



The EU State Aid Regime

An Overview

Introduction

The starting point of European Union State aid policy is that aid given by individual EU Member States to industrial and commercial undertakings is prohibited as incompatible with the Internal Market. This prohibition is not absolute and there are a number of areas where State aid is seen as necessary and fair. A complex framework of European Union State aid rules is designed to ensure that such aid is compatible with the needs of the Internal Market.

The core State aid rules have been in place since the 1957 Treaty of Rome. The content of the policy has changed over time. The current EU State aid regime reflects the 2005 State aid reform programme and is designed to result in less but better targeted aid in order to boost the European economy.

In February 2012, the European Commission launched a State aid reform process, aimed at reducing and directing public spending to areas where it enhances long-term growth and fosters job creation. There will be a greater focus on cases which have a significant impact on trade in the Internal Market and it is intended to cut red tape in non-controversial cases. A Commission communication in the area is imminent.

It is therefore opportune to provide an overview of the EU State regime, to understand how it functions at present and what is coming around the corner.

The Legal Framework

The legality or otherwise of State aids granted by EU Member States is governed by Articles 107 to 109 of the Treaty on the Functioning of European Union (the TFEU) and a large number of secondary measures and guidelines.

What is State aid?

Any aid granted by a Member State or through State resources in any form is in principle prohibited as incompatible with the Internal Market where it: (a) distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods; and (b) affects trade between Member States.

A broad interpretation has been given to “aid”, to cover all types of transfers of State resources and other economic advantages, including tax exemptions. In certain cases, payments made by the State will not constitute aid. For example, investments satisfying the market economy investor principle are not treated as aid. Compensation paid to undertakings in return for their performing services of general interest will not be aid where a number of conditions – originally set out by the European Court of Justice in the *Altmark* case – are satisfied.

In order to be caught by the prohibition, an aid must be “selective” in that it affects the balance between the beneficiary firm and its competitors. General measures which apply to all firms in a Member State – such as across the board taxation measures – will not be regarded as aid.

Aid must have an actual or potential effect on trade between Member States. Except in the case of low-value (*de minimis*) aid, this jurisdictional test is easily satisfied.

Compatibility with the Internal Market

Not all State aid is incompatible with the Internal Market, defined as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”. However, it is recognised that State aid may in certain circumstances be necessary for a well-functioning and fairly-run economy: there are therefore a number of recognised exemptions from the prohibition.

Three categories of aid are deemed by the TFEU to be compatible with the Internal Market: (a) aid having a **social character**, granted to individual consumers, provided that it is granted without discrimination related to the origin of the products concerned; (b) aid to **make good the damage caused by natural disasters or exceptional circumstances**; and (c) aid granted to **certain areas of the Federal Republic of Germany** affected by the former division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

Other categories of aid may be considered to be compatible with the Internal Market: (a) aid to **promote the economic development of areas where there is an abnormally low standard of living or serious underemployment** and of **regions referred to in Article 349 TFEU**, in view of their structural, economic and social situation; (b) aid to **promote the execution of an important project of common European interest** or to **remedy a serious disturbance in the economy of a Member State**; (c) aid to **facilitate the development of certain economic activities or of certain economic areas**, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to **promote culture and heritage conservation** where it does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; and (e) such **other categories of aid** as may be specified by decision of the Council on a proposal from the Commission.

The Role of the European Commission

Within the framework set out in the TFEU and Council Regulations made under Article 109 TFEU, the European Commission has a key role in reviewing existing aid and in deciding on plans to grant or alter aid. In exceptional circumstances, the Council may decide that aid is compatible with the Internal Market and thereby block Commission action: however, the requirement for unanimity means that such decisions are made very rarely.

EU State Aid Policy

A large number of EU measures – in the form of directly applicable regulations and non-binding guidelines – set out EU State aid policy.

Measures applying to specific sectors, or applying to all sectors in a “horizontal” manner, set out the conditions which need to be satisfied in order for State aid to be compatible with the Internal Market. A number of specific aid instruments are also addressed.

Some of these measures set out the conditions for clearance of aid to be *notified* in advance to the European Commission (whether as an individual aid or as an aid scheme), whilst others provide a “block exemption”, dispensing with the need to notify provided certain conditions are satisfied.

Individual Sectors

Individual sectors covered by EU measures are:

- **Agriculture and forestry:** in particular, the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013.
- **Audiovisual production:** the 2001 “Cinema Communication” containing film support rules has been prolonged until the end of 2012.
- **Broadband:** the 2009 Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks.
- **Broadcasting:** the 2009 Commission Communication on the application of State aid rules to public service broadcasting.
- **Coal:** the 2010 Council Decision on State aid to facilitate the closure of uncompetitive coal mines.
- **Electricity:** the 2001 Commission Communication relating to the methodology for analysing State aid linked to stranded costs.
- **Fisheries:** in particular, the 2009 Guidelines for the examination of State aid to fisheries and aquaculture.
- **Motor vehicles:** the Multisectoral framework on regional aid for large investment projects.
- **Postal services:** 1998 Commission notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services.
- **Shipbuilding:** the 2011 Framework on State aid for shipbuilding.
- **Steel:** the 2002 Commission Communication on rescue and restructuring aid and closure aid for the steel sector and the Multisectoral framework on regional aid for large investment projects.
- **Synthetic fibres:** Multisectoral framework on regional aid for large investment projects.
- **Transport:** for **air transport**, the 1994 Guidelines on State aid in the aviation sector and the 2005 Guidelines on financing of airports and start-up aid to airlines departing from regional airports; for **maritime transport**, the 2004 Guidelines on State aid to maritime transport, the 2008 Guidance on State aid complementary to Community funding for the launching of the motorways of the sea and the 2009 Guidance on State aid to ship management companies; for **road and land transport**, the 2007 Regulation on public passenger transport services by rail and by road and 2008 Community guidelines on State aid for railway undertakings.

Horizontal State Aid Measures

A number of “horizontal” measures apply across a wide range of industrial and economic sectors. These relate to:

- **Regional aid:** see, in particular, the Guidelines on national regional aid for 2007-2013.
- **Research and Development and Innovation:** the 2006 Framework for State aid for R&D&I.
- **Environmental aid:** the 2008 Guidelines on State aid for environmental protection.
- **Disadvantaged and disabled workers:** the 2009 Commission Communication on the criteria for the compatibility analysis of State aid to disadvantaged and disabled workers subject to individual notification.
- **Training:** the 2009 Commission Communication on the criteria for the compatibility analysis of training State aid cases subject to individual notification.
- **Risk capital:** see the General Block Exemption Regulation and the amended 2006 Guidelines on State aid to promote risk capital investments in small and medium sized enterprises (SMEs).
- **Rescue and restructuring aid:** the 2004 Guidelines on State aid for rescuing and restructuring firms in difficulty (extended to 9 October 2012).

All but the last of these categories are to a certain extent covered by the General Block Exemption Regulation (see below)

The Block Exemption Regulations

There are two “block exemption” regulations.

One covers **aid regarded as of minor importance** (*de minimis*) having a negligible effect on trade between Member States.

The other – the 2008 **General Block Exemption Regulation** (the GBER) – covers no less than 26 different categories of aid, for SMEs and for all enterprises (with some exceptions).

- In relation to small and medium-sized enterprises (SMEs), the GBER covers a number of **specific SME aids** (investment and employment aid, consultancy aid, aid for SME participation in fairs), **aid in the form of risk capital** and **aid for promoting female entrepreneurship**.
- In relation to most economic sectors, the GBER covers **aid for research & development & innovation, environmental aid, regional aid, training aid, and aid for disadvantaged and disabled workers**.

Specific Aid Instruments

A number of specific aid instruments are also addressed by Union measures. Aid in the form of **State guarantees** is dealt with in the 2008 Commission Notice on State aid in the form of guarantees. A 2007 Commission Communication concerns aid elements in **land sales by public authorities**. **Short-term export credit insurance** is addressed in an amended 1997 Commission Communication. A 1998 Commission Notice concerns the application of the State aid rules to measures relating to **direct business taxation**.

State-Owned Enterprises and the Transparency of Public Undertakings

Union measures also address the question of **State investments in undertakings**. As long ago as 1984, the Commission issued a paper on **public authorities’ holdings in company capital**. In February 2012, the Commission published a guidance paper on **State-aid compliant financing, restructuring and privatisation of State-owned enterprises**.

The **transparency of public undertakings** has been addressed in a 1984 Commission Communication on the application of State aid rules to public undertakings in the manufacturing sector and in the 2006 Commission Directive on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.

Services of General Economic Interest

The importance of, and the central role of the individual Member States in ensuring the provision of, **services of general economic interest** (SGEI) is seen in Article 14 TFEU. The TFEU allows Member States to derogate from the State aid rules with regard to undertakings entrusted with such services if the application of such rules obstructs the performance of the tasks assigned to them, provided that the development of trade is not affected contrary to the Union’s interests.

This was addressed in a 2005 SGEI package introduced as part of the 2005 State aid reform. In December 2011, this package was replaced by a new package setting out the conditions under which State aid in the form of public service compensation may be considered to be compatible with State aid rules. The package consists of four measures:

- A Commission Communication on the application of the State aid rules to compensation granted for the provision of SGEI. This clarifies the basic concepts of State aid in the area.
- A Commission Decision on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to undertakings entrusted with SGEI. This exempts Member States from the obligation to notify certain aids to the Commission.
- The European Union framework for State aid in the form of public service compensation. This sets out the basis for the Commission’s assessment of notified aid.

- A *draft* Commission Regulation on *de minimis* aid for the provision of SGEI. This will set out the rules for determining that an aid is of minor importance and is likely to be adopted in Spring 2012.

State Aids and the Economic and Financial Crisis

A number of *temporary* rules have been established in response to the economic and financial crisis.

In relation to **financial institutions**, the Commission has issued four Communications. The 2008 **Banking Communication** and the 2009 **Recapitalisation and Impaired Assets Communications** – address State guarantees on liabilities, recapitalisations and asset relief measures. The 2009 **Restructuring Communication** addresses restructuring or viability plans in the context of crisis-related State aid granted to banks. These four measures have been extended beyond the end of 2011, with a view to their being replaced by permanent rules for State aid for bank rescue and restructuring when market conditions allow.

A **temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis** was adopted in October 2009 and modified a number of times since. This temporary framework expired in December 2011.

Notifying Aid

In the absence of a block exemption, a State aid or State aid scheme must be notified to the Commission and authorised before it is put in effect. The basic procedure for notification is set out in the 1999 Council **Procedural Regulation** and a Commission **Implementing Regulation** contains more detailed rules including prescribing the forms to be used in the electronic notification process. The Commission should take a decision within two months (though this period may be extended and has often taken up to six months). The procedure may be closed by a decision that there is no aid or that aid is compatible with the Internal Market. Where the Commission has doubts about compatibility with the Internal Market it will open a formal investigation procedure (which it will endeavour to complete within 18 months): this will end with a decision that there is no aid, or that aid is compatible with the Internal Market or that aid is incompatible and thus cannot be implemented (if it is already implemented, the Member State will usually be required to recover the aid with interest).

The Commission has sought to simplify and speed up procedures for straightforward State aid cases. In 2009 it adopted a **Simplification** Package to accelerate State aid decisions. This consists of:

- The **Best Practices Code** encouraging pre-notification contacts and streamlining the exchange of information between Member States and the Commission; and
- The **Simplified Procedure** enabling cases to be addressed within one month of notification. This is intended to cover aids in line with existing horizontal measures or Commission decisional practice.

The Treatment of Unlawful Aid

The Commission may act against unlawfully-granted aid either of its own motion or on foot on a complaint. Any interested party is entitled to complain and should use the **form for complaints** available on DG Competition's website.

Where, after due investigation, the Commission finds there has been unlawful aid, it is usually required to take a **recovery decision** requiring repayment of the aid with interest. Significant failings of Member States in this respect resulted in a 2007 **Commission Notice on the effective implementation of recovery decisions**.

The Role of the Courts

The **Court of Justice of the European Union** has an important judicial role in the State aid area. The first-instance **General Court** is responsible for deciding on direct actions brought by natural or legal persons against acts of the Commission and other EU bodies, against regulatory acts and against failures to act. It also hears actions brought by Member States against the Commission and actions brought by Member States against the Council relating to acts adopted in a number of fields, including State aid. The **Court of Justice** hears appeals, limited to points of law, from the General Court. It also rules on references from national courts and tribunals on the interpretation of the Treaties and the interpretation and validity of acts of EU bodies

National courts have a key role to play in the enforcement of the State aid rules. They are responsible for enforcing the **standstill obligation** – preventing Member States from putting proposed State aids into effect until authorised by the Commission. Apart from enforcing this standstill obligation, national courts do not have the power to declare a State aid compatible or incompatible with the Internal Market. They also have a role in the **implementation of recovery decisions**. Where appropriate, they may, and in certain cases must, refer questions of interpretation and validity of EU law to the Court of Justice. Detailed guidance on the role of national courts is contained in the 2009 **Commission Notice on the enforcement of State aid law by national courts**.

Further Information

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