



7 November 2012

APPLYING THE STATE AID MODERNISATION PRINCIPLES TO SPECIFIC AREAS

KEY MESSAGES

- 1 The application of competition rules and efficiency criteria in public spending are key at a time when Member States are looking for growth measures with limited budgets.
- 2 Strengthening mechanisms to avoid distortions of competition in the single market is crucial and must go hand in hand with a strong focus on stimulus and growth.
- 3 Achieving efficiency through decentralisation of state aid control must not result in a more subjective and less uniform application of the rules in Europe. Any reform should increase legal certainty and avoid a risk that national control systems be less rigorous, in all likelihood leading to more incompatible aid.

WHAT DOES BUSINESSEUROPE AIM FOR?

- *Improve the functioning of the single market, through a more efficient and effective state aid policy, which does not result in higher overall amounts of aid.*
- *Increase transparency on national aid measures, in particular regarding the significant amounts of illegal aid that currently are likely to go undetected.*
- *Achieve more effective enforcement and more objective and uniform application of the rules at national level, in particular through increased responsibilities for Member States in case of non-compliance.*

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BUSINESSEUROPE'S VIEWS:

APPLYING THE STATE AID MODERNISATION PRINCIPLES TO SPECIFIC AREAS

1. INTRODUCTION

State aid rules play a key role in the regulation of the single market. BUSINESSEUROPE supports the Commission initiative to reflect on how the principles of the state aid modernisation initiative can be applied effectively in the following areas:

- State aid procedures
- State aid for environmental protection
- State aid to support SMEs access to risk capital
- Rules applying to small aid amounts (de minimis)

We continue to endorse the Commission's view that state aid can be an appropriate tool to address market failures and believe that the principles of the reform could already be fruitfully applied to some policy-specific rules that are currently under revision.

The comments below provide our views on how the modernisation should be conducted in general in state aid, and in particular in the context of the four recently launched consultations above.

2. GENERAL COMMENTS

1. First and foremost, in order to further improve the functioning of the single market, BUSINESSEUROPE stresses that these reforms should not necessarily result in higher amounts of aid overall and should respect the principle of "better targeted aid".
2. Second, stronger state aid enforcement policy is needed: in 2011 the total amount of illegal aid recovered in the last 10 years reached € 10.9 billion¹. The quantity of unlawful and incompatible aid and the large number of non-notified State aid measures are signs of a problem that needs to be addressed. BUSINESSEUROPE is seriously concerned by the fact that in addition to the amounts actually recovered, significant amounts of illegal aid are likely to go undetected.
3. Finally, the application of competition rules and efficiency criteria in public spending are key at a time when Member States are looking for growth measures with limited budgets. Europe is experiencing extremely difficult economic times, high unemployment levels and very limited growth prospects. In this context, it is key that the revisions maintain a strong focus on stimulus and growth.

¹ See European Commission press release of 18 February 2011:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/201&format=HTML&aged=0&language=EN&guiLanguage=en>

3. SPECIFIC COMMENTS

3.1 STATE AID PROCEDURES

Timing

4. BUSINESSEUROPE believes that a consolidation and tightening of procedures is necessary. The approximate time limits currently foreseen can be very easily extended. The Commission should introduce strict time limits for state aid cases, comparable to those in merger control procedures. This would increase the predictability for companies and force Member States to gather and submit the necessary information timely. A first step in this direction could be an extension of the “Simplified Procedure for the treatment of certain types of State aid”.
5. The long duration of complaints investigation (often up to many years) creates legal uncertainty, which in turn results in i.a. lack of investment and other incentives for companies. Moreover, private businesses lose interest in pursuing alleged illegal state aid when results would take years to take effect. Delivering decisions within business-relevant timelines is therefore vital. We support measures which allow the Commission to obtain complete and correct information from the parties involved. At the same time, we do not believe that limiting the scope of the cases which would be subject to a complaint would be an appropriate way to tackle this issue, or would represent a genuine improvement of the State aid system as such.

Monitoring and enforcement

6. While acknowledging the key role of the Temporary Framework in response to the crisis and the advantages brought about by the General Block Exemption Regulation (GBER), BUSINESSEUROPE stresses that since their introduction, more and more aid is exempted from the Commission’s centralised control. Increased decentralisation of State Aid control risks leading to subjective application of the rules by Member States and boosting the amount of unlawful and incompatible state aid with detrimental effects to free and fair competition.

This seems to be already happening according to the December 2011 European Court of Auditors’ report on State aid, which suggested that better national controls were needed. The report revealed important compliance gaps, especially when it comes to block-exempted measures directly implemented at country level. Preliminary results show that over 40% of the cases monitored by the Commission are potentially problematic². The Commission confirms that “substantive problems or procedural issues (such as transparency, reporting, speed and quality of answers) were identified in a growing minority of cases. That indicator may point to issues of administrative capacity or lack of knowledge of the State aid rules at Member State level. The cases in which no appropriate solution was identified are still being investigated.”³

7. Achieving efficiency through decentralisation of state aid control needs to be counterbalanced by ensuring that the result will not be a more subjective and less uniform application of state aid legislation in the different EU countries. Any reform should increase legal certainty and avoid a risk that national control systems be less rigorous, in all likelihood leading to more incompatible aid.

² Vice-President Joaquín Almunia speech on 7 June 2012 (SPEECH/12/424).

³ Commission staff working paper accompanying the Report on Competition Policy 2011 (COM(2012)253).



8. This can be achieved for example by guaranteeing greater clarity in the rules, and introducing more reporting obligations for Member States to have more transparency on the aid measures put in place. Reporting should focus more on the quality than quantity of information, and the way it is collected, also to avoid increased information requirements on companies. In this context, it is important that block exemption regulations are clear, that all relevant information is accessible about block exempted aid, and that the Commission carefully monitors the implementation of the rules.
9. The Commission highlights the importance of effective national systems (including enforcement of state aid by national Courts). We strongly agree with the need for stronger enforcement and the importance of providing companies with compensation tools against Member States for the damage they create by breaching EU State aid rules. However, as a consequence of a number of legal requirements and needed safeguards (e.g. prove causation and/or quantify the loss suffered) national courts are often not in a position to ensure that State Aid law is enforced efficiently. Member States should make sure their judicial systems allow those harmed by illegal aid to effectively exercise their rights stemming from EU law, intervening against unlawful aid, asking for its recovery and claiming damages where appropriate. In addition, the possibility of seeking injunctive relief should be made more realistic by ensuring much more transparency on the aid measures that Member States are about to put in place.

In this context, we encourage the Commission to publish a guide on enforcement of State aid law at national level. Such a guide should target undertakings and address issues like relevant national courts, standing, damages actions and other important enforcement issues. Further guidance in this field and a more proactive stance of the Commission in national State aid litigation would be highly welcomed.

10. Consistent with the goal of improving enforcement, BUSINESSEUROPE strongly recommends stressing further the need to apply systematically the principle established by the European Court of Justice in the Deggendorf case: new aid cannot be granted to those who have previously received illegal aid until the latter is recovered. When the Commission approves notified aid, it would send an important political signal by referring to the Deggendorf principle and clearly stating that the approved aid scheme shall not be applicable to beneficiaries subject to an outstanding recovery order following a previous Commission decision declaring the aid illegal.
11. To further increase State Aid discipline it could be considered to introduce fines on the national authorities that granted the unlawful aid in question, hereby creating financial incentives for the Member States to respect the EU state aid rules.

Prioritisation

12. According to the SAM Communication the Commission will set priorities for complaints handling, in order to prioritise allegations of potential aid with a large impact on competition and trade in the internal market. The proposal to allow the Commission to set priorities and take more ex officio investigations deserves consideration. The Commission should however better explain the criteria upon which the prioritisation will be based, and provide more details about how non-priority cases would be dealt with. Shifting to more ex-post evaluation for the “non-priority” cases risks leading again to lack of clarity and control on the compatibility of Member States’ measures.

13. In this context, the criterion of the effect on intra-EU trade plays a key role. The case-law of the Court of Justice clarifies that there is no threshold or percentage below which trade between Member States can be regarded as not having been affected, but the Commission has in several cases concluded that activities had a purely local character and did not affect trade between Member States. However; even when a single case does not affect trade, BUSINESSEUROPE stresses that the cumulated effect of a number of “small” cases might have an impact on competition.

Handling of complaints

14. BUSINESSEUROPE is concerned about the burdens placed upon the complainants. To increase the chances for a successful complaint, the complaint form has to be supported by detailed information about the alleged unlawful aid. Access to evidence seems to be an obstacle especially in cases about SGEI and overcompensation. Together with a new focus from the Commission on the most significant cases, these additional burdens could discourage interested parties from filing meritorious complaints. The system could appear less accessible for the complainants than it is today, and limiting the scope of the cases which would be subject to a complaint would not represent a genuine improvement of the state aid system.
15. The existing complaint form already requires a market assessment and legal knowledge. It also requires detailed information about the alleged aid measure which might be difficult for complainants to acquire, particularly if they are located in a different Member state from that in which the aid is being provided. This might not be an insurmountable problem for large companies/associations, but will deter small companies. In addition, for cases concerning SGEI and over-compensation, even large companies struggle to access the evidence. In this context, the Commission should aim to make the system more accessible than it is today.
16. It would be useful for the complainant to get access to the Commission’s file, including the correspondence between the Commission and the member state in question. Such access to the file would allow the complainant to substantiate the complaint.
17. Better communicating and explaining to citizens what state aid is about can also help avoid creating false expectations and decrease unfounded complaints. We support the Modernisation communication’s idea to better explain the notion of State aid – this could be done for example by way of concrete examples based on existing case-law.
18. As regards the tools available to gather information, according to article 22 in Regulation 659/1999 the Commission is allowed to undertake on-site monitoring visits. It would be useful to clarify how this procedure will be applied in practice (e.g. like in the field of antitrust) to safeguard the rights of the companies involved.

While market assessment is a factor in a state aid investigation, state aid is not directly analogous with competition law. BUSINESSEUROPE concurs with the need to give the Commission more effective investigative tools, but this should not involve disproportionate burdens on the business involved and works on a voluntary basis.

We encourage Member States to let the Commission apply “market-investigation tools” to collect information on specific state aid cases, when Member States are not sufficiently cooperative, through direct contacts with relevant businesses, therefore bypassing the current system where national authorities are the only interlocutors.



However, we stress that any suggestion that competitors to the aid beneficiary should be required to provide market data would be an undue regulatory burden – and we oppose any attempt to penalise companies for non-compliance. It is in a company's interest to co-operate in an investigation if that company has a genuine fear that the proposed aid will benefit a competitor. That should be sufficient motivation, so cooperation must remain on a voluntary basis and companies should not be faced with sanctions in relation to the Commission gathering information process.

19. The introduction of a hearing officer could also be considered to safeguard the effective exercise of procedural rights throughout state aid proceedings before the Commission. A similar hearing officer initiative already exists in merger and antitrust proceedings. It could also be considered to set up a state aid stakeholder expert group, which could provide the Commission with high-quality expertise and practical insight with a view to assisting it in shaping and implementing EU state aid policy.

3.2 AID FOR ENVIRONMENTAL PROTECTION

20. The current Guidelines on State Aid for environmental protection deal mainly with “classical” environmental measures. They do not address many of the measures introduced by Member States to reduce their environmental footprint. This is for example the case for market-based support mechanisms to incentivise investment in more expensive but lower carbon-intensive technologies such as renewables. Where these mechanisms involve State resources, the Commission should develop guidelines aimed at ensuring, inter alia, that there is no over-compensation and no distortion of competition between similar operators on the relevant market, i.e. that the aid is paid on a non-discriminatory basis.
21. Many support mechanisms however do not involve the transfer of state resources. This is the case where the incentive is provided for example by means of a carbon tax. Such taxes are designed to favour low carbon technologies by obliging higher carbon generators to internalise the cost of carbon. So long as such taxes are applied on a non-discriminatory basis, they clearly do not constitute State aid to the low carbon generators and as such are outside the scope of the Guidelines.
22. Support to low carbon generation may also be provided through a mechanism funded by the market players themselves, i.e. where the cost is borne not by state resources but by energy consumers. Developing guidelines would also be inappropriate in this case, as these measures do not comprise State aid. Furthermore, provided the incentives are paid on a transparent and non-discriminatory basis, there should be no distortion of competition. Also, while it is a highly desirable objective to avoid over-compensation, BUSINESSEUROPE does not believe that it is legitimate to attempt to achieve this by means of State aid controls in the case of this type of mechanism.
23. Policies aimed at combating climate change are becoming extremely expensive, leading to a very real risk of carbon leakage for energy intensive industries. The precedent for recognising the risk of carbon leakage has already been set in the EU ETS Directive, but this risk is also inherent in a wide range of national policies, which frequently can have a cumulative impact. While State aid control is about minimising competitive distortions within the EU, climate change policies can create competitive burdens which distort competition affecting both intra- and extra-EU trade. In the interests of Europe's growth agenda, the avoidance of carbon leakage must be adopted as a key guiding principle when assessing environmental aid measures.



24. Many Member States have in recent years become concerned about the cost impact of the various support mechanisms to renewables on the competitiveness of energy intensive industries (EIs), and have sought to introduce ways of offsetting these “artificial” costs or of compensating the EIs for them. The Commission should develop guidance on the compatibility of such compensation where it takes the form of transfers of state resources, drawing on the precedent already set in the EU ETS guidelines. This would include for example aid paid in the form of compensation to electricity consumers to offset the indirect cost of upstream carbon taxes.

However, other offsetting mechanisms (such as those addressing the indirect costs of the type of support measure described in paragraph 22) may be integral to the structure of the electricity market: in other words, such mechanisms need not involve the transfer of state resources, but merely involve an asymmetric distribution of costs among different categories of consumers. While it is desirable that such mechanisms are transparent and applied in a non-discriminatory manner, they do not in BUSINESSEUROPE’s view involve state aid.

25. The existing Guidelines have a section regarding aid in the form of reductions of or exemptions from environmental taxes, paid directly by the undertakings in question (paragraphs 151 – 159). It would be beneficial to revise this section making the wording more user-friendly and less formalistic. It could be considered to emphasise the use of agreements between Member States and recipient undertakings or associations of undertakings whereby the recipients commit themselves to achieve environmental protection objectives, hence such agreements would incentivise companies to cooperate to achieve certain environmental objectives.

3.3 SMEs ACCESS TO RISK CAPITAL

26. SMEs tend to experience difficulties when it comes to accessing finance. Several financial instruments are particularly suitable for SMEs: asset backed securities, venture capital (in particular for innovative companies), mezzanine finance and micro-credit. However, they are presently not sufficiently available for SMEs and thus hinder their growth ambitions.
27. The EU market for venture capital is still fragmented along national borders which inhibits SMEs’ access to capital. Creating a well functioning single market for venture capital by removing obstacles for these investments across borders is crucial.
28. Public schemes in favour of SME finance should be boosted at both national and European level. Public financing should however be limited to identified market failures, which can differ from one Member State to another. For specific types of projects, such as innovation and R&D, international development or investments in eco-friendly energy technologies in particular, SMEs experience finance shortages. However, it has to be noted that state aid rules offer various options to support companies in these areas and this should be taken into account when revising the current guidelines.
29. Finally, having in mind the SAM objective of streamlining the rules BUSINESSEUROPE believes it important to evaluate the actual use of the possibilities offered under the current guidelines. It might be worth keeping this in mind when evaluating the need to extend the application of the guidelines – especially given the availability of other tools to ensure access to finance for SMEs.



3.4 DE MINIMIS AID

30. It is important to examine thoroughly the current use of de minimis aid in the Member States. The probability that de minimis aid contributes to EU objectives of common interest is hard to demonstrate. On the contrary, an increase in the thresholds would lead to an imminent risk that Member States will expand their aid levels to an extent likely to distort competition further and impede restructuring where necessary. A higher aid ceiling might be detrimental to free and fair competition especially between SMEs, where even small amounts of aid could distort competition. To minimise the distortive effect, any review of the de minimis rules should also take into consideration the cumulative effect of various national, regional and local measures.
31. The Court of Justice has consistently held that “the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected” (e.g. C-172/05, Heiser, paragraph 32; Case C-280/00, Altmark, paragraph 81). Especially in sectors with overcapacity – in combination with a large number of smaller undertakings – even small aid amounts could risk creating distortions of competition and affecting trade between Member States.

To minimise the risk of creating distortions of competition BUSINESSEUROPE believes that de minimis aid should be limited to clearly identified market failures – such a link to market failures would be in line with the Commission’s communication on the SAM, proposing that “...modernised State aid control should facilitate the treatment of aid which is well designed, targeted at identified market failures and objectives of common interest, and least distortive (“good aid”)[...]”.

32. The current policy of the Commission as laid out in the de minimis regulation is that subsidies below the de minimis threshold are not considered “state aid” by definition. In view of the above considerations, BUSINESSEUROPE recommends that this is reviewed so that measures falling under the current threshold are considered state aid. While de minimis “state aid” could be subject to a block exemption regulation and be deemed automatically compatible so to avoid any additional administrative burden that would otherwise be placed on Member States or enterprises involved, the change of definition would allow the Commission to exercise its monitoring and enforcement powers according to the Treaty when needed and taking into account any extra administrative burdens.
33. BUSINESSEUROPE opposes an increase in the current de minimis thresholds. However, if the Commission considers this possibility, such increase should be as limited as possible and accompanied by much stricter compatibility criteria for the new aid measures falling under the application of the de minimis rules, as outlined above in para 31. In addition, Member States should be obliged to supply the Commission with annual reports on the application of the de minimis regulation to increase transparency, to be made public on the Commission’s website.

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