

REINFORCING STATE AID MONITORING AND CONTROL AT NATIONAL LEVEL

UNICE DISCUSSION PAPER

Executive Summary

- Volumes of state aid in the EU remain at very high levels, with the consequent risk of market distortions threatening EU competitiveness. To quote the Commission, state aid represents “foregone opportunities to use resources efficiently” (7th Survey on state aid in the EU).
- The first steps have now been taken towards the Commission delegating some of its state aid policing activities to the Member States. This decentralisation clearly carries with it the strong risk of deterioration in state aid control and the uniformity of its application.
- National courts do not at present provide an effective means of redress for competitors adversely affected by state aid. Decentralisation of state aid policing will exacerbate these difficulties.
- Despite the trend towards decentralisation, many of the problems of state aid control occur in areas which are decentralised, *i.e.* where activities already take place at a national level. Here, increased centralisation may be needed.
- In this context, increasing the Commission’s powers of inspection should be considered.
- The key institution for state aid enforcement must remain the Commission. However, national controlling bodies could play a useful role in relation to illegal aid, the enforcement of Commission decisions and the monitoring of state aid decisions taken by Member States following decentralisation. For the first two tasks, the national competition authorities, or independent state aid authorities, could be the appropriate body, while the monitoring could be carried out by the national audit offices.
- DG Competition resources devoted to state aid control are currently seriously inadequate and must be improved to enable the Commission to fulfil its obligations under the Treaty.
- Increased efficiency of national courts is needed both in relation to the control of illegal aid and the enforcement of Commission decisions. Increased efficiency could be achieved through a remedies directive, improving and harmonising national court proceedings in relation to state aid within the EU and the creation of specialised state aid courts.
- The Commission could be given *locus standi* before national courts both in respect of the pursuit of illegal aid and of securing its recovery.
- A public register of all national state aid decisions should be established by the Commission. This should be a priority as the easiest and best way of increasing transparency.



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1. STATE AID CONTINUES TO UNDERMINE EU COMPETITIVENESS

An analysis of the Commission's Eighth Survey on State Aid¹ shows that, although the overall volume of state aid is trending downwards, it remains very high in absolute terms, averaging €93 billion a year during the review period 1996-1998. This represented 1.1% of GDP in the EU as a whole.

It is important to note that these figures understate the real level of state aid as they only cover aid approved by the Commission. They do not of course include aid that remains undetected. By definition this is unquantifiable, but since 22% of the cases registered by the Commission in 1998 concerned aid that had not been notified to the Commission, it is reasonable to assume that the volume is considerable. (For example, the Commission has acknowledged that failure to notify aid given in the form of loan guarantees is a particular problem.)

In the **manufacturing sector**, the 15% fall in aid between 1994-96 and 1996-98 is in large part due to the substantial reduction in the exceptional aid approved for the Neue Länder. When the latter is excluded, the reduction aid volumes drops to just 5%. In fact, the level of aid per person employed increased in 10 of the 15 Member States.

State aid also remained extremely distortive, due to the large variations in aid volumes available in different Member States. Aid to manufacturing sector ranged from €188 per person in Portugal to €1,569 per person in Italy. It will also be noted that *per capita* aid amounts tend to be higher in the richer Member States.

It is therefore clear that state aid remains a significant problem in the EU, requiring effective monitoring and control.

2. STATE AID CONTROL AS IT OPERATES TODAY

State aid control consists of the following elements:

2.1 Monitoring

Monitoring of state aid measures, so far, has been done exclusively by the European Commission. This relates in particular to checking that aid measures have been pre-notified to the Commission in accordance with Article 88(3) (formerly 93(3)).

¹ Eighth Survey on State Aid in the European Union.

2.2 Assessment and enforcement in relation to aid which may be illegal

Aid which has not been notified to and approved by the Commission is illegal. According to the European Court of Justice² the control of illegal state aid is almost exclusively in the hands of the national courts. It is their duty to ensure that no effect is given to a proposed aid measure until the Commission has reached a final decision on the substantive merits of the case (ie whether the aid is compatible or not). The national judges must use all available remedies under national law to make sure that effect is given to the notification and standstill obligations. Remedies include the grant of interim relief, an order for repayment of illegally granted aid and the award of damages to injured third parties.

The role of the Commission in relation to illegal aid is limited to specific circumstances as defined in Article 11 of the Procedural Regulation³. Only where there is (i) no doubt about the aid character of the measure and (ii) there is an urgency to act and (iii) there is a serious risk of substantial and irreparable damage to a competitor, is the Commission entitled to adopt a decision requiring the Member State provisionally to recover illegal aid⁴.

2.3 Substantive assessment of state measures

The substantive analysis of compatibility of an individual state aid or an aid scheme under the state aid rules (i.e. whether any of the exemptions set out in Article 87(2) EC Treaty (formerly Article 92(2)) apply) is within the exclusive competence of the European Commission.

(Note: The block exemptions (see below) will however reduce the scope of assessment by the Commission in certain areas.)

2.4 Enforcement of Commission decisions

Enforcement of substantive rules of compatibility covers two cases: where the Commission takes a negative decision and aid was already granted, and where the Commission approval of aid is subject to conditions.

Where the Commission has taken a negative or conditional decision, it is for the Member State concerned to ensure compliance with such a decision. Recovery or imposition of conditions is effected in accordance with national law. However, national law cannot be invoked to frustrate the effect of the decision.

The Procedural Regulation states in Article 14 that “recovery shall be effected without delay and in accordance with the procedures under national law of the Member States concerned, provided that they allow the immediate and effective execution of the Commission’s decision.” It is unclear to what extent, if any, Article 14 has changed the status quo.

Conclusion

Of the four main components of state aid control, only two (monitoring and substantive assessment of compatibility) are carried out centrally, while the other two (assessment and enforcement of illegal aid and enforcement of Commission decisions) operate more or less exclusively on a national level.

² Case C-354/90

³ Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty

⁴ In the past, UNICE has stated that it regrets these conditions (which were not included in the Commission's proposal for the Procedural Regulation), since they weaken the Commission's power of interim recovery.

3. IMPACT OF THE BLOCK EXEMPTION REGULATION

The Block Exemption Regulation⁵ for the first time enables the Commission to delegate some of its monitoring activity (under 2.1 above) and some of its powers to decide on the compatibility of aid (under 2.3 above) to the Member States⁶. This delegation of powers will apply to six categories of aid, plus the assessment of *de minimis* aid. A series of subsidiary “group exemption” regulations for each of these categories will in due course be promulgated, laying down detailed rules for the Member States to follow.

The aim of the block exemptions is not to allow Member States the same degree of assessment in areas covered by them as enjoyed by the Commission. “If the block exemption regulations leave a margin of discretion, serious problems of legal uncertainty could arise and the effectiveness of state aid control will suffer. The Commission will do everything it can to make sure that its legislation is precise and easy to understand and apply.”⁷ Nevertheless, it is clear from some of the initial drafts that this will not be easy.

While the application of simple monetary ceilings should not of itself allow for flexibility of interpretation by Member States, in many cases Member States will be required to make more subjective assessments of how to categorise particular measures. Therefore, even if one discounts the dangers inherent in allowing Member States to police their own activities, there is a genuine risk of differing interpretations emerging across the EU, leading to an increase, rather than reduction, in market distortions arising from state aid.

4. USE OF NATIONAL COURTS - EXISTING SITUATION

The Commission recently commissioned research into whether national courts were well equipped to handle state aid cases in instances where they would theoretically be a more appropriate vehicle for resolving disputes than the Commission. With Member States becoming involved in the assessment of state aid, it is likely that the number of instances in which national courts are the more appropriate vehicle will rise.

The report⁸ showed that national courts were not at present an effective means for aggrieved competitors to seek redress.

- Although remedies existed in all Member States for competitors to obtain from Member States both the recovery of aid and damages, the procedures involved varied enormously.
- The ability to seek an injunction to prevent the grant of aid was not universally available.
- Only 115 cases had ever been brought. Of these, only 28 were actions brought by competitors.
- The largest number of cases (52%) involved companies seeking relief from alleged discriminatory impositions of tax – primarily in Germany and France.

⁵ Council Regulation 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal state aid.

⁶ UNICE in the past has welcomed this decentralisation in principle, as a means of allowing the Commission to concentrate on the more serious cases. Nevertheless, UNICE stresses that decentralisation should not be used as an excuse for diminishing DG Competition's already limited resources. On the contrary, UNICE is concerned that the State Aid Directorate is woefully under-resourced for the effective administration of the Commission's obligations under the treaty.

⁷ Jonathan Faull (former Commission Deputy Director-General responsible for state aid): “Decentralisation Enforcement of State Aid Law”, 1999 EUI Competition Workshop, page 9.

⁸ Application of EC state aid law by the Member State courts, Association Européenne des Avocats, November 1998.

- The third largest category (14%) involved state aid beneficiaries trying to resist the recovery of aid following a negative decision by the Commission. This illustrates a significant principal weakness of the national courts as enforcers of state aid laws: there are genuine difficulties in bringing cross-border cases, of which evidence/disclosure is the most important.
- In very few instances were cases brought by companies who were not based in the country in question.
- There were only three cases in which competitors were able to achieve the economic goal they were pursuing.

5. PROBLEM AREAS AND POSSIBLE SOLUTIONS

The main problems in relation to state aid control are as follows:

5.1 Lack of control of illegal aid

According to estimates from the European Commission, 22% of cases registered by the Commission in 1998 concerned unnotified (i.e. illegal) aid. In the light of this large number and the close scrutiny of commercial and governmental activities in many sectors, the absence of any significant number of cases before the national courts clearly points to deficiencies in the assessment and control of illegal aid.

The lack of control of illegal aid is due to a number of reasons. First, third parties often lack the incentive to bring a case of illegal aid before the national courts, as the costs of litigation may exceed possible benefits. Second, third parties lack investigatory powers and may therefore be unable to establish that illegal aid was granted (this problem is related to the discovery proceedings before national courts). Third, it seems that national courts are not always sufficiently familiar with EC state aid rules to deal adequately with questions of illegal aid. Fourth, foreign competitors may lack knowledge of the relevant legal system, while national competitors may have inhibitions to start a legal action against their own government.

There are various ways in which the control of illegal aid could be improved:

- **giving the Commission a greater role:** one problem with the control of illegal aid is that private parties often lack the incentive as well as the investigating powers to pursue illegal aid. This indicates that the Commission should be given a greater role in the control process of illegal aid, either directly, by lowering the thresholds of Article 11 of the Procedural Regulation, or indirectly, by giving the Commission *locus standi* before national courts, as a means of enforcing the recovery of illegal aid. The Commission should also be given the appropriate resources.
- **allowing national controlling bodies a role in controlling illegal aid:** as with the Commission, a direct or indirect role would be conceivable. National controlling bodies would only be appropriate if they were sufficiently independent of their government.
- **the establishment of specialist courts:** ensuring that national courts dealing with illegal aid are sufficiently familiar with the issues.
- **more efficient court proceedings.**

5.2 Lack of enforcement of Commission decisions

In the past the track record for the enforcement of negative and conditional decisions has been less than impressive. Between 1982 and January 1998 aid was only recovered in 36% of cases.⁹

The absence or delay of enforcement has been due to two main factors:

- (a) The Commission's limited involvement in the enforcement process: this has been partly due to the limited resources of the Commission, and partly due to its restricted investigatory and legal powers. The Commission's investigatory powers have been increased as a result of the Procedural Regulation, but only as regards on-site monitoring to verify compliance with a decision.
- (b) Delays through national litigation: negative and conditional Commission decisions are often challenged by beneficiaries in national courts, for example on the basis of legitimate expectations. While these challenges often ultimately fail, they may delay enforcement of a Commission decision for ten years or even longer, thereby completely negating the effectiveness of EU state aid disciplines in removing injury to unaided competitors.

As mentioned above, Article 14 of the Procedural Regulation stipulates that "recovery shall be effected without delay", its legal impact, however, is uncertain.

Ways to improve the enforcement of Commission decisions include:

- **more efficient court proceedings:** UNICE has in the past urged the need for a remedies directive, which could harmonise the rights of parties, the nature of the remedies available and procedural and other rules. The ability to obtain speedy injunctive relief and the need for effective discovery procedures in all jurisdictions are of particular importance.
- **a role for national controlling bodies in enforcing Commission decisions**
- **greater investigatory powers for the Commission:** it will have to be seen to what extent the on-site monitoring powers are sufficient.
- **giving the Commission *locus standi*:** before national courts.

5.3 Delays in substantive assessment

Substantive assessment of the compatibility of state aid measures by the Commission is often subject to considerable delay. The group exemption regulations may help the Commission to focus on important cases.

An independent role for national controlling bodies in the substantive assessment of issues delegated to Member States by the group exemption regulations could help establish the necessary division of power between the twin roles of Member States as both policemen and donors. Any role in substantive assessment beyond this would not be appropriate as this may lead to an inconsistent application of the state aid rules.

5.4 Lack of Transparency

UNICE has on several occasions in the past pursued its case for greater transparency in the application of the state aid rules. This need will become more acute with the partial decentralisation of state aid control to the national level. UNICE proposes the introduction of a regularly updated public register (at EU level) of all national state aid decisions.

⁹ Sixth Survey on State Aid in the European Union in the Manufacturing and Certain Other Sectors. COM(98) 417.

6. CONCLUSION

6.1 Increased centralisation

While decentralisation of state aid seems to be the current buzzword, UNICE stresses that the Commission must remain the key institution for effective implementation of state aid controls. Indeed, many of the problems of state aid control occur in areas which are decentralised, ie where activities already take place at a national level. Here, increased *centralisation* may be needed. For example:

6.1.1 The Commission could be given *locus standi* before national courts in order to improve both the control and recovery of illegal aid.

6.1.2 The Commission's powers of investigation could be extended beyond the monitoring of compliance with conditions imposed.

6.2 Increased decentralisation: a role for national controlling bodies

National controlling bodies could play a useful role in relation to illegal aid, the enforcement of Commission decisions and the monitoring of state measures. For the first two tasks, the national competition authorities may be the appropriate body, while the monitoring could be carried out by the national audit offices.

Apparently, two national competition authorities (namely in Denmark and Portugal) have already been given responsibility for state aid matters and it would be helpful to draw from their experience.

6.3 Improved decentralisation: increased efficiency of national courts

Increased efficiency of national courts is needed both in relation to the control of illegal aid and the enforcement of Commission decisions. Increased efficiency could be achieved through a remedies directive, improving and harmonising national court proceedings in relation to state aid within the EU, and the creation of specialised state aid courts.
