

12 June 2013

THE REVISION OF STATE AID PROCEDURAL RULES

1. INTRODUCTION

1. 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 effectively reflected in more efficient State aid procedures.
2. First and foremost, in order to further improve the functioning of the single market, BUSINESSEUROPE stresses that a 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.
3. 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. It is therefore crucial that the revision of procedures aims at making state aid enforcement more effective, leads to more transparency and provides higher legal certainty.

2. SPECIFIC COMMENTS

2.1 HANDLING OF COMPLAINTS

Timing

4. A consolidation and tightening of procedures is necessary. The 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. We stress in this context the importance of extending the use of the “Simplified Procedure” for 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

¹ See 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>



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. In recent years, more and more aid has been 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.
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.
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.

Prioritisation

11. 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.
12. 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.

Investigations

13. The Commission proposes to introduce market information tools (MIT) and a legal basis for conducting investigations into particular sectors of the economy and into particular aid instruments in order to enable information directly from the market. 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 **should work on a voluntary basis**.
14. In principle market information can contribute to a better basis for the Commission when assessing state aid; however we cannot support the proposal to give the Commission the power to issue fines if the companies do not provide the Commission with the information requested, or in relation to sector inquiries. The Commission’s proposal to extend antitrust tools to State aid policy is inconsistent and disproportionate.
15. The Commission should be able to have direct contacts with relevant businesses on specific state aid cases, but only when national authorities’ cooperation is not sufficient, therefore bypassing the current system where national authorities are the only interlocutors. However, **the new provisions (new articles 6a and 6b) requiring companies other than the beneficiary to provide market data would constitute an undue regulatory burden** – and we oppose any attempt to sanction companies in this context. It is in a company’s interest to co-operate in an investigation if that company has a genuine concern 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**.

16. As regards in particular the **information obligations**, the proposed powers of the Commission would be too discretionary. The Commission would not need to prove that the enterprise which has to comply with the obligation has an actual interest in the case which would justify its involvement. While in the explanatory memorandum the Commission clarifies that MIT would be mostly used in complex individual cases, the amended draft regulation never mentions the issue of “complexity”, nor sets limits to the Commission’s discretion.
17. While we understand the reasons for applying sanctions in case of supply of false or misleading information, BUSINESSEUROPE believes once again **it is inappropriate to allow the Commission to issue sanctions for those who do not respond to the Commission request, which may be due to many legitimate reasons**. In addition, the current proposal would lead to an awkward situation where the Commission could sanction enterprises that do not cooperate, while this would not apply to Member States, which are in fact the only direct addressees of State aid rules.

Handling of complaints

18. BUSINESSEUROPE understands the arguments leading the Commission to propose compulsory use of the complaints form, as this would facilitate its work to identify whether a complaint involves State aid issues and to determine the degree of priority which should be given to each complaint.
19. However, easy and free access to bring forward state aid complaints before the Commission is a very important aspect for effective enforcement. In some cases it may be difficult for the complainants to acquire very detailed information about the alleged aid measure. 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 than it is today, which would not represent a genuine improvement of the state aid system.
20. We are concerned about the burdens placed upon the complainants. To increase the chances of a successful complaint, the form has to be supported by detailed information about the alleged unlawful aid. 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. This might not be an insurmountable problem for large companies/associations, but will deter small companies. 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. Hence **we recommend some flexibility regarding the level of details required in the complaints form**.
21. 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.
22. In the context of improving the handling of complaints, we recommend **a reduction of the Commission’s current 10 years limitation period for recovering illegal aid**. The limit of ten years, in fact, appears hardly manageable from a business perspective as a) after more than 5 years from the awarding of the unlawful aid, its effects have usually vanished and collecting documentary evidence may be impossible (in fiscal



matters the limitation period for the imposition of fines is often shorter; following this period, the relative documentation may be legitimately destroyed); and b) the undertakings which received unlawful State aid might no longer exist, so it becomes difficult to induce them to give the money back; if the beneficiary undertakings are still operating, the recovery may be fatal as they are faced with an entirely unexpected cash outflow.

Interested parties

According to the proposal the complainants shall demonstrate that they are interested parties and that they therefore have a legitimate interest to lodge a complaint. If such a criterion is introduced, it is necessary to clarify that the Commission should still be in a position to investigate a complaint even though the complainant fails to demonstrate a status as interested party.

National courts

The Commission highlights that private litigation in front of national courts could provide increased discipline in the field of state aid. BUSINESSEUROPE supports a stronger enforcement in the field of state aid; however experience shows that enforcement at national level is still in its infancy and further improvements can be made. In this context we support the proposal that national courts explicitly have the right to obtain from the Commission information for the purpose of applying Articles 107(1) and 108 TFEU and to ask for an opinion of the Commission on questions related to the application of State aid rules, and introduction of a right for the Commission to make submissions to national courts in written or oral form.

* * *