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The Modernisation of State Aid for Economic and Social Development

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Bruno Nascimbene • Alessia Di Pascale
Editors

The Modernisation of State Aid for Economic and Social Development

 Springer

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Introduction: The Modernization of State Aid Regulation



Bruno Nascimbene

1 The Complexities of EU State Aid Policies

In recent years, competition policy has seen State aid regulation take on an increasingly relevant role, while trying to occupy a middle ground between pushing toward the single market and protecting common interests.¹

- a) In the matter of State aid regulation, the European Union is unique in that we find various public authorities (Member States) abiding by rules set out by a single higher authority (the European Commission). Moreover, the legal framework underpinning this system was designed at a time when no precedent or previous experience were available.²

Even though the rules on State aid were established in 1957 (Article 87 of the Treaty of Rome)³ and scarcely changed since then, we have had to wait almost 40 years to see them in effect.⁴

In spite of this stagnation, however, the definition of State aid has undergone an evolution, influenced by the policies of the European Commission, the difficulties in their enforcement and the build-up of case law produced by the European Court of Justice during the integration process.⁵

¹See, inter alia, Tosato (2011), pp. 3 et seq.

²See Ehlermann (1994), pp. 1213 et seq.

³The only modification consisted of the substitution of “common market” with “internal market”.

⁴See Lyons and Kassim (2013), p. 4.

⁵For an analysis of the different interests involved in the evolution of the EU concept of State aid, see Piernas Lopez (2015), chapter 1.

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- b) According to many political scientists, one has to consider the economic and political context which accompanied this evolution of State aid policies, as it may be argued that the very definition of State aid has been subject to various interpretations according to the interests and political aims prevailing at a particular time—thus giving rise to a somewhat fluid concept of State aid.⁶

This matter—as well as being a unique phenomenon that is wholly European in creation—has numerous implications that go beyond mere economic or legal considerations. The political nature of decisions taken by the European Union regarding State aid means that the effect of such decisions on the internal balance of the EU has to be considered. Indeed, the Commission has exercised on-and-off control and its monitoring actions have been carried out with varying intensity, sometimes in sharply opposed directions. This happened not because of specific deficiencies in the Treaties, but as a result of the economic and political conditions of the European Union.

Furthermore, it should be stressed that the uniqueness of State aid rules depend also on the fact that State aid involves a multiplicity of public and private parties, which leads to many difficulties in the coordination and in the relationships between national authorities (central and regional) and the Commission.⁷

Finally, a genuine modernization process of State aid rules was sparked by the recent financial and economic crisis, which was followed by huge injections of liquidity in support of companies and banks.

2 The Modernization Process: Historical Background

As mentioned previously, although the main rules regarding State aid have been left well-nigh unaltered in substance, their application has seen remarkable changes over the years. Initially, this process was propelled mainly by the implementation of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter the “TFEU”), while that of Articles 107 and 108 TFEU took over at a later stage.

Again, the context in which these changes took place has to be considered: the first important drive toward a revolution of the enforcement systems came from the EU enlargement. With the addition of new Member States in the 1990s, the centralized system began to be considered ineffective in protecting competition: in order to preserve the Commission’s resources for the most important cases, decentralization—that is, task distribution—was to be put in place.

⁶De Burca (2002), p. 181. The terminology of De Burca has already been borrowed by Piernas Lopez (2015).

⁷In this sense, see Tesouro (2011), p. XIII; Köhler (2014), P-165-174.

- a) The modernization process involved the entire area of EU antitrust law. In 2004, EC Regulation no. 1/2003⁸ replaced EEC Regulation no. 17/62.⁹ The acknowledgement of the direct effect of Article 101(3) TFEU, and the subsequent repeal of the mechanism for prior notification, brought about a “network” system, in which the application of Articles 101 and 102 is fully shared between the Commission, the national courts and the competition authorities of Member States, in contrast with the previous centralized system that hindered the Commission’s ability to tackle the most serious infringements of antitrust rules.
- b) Subsequently, efforts toward decentralization were also evident in the application of the rules for the control of State aid. In 2012 the adoption of a communication by the Commission on the modernization of State aid control launched this second phase.¹⁰ The objective was to cut down the number of *ex ante* notifications of aid measures and aid schemes to the Commission—under Article 108 TFEU—by making such notifications compulsory only for those measures likely to have far-reaching consequences on competition and the internal market. Projects raising lesser competition concerns would be exempt from the notification obligation, while certain requirements—set out by the Commission—would ensure the compatibility of non-notified aid measures with Article 107 TFEU. New responsibilities would fall to Member States in ensuring the compliance of aid measures with EU rules. New safeguards—in particular transparency obligations and *ex post* monitoring—would be necessary as well.¹¹

By contrast with Articles 101 and 102 TFEU, Article 107 has not become applicable directly and the Commission retains the exclusive competence to establish whether an aid measure is compatible with the Treaty. There are similarities between the two modernization processes, in particular in the attempt to reduce the administrative burden on the Commission. Nevertheless, certain peculiar features distinguish the modernization of State aid control from the modernization of antitrust rules. The subject matter of State aid control is the use of public resources by Member States. With the erosion of Member States’ financial capabilities and the increased pressure for more efficient public spending, the reform of State aid control actually aims to encourage a more effective use of public resources by national authorities. To this end, the latest regulations and guidelines are consistently designed to promote ‘better-targeted’ aid, needed

⁸Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁹Council Regulation (EEC) No 17/62: First Regulation implementing Articles 85 and 86 of the Treaty.

¹⁰Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM), COM (2012) 209 of 8 May 2012.

¹¹See, inter alia: Walter (2013), pp. 757–772; von Wendland (2015), pp. 25–50; Lever (2013), pp. 5–10.

either to correct actual market failures in connection with the objectives of the ‘Europe 2020’¹² agenda or to encourage social cohesion.

- c) Thus, the modernization of State aid control aims at economic and social reform. Under the *modernized* approach, the conditions under which a State aid measure or regime is deemed compatible with the internal market follow a set of common principles aimed at ensuring that State aid pursues clearly defined objectives of general interest, is an appropriate instrument, does not go beyond what is strictly necessary to pursue such objectives and that negative consequences of State aid for competition are kept to a minimum. In other words, decentralization is the key through which a more flexible and efficient control of State aid may be achieved, following a similar pattern to that of the European antitrust modernization. In particular, a widespread shift from *ex ante* to *ex post* State aid control was set in motion by the mentioned Regulation 651/2014—extending the exemption from notification obligation (pursuant to Article 108(3) TFEU) to a wide number of aid measures. As a result of this provision, Member States are required to verify the conditions for the exemption and in some cases they themselves must evaluate the effect of the adopted aid measures. This substantial shift from the traditional *ex ante* to *ex post* control could make it easier for Member States to grant aids that are assumed to be compatible with the internal market, and some fear that effective control has been weakened.¹³
- d) It should be recalled that the so-called Almunia Package¹⁴ on the assessment under State aid rules of the compensation of public service obligations for services of general economic interest (SGEI), adopted in 2011, already enshrined some of the main features of the new approach: only measures potentially entailing major distortions of competition remain subject to the notification obligation; the Commission, moreover, sets forth detailed requirements that aim to ensure that service providers are not overcompensated and that the use of public resources is limited to what is strictly necessary in the public interest. Moreover, in the Almunia Package the Commission tried to simplify procedures, in particular with reference to social services of general economic interest.
- e) Between 2012 and 2015 the reform announced by the Commission in the communication on the modernization of State aid control has been almost entirely completed. Procedural rules have been revised (they were recently consolidated in Council Regulation No. 1589/2015¹⁵); a new broad general

¹²Communication from the Commission, Europe 2020: A strategy for smart, sustainable and inclusive growth, COM (2010) 2020 of 3 March 2010.

¹³See Boccaccio (2016).

¹⁴The Commission, on 8 September 2015, published the Member States’ reports on compliance with the rules on State aid for the provision of services of general economic interest (“Almunia package”) in 2012–2014.

¹⁵Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification).

block exemption regulation¹⁶ together with a new *de minimis* regulation¹⁷ have been adopted. Several acts of soft law have been either revised or adopted *ex novo*, aiming to provide a complete and consistent set of guidelines to the public administration of the Member States for the use of public resources in a way which is consistent with the Treaty. The topics covered by the various communications and guidelines include the rescue and restructuring of companies, regional aid, research and development, energy and environment, agriculture, investment and risk financing, broadband, air transport and airports, and projects of European interest. Moreover, the Directorate-General for Competition (DG COMP) has published some complementary documents on how to conduct the *ex post* evaluation of the impact of major aid schemes and how to assess the compatibility of State aid in the field of infrastructure.

3 The Modernization Process: A First Assessment

- a) It is still too early to make an assessment of the overall effectiveness of the reform of State aid control. Whether it will respond to the expectations of the Commission strongly depends on how Member States play their role in the new decentralized application system. Nonetheless, at this stage of the process it appears relevant to put forward an in-depth analysis and discussion of the main features of the State aid modernization framework, considering both its strengths and the challenges that will have to be met in the coming years.
- b) Furthermore, the factors mentioned in Sect. 1 above are still in the balance. One should also consider that the evolution of the Commission's policy related to State aid reveals how dynamic the development of State aid regulation has been.¹⁸ This is of course a consequence of the subject matter's interconnection with the main economic and political events that have affected the European Union (and, before, the European Community). Indeed, the literature often distinguishes a number of periods of EU integration and shows how the objectives and priorities of State aid policy have been influenced by the general political and economic developments taking place at EU level.¹⁹ The Commission had to cope with a "dilemma of discretion" at the heart of its State aid mandate. Even as the Commission had considerable freedom to exercise its

¹⁶Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance.

¹⁷Commission 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.

¹⁸For an in-depth analysis of the evolution of the Commission's policy on State aid divided into four main periods, see Piernas Lopez (2015), chapter 3.

¹⁹For different periodizations of the evolution of EU competition law, see: Weiler (1991), p. 2403; Wesseling (2000), p. 9; Doleys (2009).

delegated autonomy, it was also subject to embedded institutional control mechanisms and political pressures that served to condition that autonomy. Some would argue that the history of EU State aid policy is written in the Commission's efforts to navigate that dilemma.²⁰

- c) Another relevant factor to be considered is the evolution in the European Court of Justice's case law. Over the years, the Court of Justice has shown a more balanced approach between deregulation and other values, with an evolving recognition, for example, of the importance of social policy and public service.²¹ In other words, the case law on State aid has been influenced by economic interests fixed by the Treaty, such as the competition rules or the free movement of goods. The influence of the Court of Justice's case law is for example evident in the broad definition of State aid, which comprehends several State measures and forms of public intervention, not considering its form as essential.

Furthermore, as has already been stressed,²² the role of national courts in the matter of State aid is marginal despite the Commission's efforts to improve this, as evidenced by the 2009 Communication.²³

- d) It is also relevant that the State Aid Action Plan (SAAP) implemented by the Commission²⁴ was primarily designed to significantly reduce the number of aids and to redistribute them according to horizontal objectives, such as relating to research or innovation.²⁵ As a consequence of the SAAP, the State aid definition has also been frequently interpreted from an economic perspective, while before almost only legal scholars debated this field.²⁶ Two main theories on the objectives and the nature of State aid rules have been developed in literature, as a consequence of the SAAP.²⁷ The first school of thought considers State aid rules to be deeply linked to the internal market; therefore economics has a very limited role in the State aid field.²⁸ By contrast, another part of the literature considers that State aid measures are by definition connected to the competition rules; therefore an economic approach is needed in order to carry out an analysis

²⁰See Doleys (2009).

²¹See Jacobs (2005).

²²See Tesauro (2011).

²³Commission notice on the enforcement of State aid law by national courts (2009/C 85/01); with regard to the Italian context, see the Casebook edited by F. Capotorti and G. Greco, *Aiuti di Stato*, available at Eurojus.it (<http://libreria.eurojus.it/prodotto/raccolta-aiuti-di-stato>).

²⁴The State Aid Action Plan presented by the Commission launched a comprehensive reform of State aid policy that will cover a 5-year period (2005–2009). The objective was to guarantee the Member States a clear and predictable framework in order to enable them to grant State aid, targeted towards achieving the Lisbon Strategy objectives.

²⁵See Schepisi (2011), pp. 17 et seq.

²⁶See, Crocioni (2006), p. 89; Neven and Verouden (2008), p. 99; Garcia and Neven (2004); Nitsche and Heidhues (2005).

²⁷For an analysis of these two approaches, see Piernas Lopez (2015).

²⁸See, inter alia: Buendia Sierra (2006), p. 59.

of distortions of competition produced by those measures and to complete the trend toward an effects-based approach.²⁹

4 The Central Idea of the Volume

The contributions collected in this book are linked together by a common thread. The different features of the reform—from the institutional framework to the substantive criteria of evaluation of State aid in the different policy areas—are analysed in light of three main objectives of the reform: clarity of rules; effectiveness of procedures; ability to promote additional investment and a more dynamic, sustainable and inclusive economy in the European Union.

Some of the chapters are revised versions of papers presented at a conference on “The modernization of State aid”, held at the University of Milan on 26 November 2014. The conference was organized by the Jean Monnet Centre of Excellence at the University of Milan and Assonime (the association between the Italian joint stock companies),³⁰ as part of the cultural initiatives on European issues held during the Italian Presidency of the EU Council.

The volume is divided in two parts—one focused on the new institutional framework and the other one on its impact on the different policy areas—that will be briefly introduced in the next two sections.

4.1 *A New Institutional Framework for State Aid Control*

Part I of the volume is devoted to the analysis of the general features of the new framework for State aid control, from both an institutional and an economic perspective.

- a) In the second chapter,³¹ Nicola Pesaresi (Head of Unit State aid at the European Commission, DG COMP) highlights that the State aid modernization reform cannot be understood in isolation from the overall Europe 2020 strategy aimed at making Europe a smart, sustainable and inclusive economy. He explains that the reform is based on three priorities: fostering ‘good’ aid, which promotes growth and quality of public spending; increasing the efficiency of State aid control through broad block exemptions, speedier procedures and a prioritization of the Commission’s efforts; improving consistency across the State aid framework and the Commission’s ability to tackle illegal aid by means of new instruments such as market investigations and sector inquiries. The author

²⁹See, inter alia: Derenne and Merola (2007); Friederiszick et al. (2008), p. 625.

³⁰‘Associazione fra le Società Italiane per Azioni’.

³¹See the chapter by Pesaresi and Peduzzi, this volume.

describes the milestones of the modernization package (regulations, guidelines and other notices) and illustrates the new role played by the European Commission in the modernized framework. Compared to the past, this role is more based on priority setting and providing guidance to Member States and national courts on the application of Article 107 TFEU. Moreover, the Commission has undertaken to establish a new partnership approach with the authorities of Member States.

- b) The third chapter,³² by Andrea Biondi (King's College, London) focuses on the scope of application of EU rules on State aid, and in particular on the notion of State aid. In the new system, the Commission retains the exclusive power to assess whether State aid is compatible with the Treaty. Therefore, the freedom of Member States to decide how to use their public resources to support undertakings closely depends on the scope of State aid control (Article 107(1) TFEU).³³ The modernization project led to the adoption of a notice by the Commission concerning this notion of State aid.³⁴ In addition, Member States and national courts have to refer to the case law of the European Court of Justice. The author discusses the relevant issues concerning the interpretation of the notion of State aid (notion of public resources, selective aid, impact on trade) and illustrates the reasons why a work of 'codification' through an act of soft law appears particularly complex. On the other hand, the interpretation of Article 107 (1) TFEU plays a crucial role in the system, especially since national courts are competent to assess, on a decentralized basis, whether aid has been illegally granted in violation of the notification obligation established by Article 108 TFEU: in this context, national courts often have to assess whether a measure is, or is not, State aid under Article 107 TFEU.
- c) Valerio Vecchietti (Department for European Affairs, Italian Presidency of the Council of Ministers) focuses on the challenges of the modernization of State aid from the point of view of the Member States and, in particular, of the national authorities.³⁵ In a system less based on *ex ante* notification and more focused on transparency and *ex post* control, national authorities have new responsibilities. The modernization package requires Member States to take ownership of the process and to ensure an effective governance of the system at the national level. National authorities have to ensure and monitor compliance with EU rules, including at the regional and local level; this task requires both educational and knowledge-spreading initiatives and a complex coordination activity. Moreover, national authorities have to organize independent *ex post* evaluations of the economic impact of the most relevant aid schemes when the Commission so requires. Member States also participate in new High Level Forum and working

³²See the chapter by Biondi and Stefan, this volume.

³³See, inter alia: Buts et al. (2013), pp. 330–340.

³⁴Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016/C 262/01.

³⁵See the chapter by Vecchietti, this volume.

groups set up by the Commission to discuss strategic issues and support the application of the new package. In this chapter the author also describes the initiatives undertaken by some Member States to adapt their national institutional and administrative set-ups to meet the challenges of the new framework for State aid control, and he considers the exchange of best practice between Member States to be essential.

- d) Phedon Nicolaides (College of Europe, Bruges and Maastricht University) discusses the issues raised by the underlined ‘more economic’ approach to the control of State aid, that is, an effects-based approach, as described in this chapter at the end of Sect. 2.³⁶ After State aid modernization, the compatibility of State aid is assessed on the basis of common principles, based on economic notions (e.g. correction of market failures). In addition, for the first time the Commission requires Member States to carry out *ex post* evaluations of large aid schemes. The chapter at hand examines both the economic rationality of the common assessment principles and the *ex post* evaluation methodology. It also reviews how the assessment principles and the evaluation methodology have been applied in practice and whether the practice so far conforms to the initial intentions of the Commission in injecting greater economic rationality in State aid rules. The author also reviews some of the methods that the Commission uses in order to verify the existence of an aid and its proportionality with the aim that it pursued.
- e) Alberto Heimler (National School of Public Administration, Rome) discusses the possible synergies between the control of State aid and the competition impact assessment of public measures promoted by the Organization for Economic Co-operation and Development (OECD).³⁷ The more economic approach undertaken by the Commission suggests following a number of steps in order to ascertain whether an aid measure is an appropriate and effective instrument. A competition impact analysis would require comparing State aid with other ways of addressing the identified market failure. Member States might usefully combine the two approaches in order to adopt the most effective and less distortive public measures to correct market failures. From this perspective, the author suggests that independent national competition authorities, which have the institutional task of promoting competition in the Member States, might be given a formal role in the governance of State aid control at the national level.

³⁶See the chapter by Nicolaides, this volume.

³⁷See the chapter by Heimler, this volume.

4.2 Policy Areas

The second part of the volume focuses on the impact of State aid modernization in some policy areas which are particularly relevant for EU social cohesion and economic growth.

- a) Erika Szyszczak (University of Sussex) discusses the new Almunia Package³⁸ on the control of State aid in the area of services of general economic interest (SGEI).³⁹ The ruling by the European Court of Justice in *Altmark*,⁴⁰ which clarified the conditions under which the compensation of public service obligation does not represent State aid, marked the start of the modernization of public services in the EU. Indeed, it preceded the Commission's modernization agenda. The author argues that the interpretation of the *Altmark* ruling, especially by the European Commission, has focused attention on the financing of public services and away from issues of defining the quality of public services. The European Courts also appear to have embraced an economic approach to the interpretation of State aid for public services. This chapter contains an overview of the recent case law of the Court of Justice aimed at examining what sort of issues arise and who the complainants are. Moreover, it examines the interaction of procurement law and State aid concluding that this may not always be a complementary exercise.
- b) Ginevra Bruzzone (Assonime and School of European Political Economy, LUISS Guido Carli) and Marco Boccaccio (University of Perugia and Assonime) analyse how State aid control affects Member States' choices concerning the creation and management of infrastructures.⁴¹ Fostering investment in infrastructures is a key objective of the EU strategy aimed at re-launching investment and growth. In recent years, the case law of the European Court of Justice has clarified that not only the economic exploitation of an infrastructure, but also the construction of an infrastructure for the purpose of its later commercial exploitation represents an economic activity and is subject to State aid control. In the framework of the modernization of the control of State aid, the European Commission has provided a number of indications on how to ensure that the funding of infrastructures is compatible with EU rules. When assessing whether State aid to infrastructures is compatible with the TFEU, the Commission follows general criteria (existence of an objective of general interest and of a market failure, adequacy, transparency etc.); in specific areas such as airports, energy and broadband, prescriptions for Member States are more detailed and articulated. In October 2015 the DG COMP published a

³⁸See note 13 above.

³⁹See the chapter by Szyszczak, this volume.

⁴⁰Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

⁴¹See the chapter by Bruzzone and Boccaccio, this volume.

staff working paper explaining its approach to the financing of infrastructures in the different areas (including ports, multiservice centres, highways, concert halls etc.). The authors discuss how the control of State aid increasingly affects public choices in the Member States, also at the local level, and argue that the principles suggested by State aid control broadly coincide with the principles which should be followed to ensure an effective use of public resources (for instance, planning of infrastructures is useful to ensure a rational priority setting). Moreover, they explain how the application of State aid rules to infrastructures requires, at the national level, the coordination of various authorities, including sector regulators.

- c) Mario Siragusa (Cleary Gottlieb and College of Europe) and Cesare Rizza (Cleary Gottlieb) address the specific issue of EU State aid policy in the field of broadband infrastructure financing.⁴² The achievement of the Europe 2020 strategy objective of smart, sustainable and inclusive growth depends to a great extent on the development of the digital economy. The availability of fast and ultrafast Internet access—with smart cities and connecting rural and regional areas to fast broadband networks as two of the core areas of investment—plays a central role therein. The Digital Agenda for Europe⁴³ established the ambitious objective to bring broadband subscriptions above 100 Mbps to at least 50% of Europeans by 2020. Even where the financing of the deployment, operation and management of the broadband network infrastructure primarily comes from commercial investors, the goals of coverage and penetration of fast and ultrafast broadband network cannot be fully achieved in the absence of State intervention. Pillar IV of the ‘Digital Agenda for Europe’ calls on Member State governments to take proportionate and appropriate steps to deal with the gap between private investment and the estimated amount of investment necessary to roll out fast and ultrafast broadband in the EU. The rationale of State aid policy in the broad- and ultra-broadband sectors—which represents a development of the European Commission’s general approach to State aid control of infrastructure funding—is as follows: State intervention is compatible with the internal market as long as the risk of crowding out private investments is minimized. This chapter discusses the principles established by Commission Guidelines on Broadband of September 2009,⁴⁴ as revised in January 2013, with

⁴²See the chapter by Siragusa and Rizza, this volume.

⁴³Communication from the Commission of 19 May 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—A Digital Agenda for Europe [COM(2010) 245]. The Digital Agenda presented by the European Commission forms one of the seven pillars of the Europe 2020 Strategy which sets objectives for the growth of the European Union by 2020. The Digital Agenda proposes to better exploit the potential of Information and Communication Technologies in order to foster innovation, economic growth and progress.

⁴⁴Communication from the Commission, Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks Text with EEA relevance, OJ C 235 of 30 September 2009, pp. 7–25.

regard both to the notion of State aid and the compatibility assessment. Special emphasis is placed on precedents concerning Italian State aid schemes as well as the Italian Strategy for the Next Generation Access (NGA) Network, adopted by the Italian government in March 2015.

- d) Massimo Merola (Bonelli Erede Pappalardo and College of Europe) and Omar Diaz (Bonelli Erede Pappalardo) address another crucial policy area of the Europe 2020 strategy, namely energy and environment.⁴⁵ The implementation of the State aid modernization communication has led to significant reform in the assessment of energy and environmental projects. It includes an overhauled notification system with higher notification thresholds, greater emphasis on *ex post* monitoring, and enhanced obligations for national authorities. The authors assess the contribution made by this reform to the Europe 2020 strategy from three different standpoints. First, they examine the Commission's initiative to clarify the notion of aid discussing the environmental and energy instruments affected by this interpretative exercise. Next, they look at the reform of the General Block Exemption Regulation and address the new exemptions and higher thresholds applicable to environmental and energy projects as well as the interplay between a broader notion of aid and a wider notification exemption. Finally, they analyse the assessment framework defined by the Environmental and Energy State Aid Guidelines⁴⁶ in light of the growth-enhancing goals of State aid modernization, discussing the stricter compatibility requirements and new aid categories for which guidance is provided.
- e) The final chapter of the volume, Daniele Gallo (Luiss Guido Carli) makes an assessment of the application of the Almunia Package—already discussed from a general point of view by Erika Szyszczak⁴⁷—and the case law of the European Court of Justice to State aid in the area of social services and healthcare.⁴⁸ The author firstly analyses the concepts of social services and health care in light of EU (binding and non-binding) secondary law as well as the jurisprudence of the European Court of Justice. Then, he highlights the evolving nature of those services and the interplay between State aid, social services, healthcare and socio-economic development. The paper then deals with the Commission Decision of 20 December 2011 on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest as part of the Almunia Package. In the Decision, the Commission not only sets out the conditions under which State aid in the form of public service compensation is compatible according to Article 106(2) TFEU, but establishes that aid measures covered by the Decision are exempted from the *ex ante* notification requirement.

⁴⁵See the chapter by Merola and Diaz, this volume.

⁴⁶Communication from the Commission—Guidelines on State aid for environmental protection and energy 2014–2020, OJ C 200 of 28 June 2014, pp. 1–55.

⁴⁷See note 14 above.

⁴⁸See the chapter by Gallo, this volume.

Therefore, the Decision aims to simplify the law, and thus it provides a more flexible approach for local and social services than was previously the case. The author addresses a number of open issues relating to the application of the Decision, including its relationship with the Altmark conditions⁴⁹ and the other measures which constitute the Almunia Package; the exhaustive character of the exemption; the notions of hospitals; the concept of entrustment; the local nature of the service provided; and the calculation of both compensation and overcompensation. Overall, in the author's view, the approach followed by the Commission in the Almunia Package has made considerable progress in updating, modernizing and simplifying the legal framework and may eventually lead to a convergence of national policies relating to the provision of social services of general economic interest. By providing and extending a special treatment for welfare services, the Commission seems to have successfully consolidated the social market economy principles in the EU. In other words, the approach adopted by the Commission may represent the right way to reach a fair balance between economic and social development.

5 Concluding Remarks

The main goal pursued by the editors of this volume, after having organized the conference already mentioned in Sect. 4 above, is to provide scholars and practitioners with a useful tool to better understand the State aid modernization process. Indeed, the topics analysed in this volume are of great interest for both scholars and practitioners, given that they concern one of the most controversial aspects of the relationship between the EU and the Member States.

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⁴⁹See note 38 above.

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Part I
A New Institutional Framework for State
Aid Control

State Aid Modernization



Nicola Pesaresi and Rodrigo Peduzzi

1 Introductory Remarks

The European Commission launched State Aid Modernization (SAM) in 2012 with a Commission Communication,¹ carried out a review of a large number of regulatory texts over the following years and recently completed it with the adoption of the Commission Notice on the Notion of Aid (May 2016). SAM should be seen in the context of the Europe 2020 Strategy, which aims to deliver a “smart, sustainable and inclusive economy”. The internal market is a key tool for stimulating economic growth, and a robust competition policy is required in order for the internal market to flourish. Competition is a major driver of growth as it puts pressure on enterprises to innovate, improve productivity and become more competitive globally. State aid control is an essential element of competition policy given that State aid distorts competition. SAM represents an attempt to bring State aid control more in line with the Europe 2020 Strategy, strengthening the Commission’s scrutiny to ensure the sound use of growth-orientated policies and to prevent undue distortions of competition arising from State aid measures. Specifically, SAM has three main objectives: first, to foster smart, sustainable and inclusive growth in a strengthened, dynamic, competitive internal market through encouraging ‘good aid’; second, to focus ex

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¹“EU State Aid Modernisation (SAM)”, COM (2012) 209 final of 8.5.2012.

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ante control on cases with the biggest impact on the internal market; and third, to streamline the rules to allow for faster, more efficient decision-making.

1.1 Foster ‘Good Aid’

In the SAM Communication, ‘good aid’ is described as an aid “well designed, targeted at identified market failures and objectives of common interest, and least distortive”.² This concept is not a novelty brought about by SAM. In fact, the State Aid Action Plan of 2005³ already introduced a ‘balancing test’ in order to assess in a consistent manner the balancing exercise required by the Commission between positive effects of aid measures (i.e. contributing to a common European interest) and negative ones (i.e. distorting competition and trade). However, SAM is clearer about exactly what kind of aid is to be considered as ‘good aid’ for the role it plays in supporting, for example, green technologies, human capital development, employment and competitiveness.

There are a number of common principles of compatibility running throughout SAM as a unifying theme. These horizontal principles clarify how the Commission assesses common features which, up until SAM, had not been treated in the same way in the different State aid guidelines and frameworks. The intention behind these common principles is to lay down a solid and consistent basis to ascertain the compatibility of aid measures across the different policy instruments and their alignment with strategic EU objectives as enshrined in the Europe 2020 Strategy.

In addition to focusing State intervention where it can have the maximum positive impact in terms of economic and social development and competitiveness, the SAM’s emphasis on the quality of public expenditure and efficiency of aid measures may have the effect of helping the Member States to strengthen budgetary discipline, as the better the design of the aid, the better the use of taxpayer’s money. Therefore, State aid control and its modernization, alongside its primary function, could contribute towards Member States targeting public spending correctly to promote growth within the confines of prudent use of public budgets. Nonetheless, it must be stressed that this is merely a possible positive side effect of State aid control, as the overriding criterion for the assessment of State aid remains its impact, the potential distortion of competition and the necessity and proportionality of the aid measures.

²Ibid., para. 12.

³“State Aid Action Plan, Less and Better Targeted State Aid: a Roadmap for State Aid Reform 2005–2009”. COM (2005)107 final of 7.6.2005.

1.2 Focusing Enforcement on Cases with the Biggest Impact on the Internal Market

Carrying out effective and efficient State aid control in a European Union of 28 Member States is not an easy task. The Treaty gives the Commission the exclusive responsibility for deciding upon the compatibility with the internal market of all State aid measures, either those that Member States notify or those that the Commission is made aware of, notably through the complaints it receives.

As part of SAM's drive to make the control of State aid more efficient, and to ensure greater prioritization in the enforcement action by the Commission, greater responsibility was given to Member States.

Before SAM, it was already possible for Member States to grant aid without being subject to the notification obligation set in the Treaty, thanks to a set of sectorial block exemption regulations introduced over time and then extended and consolidated in the 2008 General Block Exemption Regulation (henceforth GBER). However, the 2008 GBER⁴ still did not apply to several policy areas and types of aid and had relatively low notification thresholds.

SAM has expanded the scope of these exemptions both horizontally, by including new types of measures and policy areas, and vertically, through the increase of the aid threshold which could fall within an exemption. At the time of the reform, the Commission estimated that 75% of aid measures would be exempted and up to 90%⁵ of aid measures would be so if Member States proactively designed their aid measures in conformity with the new GBER, adopted in 2014.⁶ Guidance was provided on how to follow the GBER's general conditions and ensure that aid remained within its limits.⁷ SAM thus meant a "Copernican revolution" in that block-exempted aid has now become the norm and notification the exception: indeed, the *ex ante* compliance check is performed by the granting authorities themselves in the vast majority of cases, while it is reserved to the Commission for the largest and potentially most distortive cases.

It is fair to say that the State aid control system has always been based on joint responsibility with the Member States. The latter share the responsibility to ensure that aid fulfils the legality conditions (in respect of the GBER conditions on notification of the aid) and the correct implementation of the compatibility

⁴Commission Regulation 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 214/3 of 9.8.2008.

⁵Actually, according to the 2016 State aid Scoreboard, around 95% of new aid measures for which expenditure was reported in 2015 was granted under the GBER. In particular, about 43% of all State aid spending for SMEs, 46% for research, development and innovation, 55% for regional development, 69% for employment and 96% for training was granted under the GBER.

⁶Commission Regulation No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187/1.

⁷Commission MEMO/14/369. Commission adopts new General Block Exemption Regulation (GBER), 21.05.2014.

conditions set by the Commission. For instance, the approval of an aid scheme by the Commission implies that Member States carry out *ex ante* and *ex post* controls to ensure that the conditions set in the notification and in the Commission decision are followed by the undertakings and the granting authorities.

The Commission expects Member States to take this responsibility seriously and regularly review the way aid is granted. With the extension of the exemptions from notifications, Member States' responsibility and accountability in the design and in the implementation of the schemes has increased and with it the role for monitoring to ensure that the rules are respected.

To balance the expansion of the GBER, the SAM includes additional safeguards, such as the evaluation of a selection of large aid schemes and the transparency of the aid awards (publication of the beneficiaries and amounts). State aid control has evolved towards more *ex ante* checks carried out by the Member States on the basis of simplified criteria and more *ex post* controls executed by the Commission. On the one hand, this new *modus operandi* responds to the call for more action on the Member States' side; on the other hand, it seeks to design more appropriate mechanisms on the Commission's side to control compliance and favour best practices and efficient control at national level.

This shift to a broader scope for exempted aid has allowed the Commission to prioritize its enforcement activity by focusing on the cases with the biggest impact on the internal market (such as cases with large individual amounts exceeding the GBER notification thresholds) and cases where the market failure, the appropriate support mechanism or the impact on competition need to be carefully assessed; essentially, the cases that create the most substantial competitive concerns.

This is, for instance, the case for the investigations the Commission is currently undertaking in relation to the selective fiscal treatment of undertakings for the purpose of their corporate taxes. The Commission is currently reviewing a number of tax rulings that fiscal authorities have signed with large multinationals which appear to make aggressive tax planning possible, with the result of attracting firms in jurisdictions where the tax burden is the lowest at the expenses of other firms. Some tax rulings, for instance, where they do not respect the arm's length principle for intra-group transactions, may confer an undue advantage and distort competition where a multinational company receives preferential tax treatment that other companies do not enjoy.

1.3 Streamlined Rules and Faster Decisions

Although not explicitly mentioned in the SAM Communication, an important reason for simplifying and harmonizing the rules on State aid control is the need to streamline the system in response to the enlargement of the European Union. Indeed, a Union of 28 Member States requires a State aid control system that is both more proportionate and more effective.

In addition to the challenges of having an increased number of Member States, the different rules on State aid had developed into a complex legal framework, with a considerable number of regulations, guidelines and other guidance documents, which sometimes lacked consistency. In this respect, SAM has also constituted an opportunity to consolidate several State aid guidelines into an overall more consistent and coherent State aid framework. The development of the common principles for the assessment of aid, applicable to the compatibility analysis of all measures, was instrumental to this outcome.

2 Common Compatibility Principles

A key element of SAM is the attempt to put more emphasis on the quality and the efficiency of the State aid system by developing a pool of “common principles” of compatibility, which consolidate the many regulations, guidelines and the guidance on the compatibility of aid into a consistent conceptual framework. As a result, the new guidelines set out common compatibility criteria that make the practice of the Commission more predictable as to how the aid measure will be assessed to the benefit of the expectations of the granting authorities and beneficiaries. There are seven common principles which must be met cumulatively for aid to be considered compatible.

2.1 Contribution to a Well-Defined Objective of Common Interest

A State aid measure must aim at an objective of common interest in accordance with Article 107(3) of the Treaty. In particular, the objectives of common interest have been aligned with the policy priorities advocated in the Europe 2020 Strategy and its flagship initiatives of fostering smart, sustainable, inclusive growth, resulting in more actions targeting, among others, the promotion of research and development and innovation or the fight against climate change. Other goals worth mentioning include improving access to finance and encouraging a more sustainable economy, alongside boosting social and territorial cohesion.

2.2 Need for State Intervention

A State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing equity considerations or cohesion concerns. In

order to meet this condition it must be proven, in an *ex ante* assessment, that a market failure does exist.

For example, in the context of risk finance, the *ex ante* assessment must provide evidence of the fact that there is a funding gap for an SME that the market cannot fill due to an information asymmetry or another market failure.

2.3 Appropriateness of the Aid Measure

The proposed aid measure must be an appropriate policy instrument to address the objective of common interest. An aid measure will not be considered compatible with the internal market if the same positive contribution to the common objective is achievable through other less distortive policy tools (e.g. regulations) or other less distortive types of aid instruments (e.g. a loan rather than a grant).

For example, in the Guidelines on State aid for environmental protection and energy, the Commission explains that State aid is not always the most appropriate measure to address a market failure such as the negative externality of pollution. Indeed, when the reduction of contaminated emissions is at stake, an effective use of the Polluter Pays Principle (PPP) through environmental legislation, which commits to holding the polluter liable under national or Union law, might be preferred over the granting of State aid.

2.4 Incentive Effect of the Aid

The aid must induce the recipient to change its behaviour in line with the common objectives, for instance by pushing it to engage in additional activity that it would not carry out in the absence of the aid or that it would carry out in a restricted or different manner or location. In other words, it must be the case that the aid alters the “natural” course of action and that, in absence of the aid, the same policy objective would not have been reached.

An example of a concrete reinforced application of this common principle can be found in the new Regional Aid Guidelines, which have adopted a stricter approach to assess the incentive effect based on the notion of “added value of aid”. According to it, the granting authorities will have to provide sufficient economic evidence that the aid granted to large undertakings provides a real incentive to invest and set up operations in an assisted area and, hence, that it truly makes a difference in the market.

2.5 Proportionality of the Aid and Keeping Aid to a Minimum

The amount and intensity of the aid must be limited to the minimum needed to induce the additional investment or activity by the undertaking(s) concerned, where limits are expressed as caps on aid amount (e.g. net extra cost to achieve objective) and/or aid intensity (proportion of eligible costs).

For example, in the new Rescue and Restructuring Guidelines, the ‘burden-sharing’ principle has been reinforced, so as to require that losses that a firm in difficulty has accumulated before the public intervention are apportioned to the company’s shareholders and investors before any State aid is granted.

2.6 Avoidance of Undue Negative Effects on Competition and Trade Between Member States

The negative effects of aid must be sufficiently limited, so that the overall balance of the measure is positive and undue negative effects on competition and trade between Member States are neutralized.

For example, in the Framework for aid to Research and Development and Innovation (R&D&I), the Commission identifies two main potential distortions of competition, namely product market distortions and location effects. State aid for R&D&I can hamper competition in the innovation processes in several ways, for instance by distorting dynamic incentives to invest in innovation. State aid increases the likelihood of successful R&D&I activities and strengthens the beneficiary’s market position. This may lead competitors to reduce the scope of their original investment plans (crowding-out effect). Only when these negative effects are kept to a minimum and below the expected positive effects in terms of contribution to the objective of common interest can the aid be found compatible.

2.7 Transparency of Aid

Member States, the Commission, economic operators, and the general public must have easy access to all relevant acts and to pertinent information about aid awarded. This new principle, which is one of the major innovations brought about by SAM, is described further below.



Fig. 1 The SAM Instruments

3 SAM: The Instruments

SAM covered both substantive and procedural rules, as summarised in Fig. 1. Moreover, for the first time ever, the Commission has issued a Notice on the Notion of Aid (NoA). The preparation and publication of such a document, the content of which is discussed below, required time and intense discussions.

3.1 *The Notice on the Notion of Aid*

In May 2016, the Commission published the final key element of SAM, namely the Notice on the Notion of Aid, as referred to in Article 107(1) of the Treaty.⁸ The NoA is an objective concept defined by the Treaty and interpreted by the Court of Justice of the European Union, and the Commission's Notice on the NoA merely clarifies the Commission's understanding of Article 107(1) of the Treaty. Furthermore, the Notice on the NoA covers areas where the Court of Justice has not yet ruled and where there is therefore no case law to provide assistance in interpreting the rules. In these cases, the Notice on the NoA describes how the Commission interprets its role in that particular area, albeit without prejudice to the interpretation that the Court of Justice may make in the future.

It should be underlined that the Commission has no control over this objective notion of aid, as defined by the Treaties, and has a limited margin of discretion in applying it, specifically when an appraisal requires technical and complex assessment, such as those involving specific economic analysis and expertise.

The Notice identifies and clarifies the different constituent elements of the notion of State aid: the existence of an undertaking engaged in economic activity, the imputability of the measure to the State, its financing through State resources, the granting of an advantage, the selectivity of the measure and its effect on competition

⁸Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262/1, 19.7.2016.