

A Very Different EU State Aid Landscape

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In May 2012, the European Commission announced an ambitious program to reform and modernize EU state aid law[1]. There were three principal aims, all with a distinctly macro economic tone:

- fostering economic development;
- a focus of enforcement on the most important cases; and
- a streamlined and faster set of procedural rules.

A little over two years later and as the current commissioner for competition nears the end of his term, the "ambitious" program has been brought to a conclusion with the commission's July 9, 2014, announcement of revised guidelines for rescue and restructuring aid.[2] The commission refers in its July press release to an impressive sequence of modernization measures that have been adopted since 2012 (new state aid handling procedures, a greatly expanded exemption of aid from notification under a revised general block exemption, a large number of revised sectoral guidelines: broadband, regional development, cinema, airports and airlines, risk finance, energy and the environment, research, development and innovation and projects of common European interest[3]), yet it is extremely difficult to view the program as a whole and to judge it.



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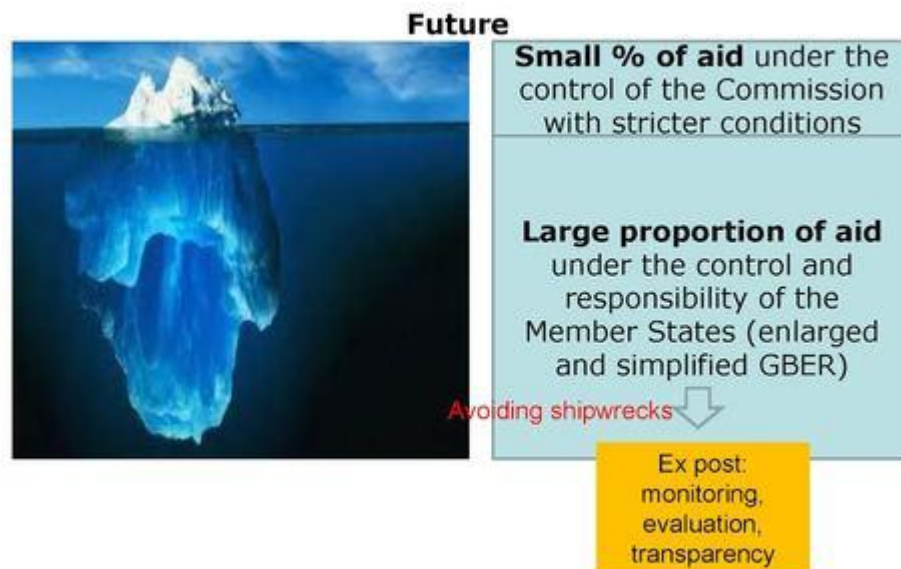
The totality of the legislative and guidance measures adds up to an ocean liner's worth of new material, part law, part practical guidance and part best practice, that will very substantially shape the application of state aid for years to come. Yet this large "vessel" of measures appears to have sailed almost undetected. What then has occurred under "SAM"; the so-called state aid modernization package?

The commission intends to transfer a large proportion of all state aid supervision and enforcement back to the member states[4]. It has stated that with appropriate safeguards as much as 90 percent of all aid measures could be handled at the national level under a revised general block exemption[5]. The idea is that such a transfer will enable the commission to concentrate its enforcement efforts upon the most important and distortive types of aid.

With a keen eye upon the effectiveness of what will be a substantial reliance upon national authorities, the commission will engage in selected ex-post analyses of state aid compliance at the national level and

will work in a close partnership with the member states. Additionally, the commission has put in place greater requirements in relation to the publication at the national level of all state aid awards, inter alia, so that third parties can detect and, as necessary, raise complaints in relation to illicit awards[6].

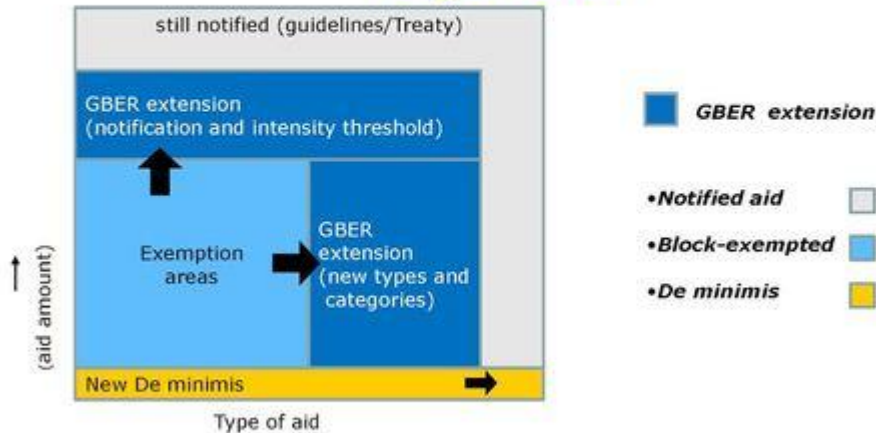
This paradigm shift in control has been captured by the commission in the following "iceberg" and "tip" pictorial metaphor:



At the heart of the measure to secure this transfer of executive power is a revised general block exemption, which provides for an automatic clearance of state aid measures that fall within its terms, thus removing the need to individually notify such measures to the commission for clearance in Brussels.

The new general block exemption has been significantly extended: (1) in scope, with some 14 new categories of aid brought within its terms; and (2) in aid amount, with higher state aid intensity thresholds (broadly the proportion of aid that is allowed and covered by the general block exemption as a percentage of total project costs). In addition, a revised de minimis state aid notice[7] means that more state aid will now escape the state aid net altogether. All this, in principle, will leave a thin upper crust (the "tip of the iceberg") of high value, strategically important state aid cases, to be handled by the commission's state aid team.

Future General Block Exemption Regulation



Why Should Business Be Concerned About State Aid?

Some aspects of competition law need little help to catch an audience's attention. The eye-watering levels of cartel fines. The use of dawn raids, surveillance and criminal cartel sanctions such as imprisonment and extradition. State aid law, and certainly the "modernization program," need considerable stage-setting if their commercial importance and relevance are even to begin to resonate. Consider here a few vital statistics in relation to state aid:

First, in relation to the impressive scale of EU state aid:

- State aid in the EU has risen from less than 1 percent EU GDP to 13 percent EU GDP during the recession[8];
- there are ca. 900-1,000 new state aid cases each year[9]; and
- the total of all state aid between 2007-2013 was €360bn.[10]

Second, in relation to the lack of effectiveness of many state aid measures:

- By way of illustration, research shows that 50 percent of companies that received rescue aid and 33 percent of companies that received restructuring aid (in both cases arguably the most interventionist of all state aid measures since they delay and potentially avoid a company's failure and market exit) ultimately went out of business despite receiving the aid.[11]

Third, in relation to the lack of compliance by member states with the state aid rules:

- 10-15 percent of the state aid cases that the commission examines each year have not been notified by the member state (in breach of their obligation to do so) (and these cases have a much higher rate of eventual rejection); and
- the commissioner for competition (Joaquin Almunia) stated in 2012 that "over 40% of the cases we have monitored [ex-post] are problematic"[12].

Fourth, in relation to the lack of an effective third party complaints process:

- There are approximately 300 complaints per year (substantially more than "one" per business day), with an average deadline for handling (at the commission level alone and ignoring court appeals) of 17 months.[13] This indicates both a high volume of complaints but also very long timescales for processing complaints. Timescales which are highly unlikely to be commercially useful.

To sum up, and perhaps to state the obvious, a poorly functioning community state aid regime will pose a significant threat to business and the competitiveness of EU markets.

What Are the Pros and Cons of the State Aid Modernization Package?

There is an impressive array of updated guidance notices which provide practical guidance on how the commission will apply state aid law in particular sectors or situations (some 39 in total). This is undoubtedly helpful. There is a greater exemption of the need to individually notify aid measures to the commission in Brussels via an expanded general block exemption regulation covering more sectors and allowing higher financial thresholds. This too will be beneficial, reducing the costs, delays and the uncertainty of individual state aid clearance notifications.

But, the transfer back to member states of the control in future years of the great bulk of state aid will be heavily dependent upon the integrity and quality of the supervision that they are able to provide. The experience from the member state application of public procurement law would lend support to those commentators who have real concerns as to the ability of many member states to police their own state aid[14].

While the commission's transparency requirements will, in theory, increase the potential for third parties to detect and complain about illegal aid and therefore play a policing role, it is a notable feature of the state aid modernization package that nothing has been done to "modernize" the rights of third parties in state aid complaints. These rights remain minimal in nature, with no access to the commission's file or right to be heard throughout the procedure. This is inherently odd because it could have been expected that, in a modernized state aid regime where the commission will delegate so much of the supervision and enforcement of state aid back to the member states, third parties would have been identified as a vital "check, balance and even deterrent" in the system. Not only has the third-party enforcement role not been improved, it has been rendered more restrictive and burdensome:

- Third parties must comply with the information requirements of a complaint form and be able to provide sufficient grounds to show unlawful aid.[15] In practice, it can be very difficult to unearth the precise nature of state aid measures which have been awarded over time by one or more public authority(s), not least where there is a deliberate concealment of the state aid trail. A third-party complainant has always been dependent upon the commission's ability to investigate and seek explanations, and therefore to, in measure, complete the state aid case. The new requirement that a complainant must, independently, be able to show sufficient grounds for a finding of illegal state aid upon a prima facie examination,[16] will potentially become a tool for the rejection of a great many complaints.
- Third parties continue to have no right of access to the exchanges between the commission and the member state authority granting the aid. The state aid investigation remains in effect a "private" bilateral dialogue between the commission and the member state. Because the third party has no access to the contents of those exchanges, it follows that he lacks any ability to comment upon their accuracy or completeness. The one very qualified exception is that a third party will have a right to comment upon a draft of the proposed final decision. Self-evidently, this is a very late point in the state aid process and a point at which it will be very difficult to change the commission's position.
- Third parties can now be compelled to respond to information requests (on penalty of fixed and periodic fines), but have obtained no corresponding improvement in their procedural rights, which remain unchanged.[17]

In sum, the new regime will serve business well when it comes to notifications and clearances (there is improved guidance and a great deal more aid will enjoy an automatic clearance), but will serve it poorly where there is a need to object to an award of aid and bring a complaint.

What Does the State Aid Future Hold?

Overall, the state aid modernization vessel that has sailed into the EU regulatory landscape, points to a very different future EU state aid landscape:

- far fewer commission cases — perhaps 10-20 percent of the current total;
- a huge reliance upon member state control of state aid — will they be up to it?
- a greater use of ex-post commission control to police the member states' performance in their new role (combined with commission/member state aid network links, training and greater transparency in relation to the award of state aid) — will the member states do better than the

40 percent "problem" rate that Almunia found when he undertook an ex-post look at national state aid cases?

- a commitment to greater state aid transparency so that third parties can detect abuses; but
- a complete failure to open up the closed shop state aid dialogue between the commission and member states and which neuters so much of the invaluable policing work and discipline that third parties could bring to the process.

Time will tell whether markets and competition will gain from this new landscape. At present, there must be concerns as to the effectiveness of:

- member state state aid control;
- ex-post checks by the commission; and
- the ability of third parties to apply an effective complaints-based deterrent.

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[1] Press release IP/12/458.

[2] Press release IP/14/795.

[3] For summary details see IP/13/728 (state aid procedure), IP/14/587 (block exemption), IP/12/1424 (broadband), IP/13/569 (regional developments), IP/13/1074 (cinema), IP/14/172 (airports/airlines), IP/14/21 (risk finance), IP/14/400 (energy and environment), IP/14/586 (research, development and innovation) and IP/14/673 (projects of common European interest). The final piece in the modernisation jigsaw is the guidance on the notion of state aid, which at the time of writing is still only available in draft form (IP/14/30).

[4] Gert Koopman, Deputy Director General, State Aids Presentation in Bucharest, 8 April 2014, p.8.

[5] See footnote 4, p.10.

[6] See the Commission Communication of June 2014 (2014 C/198/02).

[7] IP/14/728, C (2014) 4136 final.

[8] Oxera Agenda, March 2013.

[9] Koopman (2012) State Aid Modernisation, European Commission slide 8.

[10] See footnote 4 above, p.3.

[11] London Economics (2004) – Ex-post evaluation of the Impact of Rescue and Restructuring aid.

[12] Almunia , speech The State Aid Modernisation Initiative, Brussels June 7, 2012.

[13] Brandtner, 10th Euroforum state aid conference, June 2012, Berlin.

[14] See, for example, the Commission's 2012 Annual Public Procurement Implementation Review (SWD (2012) 342 final and State Aid Modernisation: Institutions for Enforcement of State Aid Rules, World Competition 35, no 3 (2012), Phedon Nicolaides.

[15] Council Regulation (EC) No 659/1999 of 22 March 1999, at Article 20 (as amended by Council Regulation (EU) No 734/2013 of 22 July 2013 at Article 1 (10)).

[16] New Article 20(2) of the Regulation 659/1999.

[17] See Regulation 659/1999 as amended by Regulation 734/2013 at Articles 6a, 6b et seq.
