
June 2012

European Commission proposes modernisation of State Aid rules

The European Commission ("Commission") issued on 8 May 2012 a communication, EU Modernization of the State Aid Rules, (COM(2012) 209 final), ("Communication") to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The Commission states the three main goals of the reform: the definition of common principles applicable to the compatibility assessment of Aid measures; focusing of the Commission's efforts on those with the largest impact on the Internal Market; and to speed up decision making by rationalizing the Commission's investigations of measures. The aim is to enable the growth of a stronger, more dynamic and competitive Internal Market. The Commission expects the reform to be in place by the end of 2013. Elisabeth Eklund, partner, and Jenny Crafoord, associate, report and comment here on the Communication.

The Commission states in the Communication that efficient and better targeted control of State Aid may promote the formation of a powerful growth-enhancing policy and limit distortion of competition in order to keep the Internal Market open and competitive. Streamlining State Aid control may also improve the quality of public financing. Furthermore, the Commission states that the current substantive and procedural rules regarding State Aid, which apply in equally to a range of cases, are complex and complicated and a challenge for State Aid control.

The proposed modernisation has three main objectives: i) to promote a sustainable and smart growth on the Internal Market; ii) to focus the Commission's ex ante scrutiny on cases with the biggest impact on the Internal Market and strengthen the Member States' cooperation in State Aid enforcement; and iii) to streamline the rules and provide for faster decisions. These three objectives are commented on in more detail below.

i) To promote growth on the Internal Market

The Communication states that modernisation of State Aid control will facilitate the treatment of State Aid which is well-designed, directed at identified market failures and objectives of common interest and which is the least distortive, so called good

June 2012
European Commission proposes modernisation of State Aid rules

Aid. This will ensure that State Aid promotes innovation, green technologies, human capital development, avoids environmental harm and ultimately promotes growth, employment and EU competitiveness. Aid that does not meet these criteria will not only be labelled as a waste of public finances but will also be considered as a brake to growth by hampering competition in the Internal Market.

The modernisation proposals to contribute to the growth goals are as follows.

- a) To identify and define common principles applicable to the Commission's compatibility assessment of all State Aid measures. Such principles would clarify how the Commission would assess common characteristics. These principles would, e.g., concern the definition and assessment of market failures and the effects of public aid, both positive and negative.
- b) Revision and streamlining of State Aid guidelines to make them consistent with the common principles, e.g. the guidelines for Regional Aid, Research & Development & Innovation, Environmental Aid, Risk Capital and Broadband (types of aid which account for two thirds of aid granted in the EU).

- ii) Focusing enforcement on cases with the biggest impact on the Internal Market

In the Commission's view, more efficient spending necessitates prioritising stricter scrutiny of aid which has a significant impact on the Internal Market, i.e. major aid measures which may have a distorting effect, such as fiscal aid. At the same time, the analysis of cases of a more local nature and with little effect on the Internal Market should be simplified. It is the hope of the Commission that the Member States will thereby have an increased responsibility to design and implement aid measures and that this will reduce the administrative burden for public authorities and aid recipients when smaller amounts are involved.

In order to meet these objectives, the Commission proposes the following:

- a) A possible review of the De minimis Regulation.
- b) Possible changes of the Council Enabling Regulation to allow the Commission to explain how certain categories of aid are compatible with the Internal Market and which can thereby be exempted from the ex ante notification, e.g. aid granted to culture and aid to make good the damage caused by natural disasters.
- c) A revision and possible extension of the General Block Exemption Regulation.

If there is an increase in the scale and scope of the aid measures exempted from the obligation to notify, the responsibility of the Member States for ensuring the correct enforcement of State Aid rules would increase. With more measures exempt from the notification requirement, the Member States would have to ensure that de minimis measures and measures covered by a block exemption comply with the State Aid

June 2012
European Commission proposes modernisation of State Aid rules

rules beforehand. The Commission states that it may consider a relief of the obligation to notify only if the national public authorities show an increased commitment and delivery in terms of compliance with the State Aid rules.

iii) Streamlined rules and faster decisions

The Commission states that the State Aid rules have, over time, developed into a complex legal framework, which is why there is reason to simplify the rules and streamline the assessment process. The Commission is obliged to investigate all allegations concerning potential aid without, in practice, being able to set priorities for the handling of complaints. Furthermore, the Commission cannot always obtain complete information from the parties concerned, which may prolong the investigation. Thus, the Commission sees a need to rationalize and reform the processes in order to deliver decisions within business-relevant timelines. In order to meet this objective, the Commission proposes that:

- a) The term State Aid should be clarified and better explained.
- b) The State Aid Procedural Regulation should be simplified in terms of handling complaints and the tools for the Commission to obtain market information in order for the Commission to focus its action on cases which are relevant from an Internal Market perspective. In order to meet this objective the Commission must be able to set its own priorities for the handling of complaints.

The Commission intends to consult the Member States in order to gather input for a debate on the proposed modernisation of State Aid rules. The Commission aims at implementing the main instruments of the modernization package, including the Council acts, before the end of 2013. To meet this goal the Commission should present its proposals for Procedural and Enabling Regulations to be adopted in autumn 2012. The Commission's goal is to form the rest of the package over the next months in order to achieve progressively the revision and streamlining of the main Commission acts by the end of 2013.

Comments

We are positive to the Commission's ambition to simplify and streamline the State Aid package and to focus its resources on cases which impact on competition on the Internal Market. This could be compared to the large-scale modernisation of the competition rules which was adopted in 2004, in which the Commission abolished the opportunity for companies to obtain formal decisions issued regarding exemption of the competition rules as well as negative clearance in order to focus its resources on cartel control.

June 2012
European Commission proposes modernisation of State Aid rules

Since compliance with the State Aid rules is not entirely optimal in all Member States, the question is how it will work in practice to give the Member States increased responsibility for ensuring compliance. It is possible, but far from certain, that a clarification of the rules will facilitate national compliance control.

We are very positive to the Commission's ambition to shorten the handling of complaints, which is a real problem today. It can be noted that current procedures, where the beneficiary of aid is not formally part of the process, are inherently flawed in that this often has the effect that the Commission does not have all relevant information when assessing a case. It is important however, even today, to make use of all unofficial opportunities to pass on important facts of a case to the Commission. The Communication is a first step in the proposed modernisation and we will follow the development and report on any tangible proposals. In parallel, it should be noted that we are expecting new Swedish legislation on State Aid. According to unofficial information, this act is expected to enter into force in January 2013. We will report back on this as soon as the proposal circulated to the Council on Legislation for consideration has been published.



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