



25 July 2012

BUSINESSEUROPE'S VIEWS ON THE MODERNISATION OF STATE AID POLICY

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 The EU State Aid Modernisation Communication needs to foster growth, focus control on the most harmful cases, ensure Member States' cooperation and streamline rules and procedures.

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: THE MODERNISATION OF STATE AID POLICY

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 state aid policy can be made more efficient and effective in order to further improve the functioning of the single market. In order to be in line with the general principle of “less and better targeted aid”, upon which state aid policy has been based so far, this initiative however should not result in higher overall amounts of aid.
2. 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. In addition, now that the crisis has increased the disparities in the level of resources that each Member State has available to finance national policies, a strengthening of mechanisms to avoid distortions of competition becomes all the more crucial. At the same time, Europe is experiencing extremely difficult economic times, high unemployment levels and very limited growth prospects. In this context, it is key that within the State aid modernisation initiative this goes hand in hand with a strong focus on stimulus and growth.
3. The need to focus on efficient State aid enforcement is clear: already before the economic and financial crisis, around € 9 billion of unlawful and incompatible aid had to be recovered between 2000 and 2007 (Spring 2008 State Aid Scoreboard). More recent figures show that this amount has been increasing, as in 2011 the total amount of illegal aid recovered in the last 10 years reached € 10.9 billion¹.
4. 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. As we have mentioned many times in the past, it is paramount to have some estimate of the amount of non-notified aid (outside the scope of the General Block exemption Regulation - GBER), so as to better understand the economic damage done, and in order to shape measures for stopping these practices. In this context, we recommend that the Commission looks closely at the responsibilities of Member States (see par. 17 below).

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>

COMMENTS ON THE STATE AID MODERNISATION COMMUNICATION

General Objectives

5. We concur with the general objectives presented by the EU State Aid Modernisation Communication (SAM) published in May 2012, namely to foster growth, focus control on the most harmful cases, ensure Member States' cooperation and streamline rules and procedures.
6. Shortening and simplification of the different state aid instruments and guidelines is necessary. Under the current regime, the rules are too untransparent and voluminous to guarantee legal certainty. The compilation of State aid rules in force (as of May 2012) is nearly 900 pages long.
7. The same goes for consolidation and tightening of procedures. The current system foresees approximate time limits, but these 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 in state aid transactions and also 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".
8. BUSINESSEUROPE acknowledges the fundamental role of the Temporary Framework in allowing a swift and coordinated response during the crisis and helping the real economy. It has been a useful safety net allowing for an emergency response during the crisis. We also stress the clear advantages brought about by the GBER. At the same time, it is important to stress that since the introduction of the General Block Exemption Regulation and the Temporary Framework, more and more aid is exempted from the Commission's centralised control, therefore additional measures are needed to ensure consistency in the way state aid rules are applied. BUSINESSEUROPE has some concerns about the proposed widening of the GBER, which would allow more aid to be exempted from the Commission's control.
9. There is a risk that an increased decentralisation of control might boost the volume of (illegal) state aid with detrimental effects to competition. This seems to be already happening according to the European Commission, which pointed out that at present, about 80% of the aid is granted through schemes and block-exempted measures, and that the December 2011 European Court of Auditors' report on State aid suggested that better national controls were needed. The report also 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 also confirms that "compared to previous years' samples, 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

² Vice-President Joaquín Almunia speech on 7 June 2012, "The State Aid Modernisation Initiative" (SPEECH/12/424).

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

More objective and uniform application of the rules

10. The SAM touches upon the above aspects, but fails to analyse in depth a fundamental issue: 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, which would lead to legal uncertainty and to a risk that national control systems might be biased towards less rigorous control, in all likelihood leading to more incompatible aid.
11. 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. 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.
12. Strengthening the monitoring instruments in the GBER could also help achieve reinforced control of block exempted aid. According to article 10 (3) GBER the Commission “may” adopt a decision stating that all future aid measures to which the GBER applies are to be notified to the Commission, if a Member State does not provide the information that is needed for effective Commission monitoring. The wording of article 10 (3) should be strengthened by changing the word "may" to "shall", hereby enforcing stricter compliance with the rules.
13. 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.
14. Finally, we encourage the Commission to published a guide on enforcement of State aid Law at national level. Such a guide should targeted undertakings and address issues like relevant national courts in all Member States, standing, damages actions and other important enforcement issues.
15. Furthermore, where appropriate the aid intensities/thresholds in the various regulations and guidelines should be set at a level that would prevent undue distortions of competition.
16. In this context, 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 minimize 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.

Member States' responsibilities

17. In addition, the EU should consider ways to concretely increase responsibilities for Member States in case of breach. Member States fundamentally have no real incentive to fully respect state aid rules. Firstly, the GBER in essence assumes that Member States will self-police their own compliance. Furthermore it is only the aid beneficiary who carries the economic risk of repaying unlawful aid, because this will simply have to be given back to the aid granting authority (with interest). It is therefore important to further increase discipline in the field of State Aid, in particular by strengthening preventive measures. Although recovery has improved, it remains a long and cumbersome process, often painful for the recipient who may have accepted the aid in good faith. And the market distortion caused is not necessarily neutralised just because the aid is eventually paid back. Effective mechanisms for recovering illegal aid are of course essential, but obviously it would be best to ensure Member States' compliance in the first place.
18. In this context, BUSINESSEUROPE considers the introduction of a State Aid remedies directive as absolutely essential, especially in the context of a possible expansion of block-exempted aid measures under the GBER or other instruments. Remedies directives already exist in public procurement, where they aim to coordinate national review systems by imposing some common standards intended to ensure that rapid and effective means of redress are available across Europe in cases where EU rules might not have been respected. Furthermore the procurement remedies directives introduce the imposition of fines on the contracting authority. If similar penalties could be imposed to authorities granting unlawful aid, this might discipline authorities and encourage them not to infringe the state aid rules.
19. The creation of coordinated state aid offices at national level could be considered, with the function of overseeing different measures that can amount to state aid put into place by various national, regional and local authorities. These offices could also work as single points of contact for the European Commission and all interested parties. However, these offices should never be considered as replacing the fundamental role of external and independent scrutiny that is and must remain an exclusive priority of the European Commission.
20. Finally, Member States should supply the Commission with annual reports on the use and application of the various regulations and notices, and particularly the de minimis regulation and the GBER. These annual reports should be made public on the Commission's website.

Stronger enforcement

21. 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 they see non-priority cases being dealt with. Shifting to more ex-post evaluation for the "non-priority" cases risks to lead again to a lack of clarity and control on the compatibility of Member States' measures, with all the consequences described above.

22. 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 to provide 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) courts are not effective enough. 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.
23. Consistent with the goal of improving enforcement, BUSINESSEUROPE strongly recommends to stress 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.

Application of the SAM principles to specific areas

24. We continue to endorse the Commission's view that aid is appropriate 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. This is for example the case in the context of the update of the broadband guidelines to ensure they help deliver the objectives set out by the Digital Agenda. Also, the regional aid Guidelines should properly reflect the political goals of the cohesion policy 2014-2020. It is particularly important that regional aid guidelines continue to recognise the fundamental role of large enterprises in supporting economic development of European regions and overall growth. Limiting regional aid to SMEs appears not to be justified, as there is not sufficient evidence on potentially distortive effects of regional aid to enterprises above the SME threshold. The Commission should also revise the 1998 notice on direct taxation, to take into account indirect taxation. This should be complemented by an updated report on the implementation of the notice, since the last report was published in 2004.
25. Especially in public procurement, while it is true that WTO rules already cover certain subsidy issues, the reality is that often EU businesses compete with third country companies that are not subject to the same strict state aid regime and are heavily subsidised by their government. The EU should better address this in its external relations and trade negotiations.
26. Finally, better communicating and explaining to citizens what state aid is about is also key, in order not to create false expectations and decrease unfounded complaints. We support the 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.

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