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EU State Aid Law - Emerging Trends at the National and EU Level

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POLICY BRIEF

Abstract

The Florence Competition Programme (FCP) of the European University Institute (EUI) recently organised two workshops in Brussels with Bird & Bird LLP and Gianni, Origoni, Grippo, Cappelli & Partners LLP. The first event, entitled ‘EU State aid policy: the forecast for the next five years’, was held on 28th November, 2019. It included two panels followed by a keynote speech, which was delivered by Nicola Pesaresi, Head of State Aid Unit I, Energy and Environment, at DG Competition of the European Commission. The second event, entitled ‘The Role of National Courts in State Aid enforcement’, took place on 23rd January, 2020. It was comprised of an introductory session and a roundtable of discussion. During both events, the FCP team presented the recent study on the role of national courts in State aid enforcement. The study, published by DG Competition in July, 2019, was carried out by a consortium, including Spark Legal Network, the Florence Competition Programme, Ecorys and Caselex.¹ In addition, the volume “EU State Aid Law - Emerging Trends at the National and EU Level” was presented during the second workshop in Brussels. The book, edited by Prof. Parcu, Prof. Monti and Dr. Botta, was published by Edward Elgar Publishing in February, 2020.² In view of the similarities of the topics, the present Policy Brief summarises the main points that were debated upon during the two workshops, and it seeks to stimulate further debate.

1. <http://fcp.eui.eu/study-on-the-enforcement-of-state-aid-rules-by-national-courts-of-the-eu-member-states/>.
2. <https://www.e-elgar.com/shop/gbp/eu-state-aid-law-9781788975247.html>.



EU State Aid Policy: *Quo Vadis* in the Next Five Years?

In light of the recent appointment of the new European Commission for the period 2019-2024, speakers started by debating whether its enforcement priorities in the field of State aid policy are likely to be consistent with those pursued during Margrethe Vestager's first mandate as Commissioner for Competition.³

Speakers debated the results of the 'State Aid Modernisation' (SAM)⁴ process, that was started by the European Commission in 2012. Notably, the reform allowed the faster deployment by EU Member States of certain aid measures, thus enabling the Commission to concentrate its scrutiny only on those measures that are most likely to distort competition in the single market. The revision of the 'General Block Exemption Regulation' (GBER) in 2014⁵ represents the most prominent example in this respect. Speakers observed that more than 90% of State aid measures are now being exempted from notification and the prior approval of the Commission.⁶ As for the EU Member States, such a simplification has been balanced with a demand for greater transparency and more *ex-post* controls, which are to be carried out through profitability assessments of public support schemes. In this respect, speakers stressed that, in the long term, it is very likely that EU State aid anal-

ysis will borrow an increasing number of tools from economics so as to rely on more sound financial elements for such assessment. In another strand of the debate, it was remarked that by determining a shift in the Commission's focus on *ex-post* monitoring analysis of the exempted measures, the 2014 GBER allowed for a significant strengthening of the Commission's State aid enforcement in key sectors of the economy, such as taxation, energy, R&D, as well as transport.

Speakers also noted that another key objective of the SAM package was to introduce major improvements in the whole legal framework governing State aid enforcement by streamlining its main provisions. On 7th January, 2019, the Commission launched a consultation for assessment of the rules adopted in the context of SAM, which are due to expire by the end of 2020. The consultation included a 'fitness check', for the purpose of deciding whether to prolong the rules' validity for two more years, as well as to possibly update those without a fixed expiry date. In April, 2019, the Commission also launched a public consultation on a possible revision of the 'Energy and Environmental Protection State Aid Guidelines' (EEAG) 2014⁷. In light of the need for a smart use of State aid rules as a tool to drive the decarbonisation of energy markets and the implementation of renewables' efficiency solutions, the importance of taking into account the lack of alignment of the 2014 EEAG with the recently adopted Clean Energy Package⁸ on a number of issues, was remarked upon during the debate.

As regards broadband internet deployment, speakers noted that the Commission has already put forward a full range of financial instruments encouraging different forms of investment in both fast and ultra-fast networks; such measures should help the public to reap the full benefits of digitalisation. The main strategic policy objectives to be pursued by 2025 are very well-established, and they consist of the following: (i) access to 1 Gbps internet speed for all schools, transport hubs and main providers of public ser-

3. Besides her mandate as Commissioner for Competition, which has been renewed for an additional five years, Margrethe Vestager has been Executive Vice President of the European Commission for 'a Europe Fit for the Digital Age' since 1st December 2019.
4. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on State aid Modernisation, COM(2012) 209 final, 8.5.2012.
5. Commission Regulation (EU) No 651/2014 of 17 June, 2014, declaring certain categories of aid compatible with the internal market in the application of Articles 107 and 108 of the Treaty, further amended by Commission Regulation (EU) 2017/1084 of 14 June, 2017 containing measures regarding aid for port and airport infrastructures.
6. Another important initiative adopted within the framework of the SAM reform is the revision of the *de minimis* Regulation on small aid amounts that fall outside the scope of EU state aid control because they are deemed to have no impact on competition and trade in the internal market. The reform further reduced the administrative burden for companies and Member States. See Commission Regulation (EU) No 1407/2013 of 18 December, 2013, on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid.

7. Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014-2020, 2014/C 200/01, 28.6.2014.
8. The package, proposed by the European Commission in November 2016, includes eight legislative proposals on the electricity market and consumers, energy efficiency, renewables and bioenergy sustainability.



vices and digitally intensive enterprises; (ii) access to download speeds of at least 100 Mbps, upgradable to 1 Gbps, for all European households; (iii) uninterrupted 5G wireless coverage for all urban areas, major roads and railways. In line with this agenda, the Commission recently approved, under State aid rules, several aid schemes that support the deployment of ultrafast internet in areas where current investments are insufficient (Greece),⁹ for the purpose of fostering the intervention of private operators (Germany),¹⁰ or that are aimed at addressing connectivity deficits across a country in order to achieve 100% full internet coverage (Ireland).¹¹ Finally, in light of potential further developments of the EU broadband State aid rules, speakers held that aspects that need careful reconsideration in the near future may include the treatment of State-owned enterprises, the role to be played by the technological neutrality principle and the opportunity to continue to encourage investments through the creation of a larger number of public-private partnerships.

Enforcement of State Aid Law by National Courts

A significant portion of the debate during the two workshops revolved around the recent study on State aid enforcement by EU Member States' national courts.¹² The study covered 766 national judgments, ruled by national courts of the 27 EU Member States in the period 2007-2017. At the time of writing, the Commission is assessing the main findings of the study, considering a possible revision of the 2009 Notice on the Enforcement of State Aid Law by National Courts (i.e., the Enforcement Notice).¹³

9. Greek Ultrafast Broadband Scheme (indicative budget: €300 million) was approved in July, 2019.
10. Following an earlier gigabit pilot project in Germany, the scheme was approved by the Commission in December, 2018, and was extended it to the whole of Bavaria.
11. The Irish National Broadband Plan (indicative budget: €2.6 billion) was approved at the end of 2019.
12. The study was conducted by a consortium, including Spark Legal Network, the EUI FCP, Ecorys and Caselex. In particular, the FCP team supervised the data collection process and drafted the final report. The FCP team included Marco Botta, acting as project coordinator, Pier Luigi Parcu, Giorgio Monti, Leigh Hancher, Francesco Maria Salerno and Maria Luisa Stasi.
13. Commission notice on the enforcement of State aid law by national

The main starting point of the discussion was that the correct application of State aid rules represents a shared responsibility between national administrative authorities, courts and the European Commission. In particular, the role of national courts is essential in order to protect the direct effect of Article 108(3) TFEU, according to which Member States shall not implement any new State aid measure before the Commission's final decision to authorize the notified measure that has been issued (the so-called 'standstill obligation'). If the standstill obligation is breached, the State aid measure is unlawful. If, following a formal investigation procedure, the Commission considers the State aid measure to be incompatible with the internal market, it will require the relevant Member State to recover the aid from the beneficiary (i.e., Recovery Decision).

The study covered both 'public' and 'private' enforcement cases. In particular, 'public enforcement' refers to national rulings flowing from the Commission's Recovery Decision, which was rendered in respect of an unlawful State aid measure that was found to be incompatible with the internal market, according to Article 107 TFEU. In this respect, the study clarifies that two main types of recovery-related litigation can be distinguished in national courts: (i) actions brought by the recovering authority that is seeking an order before the national court to force an unwilling beneficiary to pay the aid back, and (ii) actions brought by beneficiaries contesting the recovery order that has been adopted by national authorities. Furthermore, a number of cases identified in the study concerned disputes on aid recovery that were directly ordered by national administrative authorities, with no direct involvement by the Commission.¹⁴ The study also covered 'private' enforcement cases, which refer to litigation cases brought before a national court by third, interested parties against the granting Member State, on the basis of the direct effect of the standstill obligation under Article 108(3) TFEU, and in the absence of any

courts, 2009/C 85/01, 9.4.2009.

14. As the CJEU recently recognised in *Eesti Pagar*, national administrative authorities have to order the aid recovery when the granting authority breaches the standstill obligation, by implementing the aid measure without the previous aid notification to the Commission.



recovery decision by the Commission. This situation arises either because the aid was not notified at all, or because the authority implemented the aid before getting the Commission's approval.

According to the study, the number of State aid cases decided by national courts has grown steadily during the past 10 years. In particular, the study noticed a prevalence of private enforcement cases (i.e., 594 private enforcement cases vs. 172 for public enforcement). Such a trend has been explained on the basis of the impact of the 2008 financial crisis, which plausibly contributed to the rise in litigation. At the same time, national courts rarely awarded remedies in cases where there was private enforcement of State aid rules. As the data was consistent across all jurisdictions, the main conclusion was that country-specific factors do not tend to play a role. Explanatory factors for the widespread failure to obtain remedies therefore include a mix of exogenous factors, such as the misinterpretation of the European Court of Justice case law by national tribunals, and endogenous factors - i.e., the heavy burden of proof borne by the plaintiff. In this respect, speakers suggested that robust economic evidence is essential in this category of cases, and that economic analysis can be used effectively for building it in several different ways, such as by: (i) developing a credible counterfactual scenario, i.e., what the aid measure's beneficiary would have done in the absence of the advantage, and with available data only; (ii) developing a theory of harm to causally link the aid beneficiary's behaviour to the impact on the plaintiff, as well as quantifying that impact; and (iii) calculating the aid quantum when it is unknown.

The main difficulties faced by national courts in 'public' enforcement cases are the calculation of the aid quantum. In order to provide further clarity to authorities, courts and beneficiaries in the future, a strand of the debate suggested that a harmonised framework on aid quantification for all EU countries would be highly desirable. Other problematic aspects encountered by national courts have dealt with the calculation of recovery interests; the insolvency of the aid recipient; and the alleged lack of clarity in the Commission's recovery decision (other than the

quantum of calculation, e.g., the starting date of the recovery period).

In 'private' enforcement cases, the main difficulties faced by national courts concerned the definition of aid and other legal interpretative issues, including, but not limited to, the determination of whether the aid recipient was an undertaking; the application of the GBER or the *De Minimis* Regulation; the application of the 'Market Economy Investor Principle' (MEIP) test;¹⁵ the application of the 'service of general economic interest' (SGEI) concept, and the *Altmark* case law.¹⁶

Finally, the debate focused on the study's results relating to cooperation tools from the perspective of judges either in cases where they submitted a request for information, opinion, or received amicus curiae observations from the Commission. The data gathered from the online questionnaires, and the interviews with national judges, suggest that, among the group of users benefitting from the tools, the overall attitude towards the cooperation tools was quite positive, although there is room for improvement. Generally, the best practices presented in the study seem to reveal that certain Member States are aware that amending national procedures is essential in order to make State aid enforcement more effective. Speakers concluded that if such changes were to be implemented in the future, an *ad hoc* design will be necessary to embed the 'culture' for the enforcement of State aid rules among all the national stakeholders, including the administrative authorities, aid beneficiaries and third parties.

15. This is one of the entry points for economic analysis in State aid cases in the Commission's practice: it is used to establish the extent to which an aid measure confers an economic advantage on the aid's recipient.

16. In this judgment of 24 July, 2003, the ECJ provided clarification as to when public service compensation does not constitute State aid, owing to the absence of any advantage. Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.



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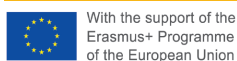
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Florence Competition Programme

The Florence Competition Programme (FCP) in Law & Economics is a programme of the Robert Schuman Centre for Advanced Studies at the European University Institute, which focuses on competition law and economics. FCP acts as a hub where European and international competition enforcers and other stakeholders can exchange ideas, share best-practices, debate emerging policy issues and enhance their networks. In addition, since 2011, the Robert Schuman Centre for Advanced Studies organises a training for national judges in competition law and economics co-financed by DG Competition of the European Commission - ENTraNCE for Judges.



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