‘Small On Small’: Towards a Two-Speed State Aid Control?

Short phrases describing the core ideas behind policy initiatives became fashionable in State aid policy some years ago. Nowadays all our readers will certainly be familiar with the motto “*Big on big; small on small*” that the European Commission is using in order to encapsulate the main content of the very recent State Aid Modernization (SAM). As is often the case with this kind of communication technique, it looks *prima facie* to be a sound goal. This precise motto seems however based on an assumption that is not so straightforward. Indeed, the phrase implicitly considers that State aid control is a burden, which is going to be imposed mainly on the big players and not so much on the smaller ones as a matter of proportionality. From that perspective, it sounds quite reasonable.

However, in our opinion, such a perspective is incomplete. State aid control is not only - or mainly - a burden for the beneficiaries and for the Member States granting the aid, but also offers protection to, and benefits for, the competitors, for the rest of the Member States and for the correct functioning of the markets. This is at least what we have always believed at EStAL and what we consider to be at the core of State aid law in the EU. The problem is that, if we took that perspective, it would become immediately obvious that giving a big benefit to the big players and markets and only a smaller benefit to the smaller ones, would perhaps not be seen as such a great idea any more.

EU State aid law is supposed to care about the efficient functioning of the markets by preventing State subsidies distorting competition between the different companies that are actively competing. That problem is exactly the same irrespective of the size and structure of the market at stake. So the size of the subsidies or of the beneficiaries is not necessarily an adequate proxy for identifying the situations requiring more protection. Smaller markets may be in need of as much State aid control as big markets, if not more.

However, the recent modernisation has taken a totally different view in terms of enforcement priorities, even leading to substantially different legal regimes. We can see the ‘*Small on small*’ approach behind the recent battery of Commission Decisions declaring as non aid certain measures allegedly not affecting trade between Member States (something whose coherence with case law remains to be verified). The *de minimis* regulation (which it now seems may also be expanded again) follows a similar logic. Above all, the main instrument of the new approach is without any doubt the recently expanded General Block Exemption Regulation (GBER), the scope of which is soon to be increased again to include some ports and airports. As a result of this, we now live with a two-speed legal system for State aid control: a stricter sophisticated one for big cases examined by the Commission; and a much more relaxed one with exemptions based on formal criteria for small cases. The current situation is that around 90% of previously notified State aid cases are now exempted from *ex ante* Commission control. The conditions of the exemption are quite basic and objective, given the need to implement it at national level, and certainly do not require any refined economic approach in its application.

So, the aid exempted under the GBER is now only subject to a theoretical prior ‘self-control’ by the national authorities granting the aid. There are also increased transparency requirements in the form of public registries and also a theoretical possibility of *ex post* controls by the European Commission that – we hope – may somehow reinforce the spontaneous willing-

ness of national authorities to respect State aid law. We will need to see how things evolve once the appropriate priority is given to this work and substantial resources are applied to it (something that we can only encourage here). However, it is quite clear for the moment that the Commission seems to be refusing to assert real control over small cases (*'small on small'*) in exchange for increasing control over big cases (*'big on big'*).

We do not put into question the genuine benefits that this change is creating in the administrations of the Commission and of the Member States granting State aid. We are simply worried about its implication on the other side of the equation. Indeed, there seem to be certain problems with the way in which that sifting of priorities is being made.

The first is that, as common wisdom states, *'hard cases make bad law'* which may be paraphrased here to say *'big cases make bad law'* (if not always, at least from time to time). We will not quote here specific examples of Decisions on big 'sensitive' cases departing from normal practice, but they are unfortunately not exceptional, both from the past and from recent times. So, if the future Commission practice were to be made only of Decisions on big cases, we should perhaps start worrying about its likely quality and coherence. The coexistence of Decisions on big and sensitive cases with normal (not so big and sensitive) cases has always been a guarantee of the overall soundness of the Commission's practice. It is against these normal cases that 'big cases' have to be compared, in order to ensure that the Commission grants a coherent and fair treatment to all market players. So, if one now changes the balance of the ecosystem, it should be prepared to see strange mutations in the years to come.

The second is that if the Commission does not intervene willingly in small cases, nobody else would be able to do it in its place, due to its legal monopoly on compatibility of State aid. At least this monopoly has not been modified by the recent 'modernisation', probably because it would require a Treaty change and also hopefully because there is a general consensus that the control of compatibility can only be charged to an independent supranational authority like the Commission.

The third and perhaps most important problem is that small markets represent a key part of the European economy. If we consider State aid control to be not just a burden for the granting authorities and for the beneficiaries, but also an indispensable element for the correct functioning of competitive markets, we fail to see why it should not apply to smaller markets.

Moreover, the new 'small on small' approach is bad news from the perspective of competition between Member States too. Indeed, the GBER has greatly expanded the legal possibilities of Member States granting many small aids to many companies. Obviously, this possibility is being exploited to varying degrees by the different countries, depending on their financial resources and their willingness to spend. So, deep pocketed countries may now under GBER legally grant bigger overall amounts of aid and severely distort competition in certain markets. These aids now pass without control under the modernised State aid radar. The first results may be seen in the latest scoreboard.¹

In our opinion the administrative problem of the Commission's high workload in the area of State aid does not require and does not justify the establishment of a two speed legal regime.

A reduction in the Commission's workload is already becoming quite substantial as a result of the dramatic fall in notifications. The Commission is very right to use part of those freed

¹ European Commission, State Aid Scoreboard 2015, <http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html> Last accessed on 6 December 2016.

resources to investigate some really important cases that have never been notified, like the tax rulings cases, or to look at previously neglected sectors like energy. However, important cases are not only – or mainly - those appearing on the front page of the Financial Times. In our opinion a coherent legal practice will only emerge from a mix of cases in which normal cases would be a substantial part of the blend. So, in our opinion, the Commission should also allocate some of its newly freed resources to perhaps less glamorous but equally important cases. In particular, if there are almost no notifications any more, this should allow the Commission to become more active with regard to complaints, whose existence may often suggest the presence of genuine competition problems.

Since the Commission would not be able to do everything, more could also be done at the level of national jurisdictions (even if they would still not be able to decide on compatibility). After all, judges are independent from the administrations granting the aid and are therefore more likely to exercise a certain external control over it. We have nothing against self-control by the granting administrative authorities but it would be better if somebody else were having an independent look too. More resources should be addressed to training national judges and explaining to them the possibilities offered under State aid law. This should normally lead in the long run to more preliminary questions of interpretation - and perhaps also of validity of certain Commission acts - in front of the Court of Justice of the European Union. In one way or another, companies would need at the end of the day legal mechanisms to enforce the rights recognised by EU law.

Big cases are certainly needed. However, State aid control is too important to be restricted only to headline-grabbing cases. Small cases are as deserving of the benefits of State aid control as big ones. In our opinion, it would be a costly mistake to forget that.

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