
June 2014

New EU state aid rules shall among other things facilitate the identification of illegal aid

The European Commission announced on 8 May 2012 that it intended to modernise the State aid legal framework. It has thereafter through extensive work consisting of impact assessments and consultations with affected parties reworked large parts of the State aid framework. This involves a series of revised legal instruments with the aim that fewer aid measures should be notified while at the same time ensuring that given aid can more easily be identified. Partner Elisabeth Eklund and associate Oscar Jansson briefly describe the changes, of which most are now in place, below.

The State aid legal framework

A fundamental idea behind the European cooperation is to create a single market for goods and services. To ensure that all companies have the same opportunities to compete in the market Article 107 of the Treaty on the Functioning of the European Union ("TFEU") imposes a general prohibition on State aid. There are however some exceptions to that general rule; e.g. for support for projects of common European interest. In order to assess whether these exceptions are met Article 108 TFEU imposes rules for determining whether a measure is allowed or not. The European Commission ("the Commission") is responsible for this assessment. Until the Commission has made its assessment Article 108(3) TFEU lays down a standstill obligation, meaning that an aid measure may not be executed until the Commission has reviewed and approved the aid.

If a public entity (municipality, county or the State or companies owned by them) (hereafter "a governmental body") grants illegal aid (i.e. aid that has not been approved) to a company, the company must repay the aid with interest from the date on which the aid was given. If repayment is not made the governmental body is required to recover the aid. These obligations do not only derive from EU legislation but since June 2013 also from Swedish legislation. The limitation period is ten years, which means that the illegal aid may have to be repaid with interest long after it has been paid out or executed.

State aid is not just financial contributions given to a company. State aid includes a range of measures from governmental bodies such as non-market interest rates for loans, if a business or property is sold at a price below market prices, guarantees, or if a public entity acquires goods above market value prices.

Because of the high risks involved and that problems can arise in a variety of situations it is both in the governmental body's as well as in the beneficiary's interest to ensure

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that the rules are adhered to. It is also important for competitors to ensure that competing companies do not benefit from illegal aid and thus distort competition. A great many transactions with governmental bodies can potentially contain elements of State aid. The State aid rules should not only be considered in transactions between governmental bodies and private companies but also in non-market value transactions within a governmentally owned company.

What rules are affected by the Commission's modernisation of the State aid rules?

To ensure that the Commission is not obliged to deal with an unmanageable amount of cases involving State aid, which does not have any effect on the internal market, there are in Articles 109 and 108 (4) TFEU possibilities for the Commission to grant exemptions from the requirement to notify aid.

The Commission has therefore, for a long time, had a comprehensive framework of instruments concerning State aid which encompasses various forms of smaller aid measures and support for specific purposes which have been exempted from the notification duty.

The Commission considered that the modernisation of these rules were needed for three reasons, to promote the growth of the internal market, in order to be able to focus efforts on those cases that most affect the internal market and to create uniform rules and be able to make faster decisions.

In its efforts to change the legal framework the Commission did, similarly to the way it work in other areas, provide transparency and openness in relation to stakeholders. In many cases, the former legal instrument was evaluated and the public was given opportunity to submit comments on the evaluation and the application of the instrument. For almost all instruments the Commission has published the drafts of the instrument for comments. Only after this stage the Commission finally drafted its proposal that was sent to the Council and the European Parliament.

These consultations have brought clarity to some previous question marks. However, a lot of question marks still remain but through broad consultations the new rules are now hopefully more appropriately designed and the problems that are most relevant for the the actors involved have hopefully been addressed.

What are the new rules?

As part of the modernisation, a lot of different legal instruments have been amended. Below we have listed the instruments that have been part of the modernisation; the date in parentheses is when the respective instrument has been adopted (if applicable).

For the following instruments, the Commission has had the goal to revise and simplify:

- Guidelines on State aid for rescue and restructuring firms in difficulty.
- The guidelines for regional aid (19 June 2013).
- The framework for State aid for research, development and innovation (21 May 2014).

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- Guidelines on State aid for environmental protection (9 April 2014).
- Communication on State aid to promote important projects of common European interest (13 May 2014).
- Guidelines on State aid to promote risk financing investments (22 January 2014).
- Guidelines on State aid for broadband (18 December 2012).
- Guidelines on State aid to airports and airlines (20 February 2014).
- The general block exemption regulation (21 May 2014).
- Regulation on the application of Articles 92 and 93 on certain categories of horizontal State aid.
- Regulation on de minimis aid (18 December 2013).

In addition, the Commission has issued a more detailed guidance on the notion of State aid, amended the procedural regulation (and complaints handling) (adopted 9 April 2014), increased transparency concerning given State aid through a communication from the Commission (adopted on 21 May 2014) and required Member States to evaluate their main aid schemes.

The work was initially intended to be completed by the end of 2013, however at the date of publication of this article some parts are still missing. One of the largest parts of the modernisation has been the revision of the general block exemption regulation, the revised regulation was announced in late May of this year and will come into force on 1 July 2014.

A selection of changes of the State aid rules

One of the greatest modifications done to the modernisation, as we mentioned above, is the new general block exemption. It exempts aid from notification in a variety of categories up to certain thresholds. Through the general block exemption regulation, the Commission has by its own admission succeeded to exempt approximately 75% of all aid measures within the Union and about 2/3 of all given aid from the requirement to notify. This means that the Commission henceforth will only assess the most important State aid measures. The block exemption has changed in that:

- The thresholds for when a measure must be notified to the Commission has in many respects increased significantly (e.g. the thresholds for aid for research and development and innovation have doubled, for risk financing investment the previous annual tranches of EUR 1.5 million have been replaced by a total limit that an eligible company can receive of EUR 15 million, for investment aid for sports and multifunctional infrastructures the threshold is EUR 15 million or total costs exceeding EUR 50 million per project and for investment aid for culture and heritage conservation the threshold is EUR 100 million per project).
- A number of new categories of support (such as aid for broadband, research and development infrastructure, innovation clusters and regional development funds, heritage conservation, support of sport and multifunctional recreational infrastructure, etc.) have been included in the general block exemption regulation and thus does not, under certain specified conditions, need to be notified.

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- Considerable simplifications of the requirements for the different rules to apply have been introduced.

New requirements for Member States to report aid in order to facilitate for competitors to identify illegal aid

In the general block exemption regulation, as well as in most of the other relevant instruments, the Commission introduced a requirement that Member States must report all individual aid granted to a company exceeding EUR 500,000. Within this framework, the beneficiary, the aid amount, purpose of the grant and the legal basis for the aid as well as information about the sector where the beneficiary is active, whether the beneficiary is a small or medium-sized company and where the company is actively listed must be published. This information should be presented on public web sites. Member States have two years to develop the website and organize a system to collect the information. This will make it much easier for competitors who are negatively affected by State aid to act against potentially illegal State aid.

De minimis aid - the threshold remains

An important part of the change concerned the revision of de minimis aid. De minimis is a level of aid for a specific time period that the Commission considers not to affect trade between Member States and therefore it does not need to be notified. This regulation has been the foundation to exclude notification for the bulk of the aid given, especially for aid given from municipalities to support local businesses. The de minimis-threshold has not been changed by the Commission through the modernisation. The threshold will thus remain at the previous level, which means that a company can receive a maximum of EUR 200,000 over a three year period without a need to notify the aid measure(s). Different aid measures from multiple sources that a company has received should be cumulated in this calculation. It is therefore important that the governmental body that awards the aid verifies whether the beneficiary has received aid from other sources during the current period and the beneficiary must keep track of that the de minimis level is not exceeded since the aid measure then must be notified.

New rules for complaints

The Commission has imposed certain restrictions on who can submit a complaint regarding suspected illegal State aid for initiations of investigations by the Commission. To submit a complaint it is required that the complainant now fall within the definition of an interested party in the procedural regulation, i.e. either a Member State, a company or business organization with interests that might be affected under the aid measure, competing companies or trade associations. In conjunction with this change, the Commission has also introduced a mandatory form that a complainant must use to submit the complaint to the Commission in order for the Commission to receive enough information to make an accurate assessment.

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The Commission has carried out an extensive work and we think that it is positive that the Commission has chosen a path that means that fewer and primarily more complex aid measures will hereinafter be subject to the Commission's review. Simplification of the legal framework is also positive for companies as it provides greater legal security, this is especially important as the consequences of illegal aid have a large impact. Also for governmental bodies the simplifications are positive as the risks to give illegal aid decreases.

Above we have just chosen a few of the many changes that have been made within the context of the modernisation and we may certainly have reason to revert to the modernisation in later newsletters.

However, as a last point we would like to point out that this comprehensive reform does not solve what, in our opinion, is the biggest problem that is linked to State aid in Sweden, namely, a general lack of knowledge of the rules' existence and how to apply them. It is important for companies to be aware of the rules when they do business with governmental bodies. Companies also need to carefully monitor their possibilities to take action against competitors who have been given aid. The risks, which have not changed after the modernisation, remain large and can have a significant impact on a company's finances. Therefore, we recommend that both private companies and the public sector are careful in order to ensure that these transactions are compatible with the State aid rules.



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