

EU State Aid Law and National Public Policy Choices

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Abstract

This paper aims to explore the rather neglected influence of EU State Aid law on national policy choices. Derogations under the prohibition of Article 107(1) TFEU will be addressed as well as the straitjacket effect of secondary legislation on national measures. State aid modernisation (SAM) provided an opportunity for the European Commission to clarify secondary law and to exempt around 90% of the state aid measures. This evolution, on the other hand, brings uncertainty into the application of state aid law as Member States are required to interpret and to apply secondary legislation at their own risk. Hence, in this new "decentralised" system, the risk of incompatible aid increases significantly. The notion of state aid is interpreted broadly by the European Court of Justice. For the purposes of this paper, it is also worth looking at the notion of state aid and to clarify how much margin is left for the Member States to provide support to undertakings. The coverage of the conditions of this notion (such as imputability, State resources, selectivity, effect on trade between Member States) has an immediate effect on the discretion of Member States in formulating their public policy.

1. Introduction

This paper's driving question is the identification of EU State aid policy objectives and the effect of this exclusive EU competence on national policy-making. The rules in primary law has not changed during the last six decades entailing a widely interpreted prohibition and justifications listed in Article 107 (2) and (3)¹, but secondary law has evolved dramatically since the 90's. Do the original goals remain unchanged or have new features appeared in the meanwhile driving the policy-making? How is the delicate balance struck by the Commission between the different policy objectives? This issue is all the more important since State aid policy and law limit Member States' competences to a considerable extent.

¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 326, 26/10/2012, p. 1-390.

Given the short nature of this research paper the scope has been narrowed down to address policy questions instead of analysing the law itself. The structure of the paper is the following: The introduction provides a sketch about the motivation of Member States granting aid. Chapter 2 briefly explores the institutional setting, while Chapter 3 deals with the core research questions. Finally, this articles concludes in Chapter 4 with some final remarks.

State aid is used to remedy temporary market failures, e.g. if sound business cannot get access to capital or to change socially or politically undesirable market outcomes.² State aid may create incentives for companies to innovate and invest and thereby to improve market outcomes. Efficient State aid control and competition policy in general plays a crucial role in promoting productivity, innovation and ultimately economic growth. For example, by granting State aid Member States can support the activities of SMEs in the common marketplace and State aid law recognised this market failure by applying higher aid intensities³ for them.

Besides the efficiency enhancing effect of State aid, it can be used to improve equity in the society by redistributing wealth within the society (for example by providing regional aid or aid for the employment of disadvantaged workers or workers with disabilities).

As Blauberger has noted “European Treaty rules on state aid control essentially constitute a compromise – aiming for undistorted competition while acknowledging the potentially welcome effects of state aid.”⁴

Copenhagen Economics points to the fact that balancing the two contradictory effects of State aid, namely the positive effect of enabling the provision of a service or activity which is not

² The Contribution of Competition Policy to Growth and the EU 2020 Strategy. European Parliament, Directorate-General for Internal Policies. 2013. The document was requested by the European Parliament’s Committee on Economic and Monetary Affairs and prepared by the Copenhagen Economics.
http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/492479/IPOL-ECON_ET%282013%29492479_EN.pdf

³ aid intensity is the gross aid amount expressed as a percentage of the eligible costs of the project.

⁴ Michael Blauberger: From Negative to Positive Integration? European State Aid Control Through Soft and Hard Law, MPIfG Discussion Paper 08/4, p. 6.

commercially viable, and the negative effect of potential distortion to competition, poses a key challenge for the application of State aid.⁵

State aid policy gives room to Member States to form their public policy but the room for manoeuvre is significantly reduced by the Treaty rules, because state aid can be given only for the goals listed in the Treaty.

The European Commission has the power to conciliate between the imperative of free competition in the internal market and the exceptions provided by the Treaty. In individual cases the European Commission applies the so-called “common interest balancing test” in the following steps: (1) Is it a well defined common interest objective that takes precedence over free and undistorted competition and free trade? (2) Is it the appropriate policy instrument to reach this common interest objective? (3) Does it have an incentive effect to change undertakings’ behaviour? (4) Analysis of proportionality (5) Balancing exercise so that any distortion is limited to the minimum.

Instead of applying the Treaty in individual cases, secondary law was developed by the Council and the Commission to specify the broad exceptions listed in Article 107 (3). First, the Commission has adopted soft law instruments, mainly guidelines and frameworks to summarise its decisional practice. Later, at the end of the 90s the Council delegated its regulatory power to the Commission to issue block exemption regulations. Block exemption regulations are well-known instruments from antitrust law. Being directly effective and having direct applicability, Member States and companies can rely on the provisions of block exemptions. Aid shall be exempted from the notification requirement and shall be compatible with the internal market provided that the conditions of the group exemption regulation are fulfilled. The balance between individual enforcement and group exemption was shifted during the State Aid Modernisation (SAM 2013-2014) towards group exemption. The main reason for this policy change was the administrative burden imposed upon the Commission to deal with cases individually, resulting in longer proceedings and a higher number of pending cases.

⁵ The Contribution of Competition Policy to Growth and the EU 2020 Strategy. European Parliament, Directorate-General for Internal Policies. 2013. The document was requested by the European Parliament’s Committee on Economic and Monetary Affairs and prepared by the Copenhagen Economics.

http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/492479/IPOL-ECON_ET%282013%29492479_EN.pdf, page 32.

2. Institutional setting

The application of exemptions to the general prohibition rests exclusively with the Commission, which possesses strong decision-making powers. The Commission's procedure is built on the bilateral relationship between the European Commission and government of the Member State concerned. Under Article 108 (3), draft state aid must be notified to the Commission and the measure can be put into effect only after approval (when the Commission has declared it compatible with the internal market.)

The role of the Council is limited. Under Article 108 (2), on application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. This competence was rarely used by the Council and the ECJ has declared that as soon as the Commission or the Council has adopted a final ruling on the compatibility of the aid in question, the other of those two institutions may no longer adopt a contrary decision.⁶

The Court of Justice acknowledged in its constant jurisprudence that in the sphere of State aid, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context⁷. That will, in particular, be the case when the Commission wishes to reconcile the objective of ensuring undistorted competition in the common market with other Community objectives.

When the Commission enjoys a wide discretion of that kind, the Court, in reviewing the legality of exercise of that power, cannot substitute its own assessment in that matter for that of the competent authority but must confine itself to examining whether the latter assessment contains a manifest error or constitutes a misuse of powers or whether the authority in question clearly exceeded the bounds of its discretion.

3. The goals of state aid control

⁶ C-110/02 *Commission v Council* 2004 [ECR] I-6333, C-399/03 *Commission v Council* [2006] ECR I-5629., C-121/10 *Commission v Council*, ECLI:EU:C:2013:784

⁷ C-110/03 *Belgium v Commission* [2005] ECR I-2801, para. 68, Case C-303/88, *Italy v Commission* [1991] ECR I-1433, para. 34.

The original goal of the prohibition of state aid in primary law was to create a level playing field for Member States and undertakings alike and to exclude subsidy race between them.

Thibaut Kleiner has identified three models of influence for state aid policy, namely the derogatory model, where the policy is attached to the protection of the single market, the competition model and the political integration model.⁸

In his model, the original goal of EU state aid policy is influenced by the establishment of the common market and the complementary role of State aid law to the four freedoms. The negative integration paradigm of the common market builds on the abolishment of trade barriers between the Member States. State aid given to local undertakings, the creation of national champions by reinforcing their competitive position vis-à-vis foreign companies can have the same detrimental effect on the common market as national measures protecting national producers or service providers by applying custom duties, discriminatory taxes, measures having equivalent effect to quantitative restrictions or government measures restricting the freedom to provide services. In this model, the main feature of state aid policy is the elimination of national advantages in line with the establishment and enhancement of the internal market.⁹ Leigh Hancher also stressed that the aim of state aid control is to reduce distortions of production and location decisions across Member States and therefore this regime “relates to competition between Member States, and not just competition between undertakings.”¹⁰ De Cecco pointed out that at the level of definition state aid is a macro level control, the emphasis being on the potential impact on the internal market rather than on specific markets or companies. Prevention of the emergence of competitive spirals is the main objective of state aid policy.¹¹

Contrary to this, the second approach in Kleiner’s model builds on the complementary role of state aid vis-à-vis Article 101-102, rules addressed to undertaking not to distort or restrict

⁸ Thibaut Kleiner: Modernization of State aid policy in Research Handbook on European State Aid Law, edited by Erika Szyszczak, Edward Elgar, 2011, pp.1-27.

⁹ Kelyn Bacon is also of the view that the main rationale for State aid control was to avoid subsidy race between the Member States, but acknowledged that a concern to avoid distortions of competition was also built into the relevant Treaty provisions from the outset. Kelyn Bacon: European Union Law of State Aid, Oxford University Press, 2013, p. 4.

¹⁰ Leigh Hancher- Tom Ottervanger- Piet Jan Slot: EU State Aids, Sweet & Maxwell, 2012, p.27. Francesco de Cecco: State Aid and the European Economic Constitution, Hart Publishing, 2013, p. 5., p.42.

¹¹ Francesco de Cecco State Aid and the European Economic Constitution, Hart Publishing, 2013, p.42-43.

competition in the internal market. In Kleiner's view this "model to State aid focuses on the distortionary effects of State aid on markets and between firms and tries to provide some rationale for the compatibility of State aid."¹² In this understanding of State aid, it is required to show that aid is distorting competition between undertakings and it is not enough to rely on a presumption that selective advantage to one firm leads to market distortion by itself. This "more economic approach" requires deeper scrutiny of the markets by the enforcer and therefore puts an additional burden of proof and workload on the Commission. We can add that application of State aid law often results in oversimplification of causes and effects. Under the dominant narrative of the Commission and the Court selective advantages by themselves distort competition.¹³ Thus, there is no need to define the market and the market players, to scrutinize their market position or to prepare a thorough analysis of potential or actual effects on competition.¹⁴ Restriction of competition has no life on its own.¹⁵

The last model, labelled "political integration model" is associated with the influence state aid policy has on Member States' competences and on the coordination between national economic policies. In this understanding state aid policy is a tool more of positive than negative integration in its capacity to coordinate not only economic policies, but also non-economic policies as well.¹⁶ As Szyszczak emphasised "Member States regard the control of

¹² p.3.

¹³ C-73/79 Philip Morris Holland B.V. v Commission [1980] ECR 2671

¹⁴ Andrea Biondi and Piet Eeckhout were of the view already in 2003 that it is increasingly difficult to locate and determine the boundaries of the two types of control, namely the control of trade and competition restraints. Andrea Biondi and Piet Eeckhout: *State Aid and Obstacles to Trade in The Law of State Aid in the European Union* (eds: Andrea Biondi, Piet Eeckhout and James Flynn) Oxford University Press, 2003, pp. 103-116., p. 104.

Francesco de Cecco: *State Aid and the European Economic Constitution*, Hart, 2013.p. 5.

¹⁵ Christian Ahlborn and Claudia Berg: *Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules in The Law of State Aid in the European Union* edited by Andrea Biondi, Piet Eeckhout and James Flynn, Oxford University Press, 2003, pp.41-65., p. 49. On the different roles of competition analysis of antitrust and state aid rules see also pp.48-49.

¹⁶ Thibaut Kleiner: *Modernization of State aid policy in Research Handbook on European State Aid Law*, edited by Erika Szyszczak, Edward Elgar, 2011, pp.1-27., p. 4. Moreover, the exclusive competence of the Commission makes it possible for Member States to resisit calls for more subsidies coming from influential political groups and companies.

state aid as a curtailment of their sovereign powers and the scope of their industrial and economic policies.¹⁷

We can add to Kleiner's model, that the budgetary discipline imposed by the European Monetary Union rules on Member States' fiscal policies increased the political integration feature of state aid policy. The consequence of setting budgetary rules for the Member States is that the political control of the Commission and the Council over the fiscal policies and industrial policies of Member States' has increased considerably.¹⁸

New goals in EU State Aid policy?

In today's state aid policy, certainly all three aspects (derogatory, competition and political integration) can be found. In Kelyn Bacon's view "State aid policy is an eclectic mix of internal market (trade) policies, competition provisions and considerations of economic efficiency and fiscal discipline."¹⁹ Moreover, she emphasised that because State aid rules are addressed to Member States, they are "more likely to interfere with national sovereignty and issues of national interest than other competition provisions."²⁰

From a historical perspective, the Commission's State Aid Action Plan (SAAP 2005-2009)²¹ was a turning point in the direction of a more economics-based policy, where certain measures are put to a deeper market test. Besides, the SAAP foresaw the more accurate identification of market failures and objectives of common interest under which aid distorting competition nonetheless can be granted by the Member States. Fiscal discipline on the other hand became more and more important after the adoption of the Maastricht Treaty and the imposition of budgetary constraints on the fiscal policies of Member States in the European Monetary Union (EMU).

¹⁷ Erika Szyszczak: *The Regulation of the State in Competitive Markets in the EU*, Hart Publishing, 2007., p. 178., see also Francesco de Cecco: *State Aid and the European Economic Constitution*, Hart Publishing, 2013, p.1.

¹⁸ See also in this respect Erika Szyszczak: *The Regulation of the State in Competitive Markets in the EU*, Hart Publishing, 2007., p. 178.

¹⁹ Kelyn Bacon: *European Union Law of State Aid*, Oxford University Press, 2013, p.5.

²⁰ Kelyn Bacon: *European Union Law of State Aid*, Oxford University Press, 2013, p.5.

²¹ State Aid Action Plan- Less and better targeted state aid: a roadmap for state aid reform. COM/2005/107 final

Another noteworthy feature of European state aid policy is the strengthening of European competitiveness in the global context. We will analyse these tendencies in more detail in the following subchapter where the brief history of state aid control is outlined.

Brief history of European State aid policy

State aid rules were an inherent part of the Treaty establishing the European Economic Community (1957), but during the 60's and 70's the Commission was rather inactive to enforce that prohibition. According to Buch-Hansen and Wigger the Commission was very reluctant to interfere with national industrial policies directed at the creation of national champions.²² In this period the provision of free competition and free market forces working without State intervention was not a goal in itself, in the contrary, "social and industrial policy concerns were considered important in the enforcement of competition rules in the era of embedded liberalism."²³

In the course of the 1980s, soft law was adopted by the Commission and Member States were reminded by the Commission of their notification obligations. In a Communication dating back to 1980, the Commission noted that cases of non-notification and late notification had ceased to be isolated and reminded Member States of their obligations.²⁴ Later, with the Commission's White Paper on the Internal Market²⁵ the neoliberal approach became more important in the economic policy. By the removal of physical, fiscal and technical barriers to trade, Member States set the goal of completing the internal market. The role of competition and state aid rules was elevated to a higher level and the Commission emphasised that discipline to rigorously enforce the rules was needed. The White Paper pointed to the previous mercantilist practice of Member States under which large amounts of public funds were spent to finance uncompetitive industries and enterprises.²⁶ This, in turn, resulted not only in the distortion of competition in the common market, but also in the long run undermined the

²² Hubert Buch-Hansen and Angela Wigger: *The Politics of European Competition Regulation*, Routledge, 2011, p.67

²³ Hubert Buch-Hansen and Angela Wigger: *The Politics of European Competition Regulation*, Routledge, 2011, p.137.

²⁴ Communication of the Commission. Notification obligation and consequences of breach of obligation, OJ C 252, 30.9.1980, p. 2.

²⁵ White Paper from the Commission to the European Council. *Completing the Internal Market* (Milan, 28-29 June 1985) COM (85) 310 final, Brussels, 14 June 1985

²⁶ para 158.

efforts to increase European competitiveness and represented a drain on scarce public resources.²⁷ It is to be noted from the White Paper that the aims of state aid control are manifold. Saving public funds, increasing European competitiveness are new tasks different from the original task to ensure a level playing field for companies.

Erika Szyszczak observed that “the 1990s saw a dramatic change of policy towards state intervention in the increasingly liberalised markets”.²⁸ The legislative activity of the Commission increased significantly in the 90s and resulted in the first half of the decade in many soft law instruments.²⁹ In the second half of the 90s, hard law is adopted by the Council to regulate the Commission’s state aid procedure³⁰ and to enable the Commission to adopt group exemption regulations in the field of horizontal aid.³¹ With the adoption of hard law the Commission started to have an increasing influence on Member States’ national aid and economic policies. The gradual decrease and elimination of sectoral aid (e.g. coal and mining, shipbuilding, synthetic fibres) resulted in widespread restructuring and had enormous social effect on workers active in these industries. Instead of financing sectoral objectives, aid was directed to finance horizontal goals that are shared by the Member States as European goals (e.g. R&D, regional aid, employment aid, environmental aid).

²⁷ para 158.

²⁸ Erika Szyszczak: *The Regulation of the State in Competitive Markets in the EU*, Hart Publishing, 2007., p. 2.

²⁹ mainly notices and communications in which the Commission has summarised the results of its enforcement activity. The ECJ did occasionally check the compatibility of soft law with primary law, namely the Treaty provisions as interpreted by the Court. In *Kronofrance* for example it ruled that although the Commission is bound by the guidelines and notices that it issues in the field of State aid, that is so only to the extent that those texts do not depart from the proper application of the rules in the Treaty, since the texts cannot be interpreted in a way which reduces the scope of Articles 87 EC and 88 EC or which contravenes the aims of those articles. *Joined Cases C-75/05 P and C-80/05 P, Germany and others v Kronofrance SA and the Commission* [2008] ECR I-6619, paras 65-67.

66 The Court of First Instance was therefore justified in holding that the multisectoral framework of 1998 should be interpreted in the light of Article 87 EC and of the principle of incompatibility of public aid set out therein, in order to attain the objective sought by that provision, namely undistorted competition in the common market.

³⁰ 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 83/1, 27.03.1999, p.1-9.

³¹ 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 aid, OJ L 142, 14.5.1998, p.1-4.

Positive integration became prevalent through secondary law, because Member States have voluntarily aligned their policies with soft law instruments to avoid a lengthy and detailed Commission procedure the outcome of which was not predictable. Later, for reasons of legal certainty and transparency soft law gave way to hard law as the Council enabled the Commission to adopt regulation in the field of state aid law.³² Christian Koenig rather harshly noted that “State aid policy has become an all-purpose tool to camouflage policy-making”³³ and “non-harmonised taxation has, as well, evolved to a laboratory of State aid policy-making and regulation.”³⁴

In the meanwhile and after the completion of the internal market, the Maastricht Treaty (1992) defined the timetable for the European Monetary Union (EMU) and for the introduction of the common currency. The Maastricht Treaty set out the requirements for the EMU membership and imposed budgetary and public spending benchmarks limiting the policy leeway of EMU Member States. To enforce the EMU benchmarks, in 1997 the Stability and Growth Pact was adopted to strengthen the monitoring and coordination of national fiscal and economic policies.³⁵ The Stability and Growth Pact put a straitjacket on Member States public spending.

The Lisbon European Council (2000) put state aid again in the focus of its agenda as part of the economic reforms for a complete and fully operational internal market. To that end, the Presidency conclusions of March 2000 called on the Member States to “reduce the general level of State aids, shifting the emphasis from supporting individual companies or sectors towards tackling horizontal objectives of Community interest, such as employment, regional development, environment and training or research.”³⁶ In 2001, the Council invited the Commission to develop statistical tools enabling these goals to be followed up and to further

³² Regulation 994/98 [1998] OJ L 142/1.

³³ Christian Koenig: Where is State Aid Law heading to? *European State Aid Law Quarterly*, 2014/4., pp.611-613., p.611.

³⁴ Christian Koenig: Where is State Aid Law heading to? *European State Aid Law Quarterly*, 2014/4., pp.611-613., p.612.

³⁵ Later, in 2011 the Six Pack and in 2014 the Fiscal Compact (Treaty on Stability, Coordination and Governance) had the same effect on public spending

³⁶ Lisbon European Council 23 and 24 March, 2000, para 17. http://www.europarl.europa.eu/summits/lis1_en.htm and later it was repeated at the Stockholm European Council conclusions, 24 March 2001 and the Barcelona European Council Conclusions, 15 and 16 March 2002 http://ec.europa.eu/invest-in-research/pdf/download_en/barcelona_european_council.pdf.

develop the use of ex ante and ex post evaluations of aid schemes to judge the quality of aid packages and their effects on competition.³⁷ To that end, the State Aid Scoreboard was introduced to keep records of the aid spent by each Member State for the various goals by its share of the GDP.

The key goal of the Lisbon strategy was to increase competitiveness built on market-based economies. The Lisbon strategy was an important policy document, setting out the vision of the Union on, among others, industrial policy, research and innovation, investments and economic reforms.

State Aid Action Plan (SAAP 2005-2009)

Linked to the Lisbon strategy, the SAAP was the first comprehensive reform of state aid policy aiming to support sustainable growth, competitiveness, social and regional cohesion and environmental protection.³⁸ By setting key priorities, the European Council invited the Commission to align its state aid policy to this vision too. In the SAAP the Commission has done its job by revising the soft law crucial to the implementation of the Strategy. In the SAAP the Commission announced several substantive and procedural reform provisions.

First, in accordance with the Strategy, the European Council has called on the Member States in 2005 to work towards a reduction in the general level of State aid and the redeployment of it in favour of support for certain horizontal objectives.³⁹ By aligning state aid rules to the Lisbon strategy in the SAAP, the Commission set positive integration goals to the Member States. According to Blauburger, large parts of the document focus on positively defining “better targeted aid” rather than on tightening state aid control (“less aid”).⁴⁰ The SAAP acknowledged that the impact of aid in the market depends first, on how accurately the accepted objective of common interest has been identified, second, whether it is the appropriate instrument and third, on its proportionality.⁴¹ De Cecco highlighted that besides

³⁷ see the Progress Report of the Commission to the Council http://ec.europa.eu/competition/state_aid/studies_reports/progress_report_en.pdf

³⁸SAAP para 1.

³⁹ European Council conclusions, Brussels, 23 March 2005, para 23. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/84335.pdf

⁴⁰ Michael Blauburger: From Negative to Positive Integration? European State Aid Control Through Soft and Hard Law, MPIfG Discussion Paper 08/4, p. 14.

⁴¹ para 20.

the original deregulatory effect of state aid law, the Commission has acquired “a set of powers which are designed to ensure that State intervention is channelled towards objectives that are perceived as priorities from an EU perspective.”⁴²

Second, the Commission has announced in the SAAP its more economic approach, with the help of which a more apt and transparent evaluation of aid measures can be achieved.⁴³ As Ulrich Schwalbe highlighted, the economic analysis was limited mainly to the assessment of the economic advantage. The competition analysis and the assessment of the negative effects on trade were rudimentary.⁴⁴

Furthermore, SAAP introduced a 3-stream procedure of block exemption, standard and detailed assessment. The latter applies to a small number of cases, for example to large investment projects. In the detailed assessment the Commission applies the so-called balancing test.⁴⁵ Balancing the negative and positive effect of aid measures renders the proceeding more lengthy, but on the other hand, the analysis becomes more accurate. By conducting the detailed assessment, the original function of state aid, namely to correct market failure, is revealed. The balancing test was incorporated into several soft law instruments in the course of the 2000s.⁴⁶

Financial and economic crisis

A couple of years after the start of the SAAP roadmap, the financial and economic crisis has changed the programme of the state aid team of the Commission. Since the crisis started, the EU used state aid rules as a substitute for the lacking resolution tools. Rescue and restructuring aid given to banks and financial institutions had to be evaluated very quickly by the officials and until October 2008 the Commission applied its already existing Rescue and

⁴² Francesco de Cecco: *State Aid and the European Economic Constitution*, Hart Publishing, 2013, p. 6.

⁴³ para 21-22.

⁴⁴ Ulrich Schwalbe: *European State Aid Control- The State Aid Action Plan in Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid* (eds: Wolfgang Wurmnest, Jürgen Basedow), Kluwer, 2011, pp.161-207, p.166

⁴⁵ Staff working paper 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3 EC-Treaty., 6 May 2009

⁴⁶ for example into the former R&D&I Framework and Risk Capital Guidelines in 2006, the Environmental Aid Guidelines in 2008.

Restructuring Guidelines.⁴⁷ Member States have announced unprecedented support for the financial sector and the Commission has been playing a key role in authorising the measures. The State Aid Scoreboard shows that the overall aid volume increased in 2008 to 2.2% of the GDP from the previous 0.52%.⁴⁸ As a consequence, it became a significant challenge for the Commission to deal with the flood of notifications quickly. It was only in October 2008 that the Commission adopted a special, crisis-specific Guideline on state aid to financial institutions under Article 87 (3) (b) of the Treaty that enables the Commission to authorise aid to remedy a serious disturbance in the economy.⁴⁹ Later the Commission adopted a Framework on the support of the real economy as well.⁵⁰

In the midst of the crisis, the Monti Report (2010) highlighted the role of state aid control and the importance of keeping national interests at bay to avoid the risk of economic nationalism.⁵¹

Leigh Hancher acknowledged that “despite initial protectionist instincts in some Member States, the Commission co-ordinated national action to limit spill-over effects, such as untenable subsidy races and distortions of competition that would have fragmented the internal market.”⁵²

The crisis had started to make its effects during the SAAP process and therefore the Commission has aligned its regulatory goals to the changed circumstances. For example, the Commission took into account in 2008 in its Impact Assessment Report on Regional Aid that in times of crisis, competition for attracting investments is distorted, since those EU countries

⁴⁷ [Community guidelines on State aid for rescuing and restructuring firms in difficulty](#), Official Journal C 244, 01.10.2004, pages 2-17

⁴⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009DC0661&from=EN>

⁴⁹ Guidelines. 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 270/02, 25.10.2008.

⁵⁰ Temporary Community framework for State Aid measures to support access to finance in the current financial and economic crisis, OJ 2009/C 16/01, 22.1.2009.

⁵¹ Mario Monti (2010): A New Strategy for the Single Market. At the Service of Europe’s Economy and Society’, p. 87. http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf

⁵² Leigh Hancher- Tom Ottervanger- Piet Jan Slot: EU State Aids, Sweet & Maxwell, 2012, p.26

having constrained resources may be easily outbid by richer regions. Thus, this may result in inefficient outcomes for collective welfare. and may jeopardise the internal market.⁵³

Europe 2020

As the Lisbon Strategy has not delivered the expected results in the meanwhile radically changed environment, the Commission proposed in 2010 the Europe 2020 strategy,⁵⁴ which was endorsed by the European Council.⁵⁵ The Commission did not devote too many words to the role of state aid policy, but noted under the Heading “A Single Market for the 21st Century” that “state aid can also actively and positively contribute to the Europe 2020 objectives by prompting and supporting initiatives for more innovative, efficient and greener technologies, while facilitating access to public support for investment, risk capital and funding for research and development.”⁵⁶

*The State aid modernisation (SAM 2012)*⁵⁷

Not so long after the SAAP was completed, another reform was decided in 2012 to give fresh impetus to European State aid control. The Commission has outlined three reasons for the modification. The first being the original main goal to ensure that the functioning of the internal market is not distorted by anticompetitive behaviour of Member States favouring some actors to the detriment of others. The second is the contribution of competition policy to reach the rather ambitious Europe 2020 goals.⁵⁸ The third reason for a renewed policy approach is the economic and global crisis which has increased the demand for a greater role

⁵³ Commission Staff Working Document, Impact Assessment Accompanying the Document Communication from the Commission, Guidelines on regional state aid for 2014-2020, SWD (2013) 214, pp. 6-7., pp. 23-24.

http://ec.europa.eu/competition/state_aid/regional_aid/impact_assessment_report_en.pdf, Mario Todino and Annagiulia Zanazzo: New Guidelines on Regional Aid- Is the Party Over for Large Investment Projects? European State Aid Law Quarterly 4/2013, pp.676-684, p. 680.

⁵⁴ Communication from the Commission. Europe 2020. A strategy for smart, sustainable and inclusive growth, , COM (2010) 2020, Brussels, 3.3.2010

⁵⁵ European Council Conclusions, Brussels, 17 June 2010
http://ec.europa.eu/eu2020/pdf/council_conclusion_17_june_en.pdf

⁵⁶ p.19.

⁵⁷ 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/2012/209 final

⁵⁸ The target of which is to make Europe a smart, sustainable and inclusive economy. Commission Communication COM (2010) finals, 3.3.2010.

of the State to protect the most vulnerable and promote economic recovery (equity and efficiency argument).⁵⁹ Hence, according to the Commission, the scarce resources should be spent more efficiently and effectively.

In the SAM the Commission has rightly recognised that the effect of the financial crisis on Member States' budgets is twofold. First, it requires fiscal discipline from the governments to keep the EMU targets, which fits very well with the "less and better targeted aid" approach of the Union and the better use of taxpayers' money. Second, the crisis has hit some Member State's more harshly than others and in consequence, it has increased the disparity in Member States' leeway to finance their policies.⁶⁰

The objectives of the SAM are therefore threefold: (i) to foster sustainable, smart and inclusive growth in a competitive internal market; (ii) to focus the Commission's ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement; (iii) to streamline the rules and provide for faster decisions.

Promoting growth could be achieved by targeting state aid at identified market failures and objectives of common interest, complementing, and not replacing private spending. The identification and definition of common principles and horizontal rules across different guidelines was also a burning concern before the SAM was issued. In line with the more economic approach of the Commission, the SAM foresaw the greater scrutiny of the incentive effect and more systematic assessment of the potential negative effects, for example distortions of allocative and dynamic efficiency, subsidy races and market power.⁶¹

At the procedural law level, we have already noted that the Commission's ex ante scrutiny is time-consuming, block exemption relieves not only the Commission but also the Member States from burdensome notification procedures. By focusing on the cases with the biggest impact on the internal market, many less distortive aid measures can come under the provisions of the block exemption regulation. The goal of the Commission is that around 70% of aid measures will be covered by the block exemption regulation at the beginning of the

⁵⁹ SAM, p.3

⁶⁰ SAM, p. 3.

⁶¹ SAM p.18

application of the new so-called umbrella General Block Exemption Regulation (GBER).⁶² If the full potential of the GBER is exploited by the Member States, this figure can increase to 90%. This in turn would result in significant resources allocated to the scrutiny of individual cases with a higher impact on the market, for example to the scrutiny of fiscal aid cases. In the end, Member States increasingly resort to state aid falling under the scope of block exemption regulations and thereby national policies are converging.

What is the current status of state aid policy?

Some commentators criticise the Commission even after the SAM was completed as not setting the right priorities for its policy. Assuming automatically that selective measures distort competition is not justified.⁶³ The interpretation of Article 107 has not changed after the SAM was completed and therefore the “broad sweep” approach is applied to cases coming under the prohibition. On the other hand, justification is based increasingly on secondary hard law, which requires only in the minority of cases to provide a thorough analysis.⁶⁴

On the contrary, de Cecco is of the view that subsidies to individual undertakings can be tested by the competition test, but the analysis of the likely impact on competition of regulatory intervention is “in fact necessarily a rather blunt judgement, which relies on assumptions rather than on empirical evidence and market analysis, as it is virtually impossible for any court to carry out a detailed analysis of the potential effects of a planned measure which benefits a variety of undertakings from different economic sectors.”⁶⁵

With regard to the justification, broader and deeper positive integration raises the question whether exceptions to the prohibition of state aid are of a national or of a European character? Can we still define the balancing activity of the Commission under Article 107 (3) between the competing interest of the Union for the creation and maintenance of an internal market with undistorted competition on the one hand and national economic or social policy to

⁶² Commission 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, OJ L 187/1., 26.6.2014.

⁶³ John Temple Lang: EU State Aid Rules- The Need for Substantive Reform, European State Aid Law Quarterly 3/2014, pp.440-453., p. 453.

⁶⁴ like large regional aid measures. The GBER does not apply to aid schemes if the average annual State aid budget exceeds EUR 150 million on regional aid, SMEs, R&D, environment or broadband. See Article 1 (2) of Commission 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, OJ L 187/1., 26.6.2014.

⁶⁵ Francesco de Cecco: State Aid and the European Economic Constitution, Hart Publishing, 2013, p.36.

support individual undertakings? The Europeanization of exceptions by first soft law, later by hard law makes it very difficult for the Member States to rely successfully on national economic or social policy reasons to justify aid measures. The Commission relies on the term “objective of common interest”, which implies that the interest is not simply the individual interest of one or more Member States.

On the other hand, from a procedural point of view, the policy shift from ex ante to ex post control of most of the aid measures have to be accompanied with reinforced ex post control of non-notifiable, group exempted measures. The Commission has itself acknowledged in the SAM that current results of the monitoring of the implementation of block exempted measures reveal frequent lack of compliance with state aid rules.⁶⁶ With this statement the Commission refers most probably to the Report of the European Court of Auditors⁶⁷, prepared in 2011, the results of which showed a fairly disappointing picture about the state aid review conducted by the Commission. In the European Court of Auditors’ view, the Commission’s monitoring activity is limited⁶⁸ and therefore it recommended to the Commission to step up its monitoring activities and to organise its ex officio enquiries in a more systematic way to regularly assess the ex post impact of state aid control on companies, markets and the overall economy.⁶⁹

The possibility of Member States to grant state aid is significantly reduced by the harmonised State aid regime and channelled towards horizontal aid. Yet, few possibilities still exist, the first being to design measures outside the scope of Article 107 (1), thus, no obligation to notify them to the Commission⁷⁰. This leaves limited leeway to Member States as the conditions of state aid prohibition (state resources, imputability to the State, economic advantage, selectivity, effect on trade) are interpreted very broadly by the European Court of Justice (ECJ). The second option is to design aid measures within the scope of Article 107 (1)

⁶⁶ p.21.

⁶⁷ European Court of Auditors Special Report, No 15/2011. Does the Commission’s procedures ensure effective management of state aid control? http://www.eca.europa.eu/lists/ecadocuments/sr11_15/sr11_15_en.pdf

⁶⁸ In one year on average 15 measures are monitored out of 1000 block exempted measures and out of 200 aid schemes on average an additional 15 is monitored ex post by the Commission.

⁶⁹ European Court of Auditors Special Report, p. 7.

⁷⁰ see for example the German attempt to design a renewable energy support scheme outside the ambit of Article 107, which has failed. Commission Decision of 25.11.2014. on the aid scheme SA.33995 (2013/C) (ex 2013/NN) implemented by Germany for the support of renewable electricity and of energy-intensive users. Brussels, 25.11.2014. C (2014) 8786 final

in conformity with secondary law, consequently there is no notification obligation. The new GBER with its broad subject matters and complex rules leaves ample room for different interpretations. Indeed, one year after its adoption, the Commission has issued a practical guide to help authorities and beneficiaries how to apply its rules.⁷¹ Lastly, it is always open for the Member States to notify individual measures to the Commission.

As to the reform of the procedural rules, the Commission gained new procedural tools to investigate markets. The new procedural regulation⁷² granted the Commission the power to request information not only from the notifying Member State, but also from other Member States and from undertakings during the formal investigation phase.⁷³ Similar to antitrust powers, the Commission can conduct sector inquiries and also state aid instrument inquiries if state aid measures may materially restrict or distort competition within the internal market in several Member States.

Besides being subject to the law, during the legislative phase, Member States may try to influence Commission law-making and thereby the substance of secondary law. The Commission cannot issue soft law or block exemption regulations against the strong opposition from numerous Member States.⁷⁴ In this sense, big Member States with strong political and economic power have a say during the legislative process.

EU state aid policy in a global context

EU state aid policy is unique in the sense that it is an exclusive Union competence implemented by the European Commission. Kelyn Bacon noted that State aid control is a “European peculiarity: no other jurisdiction or trade area has similar provisions”.⁷⁵

⁷¹ http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf

⁷² 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, OJ L204, 31.7.2013, p. 15-22.

⁷³ Information requests from market participants is enforceable via pecuniary sanctions. See the article of Hanns Peter Nehl: 2013 Reform of EU State Aid Procedures: How to Exacerbate the Imbalance between Efficiency and Individual Protection. *European State Aid Law Quarterly* 2/2014, pp.235-249.

⁷⁴ Michael Blauburger: From Negative to Positive Integration? *European State Aid Control Through Soft and Hard Law*, MPIfG Discussion Paper 08/4, p. 23.

⁷⁵ Kelyn Bacon: *European Union Law of State Aid*, Oxford University Press, 2013, p. 4. She has also noted that the WTO rules are more limited in their scope and in their enforcement regime.

Critics of the rigorous Union state aid control often claim that firms located outside of the Union have more opportunities to improve their competitiveness. Studies show that the overall aid to enhance competitiveness is not lower in the EU than in other jurisdictions. ‘The argument that state aid control makes Europe a less attractive location for foreign capital is short on facts.’⁷⁶

Tough stance on state aid was increasingly viewed by the Commission as a necessary tool to improve the competitiveness of the European industry in a global economy.

Stressing European competitiveness has started to surface in 2000 with the inclusion of competition policy in the Lisbon Strategy and since then has penetrated into soft law. For example, in the Guidelines on State aid for environmental protection and energy (2014) the Commission has also taken into account the competitive position of companies active in electro-intensive industries and aimed to reduce their competitive disadvantage resulting from the obligation to support energy from renewable resources.⁷⁷

The aid is limited to sectors that are exposed to a risk to their competitive position due to the costs resulting from the funding of support to energy from renewable sources as a function of their electro-intensity and their exposure to international trade.

4. Final remarks

Free movement rules facilitate regulatory competition between Member States by removing trade barriers. National interest therefore plays a crucial role in the justification of trade barriers. In the same vein, state aid is not an absolute prohibition, but exceptions to it do not concern the protection of national interest, but European interest.

While the restriction of free movement can be justified before the European Court of Justice relying on public security, public policy or public health reasons, state aid rules do not allow room for the Member States to invoke so directly their national interest. This conclusion also

⁷⁶ Mario Monti (2010): A New Strategy for the Single Market. At the Service of Europe’s Economy and Society’, p. 87. http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf

⁷⁷ Communication from the Commission. Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, pp.1-55., paras 181-192.

flows from the text of Article 107 (3) that limits sectoral and cultural aid not affecting trading conditions to an extent contrary to the common interest.⁷⁸

The national interest is thus labelled and selected by the European legislator and policy-maker as harmful or harmless. The distinction between “bad” and “good” aid is not drawn by the Member States, but by the Commission itself. In the same vein, the Report prepared by the Copenhagen Economics in 2013 suggests that ‘making concessions to national interests in competition policy may damage effective competition, lead to an unlevel playing field across Member States.’⁷⁹

Regional policy, environmental policy or employment policy became by their nature European policies, regulated by the Commission.⁸⁰ As the ultimate arbitrator is the Commission, Member States have limited possibilities to use these tools for pursuing their individual interest. The collective interest of the Union is prevalent in the case of aid granted under Article 107 (3) b) for the execution of an important project of common European interest. In this case the Union itself sets the agenda, that is promoted through the European Structural and Investment Funds and the Member States together. Aid to support the Europe 2020, Digital Agenda for Europe or the Trans-European Transport and Energy Network projects are considered of common European interest and thereby have a privileged status.

Thus, this article has shown that state aid policy is a proactive policy, which takes into account the Europe 2020 goals by limiting aid to better-targeted growth-enhancing aid.

Moreover, the present study has offered a short outline of the evolution of EU State aid law that developed dramatically in the 90s from an inactive and toothless policy into a broad – sweeping positive integration tool which is used frequently by the Commission in case of lack of positive harmonisation competence.

⁷⁸ Article 107 (3) c) and d)

⁷⁹ The Contribution of Competition Policy to Growth and the EU 2020 Strategy. European Parliament, Directorate-General for Internal Policies. 2013. The document was requested by the European Parliament’s Committee on Economic and Monetary Affairs and prepared by the Copenhagen Economics.
http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/492479/IPOL-ECON_ET%282013%29492479_EN.pdf, page 37.

⁸⁰ the only exception to this is perhaps culture and heritage conservation, where there is no regulation or soft law adopted by the Commission.

Especially, this paper revealed that the new emphasis on less and better targeted aid granted for European policy objectives is a prominent feature of European State aid law and careful evaluation of the effects on the global competitiveness of European companies has become more important.

Thus, the effect on national policy choices is wide-ranging and the knowledge of State aid law is indispensable for officials working in the public administration.

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