2022 GCLC Annual Conference - 26 March 2022

Transformation of EU competition law and the next generation issues

Panel 5: The transformation of State aid law and policy: Modernisation relaunched and the link with crisis management

State aid modernisation over a period of fifteen years, and in the response to the crisis

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1. What is the basis for aid to be compatible, and in whose interests?

State Aid Action Plan - Less and better targeted State aid: a roadmap for State aid reform 2005 – 2009 (EUR-Lex - l26115 - EN - EUR-Lex (europa.eu) and kdab050023ac.indd (europa.eu))

> *State aid may […] be compatible with the Treaty provided that it fulfils clearly defined objectives of common interest and does not distort competition to an extent contrary to the common interest. Control of [S]tate aid is fundamentally about balancing the negative effects of aid on competition with its positive effects in terms of common interest, although the presumed advantages for the common interest must outweigh the negative effect of the distortion of competition.*

Eight "key priorities": R&D&I; risk capital; human capital; high-quality SGEIs; broader BERs and higher *de minimis*; more focussed regional aid; a more environmentally sustainable future; and modern infrastructure for energy, transport and ICT.

Commission Communication of 26 November 2008, European Economic Recovery Plan (COM(2008) 800) (EN (europa.eu)), seeking to, inter alia:

> *help Europe to prepare to capitalise when growth returns, so that the European economy is in tune with the demands for competitiveness and sustainability and the needs of the future, as outlined in the Lisbon Strategy for Growth and Jobs. That means supporting innovation, building a knowledge economy and speeding up the shift towards a low-carbon and resource-efficient economy.*

Commission Communication of 8 May 2012 (COM(2012(209)), EU State Aid Modernisation (EUR-Lex - 52012DC0209 - EN - EUR-Lex (europa.eu))

Point 6: *The modernisation of State aid control is needed to strengthen the quality of the Commission's scrutiny and to shape that instrument into a tool promoting a sound use of public resources for growth-oriented policies and limiting*

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competition distortions that would undermine a level playing field in the internal market.

Point 12: *Modernised State aid control should facilitate the treatment of aid which is well-designed, targeted at identified market failures and objectives of common interest, and least distortive ("good aid"). This shall ensure that public support stimulates innovation, green technologies, human capital development, avoids environmental harm and ultimately promotes growth, employment and EU competitiveness.*

2. Red lines and blacklists

Case C-594/18 P *Austria* v *Commission* EU:C:2020:742, paragraph 20:

> *Unlike Article 107(3)(b) TFEU, which provides that aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State may be declared compatible with the internal market, Article 107(3)(c) TFEU […] does not make the compatibility of aid dependent on its pursuing an objective of common interest, without prejudice to the fact that decisions adopted by the Commission on that basis must ensure compliance with EU law.*

See also paragraphs 45 and 49, on aid for activities that are contrary to Union law.

See also paragraph 67, on the role of market failure.

Guidelines on State aid for climate, environmental protection and energy 2022, OJ C 80, 18.2.2022, p. 1 (EUR-Lex - 52022XC0218(03) - EN - EUR-Lex (europa.eu)).

Post-*Hinckley* compatibility structure under Article 107(3)(c) TFEU set out in section 3.

See also in particular points 74, 128 and 129

3. <u>Reaction to the three crises – mitigation, long-term goals, and investment gaps</u>

Temporary Community Framework, OJ C 83, 7.4.2009, p. 1 (in place from 17 December 2008 to 31 December 2011)

- Section 4.5 – Aid for production of green products

Juncker Plan: Commission Communication of 26 November 2014 (COM(2014) 903 final), 'An Investment Plan for Europe' (EUR-Lex - 52014DC0903 - EN - EUR-Lex (europa.eu))

Section 2.1: *All interventions by the European Fund for Strategic Investments will be covered by established [S]tate-aid clearance procedures.*

[footnote: "To ensure that infrastructure and project investments supported under this initiative are consistent with [S]tate aid rules, projects should

address unmet needs (e.g. not duplicate existing infrastructure), crowd in private financing to the maximum extent possible and avoid crowding out privately financed projects. Supported projects should generally be open to all users, including competing operators, on fair, reasonable and appropriate conditions so as to avoid the creation of entry barriers to entry. To maximise the impact of such investments, the Commission will formulate a set of core principles, for the purpose of [S]tate-aid assessments, which a project will have to meet to be eligible for support under the European Fund for Strategic Investments. If a project meets these criteria and receives support from the Fund, any national complementary support will be assessed under a simplified and accelerated State Aid assessment whereby the only additional issue to be verified by the Commission will be the proportionality of public support (absence of overcompensation)."

European Fund for Strategic Investments 'EFSI' (Regulation (EU) 2015/1017 of the European Parliament and the of the Council, OJ L 169, 1.7.2015, p. 1).

Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (post-6th Amendment) (\Temporary Framework (europa.eu))

- Point 10 TF: *Targeted and proportionate application of EU State aid control serves to make sure that national support measures are effective in helping the affected undertakings during the COVID-19 outbreak but also that they allow them to bounce back from the current situation, keeping in mind the importance of meeting the green and digital twin transitions in accordance with EU objectives.*
- Points 44, 45, 83 and 85: role of green and digital transformation in the structuring of section 3.11 TF measures (COVID-19 recaps), in reporting on use of aid and in the review of any restructuring plan provided if the recap is not brought below 15% of the equity of the beneficiary.
- Points 16 and 17 of the 6th Amendment (on section 3.13 TF, sustainable investment support)

  Investment support should facilitate the development of economic activities required for the return to a sustainable long-term growth, overcoming the negative economic effects of the crisis including a widening of the investment gap. It should also support a more resilient economy for the future, while effectively limiting potential negative effects on competition and trade. Support of that kind may also help Member States to particularly develop those economic activities required to achieve the objectives of the green and digital transitions and support recovery towards a greener and more digital future while strengthening resilience and preserving a level playing field.

Temporary Crisis Framework OJ C 131I, 24.3.2022, p. 1 (EUR-Lex - 52022XC0324(10) - EN - EUR-Lex (europa.eu))

- Point 24 (environmental protection in relation to aid covering additional costs in the form of greatly increased prices for natural gas and electricity)

4. **<u>“Strong Nudges” - Block exemption of measures</u>**

Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs, OJ L 156, 20.6.2017, p. 1

- Horizon 2020 SME-instrument

Commission Regulation (EU) 2021/1237 of 23 July 2021 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 270, 29.7.2021, p. 39

- European Structural and Investment Funds, Articles 14(15), 16(4), 19a, 19b, 20 and 20a GBER
- Horizon 2020/Horizon Europe, Articles 25, 25a, 25b, 25c and 25d GBER
- InvestEU Fund

5. **<u>The piper principle</u>**

Context: Pushback on SAM

Context: Temporary Framework, point 9:

> *Given the limited size of the EU budget, the main response will come from Member States’ national budgets. EU State aid rules enable Member States to take swift and effective action to support citizens and undertakings, in particular SMEs, facing economic difficulties due to the COVID-19 outbreak.*

Regulation (EU) 2020/2094 of the European Parliament and the of the Council of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433, 22.12.2020, p. 23

Mechanism for providing through the Union budget financial support in favour of Member States, through a mixture of loans and grants, for a total of EUR 750 billion.

Regulation (EU) 2021/241 of the European Parliament and the of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ 57, 18.2.2021, p. 17

Recital 8: *The Facility should be a dedicated instrument designed to tackle the adverse effects and consequences of the COVID-19 crisis in the Union. It should be comprehensive and should benefit from the experience gained by the Commission and the Member States from the use of the other instruments and* *programmes. Private investment could also be incentivised through public investment schemes, including financial instruments, subsidies and other instruments, provided State aid rules are complied with.*

Recital 50: *Union institutions should do their utmost to reduce processing time in order to ensure the smooth and rapid implementation of the Facility*.

The scope of the RRF is built around six pillars: (1) green transition; (2) digital transformation; (3) economic cohesion, productivity and competitiveness; (4) social and territorial cohesion; (5) health, economic, social and institutional resilience; and (6) policies for the next generation.