

State Aid Modernization: The Commission Lays First Cornerstones

I. OVERVIEW

On December 5, 2012, the Commission issued an important package of proposals to amend Council Regulation 659/1999 governing State aid procedure¹ (the “Procedural Regulation”) and Council Regulation 994/98² (the “Enabling Regulation”), which allows the Commission to exempt certain categories of State aid from the requirement of prior notification. These proposals constitute the first step of the Commission’s State Aid Modernization initiative, which was outlined in a Communication of May 8, 2012, and aims at (i) fostering economic growth; (ii) focusing the Commission’s enforcement activities on the most significant cases for the single market; and (iii) streamlining rules and allowing for a faster decision-making process in the field of State aid.³

II. THE REFORM OF STATE AID PROCEDURE

The proposed amendments to the Procedural Regulation address two objectives: (i) to improve the handling of complaints; and (ii) to strengthen the Commission’s means of gathering market information. They are very similar to the corresponding provisions already applied in the fields of antitrust and merger control under Regulations 1/2003 and 139/2004.⁴

As regards the handling of complaints, under the current legal framework the Commission is obliged to investigate and adopt a decision on any complaint brought by a

¹ Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

² Council Regulation No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid.

³ COM(2012) 209 final, para. 8.

⁴ Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules laid down in Articles 81 and 82 of the Treaty; Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

third party (Articles 10 and 13 Procedural Regulation), even if the complaint is not sufficiently substantiated.⁵ The Commission proposes to set formal requirements in order to increase the quality of the complaints. In particular, under the proposed amendments the Commission would be obliged to adopt a decision only if complainants (i) submit a certain amount of compulsory information and (ii) demonstrate that they are interested parties with a legitimate interest in lodging a complaint.⁶ The proposed amendment confers on the Commission the power to adopt implementing provisions concerning “*the form, content and other details of complaints submitted.*”⁷

In order to provide an alternative to complaints before the Commission in the enforcement of State aid rules, the proposed amendments also strengthen the role of national courts. In particular, the proposal acknowledges national courts’ right to obtain information or request information from the Commission on the application of State aid rules (proposed Article 23a (1) Procedural Regulation) and introduces the right for the Commission to make submissions to national courts in written or oral form (proposed Article 23a (2) Procedural Regulation).

The Commission also proposes a significant extension of its powers to gather information in State aid cases, which would allow it to request information from third parties, coupled with the possibility to impose fines. Under the current legal framework the Commission in State aid proceedings is largely dependent on information provided by Member States and can only ask for comments from third parties (*i.e.*, undertakings such as the aid beneficiary or its competitors, industry associations, other Member States) when it opens a formal investigation procedure. Even in such formal proceedings the Commission can only rely on voluntary submissions, since third parties are not obliged to reply to its requests for information. The proposed amendments introduce two new types of requests that could be addressed to third parties when the formal investigation procedure is opened:

- **Simple requests for information** (proposed Article 6a (3) Procedural Regulation). Undertakings or associations of undertakings receiving a simple request for information could be imposed a fine not exceeding 1% of total turnover for supplying incorrect or misleading information in response to such request (proposed Article 6b (1)(a) Procedural Regulation). If the third party chose, however, not to provide any information, or to provide only

⁵ COM(2012) 725 final, p. 4.

⁶ COM(2012) 725 final, p. 5, and proposed Articles 20 (2) and 27 Procedural Regulation.

⁷ COM(2012)725 final, proposed Article 27 (c) Procedural Regulation.

partial information in response to this type of request, no fine could be imposed.

- **Commission decision requesting information** (proposed Article 6a (4) Procedural Regulation). Undertakings or associations of undertakings receiving a Commission decision requesting information could be imposed a fine not exceeding 1% of total turnover for supplying incorrect, incomplete, or misleading information or for not supplying the information within the specified time limit (proposed Article 6b (1)(b) Procedural Regulation). In contrast to simple requests, the addressee of such a request for information would thus also face a fine if it refrained from responding to the Commission's request. In addition to such fines, the Commission could also impose periodic penalty payments not exceeding 5% of average daily turnover for each working day of delay from the date established in the decision (proposed Article 6b (2) Procedural Regulation).

The Court of Justice would have unlimited jurisdiction to review any fines or periodic penalty payments imposed by the Commission (proposed Article 6b (6) Procedural Regulation). The proposed amendment to the Procedural Regulation itself does not limit the kind of information that could be the subject of the Commission's requests. However, the Commission indicates in its proposal that the information sought should be readily available to the market actors and consist in particular of factual market data (*e.g.*, market size, market shares) and company data (*e.g.*, cost structure, profits, ownership and control) as well as a facts-based analysis of the functioning of the market (*e.g.*, established practices, entry barriers, cost of entry, growth rates), the likely impact of the aid on the beneficiary, and an assessment of proposed remedies or compensatory measures.⁸

Professional secrets contained in information provided by third parties under this new procedure would be protected, for instance by aggregating sensitive data or requesting third parties' permission before disclosing the information to the Member State and in the decision. The Commission may, however, decide to disclose information that it considers is not protected by professional secrecy, after leaving the party a period of no less than one month to seek legal remedies (*i.e.*, interim measures) (proposed Article 7(9) Procedural Regulation).

Finally, as in antitrust matters, the Commission also proposes to introduce a tool enabling it to investigate entire sectors of the economy under State aid rules. To allow for

⁸ COM(2012) 725 final, p. 8 s.

such sectoral investigations, the Commission would be entitled to examine information from whatever source regarding alleged unlawful aid (proposed Article 10 (1) Procedural Regulation). Importantly, the duties of third parties to reply to information requests outlined above would be extended to such sector inquiries by way of reference (proposed Article 10 (2) Procedural Regulation).

III. THE EXTENSION OF GROUP EXEMPTIONS

In the existing Enabling Regulation the Council has conferred powers on the Commission to adopt “*group exemptions*” to declare compatible with the Treaty certain categories of State aid and exempt such aid from the prior notification requirement. The categories involved include aid in favor of SMEs, research and development, regional aid, environmental protection, and employment and training.

In its proposed amendment, the Commission suggests significantly to expand this list of possible group exemptions. Specifically, the Commission proposes to extend the possibilities to “group exempt” State aid to the following heterogeneous categories:

- Culture and heritage conservation;
- Making good the damage caused by natural disasters;
- Making good the damage caused by certain adverse weather conditions in fisheries;
- Forestry and promotion of certain food products;
- Conservation of marine biological resources;
- Amateur sports;
- Residents of remote regions, for transport;
- Coordination of transport or reimbursement for the discharge of certain public service obligations; and
- Certain broadband infrastructure (including civil engineering works and passive broadband infrastructure).

Importantly, the adoption of this proposed amendment of the Enabling Regulation would not entail an automatic exemption from the notification requirement for State aid falling in one of these categories. It would simply confer on the Commission the power (but not the obligation) to adopt such block exemptions. The Commission has indicated that it intends to use the new competences only gradually, when experience acquired is sufficient to allow for a definition of clear compatibility criteria for certain types of aid measures.⁹ This is in line with the Commission’s approach under the current Enabling Regulation,

⁹ COM(2012) 730 final, p. 2.

where the block exemptions have only been adopted between 4 and 10 years after the adoption of the initial Enabling Regulation.

IV. OUTLOOK

In order to be valid, the proposed amendments have to be adopted by the Council, after consultation of the European Parliament. The Commission has indicated its expectation that the changes would be adopted in 2013, together with further projects that are part of the State Aid Modernization initiative.

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For additional information, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under antitrust and competition in the “Practices” section of our website (www.clearygottlieb.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI

Al Odaid Tower
Office 1105, 11th Floor
Airport Road; PO Box 128161
Abu Dhabi, United Arab Emirates
T: +971 2 414 6628
F: +971 2 414 6600

SEOUL

Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099