THE MODERNISATION OF STATE AID CONTROL AND ITS OBJECTIVES: CLARITY, RELEVANCE, EFFECTIVENESS

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Abstract: On 8 May 2012, the Commission adopted its Communication on State aid modernisation. Two years later, most elements of the reform have come into force. This was the most comprehensive overhaul in the history of State aid control. First, the Council quickly agreed to amendments of the Enabling Regulation, enlarging the scope of measures that can be exempted from notification, and of the Procedural Regulation, enhancing the investigative powers of the Commission and introducing the possibility for the Commission to intervene in national litigation. Second, the Commission issued new versions, based on a common structure, of its horizontal guidelines and frameworks: regional aid, risk finance, environmental protection with the addition of energy, research and development and innovation, rescuing and restructuring of undertakings in difficulty, a new document concerning important projects of common European interest, and some important sectorial instruments (broadband, aviation). Third, the Commission adopted a new de minimis regulation and a new, comprehensive block exemption regulation, intended to cover the majority of national aid measures. Fourth, a new notice on the notion of aid, yet to be finally adopted, should provide interpretative guidance. The result of the exercise is a considerable clarification of the rules, an improvement of the procedural tools and a limitation of the obligation to notify State aid projects. In turn, this should allow the Commission to work more efficiently, to reduce the duration of its procedures and to focus on the most distortive measures.

1. INTRODUCTION. THE COMMUNICATION ON STATE AID MODERNISATION

On 8 May 2012, the Commission, acting on a proposal by Vice-President Almunia, issued its Communication on State aid modernisation,1 announcing a comprehensive reform program of the existing instruments concerning State aid control.

This is not the first time the Commission reforms its instruments in the area of State aid. Over the years, it has progressively expanded and regularly updated the legal framework developing the basic provisions of Articles 107 - 109 TFEU. Significant changes occurred between 1998 and 2001, with the adoption of the so-called Enabling Regulation,2 determining

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1 Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions - EU State aid modernisation (SAM) (COM/2012/0209 final).

2 Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain
the categories of aid that the Commission could block-exempt, of the Procedural Regulation, laying down for the first time comprehensive rules governing the Commission’s action in this field, and of the first generation of block exemption regulations.

Then, the State aid action plan, launched in 2005, covered the period 2005-2009 and brought about further changes, with a revision of all major guidelines and frameworks entailing more sophisticated methods for the compatibility assessment by the Commission, the adoption of a comprehensive block exemption regulation, and a clarification of the role of national courts in the implementation of State aid rules.

What is unprecedented in the current modernisation exercise, however, are its speed, its coherence and its comprehensive nature. Within two years, the Commission has brought about a radical overhaul of most relevant rules. The first step was to submit the necessary proposals to the Council and to quickly obtain its agreement to amend the Enabling Regulation and the Procedural Regulation. Second, the Commission has revised and streamlined all the major guidelines and frameworks in accordance with common principles for the assessment of compatibility with the internal market. Third, it has adopted

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6 This concerns, first and foremost, the main horizontal guidelines and frameworks: see Guidelines on regional State aid for 2014-2020 (OJ C 209 of 23.7.2013, p. 1); Guidelines on State aid to promote risk finance investments (OJ C 19, 22.1.2014, p. 4); Framework for State aid for research and development and innovation (OJ C 198, 27.6.2014, p. 1); Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1); draft Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.07.2014, p. 1); and a new Communication - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (OJ C 88 of 20.6.2014, p. 4). In addition, some important guidelines concerning specific sectors have been adopted in the context of modernisation and in line with the same common principles: EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband
a new de minimis regulation\textsuperscript{11} and a new, comprehensive block exemption regulation, covering also the new categories of aid determined by the Council in the revised Enabling Regulation\textsuperscript{12}. Fourth and finally, the Commission will issue a new interpretative notice on the notion of aid, attempting for the first time to provide guidance on all aspects pertaining to the interpretation of Article 107(1) TFEU\textsuperscript{13}. The initial target of concluding the process by end of 2013 was abandoned because of delays in the adoption of the EU multiannual financial framework, which in turn slowed down the procedures concerning the EU structural funds, so that the new programming period will only start in July 2014. Guidelines and block exemptions linked to the operation of the structural funds were also delayed by six months and, with the limited exception of the fisheries sector, have become applicable or entered into force in place on 1 July 2014. The Notice on the notion of aid has not yet been adopted. What is also new is that, in addition to the traditional objectives of undistorted competition and proper functioning of the internal market, the Commission dared to express a view that had been implicit in its actions for many years, namely that “By putting

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\textsuperscript{12} Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (L 187, 26.06.2014, p. 1). In addition, the Commission has adopted a new, comprehensive block exemption for the agricultural sector: see Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of

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\textsuperscript{13} The draft was published for consultation at http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf.
an emphasis on the quality and the efficiency of public support, State aid control can also help Member States to strengthen budgetary discipline and improve the quality of public finances – resulting in a better use of taxpayers’ money. It is particularly important in order to achieve smart fiscal consolidation, reconciling the role of targeted public spending in generating growth with the need to bring budgets under control. There is therefore also a need to embed State aid control and more general competition concerns in the EU Semester procedure”.

According to conventional wisdom, the impact on the efficiency of national public spending was at best a side effect of State aid control, a necessary implication of a scrutiny of State interventions in the economy, but not a goal in itself. Meanwhile, progresses made in the area of economic and monetary union and the experience of the financial and economic crisis have put the spotlight on the need to find a better balance between the effects of national measures on the functioning of the economy and the sacrifice of precious budgetary resources. While State aid supervision by the Commission is still based on the same Treaty rules and while its primary justification for such mechanisms still lies in the necessity to limit distortions of competition in the functioning of the internal market, it now appears legitimate to mention its contribution to improving the quality and the cost-effectiveness of public spending.

When announcing its intention to modernise State aid control, the Commission stated that its objectives were “threefold: (i) to foster sustainable, smart and inclusive growth in a competitive internal market; (ii) to focus Commission ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement; (iii) to streamline the rules and provide for faster decisions”. One can, of course, debate the relevance and the exact definition of any single point, but this seems to be an appropriate set of goals for any attempt to improve the design and the enforcement of State aid policy within the EU.

Of course, the first objective is very broad and ambitious, so that State aid control can only provide a contribution towards its attainment. According to the Commission, “The proposals of the State aid modernisation contributing to the growth objective are: (a) Identification and definition of common principles applicable to the assessment of compatibility of all the aid measures carried out by the Commission; […] b) Revision and streamlining of State aid guidelines, to make them consistent with those common principles”.

In respect of the second objective, the Commission stated that “the proposals of the State aid modernisation contributing to the prioritisation objective are: a) a possible review of the de minimis Regulation […]; b) possible changes to the Council Enabling Regulation to allow the Commission to declare that certain categories of aid are compatible with the internal market and are therefore exempted from ex ante notification […]; c) a revision and possible extension of the General Block Exemption Regulation, for the categories of aid covered by the revised Enabling Regulation […]”.

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14 See Communication on EU State aid modernisation (SAM), quoted above, at paragraph 14.
15 See Communication on EU State aid modernisation (SAM), quoted above, at paragraph 8.
16 Ibidem, paragraph 18.
17 Ibidem, paragraph 20.
Finally, elements of the package contributing to third objective were identified as follows: “(a) clarification and better explanation of the notion of State aid […] (b) A modernisation of the State aid Procedural Regulation with regards to complaint-handling and market information tools, in order to enable the Commission to better focus its action on cases which are most relevant for internal market”.  

Two years have elapsed since the announcement of State aid modernisation: that programme has been largely implemented and the Commission is about to adopt the final missing pieces. The time has come to assess what has been put in place and to analyse its foreseeable effects on State aid control for the next few years.

In so doing, I will endeavour to assess whether the result is consistent with the stated objectives, which in my view can be resumed as clarity, relevance, effectiveness: i) clarity and consistency of the legal framework as a contribution to sustainable, smart and inclusive growth; ii) relevance of State aid control to the functioning of the European economy, through focusing on those measures that, by their size or their features, are likely to have the biggest impact on the internal market; iii) efficiency of State aid procedures, so that compatibility of national measures with the internal market can be established in a timeframe which remains consistent both with public policies pursued by the Member States and with economic choices to be taken by the undertakings concerned.

Notwithstanding the classification to be found in the Commission communication on modernisation, different building blocks of this exercise can provide a cross-cutting contribution to two or even to all three of the objectives pursued by the Commission. For instance, the draft notice on the notion of aid may simplify State aid control and enforcement but, at least as importantly, it should bring clarity as to the subject-matter of State aid control. To make another example, the revision and extension of the block exemptions, covering measures identified ex ante as less problematic, should certainly allow the Commission to devote scarce resources to more important cases; but at the same time it will allow Member States to intervene swiftly to promote public goals and stimulate the economy without the need for notifications and, possibly, lengthy investigation procedures.

Therefore, while keeping in mind that the merits of each individual initiative and the global assessment of State aid modernisation must be based on the attainment of the objectives set by the Commission itself, I will rather organise my presentation around the different groups of instruments: Council regulations, guidelines, block exemption regulations and, last but not least, the notice on the notion of aid.

**2. COUNCIL REGULATIONS**

Even after the Lisbon Treaty, Article 109 TFEU, like its companion provision of Article 103 concerning the implementation of the competition rules of Articles 101 and 102 TFEU, has remained a legal basis for adoption by the Council alone of the appropriate rules for the application of Articles 107 and 108 TFEU. The Council acts on a proposal from the Commission and the European Parliament is only consulted. In addition, both legal bases

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18 *Ibidem*, paragraph 23.
are qualified as non-legislative within the meaning of Article 289 TFEU.

Therefore, when the Commission proposes amendments to State aid regulations, its main counterpart is the Council, where, of course, decisions are taken by Member States that have an interest in the proper functioning of State aid control, but are also the authors of the measures that will be subject to such control. Hence the traditional fear that the Council could take advantage of its regulatory powers to condition and possibly to weaken the Commission’s action.

For that reason, the Commission waited until the late nineties before proposing the adoption of the Enabling Regulation, determining the categories of aid that the Commission could block-exempt, and of a Procedural Regulation. In the absence of such instruments, the notification obligation applied indistinctly to all measures qualifying as State aid and the procedural rules were largely laid down by judicial law-making, through repeated interventions by the Court of Justice. The Enabling Regulation, finally adopted in 1998, was largely respectful of the Commission’s prerogative to lay down the compatibility (and exemption) criteria for those categories of aid that had been previously identified by the Council. On the contrary, the 1999 Procedural Regulation, while broadly in line with the principles enshrined in the Treaty, as further developed by the Court, shows a number of marks of the Member States’ willingness to curb the Commission powers, for instance by imposing a number of preliminary steps or by making an instrument like the suspension injunction extremely difficult to use.

Under such circumstances, it is hardly surprising that the Commission waited almost fifteen years before proposing any amendment to either Regulation and that, when it did, it carefully selected specific provisions and topics, thereby preventing the Council from intervening on other issues regulated in the same instrument. Maybe because of the limited scope of the proposed amendments, maybe thanks to the ability of the negotiators or to a positive atmosphere within the Council, the approval of both proposals presented on 5 December 2012 was achieved in a matter of a few months, with formal adoption on 21 July 2013.

The extension of the Enabling Regulation was not likely to elicit objections or resistance within the Council. On the one hand, it is in the interest of the Member States not only to have a well-functioning State aid control mechanism, but also to be allowed to implement rapidly and without a previous approval by the Commission measures that are not deemed to be particularly dangerous or distortive. On the other hand, because of the system put in place by the Treaties, as clarified by the Treaty of Lisbon with the insertion of Article 108(4) TFEU, the Council was not entitled to define any detail of the substantive conditions for the block-exemption, the Commission having sole competence in this respect. It is simply regrettable that the Council declined to follow the Commission proposal on an institutional issue, which would have put an end to the anomaly represented by the sectorial block-exemption contained in
Regulation No 1370/2007 in the area of land transport. In that instrument, the conditions for the block exemption had been defined directly by Parliament and Council, rather than by the Commission as now unequivocally foreseen by Article 108(4) TFEU. For the rest, the Council was glad to extend the list of categories eligible for exemption and simply made the list somewhat longer than initially proposed by the Commission; however, the latter remains free to use that possibility in full or in part. The categories added to the 1998 list include innovation; culture and heritage conservation; making good the damage caused by natural disasters; sports; transport for residents of remote regions, some types of broadband infrastructure and other sorts of infrastructures supporting certain goals. In addition, the insertion of new categories for forests and food products outside Annex I of the Treaty now make it possible to block-exempt State aid for these purposes when it is linked to the programmes of the EU rural development fund, aid that is otherwise not even covered by State aid rules in respect of agricultural products.

It is somewhat more surprising that the Council easily came to an agreement on the amendments to the Procedural Regulation. The Commission had decided to limit its proposal to four well circumscribed issues: requests for information to be addressed to undertakings (so-called "investigative measures" or “market information tools”), complaints, sector enquiries and amicus curiae interventions before national courts. Notwithstanding requests from some Member States, during the discussion in the Council it refused to extend it to cover further and more divisive issues. The outcome was that the Council accepted to intervene on all four items contained in the proposal, but amended the latter on a number of points to include additional safeguards and make it more difficult for the Commission to exercise its new powers.

Let us briefly describe the innovations in turn. First, the Commission is now expressly entitled to address to undertakings or associations of undertakings simple requests for information or decisions. Such “market information tools” are meant to complement information to be provided by the Member State concerned, but can only be used after the Commission has initiated a formal investigation procedure and found it to be ineffective to date; in the case of requests to aid beneficiaries, the agreement of the Member State is required. As for the similar instruments foreseen in Regulation No 1/2003 or in the Merger Regulation, addressees that supply incorrect or misleading

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information or, in the case of decisions, do not supply the information may be fined or made to pay periodic penalties. It can be expected that the Commission will use the new tools sparingly, but they may turn out to be particularly useful whenever a survey of market conditions is relevant to decide whether the measure constitutes aid or whether it is compatible with the internal market.

Second, it has been clarified that only interested parties within the meaning of Article 108(2) TFEU are entitled to file complaints and that, to that effect, they shall duly complete a form that has been defined in an implementing regulation. Of course, the Commission may still use information provided by other sources, such as citizens or taxpayers, as a basis for its investigations and cases. But it is no longer under a duty to act when requested by those subjects. In any event, even before the amendment of the Procedural Regulation, such duty was not actionable before the courts because simple citizens lacked the locus standi to obtain judicial protection in this respect.

Third, by analogy with the instrument foreseen in Regulation No 1/2003, it has been decided that the Commission may conduct inquiries across various Member States into State aid measures concerning a particular economic sectors or based on a particular aid instruments that may materially restrict or distort competition. In that context, the Commission may use market information tools. It shall publish a report on the results of its inquiry.

Importantly, information obtained from such enquiries may then be used in the framework of investigation procedures. My guess would be that, here again, there will be a moderate use of the new tool, possibly more often in respect of specific aid instruments, such as tax advantages, than in respect of sectors of the economy. However, enquiries into economic sectors could be conducted in parallel with sector enquiries under Regulation No. 1 and contribute to providing a more accurate picture of the competitive situation prevailing in such areas.

Fourth and finally, a new chapter on cooperation with national courts now expressly provides that the latter may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid rules, which has happened in practice for many years and with increasing frequency. More importantly, the Commission is now empowered, by analogy with the similar instrument foreseen in Regulation No 1/2003, to submit of its own motion written observations to national courts, and to make oral observation if the court in question permits it. It may be expected that such amicus curiae interventions will be more frequent in the field of State aid than they have been in the area of competition rules applicable to undertakings. In national State aid litigation, the Commission will more often see its own role as


24 See the first Notice on cooperation between national courts and the Commission in the State aid field (OJ C 312, 23.11.1995, p. 8) and its 2009 successor text, Commission Notice on the enforcement of State aid law by national courts, quoted above. See also Case C-39/94 *SFIE and Others* [1996] ECR I-3547, paragraph 50.
enforcer at stake and may wish to underline that certain measures should have been notified to it or to promote the proper execution of its decisions, including through the recovery of illegal and incompatible aid. Therefore, interventions before national courts may not only be prompted by a general interest to promote the correct application of EU competition rules, as in the field of antitrust, but also by the concern that defective decisions by national courts may disrupt State aid enforcement by the Commission.

3. GUIDELINES AND FRAMEWORKS

The next and fundamental area of modernisation is a radical overhaul of all major guidelines and frameworks, in particular of the ones pertaining to horizontal objectives under Article 107(3)(a) and (c) TFEU: regional aid; risk finance; environmental protection, with the addition of energy; research and development and innovation; rescuing and restructuring of undertakings in difficulty; on top of that, the adoption of a new set of criteria concerning important projects of common European interest within the meaning of Article 107(3)(b) TFEU.

All these documents share a number of common features. First, compared with their predecessor texts, they have lost most of the sections concerning the existence of State aid within the meaning of Article 107(1) TFEU. Such developments, concerning an objective legal notion, may indeed be confusing when inserted in guidelines by which the Commission announces how it intends to exercise its discretion when assessing the compatibility of aid measures with the internal market and thereby binds itself, in principle, to follow certain rules. The notion of aid will now be discussed in a separate interpretative notice, while guidelines and frameworks only contain residual comments related to the specific features and problems of the sector at stake.

Second, in an attempt to increase clarity, the new guidelines now contain all the relevant rules on compatibility, including reminders of certain general horizontal principles that flow from the case-law, but were not mentioned in the previous generation of texts. So, it is now expressly stated that the Commission can never approve aid measures which entail by themselves, by the conditions attached to them or by their financing method, a non-severable violation of Union law; that it will take account of any proceedings concerning infringements of Articles 101 and 102 TFEU which may concern the beneficiary of the aid and which may be relevant for its assessment; or that, when assessing aid granted to an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring an aid illegal and incompatible with the internal market, the Commission will take into account the amount of aid still to be recovered.

Third and most importantly, the new guidelines and frameworks share a common approach to the compatibility assessment and a largely uniform structure. This represents an

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important novelty compared with past updates of existing guidelines, which were not always or not visibly based on a common, comprehensive approach; rather, the structure, style and sequence of each document largely depended on circumstances, if not on the personal preferences of the drafters. As a consequence, the compatibility assessment to be developed in future individual decisions should follow a common path and become more systematic.

It is obviously impossible to dwell upon each individual set of guidelines. Rather, I shall attempt to describe their common structure and principles.

As explained in the 2012 Communication on modernisation, the first step was to identify and define "common principles applicable to the assessment of compatibility of all the aid measures carried out by the Commission; such horizontal principles would clarify how the Commission would assess common features that are presently not treated in the same manner across the different guidelines and frameworks". The Commission has finally decided not to issue a separate document setting out such common principles, but rather to develop a list of such principles to be inserted in each set of guidelines and to draft each document in accordance with a uniform structure and pattern.

As to the policy options, according to the 2012 Communication, the revision was to follow "a general approach based on strengthening the internal market, promoting more effectiveness in public spending (use of State aid only where it represents a real added-value); a clearer definition of the market failures that need to be addressed and greater scrutiny of the incentive effect will play an important role in that context to ensure value for money and avoid distortions. A more systematic assessment of the potential negative effects of State aid - notably in terms of distortions of allocative and dynamic efficiency, subsidy races and market power - will also need to be pursued".

In fact, the guidelines and frameworks generally set out in the same terms the common assessment principles:

a) contribution to a well-defined objective of common interest: a State aid measure must aim at an objective of common interest in accordance with Article 107(3) of the Treaty;

b) need for State intervention: a State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself by remediing a market failure;

c) appropriateness of the aid measure: the State aid measure must be an appropriate policy instrument to address the objective of common interest;

d) incentive effect: the State aid measure must change the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity which it would not carry out without the aid or would carry out in a restricted or different manner;

e) proportionality of aid (aid limited to the minimum): the State aid measure must be limited to the minimum needed to induce the additional investment or activity by the undertaking(s) concerned;

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28 See Communication on EU State aid modernisation (SAM), quoted above, at paragraph 18;

29 Ibidem.
f) avoidance of undue negative effects on competition and trade between Member States: the negative effects of State aid measure must be sufficiently limited, so that the overall balance of the measure is positive;

g) transparency of aid: Member States, the Commission, economic operators, and the public must have easy access to all relevant acts and to pertinent information about the aid awarded.

These general criteria are then developed, sometimes in great detail, in each set of guidelines, in respect of the particular area and also of different types of aid measures covered by the different guidelines. The result is that some texts contain, so to say, a general part, which is then completed and refined by special parts covering particular measures. True, this may oblige the reader to put together two different parts of the same document in order to obtain the rules that apply to a certain type of measure. However, consistency and predictability of the compatibility assessment should be greatly increased through the harmonisation of the presentation and content of the common assessment principles across the different guidelines. While there is no separate document setting out the compatibility criteria that the Commission intends to follow for the assessment of cases not covered by the guidelines, in which it applies Article 107(3)(c) directly, it is to be expected that its analysis will follow the same logic.

Particular attention is devoted to elements that should improve the monitoring of State aid measures, including by interested parties, such as the publication of the most relevant information on a comprehensive website, at national or regional level. In addition, certain large aid schemes shall be subject to a detailed evaluation after an initial period. This should allow the Commission to check their actual effects and to refine compatibility rules for the future.

It can also be noted that on two occasions, namely the Aviation Guidelines and the Environment and Energy Guidelines, the Commission has decided that, contrary to its usual practice, some rules concerning, respectively, operating aid to airports and reductions in funding support for electricity from renewable sources, will also apply to the assessment of unlawful aid granted in the past. While such a choice is not unprecedented, it has now been made with the intent to replace strict rules that were not properly applied by more realistic provisions requiring a progressive change in the behaviour of Member States and beneficiaries alike. This looks like an interesting symptom of a more general trend, whereby State aid rules are expected to be applied and complied with in a more systematic manner to all national measures falling under Article 107 (1) TFEU and deviations will no longer be tolerated.

Finally, on top of the guidelines based on Articles 107(3)(a) and (c) TFEU, the

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30 See, for instance, the Guidelines in State aid for environmental protection and energy 2014-2020, quoted above.

31 See Guidelines on State aid to airports and airlines, quoted above, point 172, and Guidelines in State aid for environmental protection and energy 2014-2020, quoted above, point 249.

Commission has issued a separate document setting out criteria for the assessment of aid in favour of important projects of common European interest within the meaning of Article 107(3)(b) TFEU. That provision has been used very sparingly until now, mainly in the area of research, and this trend should not fundamentally change in the future, but the relevant rules are now to be found in a single document which applies across the board, whatever the area or the objective concerned.

4. Block Exemption Regulations

A further element of modernisation is the replacement of all the existing block exemption regulations, whether they concern de minimis measures, which are deemed not to constitute State aid, or measures that are considered compatible with the internal market.

The new de minimis regulation does not fundamentally alter the previous situation; in particular, the general limit of 200,000 euros per three year period has not been increased, in line with the attempt to limit potentially distortive measures that do not make a clear contribution to the attainment of an objective of common interest. In the current economic and financial context, where Member States' budgetary capacities vary widely, the Commission considered it appropriate not to widen an exemption that could give rise to significant cumulative distortions in case of a widespread use. However, the rules have been clarified in many respects, such as the definition of undertaking for the purpose of the application of the ceiling, and simplified, in particular through the introduction of exemption criteria for subsidised loans of up to €1 million.

The new general block exemption regulation is a fundamental element of the new architecture, expected to cover the vast majority of State aid measures to be granted by Member States: according to some estimates, 3/4 in terms of number and some 2/3 in terms of aid amounts. It has been extended to cover a number of new areas that are now foreseen in the revised Enabling Regulation, such as innovation aid for large companies, aid for broadband infrastructure, aid for culture including audio-visual works, aid for sport, aid to make good the damage caused by natural disasters and social aid for the transport of residents of remote regions. Moreover, the Commission has considerably increased the notification thresholds. Both tools pursue the objective to limit the ex-ante assessment of State aid by the Commission to the largest aid measures and to those which are most likely to create serious distortions in the single market. The Commission will thus apply generous compatibility criteria, also in respect of aid granted in the past, concerning areas such as culture, where notifications have been rare and severe distortions are unlikely to occur, in a further attempt to align State aid rules with the reality and to promote their systematic application and enforcement.

As to its content, the general block exemption regulation follows the same structure as the revised guidelines, with a general section on common assessment principles and detailed rules concerning different kinds of measures. Another feature in common with the guidelines is the exclusion of measures which entail by themselves, by the conditions attached to them or by their financing method, a non-severable violation of Union law. Also, Member States will be required to perform an evaluation of
large schemes and to notify them for this purpose only, it being understood that the compatibility assessment will be conducted on the basis of the substantive rules of the exemption regulation and not of the guidelines.

5. THE NOTICE ON THE NOTION OF AID

Finally, the Commission intends to adopt for the first time a comprehensive notice on the notion of aid within the meaning of Article 107 (1) TFEU. The notice will also supersede a number of texts on specific issues, such as privatisations, sales of land or tax measures, that have become largely obsolete, and will take on board some comments on the presence of aid that were often to be found in the introductory part of many guidelines.

It is important to underline the purpose and legal effects of such an interpretative communication: the Commission attempts to give an objective, reasonable and systematic interpretation of the law, and in particular of the case-law. The document is supposed to clarify the law as it stands, but has no constitutive effects. While guidelines on compatibility bind the Commission, which can only depart from them by giving reasons that are compatible with the principle of equal treatment, the situation is different here. The concept of State aid is an objective one and cannot depend on the conduct or statements of the institutions. Whatever it may say, the Commission is obliged to act within the framework prescribed for it by the Treaty as interpreted by the Court of Justice.

Nevertheless, I believe that this initiative can contribute to a better understanding of State aid rules, increasing awareness among those concerned and dispelling certain doubts about the exact scope of the notion of aid, and consequently of the notification obligation imposed on Member States. In presenting the state of the law as it perceives it, the Commission has been extremely careful to base its reconstruction on the case-law, complemented by its own decisional practice mainly in those areas where judgments are scarce or do not decide all relevant issues. The current draft can certainly be improved and even the final product will not be perfect, but it will be the outcome of a sincere effort to restate the law as it stands and not the expression of policy choices.

If the Commission has refrained from publishing such a notice in the past and is now ready to do it, it is because of the considerable clarifications brought by the European Courts over time and increasingly in the last few years. The areas of uncertainty have been greatly reduced, so that doubts or divergent views are now due to the difficulty to reconcile certain judgments with one another, rather than to the lack of guidance from Luxembourg. Whenever there is doubt, the Commission has attempted to propose the most plausible construction, with precise references to the judgments or precedents at stake. Of course, the notice will not provide a ready answer to all problems of interpretation, but it should be a reliable guide through the main issues and allow the reader to further refine his understanding and thinking based on the relevant case-law.

6. CONCLUSION

State aid modernisation has almost been completed. Only time and experience will tell if it will bring significant benefits. However, it
may already be possible to make some comments and guesses as to its possible effects and to assess whether it is indeed likely to bring clarity and to make State aid control and enforcement more relevant and more effective.

The progress made in terms of clarity can be already measured to a large extent. The notice on the notion of aid will for the first time convey a comprehensive view about the actual subject-matter of State aid control. It should become easier for national authorities, beneficiaries and interested parties to understand whether a national measure is likely to constitute State aid and, therefore, whether it should in principle be notified to the Commission under Article 108(3) TFEU. The streamlining of the guidelines and their common structure, which extends to the block exemption regulation, should also contribute to a better understanding of the compatibility requirements and of the Commission’s policy options. Finally, over time, Commission interventions as amicus curiae before national courts may also shed further light on difficult questions arising in national litigation.

Whether State aid control will become more relevant depends on the way the Commission action will develop in the near future and, in particular, on its ability to take action, if necessary of its own motion, on cases and measures that are most likely to provoke major distortions. What can be said is that all the conditions are now in place to allow a better focus on the most harmful measures.

First, large portions of national aid schemes will be covered by the general block exemption, which will avoid the need for routine decisions and free resources for more demanding cases. Of course, the qualitative and quantitative expansion of the block exemption triggers the need for a better monitoring of the actual implementation of those schemes and may prompt the Commission to take action in cases of abuse or violations of the exemption conditions. But this will be a proactive response and can be tailored to the actual needs, rather than freezing resources depending on the inflow of notifications.

Second, while the flow of information from all sources, including the general public, will still be available and will certainly be used to detect problematic situations, the Commission will no longer be obliged to act unless it receives a duly substantiated complaint from an interested party. Again, this should avoid unnecessary administrative work and allow a better prioritisation of cases.

Third, the Commission will be better informed on the actual situation, through the evaluation mechanisms of large schemes, the use of sector enquiries and the availability of so-called market information tools, whether in the context of individual cases or of the sector enquiries. A better informed regulator should become a better regulator, able to select and pursue cases of greater importance and to better ensure that competition is not unduly distorted in the functioning of the internal market.

Fourth, a more realistic set of rules, with more generous exemptions for relatively innocent measures and better-tailored rules for measures entailing serious distortions, will also allow the Commission to intervene in a manner that is commensurate to the actual needs.

Efficiency, like relevance, will depend on the way the Commission is able to exploit the assets now at its disposal. The availability of
resources freed from less productive tasks should be used to reduce the backlog and to close cases that have been pending for too long. Requesting information to undertakings may become a precious way to overcome the reluctance of the Member State to provide certain data or its inability to provide a clear picture of the market situation, when the latter is relevant for the assessment of the measure.

In any event, it is extremely important for the credibility of State aid control to reduce the duration of investigation procedures, taking quick decisions on unproblematic cases and making sure that investigations do not remain inactive without good reasons. The Commission should intervene rapidly and take effective action, so that decisions are adopted in a time frame that is compatible with the legitimate interests of the Member States and of the undertakings concerned. The Commission has shown that it was able to do so when this was absolutely necessary, as for the banking cases. Of course, not all investigations can or should receive the same degree of priority, but there is ample margin for progress.

By way of conclusion, modernisation was a prerequisite for necessary improvements in the quality of State aid control. Very considerable work has been done in just two years, alongside of the usual business and without further delaying the normal investigations and decisions. This initiative has also contributed to increase the awareness of Member States and stakeholders and has left little doubt that the Commission is serious about its enforcement activities. Pretending to ignore it or trying to conceal problematic measures are no longer viable options. While some final pieces of the puzzle are not yet in place, the main elements apply since 1 July 2014 and the reform should start bearing its fruits. Whether the results will be in line with the ambitions remains to be seen, but there are reasons to be relatively optimistic.
REFERENCES
Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions - EU State aid modernisation (SAM) (COM/2012/0209 final).


Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ C 272, 15.11.2007, p. 4).


Communication - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (OJ C 88 of 20.6.2014, p. 4).

EU Guidelines for the application of State aid rules in relation to the rapid deployment of

Communication from the Commission on State aid for films and other audiovisual works (C 332, 15.11.2013, p. 1).


