State Aid Modernisation: An Opportunity or a Straitjacket?

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1. The context of this paper

State aid control touches on several disciplines, economics, political science and law. Only within economics, it is related to several sub-themes: first, to public economics, because state aid is a form of public intervention in the economy and its purpose, role and effects has to be justified and studied; second, to the economics of competition, as state aid confers a selective advantage to undertakings and thus is capable of affecting the competitive process and the marketplace; and third, to international trade theory, as state aid can affect trade between Member States.

According to Hans W. Friederiszick, Lars-Hendrik Röller and Vincent Verdouen this latter aspect ‘creates incentives for national governments to pursue national economic or political goals, which in turn provides a rationale for supranational (European) state aid control.’

In the political science literature, amongst others, Michelle Cini acknowledged that state aid control is one of the most politicized of the EU’s regulatory policies, as Commission decisions can prevent national governments from pursuing their own national industrial policies.

Norms of State aid law, being soft or hard, necessarily reflect this complexity.

State Aid Modernisation (SAM) is a European Commission project that was decided in 2012 and was mostly accomplished in 2014. Almost two years after, the evaluation of the results of the modernisation is still missing from the political science and law literature. Without going

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into the technical details of the modernisation and the law adopted therein, this paper attempts to draw the first general conclusions on the direction of the reform. This paper’s driving question is how EU state aid policy and law developed with the overhaul of almost entire body of secondary state aid law.

The rules in primary law has not changed during the last six decades entailing a widely interpreted prohibition and justifications listed in Article 107 (2) and (3)\(^3\), but secondary law has evolved dramatically since the 90’s. Do the original goals remain unchanged or have new features appeared in the meanwhile driving the policy-making? How is the delicate balance struck by the Commission between the different policy objectives? This issue is all the more important since State aid policy and law limit Member States’ competences to a considerable extent.

First, the paper provides an insight into the history of EU state aid policy and a brief introduction into the modernisation and its predecessor, the State Aid Action Plan (SAAP). In the following chapter, the outcome of the modernisation is evaluated. Last, some preliminary conclusions will be formulated.

State aid is used to remedy temporary market failures, e.g. if sound business cannot get access to capital (welfare objective) or to change socially or politically undesirable market outcomes (equity objective).\(^4\) State aid may create incentives for companies to innovate and invest and thereby to improve market outcomes. Efficient State aid control and competition policy in general plays a crucial role in promoting productivity, innovation and ultimately economic growth. For example, by granting State aid Member States can support the activities of SMEs in the common marketplace and State aid law recognised this market failure by applying higher aid intensities\(^5\) for them.

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\(^5\) Aid intensity is the gross aid amount expressed as a percentage of the eligible costs of the project.
Besides the efficiency enhancing effect of State aid, it can be used to improve equity in the society by redistributing wealth within the society (for example by providing regional aid or aid for the employment of disadvantaged workers or workers with disabilities).

State aid policy gives room to Member States to form their public policy but the room for manoeuvre is significantly reduced by the Treaty rules, because state aid can be given only for the goals listed in the Treaty.

As Blauberger noted “European Treaty rules on state aid control essentially constitute a compromise – aiming for undistorted competition while acknowledging the potentially welcome effects of state aid.”

Copenhagen Economics points to the fact that balancing the two contradictory effects of State aid, namely the positive effect of enabling the provision of a service or activity which is not commercially viable, and the negative effect of potential distortion to competition, poses a key challenge for the application of State aid.

The European Commission has the power to conciliate between the imperative of free competition in the internal market and the exceptions provided by the Treaty. In individual cases the European Commission applies the so-called “common interest balancing test” in the following steps: (1) Is it a well defined common interest objective that takes precedence over free and undistorted competition and free trade? (2) Is it the appropriate policy instrument to reach this common interest objective? (3) Does it have an incentive effect to change undertakings’ behaviour? (4) Analysis of proportionality (5) Balancing exercise so that any distortion is limited to the minimum.

Instead of applying the Treaty in individual cases, secondary law was developed by the Council and the Commission to specify the broad exceptions listed in Article 107 (3). First, the Commission has adopted soft law instruments, mainly guidelines and frameworks to summarise its decisional practice. Later, at the end of the 90s the Council delegated its

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7 The Contribution of Competition Policy to Growth and the EU 2020 Strategy. European Parliament, Directorate-General for Internal Policies. 2013. The document was requested by the European Parliament’s Committee on Economic and Monetary Affairs and prepared by the Copenhagen Economics.

regulatory power to the Commission to issue block exemption regulations. Block exemption regulations are well-known instruments from antitrust law. Being directly effective and having direct applicability, Member States and companies can rely on the provisions of block exemptions. Aid shall be exempted from the notification requirement and shall be compatible with the internal market provided that the conditions of the group exemption regulation are fulfilled. The balance between individual enforcement and group exemption was shifted during the State Aid Modernisation (SAM 2012-2014) towards group exemption. The main reason for this policy change was the administrative burden imposed upon the Commission to deal with cases individually, resulting in longer proceedings and a higher number of pending cases.

2. Institutional setting

The application of exemptions to the general prohibition rests exclusively with the Commission, which possesses strong decision-making powers. The Commission’s procedure is built on the bilateral relationship between the European Commission and government of the Member State concerned. Under Article 108 (3), draft state aid must be notified to the Commission and the measure can be put into effect only after approval (when the Commission has declared it compatible with the internal market.)

The role of the Council is limited. Under Article 108 (2), on application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. This competence was rarely used by the Council and the ECJ has declared that as soon as the Commission or the Council has adopted a final ruling on the compatibility of the aid in question, the other of those two institutions may no longer adopt a contrary decision.8

The Court of Justice acknowledged in its constant jurisprudence that in the sphere of State aid, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context9. That will,

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in particular, be the case when the Commission wishes to reconcile the objective of ensuring undistorted competition in the common market with other Community objectives.

When the Commission enjoys a wide discretion of that kind, the Court, in reviewing the legality of exercise of that power, cannot substitute its own assessment in that matter for that of the competent authority but must confine itself to examining whether the latter assessment contains a manifest error or constitutes a misuse of powers or whether the authority in question clearly exceeded the bounds of its discretion.

3. The goals of European state aid control

The original goal of the prohibition of state aid in primary law was to create a level playing field for Member States and undertakings alike and to exclude subsidy race between them.

Thibaut Kleiner has indentified three models of influence for state aid policy, namely the derogatory model, where the policy is attached to the protection of the single market, the competition model and the political integration model.\(^{10}\)

In his model, the original goal of EU state aid policy is influenced by the establishment of the common market and the complementary role of State aid law to the four freedoms. The negative integration paradigm of the common market builds on the abolishment of trade barriers between the Member States. State aid given to local undertakings, the creation of national champions by reinforcing their competitive position vis-à-vis foreign companies can have the same detrimental effect on the common market as national measures protecting national producers or service providers by applying custom duties, discriminatory taxes, measures having equivalent effect to quantitative restrictions or government measures restricting the freedom to provide services. In this model, the main feature of state aid policy is the elimination of national advantages in line with the establishment and enhancement of the internal market.\(^{11}\) Leigh Hancher also stressed that the aim of state aid control is to reduce distortions of production and location decisions across Member States and therefore this regime “relates to competition between Member States, and not just competition between


\(^{11}\) Kelyn Bacon is also of the view that the main rationale for State aid control was to aviod subsidy race between the Member States, but acknowledged that a concern to avoid distortions of competition was also built into the relevant Treaty provisions from the outset. Kelyn Bacon: European Union Law of State Aid, Oxford University Press,2013, p. 4.
De Cecco pointed out that at the level of definition state aid is a macro level control, the emphasis being on the potential impact on the internal market rather than on specific markets or companies. Prevention of the emergence of competitive spirals is the main objective of state aid policy.

Contrary to this, the second approach in Kleiner’s model builds on the complementary role of state aid vis-à-vis Article 101-102, rules addressed to undertaking not to distort or restrict competition in the internal market. In Kleiner’s view this “model to State aid focuses on the distortionary effects of State aid on markets and between firms and tries to provide some rationale for the compatibility of State aid.” In this understanding of State aid, it is required to show that aid is distorting competition between undertakings and it is not enough to rely on a presumption that selective advantage to one firm leads to market distortion by itself. This “more economic approach” requires deeper scrutiny of the markets by the enforcer and therefore puts an additional burden of proof and workload on the Commission. We can add that application of State aid law often results in oversimplification of causes and effects. Under the dominant narrative of the Commission and the Court selective advantages by themselves distort competition.

The third building block of Kleiner’s model, labelled “political integration model” is associated with the influence state aid policy has on Member States’ competences and on the

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16 Andrea Biondi and Piet Eeckhout were of the view already in 2003 that it is increasingly difficult to locate and determine the boundaries of the two types of control, namely the control of trade and competition restraints. Andrea Biondi and Piet Eeckhout: State Aid and Obstacles to Trade in The Law of State Aid in the European Union (eds: Andrea Biondi, Piet Eeckhout and James Flynn) Oxford University Press, 2003, pp. 103-116., p. 104., Francesco de Cecco: State Aid and the European Economic Constitution, Hart, 2013.p. 5.
coordination between national economic policies. In this understanding state aid policy is a tool more of positive than negative integration in its capacity to coordinate not only economic policies, but also non-economic policies as well.\textsuperscript{18} As Szyszczak emphasised “Member States regard the control of state aid as a curtailment of their sovereign powers and the scope of their industrial and economic policies.”\textsuperscript{19} The political nature of State aid law explains why the economic analysis of state aid was underdeveloped in the early stages of its implementation.\textsuperscript{20}

What is missing from Kleiner’s model is that the budgetary discipline imposed by the European Monetary Union rules on Member States’ fiscal policies increased the political integration feature of state aid policy. The effect of setting budgetary rules for the Member States is that the political control of the Commission and the Council over the fiscal policies and industrial policies of Member States’ has increased considerably.\textsuperscript{21}

\textit{New goals in EU State Aid policy?}

In today’s state aid policy, certainly all three aspects (derogatory, competition and political integration) can be found. In Kelyn Bacon’s view “State aid policy is an eclectic mix of internal market (trade) policies, competition provisions and considerations of economic efficiency and fiscal discipline.”\textsuperscript{22} Moreover, she emphasised that because State aid rules are addressed to Member States, they are “more likely to interfere with national sovereignty and issues of national interest than other competition provisions.”\textsuperscript{23}

\textsuperscript{18} Thibaut Kleiner: Modernization of State aid policy in Research Handbook on European State Aid Law, edited by Erika Szyszczak, Edward Elgar, 2011, pp.1-27., p. 4. Moreover, the exclusive competence of the Commission makes it possible for Member States to resist calls for more subsidies coming from influential political groups and companies.


\textsuperscript{21} See also in this respect Erika Szyszczak: The Regulation of the State in Competitive Markets in the EU, Hart Publishing, 2007., p. 178.

\textsuperscript{22} Kelyn Bacon: European Union Law of State Aid, Oxford University Press, 2013, p.5.

\textsuperscript{23} Kelyn Bacon: European Union Law of State Aid, Oxford University Press, 2013, p.5.
The goals of European State aid control cannot be considered as static or constant. From a historical perspective, the Commission’s State Aid Action Plan (SAAP 2005-2009)\textsuperscript{24} was a turning point in the direction of a more economics-based policy, where certain measures are put to a deeper market test. Besides, the SAAP foresaw the more accurate identification of market failures and objectives of common interest under which aid distorting competition nonetheless can be granted by the Member States.\textsuperscript{25} Fiscal discipline on the other hand became more and more important after the adoption of the Maastricht Treaty and the imposition of budgetary constraints on the fiscal policies of Member States in the European Monetary Union (EMU).\textsuperscript{26}

Another noteworthy feature of European state aid policy is the strengthening of european competitiveness in the global context. We will analysis these tendencies in more detail in the following subchapter where the brief history of state aid control is outlined.

4. Brief history of European State aid policy

State aid rules were inherent part of the Treaty establishing the European Economic Community (1957), but during the 60’s and 70’s the Commission was rather inactive to enforce that prohibition. According to Buch-Hansen and Wigger the Commission was very reluctant to interfere with national industrial policies directed at the creation of national

\textsuperscript{24} State Aid Action Plan- Less and better targeted state aid: a roadmap for state aid reform. COM/2005/107 final
\textsuperscript{25} According to Weaver the SAAP was in part an attempt to catch up to the hard economic approach of the rest of the Directorate General for Competition (DG Comp). Alexander M. Weaver: Convergence through the Crisis: State Aid Modernisation & West European Capitalism, 21 Columbia Journal of European Law 587 214-2015, p. 594.
\textsuperscript{26} Mathias Dewatripont- Paul Seabright: “Wasteful” public spending and state aid control, Journal of European Economic Association 4. 2-3. 513-522, at pages 520-521 claim that “A politician funds wasteful projects not because she intrinsically wants them but rather because she want to send a signal about being a good type of politician.” […] “Finally, is there anything intrinsically international about state aid control? Could not some domestic mechanism (an auditor-general or a “Cour des Comptes”) act as controller? The answer is certainly that it could—provided it were sufficiently independent (and visibly so) of domestic political processes to provide the necessary check on domestic funding decisions. However, if there already exists an agency (e.g., the European Commission) that has the expertise necessary to examine state aids for the presence of international spillovers, then it is plausible that such an agency would be able, at relatively lowcost, to provide the credible countervailing incentives that a controller would require.”
champions. In this period the provision of free competition and free market forces working without State intervention was not a goal in itself, in the contrary, “social and industrial policy concerns were considered important in the enforcement of competition rules in the era of embedded liberalism.”

In the course of the 1980s, soft law was adopted by the Commission and Member States were reminded by the Commission of their notification obligations. In a Communication dating back to 1980, the Commission noted that cases of non-notification and late notification had ceased to be isolated and reminded Member States of their obligations. Later, with the Commission’s White Paper on the Internal Market the neoliberal approach became more important in the economic policy. By the removal of physical, fiscal and technical barriers to trade, Member States set the goal of completing the internal market. The role of competition and state aid rules was elevated to a higher level and the Commission emphasised that discipline to rigorously enforce the rules was needed. The White Paper pointed to the previous mercantilist practice of Member States under which large amounts of public funds were spent to finance uncompetitive industries and enterprises. This, in turn, resulted not only in the distortion of competition in the common market, but also in the long run undermined the efforts to increase European competitiveness and represented a drain on scarce public resources. It is to be noted from the White Paper that the aims of state aid control are manifold. Saving public funds, increasing European competitiveness are new tasks different from the original task to ensure a level playing field for companies.

Erika Szyszczak observed that “the 1990s saw a dramatic change of policy towards state intervention in the increasingly liberalised markets”. The legislative activity of the Commission increased significantly in the 90s and resulted in the first half of the decade in

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27 Hubert Buch-Hansen and Angela Wigger: The Politics of European Competition Regulation, Routledge, 2011, p.67
31 para 158.
32 para 158.
many soft law instruments.\textsuperscript{34} For Smith soft law was created “partly to neutralize the strong political pressures it [the Commission] sometimes faces on state aid cases.”\textsuperscript{35} From the perspective of a political scientist, frameworks and guidelines served the Commission to resist Member State’s governments. \textit{Christian Koenig} rather harshly noted that “State aid policy has become an all-purpose tool to camouflage policy-making.”\textsuperscript{36}

In the second half of the 90s, hard law was adopted by the Council to regulate the Commission’s state aid procedure\textsuperscript{37} and to enable the Commission to adopt group exemption regulations in the field of horizontal aid.\textsuperscript{38} With the adoption of hard law the Commission started to have an increasing influence on Member States’ national aid and economic policies. The gradual decrease and elimination of sectoral aid (e.g. coal and mining, shipbuilding, synthetic fibres) resulted in widespread restructuring and had enormous social effect on workers active in these industries. Instead of financing sectoral objectives, aid was directed to finance horizontal goals that are shared by the Member States as European goals (e.g. R&D, regional aid, employment aid, environmental aid).

Positive integration became prevalent through secondary law, because Member States have voluntarily aligned their policies with soft law instruments to avoid a lengthy and detailed

\textsuperscript{34} mainly notices and communications in which the Commission has summarised the results of its enforcement activity. The ECJ did occasionally checked the compatibility of soft law with primary law, namely the Treaty provisions as interpreted by the Court. In Kronofrance for example it ruled that although the Commission is bound by the guidelines and notices that it issues in the field of State aid, that is so only to the extent that those texts do not depart from the proper application of the rules in the Treaty, since the texts cannot be interpreted in a way which reduces the scope of Articles 87 EC and 88 EC or which contravenes the aims of those articles. Joined Cases C-75/05 P and C-80/05 P, Germany and others v Kronofrance SA and the Commission [2008] ECR I-6619, paras 65-67.

\textsuperscript{35} Mitchell P. Smith: Autonomy by the Rules: The European Commission and the Development of State Aid Policy, Journal of Common Market Studies, Vol.36, No.1., pp.55-78, p. 62., Michelle Cini: The soft law approach: Commission rule-making in the EU’s state aid regime. Journal of European Public Policy 8 (2):192-207. She noted in 2001 that there is no trend from soft law to hard law, or an end to the Commission’s soft law approach. What we are witnessing is a different mix of soft and hard law. (p.193, p.204)

\textsuperscript{36} Christian Koenig: Where is State Aid Law heading to? European State Aid Law Quarterly, 2014/4., pp.611-613., p.611.


Commission procedure the outcome of which was not predictable.\textsuperscript{39} Later, for reasons of legal certainty and transparency soft law gave way to hard law as the Council enabled the Commission to adopt regulation in the field of state aid law. The delegation of legislative power is restricted to the adoption of group exemption regulations by the Commission in the field of certain horizontal aid.\textsuperscript{40} Under the enabling Council regulation the Commission was authorised to declare by means of regulations that certain categories of aid are compatible with the common market, making the notification superfluous in these cases. The reason for the delegation of limited lawmaking powers was that Member States were fearful of the opportunism of the Commission in the ambit of the most politically sensitive aid categories, including sectoral aid.\textsuperscript{41}

One year after, in 1999, the Council adopted the procedural regulation on the application of state aid rules,\textsuperscript{42} which obliged Member States to notify new draft aid to the Commission and allowed the Commission to order recovery of incompatible aid with interest. The political science literature considered that the adoption of the Regulation was a milestone because Member States finally accepted their obligation not to grant state aid without prior Commission consent.\textsuperscript{43}

In the meanwhile and after the completion of the internal market, the Maastricht Treaty (1992) defined the timetable for the European Monetary Union (EMU) and for the introduction of the common currency. The Maastricht Treaty set out the requirements for the EMU membership and imposed budgetary and public spending benchmarks limiting the policy leeway of EMU Member States. To enforce the EMU benchmarks, in 1997 the Stability and Growth Pact was adopted to strengthen the monitoring and coordination of

\textsuperscript{39} voluntary alignment was questioned by XXX. (missing reference)
\textsuperscript{40} the first enabling regulation was Regulation 994/98 [1998] OJ L 142/1.
national fiscal and economic policies.⁴⁴ The Stability and Growth Pact put a straitjacket on Member States public spending.

The Lisbon European Council (2000) put state aid again in the focus of its agenda as part of the economic reforms for a complete and fully operational internal market. To that end, the Presidency conclusions of March 2000 called on the Member States to “reduce the general level of State aids, shifting the emphasis from supporting individual companies or sectors towards tackling horizontal objectives of Community interest, such as employment, regional development, environment and training or research.”⁴⁵ In 2001, the Council invited the Commission to develop statistical tools enabling these goals to be followed up and to further develop the use of ex ante and ex post evaluations of aid schemes to judge the quality of aid packages and their effects on competition.⁴⁶ To that end, the State Aid Scoreboard was introduced to keep records of the aid spent by each Member State for the various goals by its share of the GDP.

The key goal of the Lisbon strategy was to increase competitiveness built on market-based economies. The Lisbon strategy was an important policy document, setting out the vision of the Union on, among others, industrial policy, research and innovation, investments and economic reforms.

*State Aid Action Plan (SAAP 2005-2009)*

Linked to the Lisbon strategy, the SAAP was the first comprehensive reform of state aid policy aiming to support sustainable growth, competitiveness, social and regional cohesion and environmental protection.⁴⁷ By setting key priorities, the European Council invited the Commission to align its state aid policy to this vision too. In the SAAP the Commission has done its job by revising the soft law crucial to the implementation of the Strategy. In the SAAP the Commission announced several substantive and procedural reform provisions.

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⁴⁴ Later, in 2011 the Six Pack and in 2014 the Fiscal Compact (Treaty on Stability, Coordination and Governance) had the same effect on public spending


⁴⁷SAAP para 1.
First, in accordance with the Strategy, the European Council has called on the Member States in 2005 to work towards a reduction in the general level of State aid and the redeployment of it in favour of support for certain horizontal objectives. By aligning state aid rules to the Lisbon strategy in the SAAP, the Commission set positive integration goals to the Member States. According to Blauberger, large parts of the document focus on positively defining “better targeted aid” rather than on tightening state aid control (“less aid”). The SAAP acknowledged that the impact of aid in the market depends first, on how accurately the accepted objective of common interest has been identified, second, whether it is the appropriate instrument and third, on its proportionality. De Cecco highlighted that besides the original deregulatory effect of state aid law, the Commission has acquired “a set of powers which are designed to ensure that State intervention is channelled towards objectives that are perceived as priorities from an EU perspective.”

Second, the Commission has announced in the SAAP its more economic approach, with the help of which a more apt and transparent evaluation of aid measures can be achieved. As Ulrich Schwalbe highlighted, until the SAAP the economic analysis was limited mainly to the assessment of the economic advantage. The competition analysis and the assessment of the negative effects on trade were rudimentary.

Furthermore, SAAP introduced a 3-stream procedure of block exemption, standard and detailed assessment. The latter applies to a small number of cases, for example to large investment projects. In the detailed assessment the Commission applies the so-called balancing test. Balancing the negative and positive effect of aid measures renders the proceeding more lengthy, but on the other hand, the analysis becomes more accurate. By

50 SAAP para 20.
52 para 21-22.
54 Staff working paper 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3 EC-Treaty’, 6 May 2009
conducting the detailed assessment, the original function of state aid, namely to correct market failure, is revealed. The balancing test was incorporated into several soft law instruments in the course of the 2000s.  

**Financial and economic crisis**

A couple of years after the start of the SAAP roadmap, the financial and economic crisis has changed the programme of the state aid team of the Commission. Since the crisis started, the EU used state aid rules as a substitute for the lacking resolution tools. Rescue and restructuring aid given to banks and financial institutions had to be evaluated very quickly by the officials and until October 2008 the Commission applied its already existing Rescue and Restructuring Guidelines. Member States have announced unprecedented support for the financial sector and the Commission has been playing a key role in authorising the measures. The State Aid Scoreboard shows that the overall aid volume increased in 2008 to 2.2% of the GDP from the previous 0.52%. As a consequence, it became a significant challenge for the Commission to deal with the flood of notifications quickly. It was only in October 2008 that the Commission adopted a special, crisis-specific Guideline on state aid to financial institutions under Article 87 (3) (b) of the Treaty that enables the Commission to authorise aid to remedy a serious disturbance in the economy. Later the Commission adopted a Framework on the support of the real economy as well.

In the midst of the crisis, the Monti Report (2010) highlighted the role of state aid control and the importance of keeping national interests at bay to avoid the risk of economic nationalism.

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55 for example into the former R&D&I Framework and Risk Capital Guidelines in 2006, the Environmental Aid Guidelines in 2008.
56 Community guidelines on State aid for rescuing and restructuring firms in difficulty.
59 Temporary Community framework for State Aid measures to support access to finance in the current financial and economic crisis, OJ 2009/C 16/01, 22.1.2009.
Leigh Hancher acknowledged that “despite initial protectionist instincts in some Member States, the Commission co-ordinated national action to limit spill-over effects, such as untenable subsidy races and distortions of competition that would have fragmented the internal market.”61 Michelle Cini shared this view by pointing out that the EU’s competition regime during the crisis has proven remarkably resilient.62

The crisis had started to make its effects during the SAAP process and therefore the Commission has aligned its regulatory goals to the changed circumstances. For example, the Commission took into account in 2008 in its Impact Assessment Report on Regional Aid that in times of crisis, competition for attracting investments is distorted, since those EU countries having constrained resources may be easily outbid by richer regions. Thus, this may result in inefficient outcomes for collective welfare, and may jeopardise the internal market.63

Europe 2020

As the Lisbon Strategy has not delivered the expected results in the meanwhile radically changed environment, the Commission proposed in 2010 the Europe 2020 strategy,64 which was endorsed by the European Council.65 The Commission did not devote too many words to the role of state aid policy, but noted under the Heading “A Single Market for the 21st Century” that “state aid can also actively and positively contribute to the Europe 2020 objectives by prompting and supporting initiatives for more innovative, efficient and greener technologies, while facilitating access to public support for investment, risk capital and funding for research and development.”66 The effect of the Europe 2020 programme on

66 p.19.
channelling aid towards common objectives cannot be underestimated. In fact, Kassim highlighted that 'it might give a push to new activist industry policy.'\textsuperscript{67} Integration of the goals of Europe 2020 into state aid law was a key objective of the State aid modernisation programme.

\textit{The State aid modernisation (SAM 2012)}\textsuperscript{68}

Not so long after the SAAP was completed, another reform was decided in 2012 to give fresh impetus to European State aid control. The Commission has outlined three reasons for the modification. The first being the original main goal to ensure that the functioning of the internal market is not distorted by anticompetitive behaviour of Member States favouring some actors to the detriment of others. The second is the contribution of competition policy to reach the rather ambitious Europe 2020 goals.\textsuperscript{69} The third reason for a renewed policy approach is the economic and global crisis which has increased the demand for a greater role of the State to protect the most vulnerable and promote economic recovery (equity and efficiency argument).\textsuperscript{70} Hence, according to the Commission, the scarce resources should be spent more efficiently and effectively.

In the SAM the Commission has rightly recognised that the effect of the financial crisis on Member States’ budgets is twofold. First, it requires fiscal discipline from the governments to keep the EMU targets, which fits very well with the “less and better targeted aid” approach of the Union and the better use of taxpayers’ money. Second, the crisis has hit some Member State’s more harshly than others and in consequence, it has increased the disparity in Member States’ leeway to finance their policies.\textsuperscript{71}

The objectives of the SAM are threefold: (i) to foster sustainable, smart and inclusive growth in a competitive internal market (competitiveness); (ii) to focus the Commission’s ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member

\textsuperscript{68} Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, State Aid Modernisation, COM/2012/209 final.
\textsuperscript{69} The target of which is to make Europe a smart, sustainable and inclusive economy. Commission Communication COM (2010) finals, 3.3.2010.
\textsuperscript{70} SAM, p.3
\textsuperscript{71} SAM, p. 3.
States cooperation in State aid enforcement (prioritisation); (iii) to streamline the rules and provide for faster decisions.

Promoting growth and competitiveness could be achieved by targeting state aid at identified market failures and objectives of common interest, complementing, and not replacing private spending. The identification and definition of common principles and horizontal rules across different guidelines was also a burning concern before the SAM was issued.

The Commission issued its common assessment principles for State aid measures. These principles build on a large extent on the balancing test adopted under the SAAP, the only new (procedural) requirement being the transparency of the measure.72

In line with the more economic approach of the Commission, the SAM foresaw the deeper scrutiny of the incentive effect (i.e. it induces the aid beneficiary to undertake activities it would not have done without the aid) and more systematic assessment of the potential negative effects, for example distortions of allocative and dynamic efficiency, subsidy races and market power.73 The European Court of Auditors also recommended to the Commission in 2011 to regularly assess the ex post impact of State aid and of State aid control on companies, markets and the overall economy.74

At the procedural law level, we have already noted that the Commission’s ex ante scrutiny is time-consuming, block exemption relieves not only the Commission but also the Member

72 a) contribution to a well-defined objective of common interest  
(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, for example by remedying a market failure or addressing an equity or cohesion concern  
(c) appropriateness of the aid measure: an aid measure will not be considered compatible if other, less distortive measures allow the same objective to be achieved  
(d) incentive effect: it incentivises market players to behave differently from how they would if the measure were not implemented  
e) proportionality (aid limited to the minimum)  
f) avoidance of undue negative effects on competition and trade between Member States: the negative effects of aid 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 pertinent information about the aid awarded

73 SAM p.18

States from burdensome notification procedures. By focusing on the cases with the biggest impact on the internal market, many less distortive aid measures can come under the provisions of the block exemption regulation. The goal of the Commission is that around 70% of aid measures will be covered by the block exemption regulation at the beginning of the application of the new so-called umbrella General Block Exemption Regulation (GBER).\(^\text{75}\) If the full potential of the GBER is exploited by the Member States, this figure can increase to 90%. This in turn would result in significant resources allocated to the scrutiny of individual cases with a higher impact on the market, for example to the scrutiny of fiscal aid cases. This allows agenda-setting by the Commission. In the end, Member States increasingly resort to state aid falling under the scope of block exemption regulations and thereby national policies are converging.

The GBER is a complex regulation with 143 definitions and almost 60 articles. The scope of it covers new categories of aid\(^\text{76}\) and it provides for higher notification thresholds and aid intensities of some type of aid measures. Responsibility for the application of the regulation rests with the Member States, the grantors of aid. Hence, the decentralised application of its rules requires extensive monitoring and ex post control of the Commission. For the execution of the monitoring exercise, Member States have strict reporting obligations.\(^\text{77}\) Under the rules of transparency, the full text of each aid measure should be published, which is supposed to induce compliance on behalf of the grantors.

Having realised that the interpretation and application of the GBER is challenging, the Commission issued a practical guide to offer guidance concerning the implementation of these rules.\(^\text{78}\)

The first monitoring experience of the Commission after completion of the SAM was rather negative. The Commissioner responsible for competition announced:

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\(^\text{76}\) local infrastructure, culture and heritage conservation, disaster aid, sport, broadband, innovation clusters, audio-visual works, regional urban development, research infrastructure

\(^\text{77}\) The MSs shall report via the Commission electronic system the summary info about each aid exempted and an annual report

\(^\text{78}\) http://ec.europa.eu/competition/state_aid/legislation/block.html
Unfortunately, the first results I have seen from our ongoing monitoring exercise show that there are 'issues' with nearly a third of all case.”\textsuperscript{79} In 2016, at the High Level Forum on state aid, the Commission offered strengthened bilateral partnership to improve the management of state aid to some Member States.\textsuperscript{80}

The European Court of Auditors Special Report issued in 2011 has already recommended to the Commission to step up its monitoring activities, both in terms of sample size and of scope.\textsuperscript{81}

“The Commission does not do enough to detect cases that should have been notified. Legally it cannot systematically review Member States’ procedures to ensure their reliability and its monitoring activities are limited. As a result, there is a risk of State aid going undetected.”\textsuperscript{82}

It has to be seen whether the Commission can devote enough time and resources to monitor aid covered by the GBER.

In line with the call for a more economic approach the GBER introduced a new tool to evaluate ex post the effect of aid measures on the common interest and on markets. Member States are responsible for the evaluation that has to be conducted according to a plan approved ex ante by the Commission. Evaluation is required only for large aid schemes, with an average annual budget exceeding €150 million.\textsuperscript{83} Member States should evaluate ex post whether the scheme brought about additional improvement in the level of investment, employment or labour productivity and the incentive effect of the aid has to be specifically assessed.

\textsuperscript{79} Speech at High Level Forum of Member States by Margrethe Vestager, Commissioner for Competition, December 2014. She noted that some of the results are very damaging. For example, failure to ensure that aid does not go to firms in difficulty without a proper restructuring plan.  
\textsuperscript{81} With regard to the previous GBER (Commission Regulation 800/2008)  
\textsuperscript{82} The European Court of Auditors highlighted that the risk of non-notification is particularly high for rescue and restructuring aid, tax measures and the sale of land below market price, which has led to several complaints. The risk is also higher for aid granted by regional and local government bodies, which only occasionally grant State aid and therefore have a limited knowledge of State aid rules. Citation missing  
\textsuperscript{83} The following aid categories will be subject to an evaluation: regional aid (except operating aid), aid for SMEs, aid for access to finance for SMEs, aid for R&D&I, aid for environmental protection (except reductions of environmental taxes under Directive 2003/96/EC) and aid for broadband infrastructures.
The main objective of State Aid Modernisation was not only to broaden the scope of the GBER, but also to provide a better scheme for the evaluation of measures falling outside the scope of it. Draft, not group-exempted aid is assessed under Commission soft law. Various soft law documents were adopted to reach the objectives of SAM: the regional aid guidelines, the guidelines on environmental protection and energy, the guidelines on rescue and restructuring or the framework for State aid for research and development and innovation, to name only few.

The coexistence of hard and soft law results in a framework, where aid measures of a larger scale or sensitive to Member States (e.g. Rescue and Restructuring) are assessed under soft law.

Cini rightly noted in 2001 that European state aid law is a mix of soft law and hard law. The rigidities of hard law are accompanied by soft law associated with a more discretionary approach. For example, rescue and restructuring aid was never the subject of hard law as it is highly political and sensitive issue, involving not only efficiency aspects, but equity aspects as well.

The new guidelines on regional aid and rescue and restructuring are more rigorous and demanding than their predecessors, requiring substantive economic analysis of the actual impact of the measure and proof of the incentive effect. To some, the new guidelines can act as deterrent for undertakings and Member States as well and Member States will be more inclined to formulate their state aid policy under the GBER.

Weaver is also of the opinion that ‘The GBER dictate the type of long-term planning that state aid regimes can support: a green, socially sustainable vision for the future of Europe’ and the modernised state aid regime guides states away from historical state-industry relations.

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85 Nicolaides has also mentioned that the new guidelines are generally more rigorous. Phedon Nicolaides (2014) An Economic Assessment of the Usability of the New General Block Exemption Regulation for State Aid (Regulation 651/2014), European Competition Journal 10:3, 403-417., p. 405.
86 Cite Ulrich Soltész. Citation missing
87 Weaver p.612.
88 Alexander M. Weaver: Convergence through the Crisis: State Aid Modernisation & West European Capitalism, 21 Columbia Journal of European Law 587 214-2015, p.587. He claims that the modernisation of the state aid regime challenges West European Member States to retool their state-industry relations and this
Blauberger explained that ‘heterogenous member state preferences have enabled the Commission to act as a supranational entrepreneur.’

Phedon Nicolaides also pointed out that the new GBER is clearer and more attractive to Member States, because the alternative option of notification is more costly. The question to be asked is whether this will result in a strait-jacket effect?

The increased use of the GBER potentially creates uncertainties for the undertakings concerned as well. Undertakings have to trust that the government rightfully applies the rules.

5. What is the current status of state aid policy?

Some commentators criticise the Commission even after the SAM was completed as not setting the right priorities for its policy. Assuming automatically that selective measures distort competition is not justified. The interpretation of Article 107 has not changed after the SAM was completed and therefore the “broad sweep” approach is applied to cases coming under the prohibition. On the other hand, justification is based increasingly on secondary hard law, which requires only in the minority of cases to provide a thorough analysis.

pressure is felt in both coordinated market economies and liberal market economies, but most acutely in state-influenced market economies. pp. 587-588.,p.612.

89 Michael Blauberger: Of ’Good and Bad’ Subsidies: European State Aid Control through Soft and Hard Law, West European Politics, 32:4, 719-737, p.720.

90 Phedon Nicolaides (2014) An Economic Assessment of the Usability of the New General Block Exemption Regulation for State Aid (Regulation 651/2014), European Competition Journal 10:3, 403-417., p.404, p.406., ‘To fit an exemption under the new GBER, states necessarily conform to the regulatory agenda set by the European Commission.’ Weaver p.598., According to Blauberger ‘the Commission creates incentives for Member States to adjust national policies to its own state aid priorities’, because the block exemption regulations relieve the Member States from burdensome notifications and lengthy Commission investigations. He expressed this opinion in 2009, when no GBER was in force. Michael Blauberger: Of ’Good and Bad’ Subsidies: European State Aid Control through Soft and Hard Law, West European Politics, 32:4, 719-737, p.733.

91 Caroline Buts: citation missing


93 like large regional aid measures. The GBER does not apply to aid schemes if the average annual State aid budget exceeds EUR 150 million on regional aid, SMEs, R&D, environment or broadband. See Article 1 (2) of
On the contrary, de Cecco is of the view that subsidies to individual undertakings can be tested by the competition test, but the analysis of the likely impact on competition of regulatory intervention is “in fact necessarily a rather blunt judgement, which relies on assumptions rather than on empirical evidence and market analysis, as it is virtually impossible for any court to carry out a detailed analysis of the potential effects of a planned measure which benefits a variety of undertakings from different economic sectors.”  

With regard to the justification, broader and deeper positive integration raises the question whether exceptions to the prohibition of state aid are of a national or of a European character? Can we still define the balancing activity of the Commission under Article 107 (3) between the competing interest of the Union for the creation and maintainance of an internal market with undistorted competition on the one hand and national economic or social policy to support individual undertakings? The Europeanization of exceptions by first soft law, later by hard law makes it very difficult for the Member States to rely successfully on national economic or social policy reasons to justify aid measures. The Commission relies on the term “objective of common interest”, which implies that the interest is not simply the individual interest of one or more Member States.

On the other hand, from a procedural point of view, the policy shift from ex ante to ex post control of most of the aid measures have to be accompanied with reinforced ex post control of non-notifiable, group exempted measures. The Commission has itself acknowledged in the SAM that current results of the monitoring of the implementation of block exempted measures reveal frequent lack of compliance with state aid rules. With this statement the Commission refers most probably to the Report of the European Court of Auditors, prepared in 2011, the results of which showed a fairly disappointing picture about the state aid review conducted by the Commission.

The possibility of Member States to grant state aid is significantly reduced by the harmonised State aid regime and channelled towards horizontal aid. Yet, few possibilities still exist, the first being to design measures outside the scope of Article 107 (1), thus, no obligation to

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95 SAM p.21.
notify them to the Commission\textsuperscript{97}. This leaves limited leeway to Member States as the conditions of state aid prohibition (state resources, imputability to the State, economic advantage, selectivity, effect on trade) are interpreted very broadly by the European Court of Justice (ECJ). The second option is to design aid measures within the scope of Article 107 (1) in conformity with secondary law, consequently there is no notification obligation. The new GBER with is broad subject matters and complex rules leaves ample room for different interpretations. Indeed, one year after its adoption, the Commission has issued a practical guide to help authorities and beneficiaries how to apply the its rules.\textsuperscript{98} Lastly, it is always open for the Member States to notify individual measures to the Commission.

As to the reform of the procedural rules, the Commission gained new procedural tools to investigate markets. The new procedural regulation\textsuperscript{99} granted the Commission the power to request information not only from the notifying Member State, but also from other Member States and from undertakings during the formal investigation phase.\textsuperscript{100} Similar to antitrust powers, the Commission can conduct sector inquiries and also state aid instrument inquiries if state aid measures may materially restrict or distort competition within the internal market in several Member States.

Besides being subject to the law, during the legislative phase, Member States may try to influence Commission law-making and thereby the substance of secondary law. The Commission cannot issue soft law or block exemption regulations against the strong opposition from numerous Member States.\textsuperscript{101} In this sense, big Member States with strong political and economic power have a say during the legislative process.

\textsuperscript{97} see for example the German attempt to design a renewable energy support scheme outside the ambit of Article 107, which has failed. Commission Decision of 25.11.2014. on the aid scheme SA.33995 (2013/C) (ex 2013/NN) implemented by Germany for the support of renewable electricity and of energy-intensive users. Brussels, 25.11.2014. C (2014) 8786 final

\textsuperscript{98} http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf


\textsuperscript{100} Information requests from market participants is enforceable via pecuniary sanctions. See the article of Hanns Peter Nehl: 2013 Reform of EU State Aid Procedures: How to Exacerbate the Imbalance between Efficiency and Individual Protection. European State Aid Law Quarterly 2/2014, pp.235-249.

\textsuperscript{101} Michael Blauberger: From Negative to Positive Integration? European State Aid Control Through Soft and Hard Law, MPIfG Discussion Paper 08/4, p. 23.
EU state aid policy in a global context

EU state aid policy is unique in the sense that it is an exclusive Union competence implemented by the European Commission. Kelyn Bacon noted that State aid control is a “European peculiarity: no other jurisdiction or trade area has similar provisions”.  

Critics of the rigorous Union state aid control often claim that firms located outside of the Union have more opportunities to improve their competitiveness. Studies show that the overall aid to enhance competitiveness is not lower in the EU than in other jurisdictions. “The argument that state aid control makes Europe a less attractive location for foreign capital is short on facts.”

Tough stance on state aid was increasingly viewed by the Commission as a necessary tool to improve the competitiveness of the European industry in a global economy.

Stressing european competitiveness has started to surface in 2000 with the inclusion of competition policy in the Lisbon Strategy and since than has penetrated into soft law. For example, in the Guidelines on State aid for environmental protection and energy (2014) the Commission has also taken into account the competitive position of companies active in electro-intensive industries and aimed to reduce their competitive disadvantage resulting from the obligation to support energy from renewable resources.

The aid is limited to sectors that are exposed to a risk to their competitive position due to the costs resulting from the funding of support to energy from renewable sources as a function of their electro-intensity and their exposure to international trade.

6. Final remarks

Free movement rules facilitate regulatory competition between Member States by removing trade barriers. National interest therefore plays a crucial role in the justification of trade barriers. In the same vein, state aid is not an absolute prohibition, but exceptions to it do not concern the protection of national interest, but European interest.

102 Kelyn Bacon: European Union Law of State Aid, Oxford University Press, 2013, p. 4. She has also noted that the WTO rules are more limited in their scope and in their enforcement regime.


While the restriction of free movement can be justified before the European Court of Justice relying on public security, public policy or public health reasons, state aid rules do not allow room for the Member States to invoke so directly their national interest. This conclusion also flows from the text of Article 107 (3) that limits sectoral and cultural aid not affecting trading conditions to an extent contrary to the common interest.\textsuperscript{105}

The national interest is thus labelled and selected by the European legislator and policy-maker as harmful or harmless. The distinction between “bad” and “good” aid is not drawn by the Member States, but by the Commission itself. In the same vein, the Report prepared by the Copenhagen Economics in 2013 suggests that ‘making concessions to national interests in competition policy may damage effective competition, lead to an unlevel playing field across Member States.’ \textsuperscript{106}

Regional policy, environmental policy or employment policy became by their nature European policies, regulated by the Commission.\textsuperscript{107} As the ultimate arbiter is the Commission, Member States have limited possibilities to use these tools for pursuing their individual interest. The collective interest of the Union is prevalent in the case of aid granted under Article 107 (3) b) for the execution of an important project of common European interest. In this case the Union itself sets the agenda, that is promoted through the European Structural and Investment Funds and the Member States together. Aid to support the Europe 2020, Digital Agenda for Europe or the Trans-European Transport and Energy Network projects are considered of common European interest and thereby have a privileged status.

Thus, this article has shown that state aid policy is a proactive policy, which takes into account the Europe 2020 goals by limiting aid to better-targeted growth-enhancing aid.

Moreover, the present study has offered a short outline of the evolution of EU State aid law that developed dramatically in the 90s from an inactive and toothless policy into a broad –

\textsuperscript{105} Article 107 (3) c) and d)


\textsuperscript{107} the only exception to this is perhaps culture and heritage conservation, where there is no regulation or soft law adopted by the Commission.
sweeping positive integration tool which is used frequently by the Commission in case of lack of positive harmonisation competence.

Especially, this paper revealed that the new emphasis on less and better targeted aid granted for European policy objectives is a prominent feature of European State aid law and careful evaluation of the effects on the global competitiveness of European companies has become more important.

Thus, the effect on national policy choices is wide-ranging and the knowledge of State aid law is indispensable for officials working in the public administration.

References


Bacon, Kelyn: European Union Law of State Aid, Oxford University Press, 2013


Blauberger, Michael: From Negative to Positive Integration? European State Aid Control Through Soft and Hard Law, MPIfG Discussion Paper 08/4

Blauberger, Michael: Of ’Good and Bad’ Subsidies: European State Aid Control through Soft and Hard Law, West European Politics, 32:4, 719-737

Buch- Hansen, Hubert and Wigger, Angela: The Politics of European Competition Regulation, Routledge, 2011


Cini, Michelle: Economic Crisis and the Internationalisation of EU Competition Policy in: Maria Joao Rodrigues, Eleni Xiarchogiannopoulou (eds) The Eurozone Crisis and the
First draft prepared for the ECPR Conference in Trento, 2016


Damro, Chad: EU State Aid Policy and the Politics of External Trade Relations, Journal of Industry, Competition and Trade 13:159-170


Friederiszick, Hans W., Röller, Lars- Hendrik, Verdouen, Vincent: European State Aid Control: An Economic Framework In Handbook of Antitrust Economics (edited by Paolo Buccirossi), Massachusetts Institute of Technology, 2008,

Hancher, Leigh- Ottervanger, Tom- Slot, Piet Jan: EU State Aids, Sweet & Maxwell, 2012


Weaver, Alexander M.: Convergence through the Crisis: State Aid Modernisation & West European Capitalism, 21 Columbia Journal of European Law 587 214-2015


Policy documents


Stockholm European Council conclusions, 24 March 2001

Barcelona European Council Conclusions, 15 and 16 March 2002

First draft prepared for the ECPR Conference in Trento, 2016

Progress Report of the Commission to the Council

European Council conclusions, Brussels, 23 March 2005


Staff working paper “Common principles for an economic assessment of the compatibility of State aid under Article 87.3 EC-Treaty”, 6 May 2009

Temporary Community framework for State Aid measures to support access to finance in the current financial and economic crisis, OJ 2009/C 16/01, 22.1.2009.


European Council Conclusions, Brussels, 17 June 2010

Mario Monti (2010): A New Strategy for the Single Market. At the Service of Europe’s Economy and Society


Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, State Aid Modernisation, COM/2012/209 final

Contribution of Competition Policy to Growth and the EU 2020 Strategy. European Parliament, Directorate-General for Internal Policies. 2013. The document was requested by the European Parliament’s Committee on Economic and Monetary Affairs and prepared by the Copenhagen Economics.