



# CPI Antitrust Chronicle

May 2014 (2)

## Commissioner *Almunia's* State Aid Modernization Project—Taking Stock

Ulrich Soltész  
Gleiss Lutz

## Commissioner *Almunia's* State Aid Modernization Project— Taking Stock

Ulrich Soltész<sup>1</sup>

### I. INTRODUCTION

Over the last few years many attempts have been made to modernize the European State aid rules, such as the ambitious “State Aid Action Plan” of Commissioner Kroes and the various ideas put forward by her predecessors Monti and Van Miert. While the impact of these previous reform projects was rather limited, it seems that Commissioner Almunia has now got it right. With its “State Aid Modernisation” project (“SAM”), pushed by Director-General Italianer and his very dynamic Deputy Director-General for State aid Koopman, DG COMP has set a clear course which, in the long term, will change many areas of State aid law over the coming years.

The reform, using catchwords such as “streamlined procedures” and “focus” is intended to concentrate State aid control on cases that really do have an impact on competition in the European Union.<sup>2</sup> The SAM project, which has the potential to change the way in which State aid law will be applied in the future, consists of a number of pillars, as described below.

### II. NEW INVESTIGATIVE POWERS—REFORM OF STATE AID PROCEDURE

One major breakthrough was certainly the entry into force of the new procedural regulation in July 2013.<sup>3</sup> The procedural rules have frequently been the object of (unsuccessful) deliberations on reform, but now the Commission would appear to have finally achieved some major changes.

The most radical—and initially controversial—change concerns the Commission’s powers of investigation. It is generally known that State aid procedures are extremely lengthy and often inefficient. In the view of the Commission, one of the main reasons for this was the outdated method of fact-finding investigation that mainly drew on submissions made by the Member State concerned. The players really affected—above all the State aid beneficiaries and their competitors—traditionally merely played a lesser role in the process.

Although the Commission long had similar powers in other areas of competition, it came as a minor sensation when, in 2012, the Commission proposed that it be empowered to pose direct questions to third parties such as competitors, associations, aid beneficiaries, customers, etc. Although these plans had initially met with fierce opposition from some governments, who perceived the bilateral nature of the procedure between Commission and Member State as being

---

<sup>1</sup> Ulrich Soltész is a partner at the Brussels office of Gleiss Lutz.

<sup>2</sup> Commission, Press Release of 8 May 2012, IP/12/458; Commission, Communication of 8 May 2012 –State aid Modernisation, COM(2012) 209 final.

<sup>3</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, 2013, L204, 31.7.2013, p. 15.

jeopardized, the Commission was finally able to prevail, at least in part. Article 6a of the new Procedural Regulation gives the Commission the right to send out questionnaires to third parties, subject to strict conditions. Pursuant to Article 6b of the Procedural Regulation, as amended, the Commission may even impose fines and periodic penalty payments in cases where information is not supplied or the information supplied is incorrect.

Furthermore, the Commission is now also authorized to conduct *ex officio* “sector inquiries.” allowing sectors or aid instruments to be scrutinized where the unlawful use of aid is strongly suspected. However, given the Commission’s high workload (a fact which has always been emphasized very strongly by DG COMP) it is unclear whether it will have adequate resources to achieve these ends.

The (potentially) affected addressees are understandably not exactly enthusiastic about the two reform steps outlined above. The Commission’s extremely comprehensive requests for information in the field of mergers and antitrust are already causing a considerable amount of work and are frequently perceived by addressees as chicanery rather than as a legitimate means for gathering information.

As far as dealing with complaints is concerned, the Commission was unable to achieve all the “improvements” on its original wish list. DG COMP originally wanted to obtain a far-reaching right to pick and choose its cases. However, such a “cherry picking” approach might have led to a vacuum in legal protection for competitors; for, in its capacity as a supervisory authority, the Commission is often the only contact point for competitors who feel placed at a disadvantage by subsidies distorting competition. The Member States were therefore right in not unrestrictedly following the Commission on that point.

To stem the flood of complaints, the requirements on providing sufficient grounds for the complaint were merely made more stringent. In addition, Article 20, paragraph 2 of the Procedural Regulation, as amended, now provides for the introduction of a compulsory complaint form (which was recently published on DG COMP’s website).

### III. OVERHAUL OF EXISTING FRAMEWORK

The existing State aid framework consists of a vast number of guidelines and frameworks that were largely outdated and about to expire. The overhaul of this set of “soft law” rules is certainly a Herculean task that the Commission has taken on itself. Some of the major examples are set out below.

Following tough negotiations, the Commission and the Member States agreed on new Regional State aid guidelines that will enter into force on July 1, 2014.<sup>4</sup> With this new package the Commission will fundamentally restructure large parts of the aid landscape in the old Member States. Many areas eligible for aid will lose their status entirely.

These cutbacks are coupled with a massive increase in the requirements to prove the “incentive effects” of aid, aimed at preventing windfall profits. This is intended to avoid subsidizing investments that the recipient would have made anyway (that is, without subsidies).

---

<sup>4</sup> OJ, 2013, C209, 23.7.2013, p. 1.

The compatibility assessment as such becomes far more complex, economics playing a fundamental role throughout the whole procedure.

Overall, applicants for aid under the new regional guidelines will encounter a substantial increase in the administrative process. The growing complexity of the new rules will ultimately lead to a certain prohibitive effect; that is, undertakings will dispense with regional aid from the outset. This was probably a desired side effect on the part of the Commission.

Cases concerning banks in connection with the financial crisis still top the Commission's agenda. With its latest (seventh) Banking Communication,<sup>5</sup> the Commission has significantly tightened the requirements for the approval of State aid packages. First, as demanded by large parts of the public, certain caps have been imposed on the remuneration of company directors. Another central pillar is the streamlining of proceedings. Finally, Brussels intends to make the shareholders and hybrid creditors of "rescued" banks more accountable, in that they make higher own contributions in terms of "burden sharing."

The long announced reform of the (general) guidelines on State aid for rescue and restructuring (outside of the financial sector) is not likely to lead to any major disruption. According to the new draft<sup>6</sup> the special treatment of the financial sector will remain in place; that is, the relevant provisions will not be integrated into the general guidelines for the time being.

The draft provides for a new concept of "temporary restructuring support" (loans and guarantees) for SMEs. A further focal point aims at the improved targeting of State aid, that is, "better filters" are to ensure that State aid measures really do serve the common interest. To that end, Member States will need to set out special circumstances, such as social hardship, market failure, etc., in order to justify aid being granted. Such a "material" test, by which an undertaking's eligibility for State aid is ultimately judged, will be a novelty. In addition, the Commission has expressed its wish for improved "burden sharing" (already familiar from the financial sector). In the view of the Commission, investors in the undertaking will be required to share the burden by making a maximum contribution of their own to the costs of restructuring.

The new Guidelines on State aid for environmental protection and energy were just adopted in April 2014 following some (very controversial) formal investigations into some national schemes in support of renewable energy sources. The new guidelines are more comprehensive than the previous set of guidelines in that they also cover energy, in particular on how Member States can relieve energy intensive companies that are particularly exposed to international competition from charges levied for the support of renewables ("carbon leakage effect").<sup>7</sup> The Commission expects to close the ongoing investigations into the national schemes very quickly.

In May 2014, the Commission also adopted a new Framework for State aid for Research, Development and Innovation<sup>8</sup> which will replace the existing rules dating from 2006. The

---

<sup>5</sup> OJ, 2013, C 216, 30.7.2013, p. 1.

<sup>6</sup> The draft is accessible on [http://ec.europa.eu/competition/consultations/2013\\_state\\_aid\\_rescue\\_restructuring/index\\_en.html](http://ec.europa.eu/competition/consultations/2013_state_aid_rescue_restructuring/index_en.html).

<sup>7</sup> [http://ec.europa.eu/competition/sectors/energy/legislation\\_en.html](http://ec.europa.eu/competition/sectors/energy/legislation_en.html).

<sup>8</sup> [http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html#rdi](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html#rdi).

Framework is primarily to be used in those cases where the ceilings specified under the General Block Exemption Regulation are exceeded, resulting in the Commission being required to make an individual assessment before State aid is granted. The reform of the Framework therefore goes hand-in-hand with the reform of the General Block Exemption Regulation (see below). The new rules are to simplify innovation aid as well as foster pilot and demonstration projects. In particular new rules have been introduced on aid for the construction and development of research infrastructures. The ceilings above which aid is no longer covered by the General Block Exemption Regulation have been raised (doubled in some cases) and the aid intensity has been enhanced.

In the area of airport financing the Commission has presented new guidelines<sup>9</sup> to replace the preceding rules dating from 2005, which proved hardly workable in practice. Under the new rules, the aid intensity to finance airport infrastructure is to be more dependent on the size of the airport. Operating aid for airports that, in general, were hitherto excluded is to be allowed subject to strict preconditions. Aid granted by airports to airlines (“*Ryanair* type cases,” i.e. reduction of fees, etc.) is still regarded as problematic. All in all, it remains to be seen how the Commission intends to handle the mass problem ensuing from the application of State aid measures to several hundred airports and their various fee systems. The past few years have shown that the Commission hardly has the resources to deal with such matters.

With its revised guidelines on the application of State aid rules in relation to the rapid deployment of broadband networks,<sup>10</sup> the Commission has placed the (extremely important) promotion of the expansion of next-generation broadband and high-speed networks (so-called “NGAs,” i.e. Next Generation Access networks) on a new footing. The guidelines cover public funds for undertakings that expand networks and are based on the principles of technological neutrality. To prevent any crowding out of private investors, they stipulate that public investments must in any event lead to a “step change.” Above all, the guidelines generally provide for a tender procedure in order to minimize the extent of the aid and hence the distortion of competition.

A (minor) revolution is the Commission’s proposal for a Communication on Important Projects of Common European Interest (“ICEIs”) which the Commission intends to base on Article 107(3)(b) TFEU. To date, this special provision in the Treaty has only been used very rarely (one historic example was the setting-up of the Airbus group in the 1970s). The provision allows the support of transnational projects that are of a strategic dimension for the European Union, in particular for the realization of the Europe 2020 objectives. The new Communication might be used to support major pan-European industry projects in sectors where European industry is lagging behind, in particular in the field of so-called “key enabling technologies” (“KETs”).<sup>11</sup>

Shortly before Christmas, the Commission launched a new *de minimis* regulation with effect to January 1, 2014 in place of the preceding regulation dating from 2006.<sup>12</sup> State funding

---

<sup>9</sup> OJ, 2014, C99, 4.4.2014, p. 3.

<sup>10</sup> OJ, 2013, C25, 26.1.2013, p. 1.

<sup>11</sup> [http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_cei/index\\_en.html](http://ec.europa.eu/competition/consultations/2014_state_aid_cei/index_en.html).

<sup>12</sup> OJ, 2013, L352, 24.12.2013, p. 1.

measures have hitherto been exempted from European State aid below a certain ceiling, which is generally EUR 200,000 over a period of three years. Contrary to earlier suggestions, this ceiling of EUR 200,000 over three years has not been raised after all. Surprisingly, however—and this is a minor revolution—the new *de minimis* Regulation no longer generally excludes State aid being granted to “undertakings in difficulty.”

#### IV. WIDENING OF THE “SAFE HARBOUR:” THE REVISED GENERAL BLOCK EXEMPTION REGULATION (GBER)

The reform of the General Block Exemption Regulation (“GBER”),<sup>13</sup> which was adopted on May 21, 2014, deserves to be called a real milestone. In particular the Commission’s efforts to broaden the scope of the GBER are certainly aiming in the right direction. The overall intention of the reform is to be relatively generous in exempting “unproblematic categories of aid” from the prohibition of State aid. This would affect areas such as culture, broadband support, innovation clusters, sporting and leisure facilities, relief from natural disasters, etc. This is somewhat surprising, given that the Commission had hitherto insisted that “trifles” such as the public funding of public libraries, museums, swimming pools, community centers, or local sports facilities should always be notified and approved by DG COMP. Fortunately, this will no longer be necessary. The Commission’s new thinking in this regard is a breath of fresh air.

This will have a positive effect above all on local authorities who understandably have no wish to notify every single financing of local infrastructural measures to the Commission. The ceilings contained in the new GBER are certainly generous and therefore quite likely to make life easier in towns and municipalities. The Commission expects that three-quarters of the current State aid measures and approximately two-thirds of the State aid amounts may possibly be exempted from the notification requirement. The new GBER is therefore quite likely to have a real impact.

The generous exemption planned under the new GBER is the inevitable consequence of constantly extending the notion of aid and expanding State aid control to include increasingly more new areas. The Commission, which has always single-mindedly argued in favor of a wide scope of State aid for decades, seems to have finally realized that it is not able to process all these cases. This insight is, in itself, a positive development. It would not be surprising if the scope of the GBER were extended even further in the future.

#### V. DRAFT NOTICE ON THE NOTION OF STATE AID—VERY WIDE SCOPE OF THE STATE AID RULES

In addition, the Commission has proposed a new draft notice designed to give practical guidance on the interpretation of the notion of State aid.<sup>14</sup> It goes without saying that the question whether a measure constitutes State aid or not is of pivotal importance as it determines whether a measure is subject to the Commission’s approval before it can be implemented.

The new draft notice is certainly a very sophisticated, comprehensive, and thorough summary of the existing case law, written largely in the style of a (high quality) textbook.

---

<sup>13</sup> [http://ec.europa.eu/competition/state\\_aid/legislation/block.html#gber](http://ec.europa.eu/competition/state_aid/legislation/block.html#gber).

<sup>14</sup> <http://ec.europa.eu/competition/consultations/open.html>.

However, in general, the draft notice adopts a very broad scope of the notion of State aid when interpreting the case law of the Courts. While this approach may be partly a reflection of the case law in this area, the Commission still seems to take the widest interpretation possible which aggravates the problem described above, namely that the Commission will not be able to process all these cases.

## VI. OUTLOOK

During the last few years State aid law has developed in an extremely dynamic manner, which is also reflected by the growing academic interest in this field of law. The enormous speed of legislative action that the Commission developed last year has indeed been remarkable.

However, realistically speaking, the Commission will ultimately need to keep up this pace of reform since—given the constantly broadening scope of State aid control—the Commission can certainly expect more work in the future, including in its function as a (quasi) legislator.

One of the key challenges facing the Commission will therefore lie in finding ways and means of “handling” the rising flood of cases in the future—also against the backdrop of further EU expansion. The problem can certainly not be solved by creating increasingly complex regulations. Sooner or later the Commission will need to take the bull by the horns again and radically extend the scope of the GBER to avoid being submerged in a deluge of cases.