

EUROPEAN COMMISSION CONSULTS ON MAJOR PLANS TO MODERNISE STATE AID

European Commission announces initiative to reform State aid control

On 8 May 2012, the European Commission (the “Commission”) announced its intention to reform EU State aid control. The reforms are part of the European Union’s (the “EU”) growth strategy for this decade, Europe 2020. The Commission sees State aid control as paramount in allowing the single market to function without distortion. It is hoped that legislation will be adopted in early 2013, with instruments of the new initiative implemented by the end of 2013.

It is the Commission’s intention that the reforms will lead to better targeted State aid control that can promote growth and competition, limit distortion and run more efficiently. To facilitate the reform, the Communication highlights the following three objectives:

- To foster sustainable, smart and inclusive growth in a competitive internal market.

- To focus Commission scrutiny on cases with the biggest impact on the internal market.
- To streamline the rules and provide for faster decisions.

Fostering growth

The Commission states that there should be a focus on “good aid”, that targets a market failure and thereby complements, rather than replaces, private spending. It is also hoped that aid will stimulate innovation, green technologies, human capital development, avoid environmental harm and promote employment and EU competitiveness. The Commission notes that State aid will only achieve the desired public policy objective when it has an incentive effect. This means that the aid should induce the beneficiary to undertake activities it would not have done without the aid.

For State aid to help achieve this growth, the Commission has proposed the following reforms:



- **Identification and definition of common principles:** the Commission wants to clarify common principles, such as the assessment of the compatibility of aid measures, of market failures, of incentive effects and of negative effects of aid.
- **Revision and streamlining of State aid guidelines:** the Commission intends to modify existing State aid guidelines, such as those for Regional Aid, Research & Development & Innovation, Environmental Aid, Risk Capital and Broadband so that they are aligned with the common principles by the end of 2013. There will be revised guidelines on rescue and restructuring aid for non-financial firms to ensure that market processes are only interrupted by State intervention when justified. There are also proposals for new guidelines for rescuing and restructuring financial institutions, which will be in line with future proposals for EU crisis management and resolution.

Prioritising cases with the biggest impact on the internal market

The Commission wishes to conduct a more rigorous examination of complainants in order to prioritise the scrutiny of State aid that covers only a large and potentially distortive part of the single market. For smaller cases, the Commission intends to define more proportionate and differentiated rules, which can be implemented by support measures of Member States. The increased responsibility for Member States will, however, require post monitoring by the Commission to ensure compliance.

To assist in prioritising what State aid cases should attract scrutiny, the Commission proposes:

- A review of the *de minimis* Regulation to ensure that the current threshold corresponds to market conditions.
- A review of whether certain categories of aid are compatible with the internal market and, therefore, exempt from prior notification. The Communication suggests that this could include: aid granted to culture; aid given in response to natural disasters; or aid to (partly) funded EU-projects.
- A review of the General Block Exemption Regulation (“The Block Exemption”) for State aid to include the categories of State aid which may be deemed compatible.

The Commission reiterates however that an increase in the sphere of State aid that is made exempt from prior notification will have to be facilitated by increased responsibilities of Member States to make sure that there is effective compliance with the Block Exemption or the *de minimis* Regulation above. To date, the Commission’s monitoring has revealed significant difficulties in the enforcement of regulations by Member States and tighter measures will have to be adopted by Member States to facilitate less involvement by the Commission.

Streamlined rules and faster decisions

The Communication acknowledges the need to streamline and reform procedures in order to deliver

decisions within a more business-relevant timeframe. At present the assessment procedures are too lengthy and complicated. To assist in streamlining these procedures, the new package will:

- Clarify and explain the notion of State aid: under Art.107 TFEU the definition of State aid can be subject to wide interpretation in assessing the intervention of the Member State; the advantage conferred on a recipient; or the distortion of competition.
- Modernise the State Aid Procedural Regulation (the “Procedural Regulation”) with regard to complaints-handling, allowing the Commission to prioritise allegations of potential aid that may impact on the internal market, rather than having to examine all allegations.
- Modernise the Procedural Regulation to improve tools used to gather information in order to increase the efficacy of investigations. The Communication stops short of revealing what these powers could be.

Implementing the reforms

In order for these measures to be implemented proportionately, the Commission has opened a public consultation to collate the views of Member States and stakeholders. Responses to the consultation should be submitted by 5 October 2012. In light of the responses, the Commission will propose a revised Regulation by December 2012, which will be subject to debates in the EU Parliament and the EU Council of



Ministers. Legislation will then follow in 2013.

It is clear that some stakeholders will welcome the proposals to streamline assessment procedures and focus only on large and potentially distortive aid. On the other hand, some have considered that State aid, under Art.107 TFEU, is being manipulated by the Commission as a tool to control the public spending of Member States. In addition, certain proposals regarding increased authority given to Member States, the party responsible for providing the aid, could prove ineffective. While streamlining procedures and updating the rules to reflect current market realities has been welcomed, it is anticipated that some of the proposals are likely to face strong resistance by Member States. In particular, this will be the case if the Commission enriches its powers by directly seeking information from third parties and aid beneficiaries in State aid proceedings. This is potentially a radical reform and one which is not envisaged under the present rules.

HFW is able to advise all stakeholders on State aid issues. Our dedicated State aid team has acted previously for recipients of State aid, complainants, awarding authorities, Governments and public bodies in State aid proceedings both before the European Commission and the European Courts.

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