can match, and it is now displacing ad networks entirely by serving ads to third-party publishers. No one could have predicted these changes since 2009. Consumers will reap the rewards of FTC regulatory restraint in the face of these changes, and the future of competition in mobile in-app advertising is bright.