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**THE TRANSPARENCY OF STATE AID WITHIN THE SCOPE
OF THE EUROPEAN UNION COMPETITION LAW**

Bachelor's Thesis

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I declare that I have compiled the paper independently
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LIST OF ABBREVIATIONS

EC	European Council
ECJ	European Court of Justice
EU	European Union
GBER	General Block Exemption Regulation
SAM	State Aid Modernisation programme
SME	Small and medium-sized enterprise
TEEC	Treaty establishing the European Economic Community
TFEU	Treaty on the Functioning of the European Union

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ABSTRACT

This thesis discusses the various forms of state aid and the questions concerning the issue of it. The procedure of issuing state aid is heavily decreed by the EU. As a primary rule, Member States can not issue state aid inside its borders without notifying the European Commission first. There are exceptions to this rule, which are discussed in this thesis.

This thesis will also discuss the consequences of issuing state aid without notifying the Commission. The procedure and consequences are examined.

Keywords:

INTRODUCTION

This thesis discusses the transparency of state aid within the scope by the European Union competition law.

The state aid rules are set to ensure fair competition within the single market. The competitors of the aid recipient have access to information which states the recipient, the amount and the purpose of the aid. This information is crucial since the aid may distort competition. The forms of aids that are considered to be compatible with the internal market are listed in Article 107 of the Treaty on the Functioning of the European Union.

State aid is defined as an advantage granted to undertakings by a national public authority.

In case a competitor feels that the state aid rules have not been followed, they can file a complaint. The European Commission examines these cases and determines whether the state aid rules have been followed pursuant to Articles 107 and 108 of TFEU.

The state aid rules are set to ensure fair competition within the single market. As of November 8th, The European Council has given decisions in 319 cases concerning state aid this year. The figures of previous years have decreased; in 2013 there were 711 cases, 2014 394 cases and in 2015 394. The figures show that state aid is an issue which is dealt by the EC on a day-to-day basis. From these statistics can be derived that even though the number of decisions has decreased, the issue of state aid transparency is far from diminished.

The new requirements for Member States to provide information about the state aid granted by them came into force on July 1st 2016. This requirement is dictated on Article 9 and Annex III of the Commission Regulation no. 651/2014.¹ The information is gathered to a register that is accessible publicly online.

The author has divided this thesis in four parts. The first part is introduction, in which the author provides background for the thesis and lists the research methods, research questions and

¹ Commission Regulation no. 651/2014 of 17 June 2014 on declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

hypothesis. Furthermore, the author discusses the motivation for choosing this topic as well as why this theme is in need of legal analysis.

The second part of the thesis consists of examining the nature of state aid. The part begins with a historical introduction before continuing to the different forms of state aid. The most relevant forms of aid to this study are examined thoroughly.

In the third part of this study the author presents the instruments controlling state aid. The author discusses the most recent changes in state aid provisions and indicates the necessary changes to the current provisions in order to ensure transparency.

The fourth part examines the recent development of state aid. The main focus will be on the transparency provisions which came into force on 1 July 2016 and the Special Eurobarometer 448. The author will analyse the results of this survey in order to attain a perception of how a commoner in EU finds the concept of state aid, and how easy it is to find information concerning it.

The final part consists of the conclusion of the study. The author provides a final analysis of the topic and concludes findings of this study.

The topic of this thesis was selected because of the author's interest in competition law. Moreover, after deciding the field of law the author chose to concentrate in state aid, as it is a field which has been decreed tremendously during the past years. Furthermore, some of the provisions in this thesis have been in force only since the Summer of 2016 and thus have not yet necessarily been proven to fulfil the aims set for them during their preparation.

Author's hypothesis is that the current instruments for state aid policy are not sufficient enough to ensure the transparency of the state aid practice. The research questions are:

- How should the state aid instruments be developed to ensure transparency?
- Why certain aids are not subject to transparency provisions?

The author has chosen to conduct the research by documentary analysis. The main sources are the most recent state aid transparency provisions and the Special Eurobarometer 448. This survey was conducted by the EC Department of Communications in order to record the awareness of Europeans concerning state aid and how accessible they found the records of it.

1. WHAT IS STATE AID?

The history of state aid derives from the Treaty of Rome, officially named as the Treaty establishing the European Economic Community (TEEC). TEEC offered a narrow definition for the act. State aid was defined to be “any aid, granted by a Member State or granted by means of State resources, in any manner whatsoever, which distorts or threatens to distort competition by favouring certain enterprises or certain productions, to the extent to which it adversely affects trade between Member States.”² The provisions concerning state aid were amended by the Treaty on the Functioning of the European Union (TFEU) in 2007.

As a basic rule, a state may not grant an aid before it has been examined by the European Commission. An aid which has been issued before it has been cleared by the Commission is deemed unlawful unless the sum involved does not exceed 200 000 Euros within a period of three years³ or is excluded under the General Block Exemption Regulation (GBER). These two exceptions, as well as exceptions to the *De minimis* rule, will be examined later in the thesis.

In order to define whether an aid is indeed state aid, a special five-part test can be used.⁴ The test is cumulative, which means that all requirements must be fulfilled in order for state aid to exist⁵. The exhaustive list can be found in the first paragraph of Article 107 TFEU, and is as follows:

- i. the use of state resources;
- ii. the measure must confer an advantage to certain firms;
- iii. the advantage must be selective;
- iv. the measure must distort competition; and
- v. affect trade between member states.

The fulfilment of each criteria needs to be analysed carefully. In case of difficulties whether a criteria is met, the extensive case law helps to determine whether the requirement is fulfilled.

² Article 92 of Treaty on the establishing the European Economic Community

³ “*De Minimis* Regulation”, EC regulation no. 1407/2013

⁴ Heimler, A. The limitations of European Union control of state aid. *Oxford review of economic policy*, 2012, 28 (2) p. 347-367

⁵ Case C-280/00

The forms of state aid vary. An undertaking may receive aid in forms of direct grants or subsidies, loans with low interest rates, tax or other social security exemptions or receiving land or buildings at a rate less than the full market value. The author of this thesis has chosen to examine tax advantages, direct grants and restricting aid closer as she feels that these forms of aid are more likely to distort competition. Indeed, in 2010 grants formed a total of 55 per cent and tax exemptions 39 per cent of the total state aid issued.⁶

Under certain conditions, EU State aid rules are not fully compatible with local aid. Such aid does not affect trade between Member States. According to the Commission, for example, they provide funding for sporting activities, recreational activities or cultural events that serve mainly local people and are therefore not expected to attract customers from other Member States of the Union. The communication thus clarifies the range of forms of aid the Commission does not see as affecting trade between Member States. The Commission does not have the power to evaluate or recover aid that does not meet all the criteria for State aid.

The purpose of the State aid rules is to prevent distortion of competition and economic advantage. It follows that aid is the kind of measures taken by the public authorities for which an undertaking obtains an advantage which it would not have obtained under normal market conditions. This economic advantage must come in the form of state funds or another. Basically, many state measures can distort competition. Consequently, according to settled case-law, the concept of aid is more general than the concept of a grant because the aid does not only refer to positive benefits. This also refers to measures which differently reduce the costs normally borne by the company and are therefore in the nature of subsidies.⁷

It is therefore necessary to classify a measure as a measure by which state authorities release certain undertakings from fees or taxes. There is no transfer of state funds, but the beneficiary is economically in a better position than the other payees. This also applies to tax cuts or suspension of maturing taxes.

This is also the case when a public body sells products or services to companies at a market price, grants a loan at market rates at a lower interest rate, guarantees the company's loan without

⁶ Table on state aid in the European Union in 2010

http://ec.europa.eu/competition/state_aid/studies_reports/expenditure.html#1

⁷ C-222/04, C-143-99

market guarantees, assumes statutory obligations, exempts the company from normal insolvency provisions or protects a particular industry from exchange rate fluctuations.⁸

Thus, the aid is deemed to be granted through State resources whenever the State actually pays the aid or renounces its claims, for example by streamlining obligations, undercutting real estate or exempting taxes. State resources are assets that are directly or indirectly governed by government or state.⁹

1.1 State aid control is an essential part of EU competition policy

MS officials must be sure that aid is not issued to companies which are in difficulty. The withdrawal of unfounded companies from the market is a normal part of the market, and their support for state measures can significantly distort competition. That is why the granting of state aid to firms in difficulty is only possible within the framework of EU State aid rules in very limited circumstances. For example, Article 1 (4c) of the General Block Exemption Regulation (651/2014) expressly prohibits the granting of aid to an undertaking in difficulty, with the exception of compensation for damage caused by certain natural disasters. Similarly, those in difficulty support for businesses is also prohibited in a number of other state aid communications and guidelines.

From the point of view of the EU state aid rules, it is possible to support companies in difficulty The State Aid Guidelines on rescue and restructuring aid¹⁰. Such aid must be notified to the Commission in advance, and support must also be obtained approval by the Commission before its implementation. The general *de minimis aid* regulation (1407/2013) aid may be granted to a firm in difficulty without the prior approval of the Commission, but not as loans or guarantees. In addition, the company in difficulty can be financed through such market-based measures that do not constitute State aid to the Treaty on the Functioning of the European Union (TFEU) within the meaning of Article 107 (1).

⁸ C-200/97

⁹ C-482/99

¹⁰ Commission Communication 2014/C249/01

State aid comes in many forms. The most common forms are tax advantages, direct grants and restructuring aid.

1.2 Tax advantages

Tax advantages issued by the state should not be confused with tax planning. Tax advantages are unlawful and distortive measures offered for companies by states in order to attract potential companies to establish branches or headquarters to the state in question. Tax planning, on the other hand, is a legal method by which a company chooses the state with the most favourable tax requirements to locate into.

1.2.1 The case of Ireland reducing the taxes paid by Apple Inc.

The European Commission published a press release on 30 August 2016 announcing that it had investigated that Ireland had granted Apple exclusive tax benefits. According to the Commission, Ireland and Apple had agreed on a complex arrangement, where the profits were addressed to Apple's head office, which had no habitual residence. Furthermore, only a portion of the profits were transferred to the Irish branch and were taxed according to Irish tax laws. For example, in 2011 Apple had paid tax on only 0,05% of its annual profit.¹¹

Such a favourable tax treatment is unlawful in consideration of the EU state aid rules. Apple gained a significant advantage as the arrangement ensured that Apple managed to avoid paying taxes from the profits gained from the sales within the EU. The timespan of this practice lasts spans over ten years: from 2003 to 2014.

¹¹ European Commission – Press Release. State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion. http://europa.eu/rapid/press-release_IP-16-2923_en.htm (4 March 2017)

The Commission ordered Ireland to recover unpaid taxes worth 13 billion Euros¹² in addition to the interest from Apple. As an interesting note, even though the Commission ordered Ireland to recover the taxes from Apple, Ireland is considered to be the offender in the case.

Ireland appealed on the Commission's recover order. The public version of the decision is not yet available at the time this thesis was conducted.

1.3. Direct grants

Grants are based on the refund of the eligible costs caused by certain activities. In other words, these are costs which have incurred to the beneficiaries while carrying out a project. Direct grants are subject to written agreements, which are agreed by the two parties: the issuer and the recipient. As a general rule, the beneficiary must have assets of its own. The assets can be obtained by either a capital loan or investment of the company founder, or an external co-financer.

1.3.1 Business Finland

Business Finland is a Finnish organization, which grants loans and funding for companies based in Finland.

The functioning of the organization is guided by several Finnish laws and EU legislation.¹³ The EU legislation which concerns is the Commission Regulation 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 and Commission Regulation 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. The later mentioned Regulation is called by the name the General Block Exemption Regulation. This Regulation will be examined later in this thesis. The national legislation which

Start-up businesses may apply for a grant named "Tempo" which enables them to test their business idea. A company may apply a sum equivalent of 75% of their budgeted project costs.

¹² European Commission – Press Release. State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion. http://europa.eu/rapid/press-release_IP-16-2923_en.htm (4 March 2017)

¹³ <https://www.tekes.fi/rahoitus/lainsaadanto/> (26 November 2017)

The applied sum must not exceed 50 000€. In addition to this, the company must have 30 000€ worth of assets of their own. The start-up business receives goals, which must be met during the project. If the goals are met, Business Finland will issue the remaining part of the grant. In a nutshell, the organization will grant 70% of the grant at the start of the project, and the remaining 30% if the goals of the project are met.¹⁴ This grant is not a loan, but a direct grant. Therefore, the company must not pay issued money back. However, the grant is considered to be a part of the 200 000€, which can be issued during three fiscal years by the Member States without the consent of the European Council.

If the start-up manages to test their concept successfully, they may apply for “R&D Funding”, for their research and development phase. Similar to the Tempo-phase, Business Finland will set goals for the start-up. In the R&D phase, the grants are issued as loans. The interest rates of these loans are minimal and there are no collateral needed. In case the project fails, portion of the loan can be converted into a grant.

1.3.2. Finnvera

Finnvera is an organization, which is owned and funded by the Finnish government. The funding is aimed for companies, which are past their phase of business idea testing. Usually start-up companies choose a path, where they first apply for the grants issued by Tekes, and only then proceed to seek for funding by Finnvera.

Similar to Tekes, Finnvera grants the loans on the basis for applications. However, Finnvera has set stricter criteria for issuing aid. For example, the backgrounds and working experience of the company’s team is examined carefully.

To improve the operations and competitiveness of Finnish companies, Finnvera offers loans, guarantees, venture capital and export guarantees.

Finnvera's operations are guided by the state's business and owner policy goals as well as by special legislation. Finnvera is able to take greater risks in its lending operations as the State participates in its credit and guarantee losses. It shares the funding risk with other donors. Getting funding requires an action plan and a presentation of the earnings model. Based on the

¹⁴ <https://www.tekes.fi/en/funding/startup/tempo/> (26 November 2017)

action plan, the necessary funding is provided. The magnitude of the need for money affects whether Finnvera can act as the sole donor or whether other financiers are required, and what is the role of self-financing. The evaluation of a newly created new company is also often evaluated by the development centres and the bank's estimates.

1.4. Reporting of the use of aid

The Beneficiary shall make a statement on the use of the grant. The survey should be submitted to the issuing authority by the deadline indicated in the grant decision.

The report includes both financial reporting and performance reporting.

The issuing authority will assess whether the individual grant has been used correctly purpose and conditions and what is the wider impact of this form of assistance.

If the beneficiary does not provide a statement, the authority may refuse to grant the beneficiary the grant new grants before submitting a missing report.

When drawing up the report, it is important to ensure that the information provided in the report and its annexes is shared coincide.

If the application has been submitted via e-business, an explanation of the state subsidy shall also be provided to make an order service. If the application is made on paper, the investigator must be submitted the same in terms of.

If the beneficiary requests a justified reason for postponement of the report, the authority may extend the deadline.

The required documents may include:¹⁵

- an activity report or a similar report on the operation
- signed financial statements
- a cost-report report on the actual revenue and expenditure of the assisted operation in the case of targeted general allowance
- balance sheet specifications

¹⁵<http://minedu.fi/documents/1410845/3505134/Opas+valtiovastusten+hakemisesta+ja+käytöstä+ja+käytön+valvonnasta.pdf/2986aef3-df33-42d5-ad29-82df568d3513> (Accessed on 31 December 2017)

- the consolidated financial statements and the Group's report on operations (if voluntary or required by law),
- a signed audit report or a performance audit report, due to the form of the organization or the scope of its activity, as further specified in the Auditing Act,
- the Association Act and the Founding Act,
- and any memorandum of the auditor or activity examiner

1.5. Restructuring aid

Restructuring aid is regarded as the last resort to recover a company which has encountered an economic hardship. Such aid can be granted only once in a ten-year period.¹⁶ This guideline has been established in order to ensure that a company does not rely on public money.

The Rescue and Restructuring Aid Guidelines entered into force on 1 August 2014.¹⁷ The new guidelines amended the provisions of 2004. The new guidelines offer more efficient criteria to ensure that the aid is issued to undertakings that were in need of recovery aid. Furthermore, the principle of “burden sharing” is promoted. In essence, this means that the investors of the company are responsible for dealing with the defeats before any state aid is issued. This feature was introduced during the latest financial crisis, when significant grants were awarded to banks. The change shifts the burden from the state – and the taxpayers – to the company as the investors should thus be more committed to recover the company.

Furthermore, The Commission has taken a stance that it allows restructuring aid to be granted only to enterprises, which are likely to be transformed as profitable businesses with the help of the aid. In order to not distort competition, the restructuring aid is limited to the amount which is the minimum to transform the company profitable.¹⁸

¹⁶ Community Guidelines on State Aid for Rescuing and Restructuring Firms in difficulty [2004] OJ C244/2

¹⁷ European Commission, Press release. State aid: Commission adopts revised guidelines for supporting firms in difficulty. http://europa.eu/rapid/press-release_IP-14-795_en.htm (4 March 2017)

¹⁸ Community guidelines on State aid for rescuing and restructuring firms in difficulty, [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52004XC1001\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52004XC1001(01))

In addition to this, the new rules allow temporary restructuring support for the struggling small and medium-sized enterprises (SMEs). This encourages states to grant forms of aid which are less distortive, such as loans, instead of direct grants. Such support can be granted for a period of 18 months.¹⁹ This measure once again shifts the burden away from the state.

In general, the EU state aid rules are considered to be difficult to find a company whose activities are concerned is considered almost end in the short or medium term without any support from the authorities. The State aid rules set out the detailed criteria under which the firm is deemed to be in trouble. The criteria are set out in Section 2.2 of the Rescue and Restructuring Guidelines and in the Article 2 (18) of the General Block Exemption Regulation

The criteria are based on the company's financial key figures. A company is assumed to be in difficulty if even one of the following criteria is fulfilled.²⁰

1. The company is a limited liability company that has lost more than half of its share capital for losses.
2. The company is an open company or a limited partnership (or any other company where at least some of the shareholders' liability for the company's debt is not limited) and has lost more than half due to the accumulated losses of its own funds under the financial statements.
3. The company has been subject to bankruptcy or business reorganization proceedings due to insolvency or bankruptcy meets the conditions laid down in national law for bankruptcy or bankruptcy at the request of creditors. If the company is an SME, which has been operating for less than three years, only this point is assessed.
4. For the purposes of the General Block Exemption Regulation, a company is considered to be in difficulty even if it is a company has got the so-called rescue aid and has not yet paid back or received restructuring aid and is subject to a restructuring plan.

¹⁹ European Commission Press release: State aid: Commission adopts revised guidelines for supporting firms in difficulty – frequently asked questions. [http://europa.eu/rapid/press-release MEMO-14-473_en.htm](http://europa.eu/rapid/press-release_MEMO-14-473_en.htm) (March 5 2017)

²⁰ Memo by the Finnish Ministry of Employment and Economy https://tem.fi/documents/1410877/2851861/Vaikeuksissa+oleva+yrittys+040112015_muistio_final.pdf/d9483233-0ac7-4def-8204-9e6cf036b985 (Accessed on 31 January 2017)

5. Large companies are considered to be in difficulty in addition to the above conditions, on the basis of the two previous annual financial statements, both of the following terms true:
- a) The company 's debt-to-equity has exceeded 7.5 and
 - b) The ratio of company EBITDA to net financial expenses has been below 1.0.

1.5.1 Commission Decision 2016/1031 of 6 November 2015 on the measures SA.35956 implemented by Estonia for AS Estonian Air. The case of Estonia issuing grants to Estonian Air

On 7th of November 2015, the European Commission ordered Estonia to recover unlawful aid which it had issued to Estonian Air between November 2010 and November 2014.²¹ The company received aid in the amount of 84,9 million Euros on several occasions. In addition to this Estonia had planned to issue an additional sum of 40,7 million Euros to recover the company. Estonian Air had been unprofitable since 2006 and was dependant of the state's support.

The European Commission ordered Estonia to recover the aid issued to Estonian Air on the basis of the unlawful grants distorting competition significantly. The Commission found out that Estonian Air had received on three occasions a sum, that could have been considered as rescue and restructuring aid, which could be granted only once within a ten-year span. Furthermore, the Commission concluded that the company "did not have a credible restructuring plan capable of ensuring that the company would become viable without continued state support."²² The company was kept artificially in business by the grants. Estonian Air filed for bankruptcy as a result of the obligation to repay the illegally issued grants and interest back to the Estonian government. As a note, since Estonian Air, of which the Estonian Government owned a majority of shares, discontinued business, the variety of airlines operating from the Tallinn airport has risen significantly. Therefore it can be concluded that Estonian Air receiving unlawful indeed did

²¹ European Commission Press release: State aid: Commission orders Estonia to recover incompatible aid from national air carrier Estonian Air, http://europa.eu/rapid/press-release_IP-15-6023_en.htm. (March 5 2017)

²² European Commission Press release: State aid: Commission orders Estonia to recover incompatible aid from national air carrier Estonian Air, http://europa.eu/rapid/press-release_IP-15-6023_en.htm. (March 5 2017)

distort competition as it prevented other airlines from gaining the opportunity to operate fairly from the Tallinn airport.

2. Monitoring and notification of State Aid

EU authorities must notify the planned grants and other subsidies to the European Commission before they are issued. Approximately 85% of the notified aid will be approved by the Commission after a preliminary study.²³

In the event of a dispute, a formal investigation is required. This investigation is to be announced in the Official Journal of the EU and in the Register of State Aid on the Commission's website. The concerned parties may express their positions as the Commission shall consider all aspects of the case before making the final decision.

The Commission also examines aids that have not been formally notified. This aid is also called unlawful aid. These unlawful aids have been informed by the Commission's own inquiries, complaints by companies or private individuals or the media. If the Commission finds the aid to be incompatible with the EU law and fair competition, it will require the national authorities to cease the aid and recover the aid which has been already granted.

2.1. Notification of issued state aid

The Article 108 of TFEU states the requirements for monitoring and notifying of state aid. The power of monitoring state aid had been focused for the European Commission. The monitoring system is based on three main points.

²³ http://ec.europa.eu/competition/consumers/government_aid_fi.html (Accessed on 4 December 2017)

First of all, the Commission monitors constantly the current aid systems of the MSs, in co-operation with the MS in question. The control of the existing aid is limited to monitoring by which the Commission monitors the aid granted by MSs afterwards. If necessary, the Commission may propose to the MSs the necessary transitional points mentioned in Article 108 TFEU.

Secondly, the third part of the Article discusses new aids and the changes in valid aids. The Article states that MSs must inform the Commission before fulfilling the granting of the aid.

Thirdly, the corner stone of monitoring is the so called stand still obligation. This obligation requires the MS to refrain from executing the informed aid during the time of when the Commission examines whether the aid is applicable to the internal market. The preliminary announcement can be considered to be the main rule of monitoring of state aid.

When the TFEU was being composed, the fact that MSs would violate the obligation of notification and execution prohibition of state aid relatively often was not considered.²⁴ This happens relatively often as MSs either do not inform the Commission about the issued aids on purpose or they assume that the aid they have issued do not fulfil all of the criteria set out in Article 107 (1) of TFEU and thus do not count as state aid. This is one of the reasons why the Article 108 considers the possibility of collect the aid from the aid recipient – along with an interest.

Monitoring the measures that may be considered as State aid causes Member States a lot of costs. Preparing the notification will cost the Member States in a number of ways. Preparing the notification will cause the work and the preparatory process will take time and will bring about legal uncertainty. This can also hinder the adoption of completely acceptable support programs. The procedural regulation gives the Commission two months to take a decision on the notified aid.

However, the two-month time limit shall be counted only after receipt of the complete notification. In practice, the notification procedure takes on average one year since the end of the

²⁴ Alkio, M. Valtiontuet. p. 243

year due to a number of additional rounds. Uncertainty and time for procedures may also reduce the willingness of companies to receive support.

Surveillance can, however, be considered to bring benefits in the absence of aid that is incompatible with the internal market and in improving the efficiency of the economy. The procedure may also enhance the use of public funds by the Member States. This can be the case at least in the case where non-aid monitoring prevents the use of inefficient support programs. The costs of control have also been significant in the Commission's view. The Commission launched a State Aid Action Plan, which was aimed at reducing costs. The same goal has been the GBER and the *de minimis* regulation.

In the Member States, State aid control has changed the decision mechanisms for the use of public funds and the distribution of public support. As a note, the use of public support was before more closely tied to political discretion, but now there are clear legal restrictions on granting aid.

2.2. Register of state aid

The Commission maintains a register²⁵, which consists of ten different aid categories. These categories are:

1. N – Notified aid
2. NN – Non-notified aid
3. C – Contradictaire, formal investigation procedure. Cases which the Commission is investigating.
4. CP – Cas presume. Cases which have been complained, but yet have not been decided.
5. MC – monitoring state aid decision
6. E – existing aid
7. X – aid which is covered by GBER
8. XA – agricultural aid which is covered by GBER

²⁵ http://ec.europa.eu/competition/state_aid/register/

9. XF – fishery aid which is covered by GBER
10. XP – Marketing of agricultural products

When a case becomes pending at the Commission, it receives a code starting with the initials SA. As the case is handled, its identification code will change according to the previous list.

The aim of the notification is to ensure that the aid is suitable for the internal market.

2.3. The period of pre-notification

The Commission recommends unofficial communication between the Commission and the MS before new state aids are applied. This communication is called pre-notification process. It is useful in cases of complex aid procedures. The communication enables the MS to discuss aid procedures unofficially before the actual process of applying for the aid. The unofficial discussion accelerates the actual notification process.²⁶

It is recommended that the communication is started at an as early stage as possible. During this process, the MS can change the problematic features of the planned aid or commission additional research on whether the aid is suitable for the internal market. In essence, this period of time may prevent problems with the actual notification of the aid.

The decision given by the Commission is not binding to either side. However, it can be seen as a nod from the Commission towards positive feedback for the actual application.

There is no set time limits for the pre-notification period. However, after the Commission has received the actual notification of the aid, it must produce a decision within two months.²⁷

²⁶ Aukio, M. Valtiontuet. p. 243.

²⁷ Article 4 of Council Regulation (EU) 2015/1589 of 13 July 2015.

2.4. Recovery of unlawful aid

The use of state aid in the case of companies and the public authorities is a risk that the Commission will order the aid to be paid for the payment of the tax and the payment of undistributed aid. Moreover, the undertaking must of course take into account that the national provisions allow the recovery of the aid because of the complainant's complaint procedure. In the case of a beneficiary, State aid appears to be very insecure because the aid paid can be recovered even if the authority has made a mistake in granting or paying the aid.

The recovery of unlawful or unlawful aid is a prerequisite for the successful control of aid. Unless recovery from non-marketable support programs could be used until it was specifically forbidden. A new aid scheme could then be introduced.

The definition of non-conforming aid is contained in the procedural regulation. It argues that the aid is unlawful simply where the new aid is issued in violation of Article 108 of the TFEU. This means subsidies which have been introduced without notification to the Commission which has therefore been unable to assess the compatibility of the aid with the internal market. Illegal subsidies are also cases of misuse of legal aid. In the event of misuse of aid, the Commission may initiate its investigation and order recovery of the aid.

In their view, the Commission draws particular attention to the effective and rapid recovery of illegal State aid in all Member States. According to the Commission, effective recovery is not just a matter for the beneficiaries, but also a prerequisite for State aid control. Naturally, the recovery of illegal aid is also important for the position of the beneficiaries of competitors.

Finnish authorities are according to the State Aid Act, required to terminate the grant and recover the already paid grant if the beneficiary has

- failed to return the grant or part thereof when it has to be returned
- used the subsidy essentially for purposes other than the purpose for which it was made has been granted
- Provided the Ministry with false or misleading information or concealed information on a matter, which would have materially affected the grant, amount or conditions of the grant
- otherwise substantially violated the provisions on the use of the grant or the grant decision conditions.

These mandatory recovery grounds are so profoundly wrong or of fraudulent procedure that the grant must always be recovered. In addition, the State Aid Act lists several situations in which the State Aid Authority may consider whether the paying of the grant must be terminated and the grant must be recovered.

Some discretionary collection criteria are overlapping in the mandatory way for grounds for the recovery, that the materiality of the error depends on which recovery criterion applies. For example, breach of the terms of a grant decision means compulsory recovery if the terms have been substantially violated. If the conditions have been violated this less, recovery is discretionary.

It should be noted that although the grant was used for the purpose for which it is granted, for example, failure to comply with a single grant decision could lead to the whole recover the sum of the grant. The amount can be recovered for example because of the lack of a project no tendering procedure has been made in accordance with the Procurement Act.

3. LEGISLATIVE FRAMEWORK

Article 106(1) of TFEU obliges a Member State not to enact or maintain any measures which are contrary to the Treaty. The Article further states that a breach of this Article requires a breach of Articles 18 and 101-109. However, case law²⁸ has dictated that a Member State may maintain a measure in force, even though it violates another Treaty Article.

2.1. State aid defined by the Treaty on the Functioning of the European Union

The most important treaty provisions are Articles 107 and 108 of the Treaty on the Functioning of the European Union.

Article 107 defines state aid. According to De Burca et al, Article 107 can be divided into the following parts²⁹:

- 1) Paragraph 1 establishes the general principle that state aids are incompatible with the internal market.
- 2) Paragraph 2 provides certain exceptions for situations where the aid will be deemed to be compatible with the internal market
- 3) Paragraph 3 list types of cases where the aid may be deemed to be compatible with the internal market.

In addition to this, in order for an aid to be considered as state aid, it must fulfil the list of Article 107. The criteria are cumulative. In order for the aid to fall under the scope of the Article, all requirements must be met.

²⁸ Case 30/87 [1988] ECR 2479.

²⁹ Craig, P., De Burca, G. EU Law, Text, Cases and Materials. Oxford University Press, 2011, fifth edition.

3.2. Exceptions to the state aid rules

The Commission introduced a number of provisions which are aimed to lighten the burden of both the Commission and the Member States. The exceptions listed below introduce situations where a state aid can be granted straight to recipient. Normally this is not the case as the Commission examines each aid before they are granted. Granting an aid which does not fall under the exceptions is unlawful and results to the recovering of the aid from the recipient.

3.2.1 General Block Exemption Regulation

The Regulation 651/2014/EU, also known as the General Block Exemption Regulation (GBER) is a tool created along with the SAM. The first GBER entered into force on 29 August 2008. The current GBER, which replaced the first version, has been in force as of 1 July 2014. The Commission is expecting the GBER to become the most used instrument of the new legal provisions. This chapter discusses the forms of aid which are covered by the GBER.

The General Block Exemption Regulation (Commission Regulation 651/2014) which is applicable from 2014 to 2020 entered into force on 1 July 2014. The revision of the Block Exemption Regulation was a key element of the overall reform of the EU state aid rules. The scope of the Regulation is wide. The aim is to speed up the processing of state aid that promotes economic growth and competitiveness and to shift the Commission's focus on State aid to the most distortive aid. The scope of the Regulation was further extended by the Commission Regulation of 14 June 2017 (2017/1084).

EU Member States may grant subsidies eligible under the Block Exemption Regulation without prior approval from the Commission. However, the aid scheme or ad hoc aid covered by the Regulation must be submitted to the Commission within 20 working days of the entry into force of the aid measure. In Finland, notifications are submitted via the Ministry of Employment and the Economy.

The Commission publishes the summaries on its website and the authorities of the Member States have to publish the text of the aid measure on the Internet. The Commission will monitor the subsequent exemption of the Block Exemption Regulation.

The Regulation contains several measures which are exempted from notification. For example, the Regulation states that EU funding which is not managed at national level should not be taken into consideration in case of cumulation. According to Staviczky, “the new GBER is allowing cumulation with State aid for different eligible costs, which is in fact not a real cumulation situation, and that in case of partly of fully overlapping eligible costs cumulation up to the highest aid intensity allowed by the new GBER.”³⁰

The introduction of the new rules concerning cumulation indicate that the Commission has recognised the need to develop the rules to conform the current situation. Furthermore, modernisation of the cumulation provisions erases uncertainty in cases where the issue is current. The modernisation of the rules aims to lighten the burden encountered by Member States when dealing with aids that are subject to cumulation.

Under the General Block Exemption Regulation, a large number of State aids is exempted from the Commission's prior notification procedure.

Block exemptions include support programs and subsidies whose benefits can in principle be judged to outweigh potential distortions of competition in the internal market. State aid under the Regulation is promoted economic growth, employment and other common goals.

The GBER covers a total of 44 different forms of support.

The Block Exemption Regulation applies if the aid measure is met the general conditions laid down in the Regulation and each form of aid specific conditions. The conditions apply, for example, to aid transparency, incentive and maximum amount.

The Regulation does not allow support for those in difficulty for example, export subsidies or subsidies for which it favour domestic products at the expense of imported products.

³⁰ Staviczky, P. Cumulation of State Aid. *European State Aid Quarterly*, 2015 (1), p 126

3.2.2 *De minimis* Regulation

The Commission Regulation no. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the TFEU to *de minimis* aid, referred as the *De minimis* regulation allows states to issue grants, which do not exceed 200 000 Euros during three fiscal years, without the authorisation of the European Commission. However, this principle does not cover the agricultural and fishery sector.

The Council established the regulation to cope with grants which did not fall under the scope of Article 107(1) TFEU, and cannot be considered as state aid.³¹ Undertakings are required to observe the aid threshold limits and inform the aid grantors of previously awarded *de minimis* aid. However, a company may request for *de minimis* aid from abroad. This aid received abroad grows within its own threshold and thus does not affect *de minimis* aid granted in other countries. This is favourable to companies which has entities in different countries. It is likely that the Commission has intended to remove burden of Member States having to examine *de minimis* aid granted in another Member State.

The beneficiary must be able to prove that the project involves State aid measures and clarify their equivalence with the provisions on exemptions. The granting of *de minimis* aid requires the applicant to submit a report on the *de minimis* aid already granted and paid and that the amount of the aid does not exceed the *de minimis* threshold.

Furthermore, Article 3 of the Regulation introduces rules on how to calculate previously issued *de minimis aid* in cases of mergers or acquisitions or undertakings. In cases involving mergers or acquisitions, prior *de minimis* aid will be taken into consideration in order to determine whether the new undertaking may seek for such aid during the current fiscal period of three years. As a note, merging or acquisition does not affect the legal status of the aid. *De minimis* aid granted legally shall remain lawful even after the newly structured undertaking.

The foundations of the *de minimis* principle were laid in the beginning of 1990's when the European Commission initiated the first measures to relieve the governing of EU's state aid

³¹ Staviczky, P. Cumulation of State Aid. *European State Aid Quarterly*, 2015 (1), p 122

control. The Commission stated in a letter to MSs that grants, which equaled a maximum of 50 000 during three fiscal years, would not distort competition or trade between MSs.³²

After this, the importance of *de minimis* aid has strengthened.

The aiding authority shall inform the undertaking in a written decision that the aid granted is *de minimis* aid and refer to the Commission's *de minimis* regulation. The company must notify the support authority in writing

all of its different authorities from two previous and current the *de minimis* aid received during the fiscal year. After the aid is granted the documents should be kept safe for a possible after-check ten years after of decision on the grant

³² A letter by the European Commission "Guidance note on the use of the *de minimis* facility provided for in the SME and guidelines" IV/D/6878, 23 March 1993.

4. RECENT DEVELOPMENT CONCERNING STATE AID

The Commission introduced the State Aid Modernisation Programme (SAM) to update the state aid framework. One of the most important principles is the De minimis regulation which is discussed above. Other tools include the Framework on research, development and innovation aid, Guidelines on environmental and energy aid, Guidelines on regional aid and Guidelines on risk finance and the Guidelines on rescue and restructuring aid for undertakings in difficulty.³³ Another recent development to the state aid toolkit is the General Block Exemption Regulation, which is also discussed in previous section.

Considering the provisions which have entered into force during the past two years, GBER seems to be the most efficient.

4.1. State Aid Modernisation Programme

The aim of the State Aid Modernisation Programme (SAM) is to promote growth and competitiveness. During the process of creating SAM, the Commission revised its rules on the role of a Member State in the event of having to rescue and restructure companies facing difficulties. These new guidelines are named as the Rescue and Restructuring guidelines and they entered into force as of 1 August 2014.

Earlier the resurrection of an ill company was done with the taxpayers' money. The new provisions aim to shift the burden towards the investors and owners of the company. The so-called rescue aid can be granted temporarily, for a period of 6 months.³⁴ The aid is considered to

³³ Staviczky, P. Cumulation of State Aid. *European State Aid Quarterly*, 2015 (1), p 125

³⁴ European Commission – Press release: State aid: Commission adopts revised guidelines for supporting firms in difficulty, http://europa.eu/rapid/press-release_IP-14-795_en.htm (5 March 2017)

be the last resort. Before granting of this aid, the investors have the obligation to try to resuscitate the company with their own money.

4.2 The state aid transparency provisions

The new requirements for Member States to provide information about the state aid granted by them came into force on July 1st 2016. This requirement is dictated on Article 9 and Annex III of the Commission Regulation no. 651/2014.³⁵ The information is gathered to a register that is accessible publicly online. This so-called State Aid Transparency Public Search enables the viewer to search details of granted state aids country-by-country. The details saved in the register include the beneficiary, amount, location, sector and objective of the granted aid.³⁶

4.3 Special Eurobarometer 448: Perception and awareness about transparency of state aid

The Special Eurobarometer 448 is a survey conducted by TNS Opinion & Social network at the request of the Directorate-General for Competition of the European Commission. The survey, which was conducted in June 2016 measured the level of awareness and opinions about the transparency of state aid. The sampling consisted of 27 818 EU citizens of the 28 EU Member States.³⁷

According to the survey, 39% of the respondents were aware of a company that had received state aid in their country. This number is in accordance with the level of awareness of state aid in their country. 81% of the participants felt that they were not well informed whereas only 17% agreed to be well informed. Another prominent feature of the results is that a clear majority of respondents, 84%, think that citizens should have full access to the information on the granted

³⁵ Commission Regulation no. 651/2014 of 17 June 2014 on declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

³⁶ European Commission's State Aid Transparency Public Search
<https://webgate.ec.europa.eu/competition/transparency/public/search/home?lang=en>

³⁷ European Commission, Department of Communication: Special Eurobarometer 448: Perception and Awareness about the transparency of state aid., 2016.

state aid. When the respondents were asked whether they found it easy to find information on companies which had received state aid during the previous year in their country, 57% answered it to be difficult and 24% easy.

It is important to note that the survey was conducted in June 2016. The obligation for states to register the information concerning granted state aid came into force on 1 July 2016. If such a survey was conducted this year, it is likely that the opinion accessibility of information on state aid has increased.

The results of the survey state also difference in awareness between various groups. According to the results, men are generally more informed, at 20% compared to 14% of women. Moreover, it seems that the longer a respondent has educated oneself, the more informed he or she feels. This can be derived from the results, as 11% of participants who have finalized education at the age of 15 are well informed. Contrary to this, 22% of those who have finalized their education at above the age of 20 are aware of state aid in their countries. When examining the information on how the participants have accessed the information on state aid, Internet has proven to be the best source. Moreover, up to 62% of those who have discovered the website of the European Commission feel to be well informed on the subject.

The survey highlights the need for the information on state aid to be easily available. 84% of the respondents felt that information on state aid should be fully accessed by anybody. This statement is fortified when 65% of the sample declared that information about state aid received by companies should not remain confidential. The survey data offers another chance of generalisation. The longer a respondent has educated oneself the more likely he or she is to agree that citizens should have access to the information. Furthermore, 89% of those who are working at manager level agree that citizens should be granted a full access to the state aid information.

The second part of the survey discussed how relevant the transparency was considering the size of the company. Furthermore they were asked which types of companies should provide access to the whole information of state aid concerning them.

74% of the respondents agreed that large companies, including also multinational companies, should provide information concerning all state aid they receive. 67% of the respondents stated that state-owned companies should provide access to the information alike the large companies.

Surprisingly, the rate is low, as usually the spending and profitability of state-owned companies in the interest of the public. 58% of the participants felt that small or medium-sized companies should publish the information. As comparison, 45% of the respondents felt that all types of companies should provide information on the granted state aids. Furthermore, only 14% agreed that only large companies and public companies should provide information on granted aids.

The third part of the survey consisted of asking the respondents' opinions on which service sectors are in need of more transparency in state aid. 48% of the respondents answered the health care and pharmaceutical industry. The second industry was financial services with 43% and thirdly the energy sector with 39%. Unsurprisingly the health sector was the first as it has been a controversial industry because of the amount of money associated with its functioning.

The fourth part of the survey discusses the most effective ways to ensure the transparency of state aid. 53 of the respondents answered that the most effective way of ensuring transparency was to require it to be automatically publicly available.

As a conclusion of the survey, it can be concluded that the participants think that they are not well informed about state aid and feel that finding information about state aid is hard. However, a majority of the respondents agreed that all citizens should have access to the information about state aid recipients.

5. SUMMARY

From the point of view of the functioning of the EU's internal market, it is essential that the rules are complied with. This requires the functionality to function. EU state aid regulation has been completely renewed over the period 2013-2014. The most important change in recent years is the expansion of GBER. This is reflected in the fact that fewer State aid calls for prior approval by the Commission. The Commission has therefore set an informal target that up to 90% of support measures could be covered by the Block Exemption Regulation.

An interim review was conducted in 2016. It seems that the goal has been achieved. The 2014-2016 statistics show that nearly 90% of the aid has been implemented directly under the GBER.

As the economy and the market develop, the industries are also developing. The EU's internal market and cohesion objectives create a detailed regulatory framework for the role of the state. However, it is important to note that the reference framework is a matter of Member States. The Treaties and the Internal Market Framework established by them are approved by the Member States. Indeed, Member States have an influence on State aid regulation all the time through their own decisions and their own actions.

In the next few years, we will see how significantly renewed state aid development works for companies and for the competitiveness of Europe as a whole.

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