

# CPI Antitrust Chronicle

May 2014 (2)

The Modernization Process of EU  
State Aid Law:

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Stefano Grassani  
Pavia e Ansaldo

## The Modernization Process of EU State Aid Law: “The Search For The Right Balance Between State Intervention And The Invisible Hand”<sup>1</sup>

Stefano Grassani<sup>2</sup>

### I. INTRODUCTION

One of the distinct and unique features of European antitrust law is (and has always been since its enactment in 1957) that the rules on restraints of trade and monopolization are complemented by a set of provisions, as embedded in the Treaty on the Functioning of the European Union (“TFUE”), which, while not strictly related to the pursuit of anticompetitive conducts *per se*, nevertheless aim at effectively ensuring level playing fields as a pre-condition for fair competition across Europe.

An undertaking that obtains governmental “support,” be it in terms of subsidies or any other form of relief/incentive/contribution, gains an advantage over its competitors. Such an advantage not only distorts competition between companies (often causing less efficient businesses to prevail) but, at the same time, risks affecting the achievement of the fundamental goal of a true market integration. As EU Commissioner Joaquín Almunia recently underlined, “State aid control is an instrument of economic integration that underpins the good functioning of the single market, which is Europe’s best asset in the global economy.”<sup>3</sup>

Articles 107-109 of the TFUE, under the same heading which sets forth “classic” antitrust rules (“Chapter I: *Rules on Competition*”), therefore generally prohibits State aids granted by Members States (or any public authority) in the European Union unless they are justified by reasons of general economic development. To ensure that this prohibition is respected, the European Commission—in addition to enforcing antitrust provisions—is also in charge of ensuring that State aids comply with EU rules.

One could certainly question (and many do) whether, 60 years after the signature of the Treaty of Rome, Europe can still afford to be the last strenuous defender of utmost competition or whether living with self-imposed State aid rules—which bring antitrust enforcement to higher standards not witnessed elsewhere in the world—has become an untenable proposition. At times where global competition acknowledges the increasing presence of sovereign funds and State-driven economies, what could have been perceived in the past as a trivial intellectual proposition has now become a serious and extremely realistic problem.

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<sup>1</sup> *Doing more with less—State aid reform in times of austerity: Supporting growth amid fiscal constraints*, Speech of Commissioner Joaquín Almunia at King’s College, European Commission press release SPEECH/13/14.

<sup>2</sup> Pavia e Ansaldo – Milan, Italy

<sup>3</sup> *Modernizing State aid control*, Speech of Commissioner Joaquín Almunia at European Economic and Social Committee, Brussels, 23 February 2012, European Commission press release SPEECH/12/117.

However, the abolition of State aid rules altogether is clearly an unrealistic option, at least at present. Yet, a debate has come to surface as to how to modernize State aid law, knowing that the European model of enforcement requires the Commission and European institutions to strike the right and delicate balance between the need to avoid distortion of competition and the willingness (and nowadays, more often than not, the legitimate interests) of Member States to support their corporations so as to sustain the ever increasing competitive pressures stemming from emerging countries and their State-owned/subsidized economies.

This need for balance is nothing new; to some extent, the development of State aid law in Europe is a story of “adaptation and resilience.”<sup>4</sup> Recently, for example, the unprecedented economic crisis that affected the European Union, like elsewhere, implicitly called for a loosening of State aids control, causing the release of an emergency package targeted at rescuing financial entities in difficulty.<sup>5</sup>

Thus, if nothing is to be expected in terms of outright modification of the key substantive rules of the TFUE, much was done—and is being done—by the Commission so as to bring State aid law in line with changes in the economy. Through appropriate procedural innovations, the Commission can indeed steer enforcement towards more workable targets.

## II. REWORKING STATE AID

### A. First Attempts

A first major string of evolutionary changes to State aid procedures had occurred between 1998 and 2001, with the adoption of the Enabling Regulation<sup>6</sup> and of the Procedural Regulation.<sup>7</sup> These regulations set forth a comprehensive legal scheme for the enforcement of State aid rules, based upon the well-established principle that State aids must be preliminarily notified to the Commission and cannot be implemented by Member States until cleared by the latter, as provided for under Article 108(3) TFEU.

Thereafter, a number of block exemption regulations ensued,<sup>8</sup> while—between 2005 and 2009—the so-called *State aid action plan*<sup>9</sup> brought further changes, including the revision of all major guidelines and frameworks and the adoption of the first General Block Exemption

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<sup>4</sup> See Joaquín Almunia, *supra* note 1.

<sup>5</sup> See, for instance, the EC Communication on the application, from August 1, 2013, of State aid rules to support measures in favor of banks in the context of the financial crisis (‘Banking Communication’), OJ C 216, 30.07.2013, which is the latest of six *ad-hoc* Communications adopted by the Commission in the banking sector starting from the beginning of the financial crisis in 2008.

<sup>6</sup> 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 State aid, OJ L 142, 14.5.1998.

<sup>7</sup> 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, 27.3.1999.

<sup>8</sup> See Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid, OJ L 10, 13.1.2001; Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ L 10, 13.1.2001; and Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, OJ L 10, 13.1.2001.

<sup>9</sup> State aid action plan—Less and better targeted state aid: a roadmap for state aid reform 2005-2009, COM/2005/0107 *final*.

Regulation (giving automatic *ex-ante* approval for a range of aid measures and so allowing Member States to grant such aids without prior notification to the Commission),<sup>10</sup> as well as the clarification of the role of national courts in the implementation of the State aid rules.<sup>11</sup>

### ***B. The ‘Big Bang’: The 2012 State Aid Modernization***

This initial program of reforms was certainly effective but, probably, not sufficiently incisive. Or, said in other terms, it has proven not to be bold enough to bring about a real change in the way State aid law is applied throughout the European Union. Further evolution was needed.

This is why, in May 2012, the Commission embarked in the brand new, and thoroughly revolutionary, *State Aid Modernization* project (“SAM”).<sup>12</sup> With it, the Commission envisaged a review of the entire European legal framework on State Aid.

The basic assumption and mission underlying SAM is that, plainly stated, European institutions and Member States alike have no money to waste: “in times of shrinking budgets EU countries have to do more with less. This is why State aid policy needs to change tack and become more strategic.”<sup>13</sup> This requires that “National governments make more efficient use of scarce resources”<sup>14</sup> and that, in this renewed quest for efficiency, the Commission takes the responsibility to guide Member States through a new way of enforcing State aid law.

SAM singles out three key objectives:

1. to foster sustainable, smart and inclusive growth in a competitive internal market;
2. to focus Commission *ex ante* scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement;
3. to streamline the rules and provide for faster decisions.<sup>15</sup>

Interestingly, these objectives are partly similar to those underlying the overhaul of EU antitrust rules in 2003. There, too, the Commission wanted to focus on certain key areas of antitrust law, leaving to Member States the task of carrying out any residual enforcement. In the context of State aids, where decentralization is less relevant (as most of the activity needs to rest with the Commission and where private enforcement is still minimal), the common theme is that of prioritizing Commission’s intervention, with the goal to deliver more efficient enforcement at times where Commission’s resources and staff are scarce.

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<sup>10</sup> Commission Regulation (EC) 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, 9.8.2008.

<sup>11</sup> See Commission Notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009 and Notice from the Commission—Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007.

<sup>12</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *EU State Aid Modernization (SAM)* COM(2012)0209 final.

<sup>13</sup> See Joaquín Almunia, *supra* note 1.

<sup>14</sup> See Joaquín Almunia, *supra* note 1.

<sup>15</sup> Communication *EU State Aid Modernization (SAM)*, *supra* note 12 ¶ 8.

### III. SAM IN A NUTSHELL

SAM essentially consists of a number of statutory and soft-law provisions that have been (or are about to be) adopted by the European Institutions.<sup>16</sup> A good portion of the regulatory acts envisaged by SAM has been already implemented, while some are due to be released by the forthcoming summer.

Four new Regulations have been adopted so far, namely:

1. Pursuant to EU Council Regulation of July 22, 2013,<sup>17</sup> SAM entailed a review of the Procedural Regulation, to wit the fundamental piece of legislation which governs how Member States should notify State aids and how the Commission should assess their compatibility under the TFEU (discussed in more detail below);
2. In July 2013 the EU Council likewise amended the so-called Enabling Regulation,<sup>18</sup> thus empowering the Commission to broadening the list of State aids which could be *ex-ante* considered compatible with the internal market and are therefore exempted from prior notification by Member States;<sup>19</sup>
3. Thanks to the powers conferred to it by the above-mentioned Enabling Regulation, the Commission indeed considerably enlarged the number of exemptions from prior notification of State aid granted by Member States. This was done with the adoption—on May 21, 2014—of a new so-called *General Block Exemption Regulation* (“GBER”).<sup>20</sup> The new GBER, which the Commission itself defined as “another milestone of State aid modernization initiative,” allows Member States to grant more aids and higher amounts without having to wait for prior authorization by the Commission. Such allowance assumes that certain aids need not be notified any longer as “they are less likely to lead to undue distortion of competition.”<sup>21</sup> GBER carries with it two fundamental elements:
  - it “covers” a very large number of categories of aids (such as aid for local, broadband, research and energy infrastructures, innovation clusters, regional urban development fund culture and heritage conservation, audio-visual works, sport and recreational

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<sup>16</sup> For a more comprehensive and detailed description of the substantial changes to State aid legislation, see Conor Quigley Q.C., *The European Commission’s programme for state aid modernization*, MAASTRICHT JOURNAL, No. 1/2013.

<sup>17</sup> 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 93 of the EC Treaty, OJ L 204, 31.07.2013.

<sup>18</sup> Council Regulation (EU) No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ L 204, 31.07.2013.

<sup>19</sup> As already stated, the basic rule of European State aid control is that aids granted by Member States, except for those of a very low amount, must be promptly notified to the European Commission for prior approval. The Enabling Regulation, as amended on 2013, has allowed the Commission to adopt regulations identifying the criteria under which a higher number of categories of aids—such as innovation aid for large companies, certain aid for broadband infrastructures, aid for culture including audio-visual works, aid for sports, aid to make good the damage caused by natural disasters, social aid for transport of residents of remote regions, and aids for certain agriculture, forestry and fisheries issues—are “in line” with the internal market and are not subject to prior notification.

<sup>20</sup> The new GBER will enter into force the 1<sup>st</sup> July 2014 and has not yet been published in the OJ. See European Commission press release IP/14/587 and MEMO/14/369.

<sup>21</sup> See IP/14/587.

infrastructures, and aid to damages of certain natural disasters) which were not included in the scope of the previous GBER (Regulation No. 800/2008); and

- it has significantly raised the exemption thresholds for many categories of aid that were already exempted under the previous GBER.

According to some Commission studies, under the new GBER about 75 percent of current State aid plans (in volume) and 66 percent of their amounts (in value) will be exempted from prior filing; and even more aids could be exempted if Member States were to resort to the possibilities offered by the Regulation, i.e. “designing” their aid schemes so that they meet GBER’s requirements.<sup>22</sup> Aid measures that are not covered by the new GBER will obviously continue to be assessed by the Commission under the relevant guidelines.

4. On December 18, 2013 the Commission adopted a revised *de minimis* Regulation on aids of small amounts, which would fall outside the scope of EU State aid control because they are deemed to have no impact on competition in the internal market.<sup>23</sup> According to this Regulation, aids that fulfil the criteria established therein are not to be considered as State aids and do not request for prior notification to the Commission. The main quantitative criterion of the new regulation remains the same as before, as it exempts aid of up to EUR 200,000 per undertaking over a three-year period.<sup>24</sup> Nonetheless, the said new Regulation contains some relevant improvements:
  - companies undergoing financial difficulties are no longer excluded from the scope of the Regulation and will therefore be allowed to receive *de minimis* aid, and
  - the definition of what constitutes an “undertaking” has been simplified and clarified.

In addition to the said statutory acts, SAM has seen the release by the Commission of a body of new soft-law, in the form of guidelines and notices. From the launch of SAM, the Commission has adopted guidelines in the following sectors: environmental protection or energy objectives;<sup>25</sup> promotion of economic development of certain disadvantaged areas within the European Union (so-called regional aid);<sup>26</sup> research, development, and innovation;<sup>27</sup> promotion of risk finance investments;<sup>28</sup> broadband networks;<sup>29</sup> and airport and airlines.<sup>30</sup>

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<sup>22</sup> Conversely, the previous GBER—i.e., Reg. No. 800/2008—covered no more than 60 percent of all aid measures and about 30 percent of the aid amounts granted each year in the European Union.

<sup>23</sup> Commission 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, OJ L 352, 24.12.2013, in force as of 1<sup>st</sup> January 2014.

<sup>24</sup> During the procedure for the adoption of the new *de minimis* Regulation, many Member States pushed the Commission to increase the threshold up to EUR 500,000 or further. Nevertheless, based upon the consideration that “increasing the ceiling would bear important risks for competition and trade in the Single Market, in particular because of the aggregate effects of a potentially widespread use of the exemption in the current economic and financial context where Member States’ budgetary capacities also vary widely,” the Commission decided to maintain the same threshold as before.

<sup>25</sup> Communication from the Commission *Guidelines on State aid for environmental protection and energy 2014-2020* C(2014) 2322.

<sup>26</sup> Guidelines on regional State aid for 2014-2020, OJ C 209, 23.7.2013. Areas eligible for regional aid under Article 107(3)(a) of the Treaty, commonly referred to as “a” areas, tend to be the more disadvantaged within the

By the end of July 2014, three further specific sector guidelines are expected, specifically: (i) State aid for rescuing and restructuring non-financial undertakings in difficulty, (ii) State aid in the agriculture and forestry sector and in rural areas, and (iii) State aid for the promotion of important projects of common European interest.

And, last but not least, the Commission is soon expected to adopt a notice aimed at providing further clarification on the fundamental issue of what is State aid under EU law.

#### IV. A SNAPSHOT OF THE MAIN CHANGES INTRODUCED BY THE NEW PROCEDURAL REGULATION

If the new regulations and guidelines described above are, from a global perspective, an overall scenario of the new legislative framework, a key element of SAM is certainly the review of the procedural rules governing State aid control in Europe. As already mentioned, the underlying objective of SAM in this respect is to allow the Commission to concentrate its efforts on the most relevant cases (i.e., cases with a bigger impact on the internal market) and prioritize enforcement, thus improving the efficiency of the State aid control throughout the European Union. Here's a brief review of the main changes to this effect enacted.

##### A. Handling Of Complaints

A considerable innovation is the introduction of a more structured pattern for complaints of alleged illegal and incompatible State aid. In the recent past, the enforcement activity of the Commission was affected by a great number of complaints which were either lacking merits or were not sufficiently proven, yet caused the Commission to investigate and take action for fear of appeals by complainants before the EU Courts for failure to act. This risk was somewhat strengthened by judgments of the EU Courts in *Ryanair*,<sup>31</sup> where it was stated that “unlike the competition rules laid down in Articles 81 EC and 82 EC, in relation to which the lodging of a complaint is regulated by Regulations Nos 1/2003 and 773/2004, in the case of State aid no specific formal requirement attaches to the lodging of a complaint.”<sup>32</sup> In *Ryanair*, the General Court e.g. declared that the Commission acted illegally in failing to adopt a decision with regard to each and every complaint submitted by Ryanair against competing airlines.

The new rules now provide for a structured filter system. According to the new text of article 20 of the reviewed Procedural Regulation, complainants are requested to demonstrate that

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Union in terms of economic development. Areas eligible under Article 107(3)(c) of the Treaty, referred to as “c” areas, also tend to be disadvantaged but to a lesser extent.

<sup>27</sup> Communication from the Commission *Framework for state aid for research and development and innovation* C(2014) 3282.

<sup>28</sup> Communication from the Commission *Guidelines on State aid to promote risk finance investments*, OJ C 19, 22.01.2014.

<sup>29</sup> Communication from the Commission *EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks*, OJ C 25, 26.1.2013.

<sup>30</sup> Communication from the Commission *Guidelines on State aid to airports and airlines*, OJ C 99, 4.4.2014.

<sup>31</sup> Judgment of 29 September 2011, Case T-442/07, *Ryanair Ltd/European Commission*, [2011] II-00333. In this judgment the General Court declared that the Commission failed to fulfill its obligations under the treaty by failing to adopt a decision in respect to some complaints received, while dismissed the action with respect to other complaints.

<sup>32</sup> Judgment of 29 September 2011, Case T-442/07, ¶ 33.

they are true “interested parties;” if they want to submit a complaint, claims must be fact-specific and proven to a reasonable degree. In other words, complaints can no longer serve as mere fishing expeditions.

This filter system will help the Commission to better prioritize the handling of complaints, focusing solely on those sufficiently substantiated. The advantage for the Commission is two-fold, since—on one hand—it will no longer waste resources in handling unwarranted complaints and—on the other—the possession of a substantiated submission will eliminate to a greater extent the need to send many subsequent requests for information to Member States or complainants themselves.

### **B. Market Investigation Tools**

Prior to SAM, Commission’s investigations in State aid matters had to essentially rely on information submitted to the latter by Member States themselves. This has proven to slow proceedings and, in any event, not to allow the Commission to properly assess the facts at stake. In relation to this aspect, SAM turned to antitrust procedural rules, and now vests the Commission with the power to run so-called Market Investigation Tools, seeking information from the undertakings directly and not necessarily having to wait for Member States’ responses.

The use of Market Investigation Tools will enable the Commission to receive reliable data in order to conclude its compatibility assessment. At the same time, Member States will substantially reduce the administrative burden in the information-gathering phase.

### **C. The EC Vis-à-Vis National Courts**

SAM also greatly innovated the connection of EU State Aid law with private enforcement of State aid law, (i.e., proceedings pending before national courts of the Member States, especially as regards to connecting with requests for damages by companies which claim that a competitor has received unlawful aids). The Commission now is empowered to intervene as *amicus curiae* before national courts, when they rule on State aid matters. Such a new role has been recently tried for the first time in *Micula Brothers*,<sup>33</sup> a case pending in Rumania.

## **V. CONCLUSION**

It is widely perceived that procedural law is neutral and, as such, cannot change the scope and extent of underlying provision of substantive law. In the context of State aids, while this continues to be technically true, one has to acknowledge that, with SAM, EU institutions have shaped the mechanisms designed to enforce the provisions of the TFEU in a way that procedural law *de facto* resembles substantive law.

SAM is not only a full-fledged package of new procedural rules that give important new powers to the Commission. The European Union has given itself a body of law that consistently seeks efficiency of enforcement. These two elements are essential for modern enforcement of State aid law: Enforcers need powers to investigate and need to focus on doing better rather than

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<sup>33</sup> In this case, the Romanian tribunal held that Romania’s decision to revoke the incentives was reasonably tailored to the pursuit of a rational policy, specifically EU accession. For a short resume of this case see <http://youngarbitratorsbelgium.com/2014/01/08/micula-brothers-vs-romania-a-road-map-for-future-investors-in-europe/>.



necessarily doing more. With SAM, the Commission has more enforcement tools and is enabled to focus on what matters most.

Only time will tell if SAM shall have been effective. For the time being, per Humphrey Bogart's famous quote from *Casablanca*, we can only say "Play it Sam!."