The Role of Competitors in State Aid Procedures

Everybody agrees that EU State aid rules are part of the EU competition rules. It is however more difficult to agree on the kind of competition that these rules are about. Is State aid about competition between undertakings (like antitrust) or is it rather about the competition between Member States in attracting and keeping economic activities on their territory?

The common wisdom is to consider that State aid law pursues both objectives simultaneously. However, the implications of such a statement are rarely understood. Indeed, the logic of both objectives is rather different: while the Treaty wants to preserve or even to encourage competition between companies, it also wants to limit competition between Member States. The problem is that the Treaty is supposed to cover both objectives with the same set of rules and this is obviously an uneasy coexistence. That is why there has always been a temptation to give priority to one objective above the other.

At its origins, it was considered that the main objective of State aid control was to put limits on the competition between Member States and to prevent subsidy wars between them in order to attract economic activity to their territory.

The emphasis started to change in recent years, when the European Commission (EC) began to speak more and more of competition between undertakings as the core mission of State aid control. Furthermore, some techniques began to be imported from antitrust which had just experienced a modernisation. The 2005 State Aid Action Plan (SAAP), with its emphasis on the refined economic approach, was the turning point.

The very recent State Aid Modernisation (SAM 2014) is more pragmatic than its predecessor and apparently less focused on the economic approach, at least as regards ex ante control. The main change is a very big expansion of the categories of aid exempted from notification. The EC argues that a reduction in the number of notifications would allow DG COMP to concentrate on the cases with the most distortive effects on competition.

The problem is that SAM, while increasing the theoretical emphasis on competition between undertakings, does absolutely nothing to increase the rights of undertakings in State aid procedures. On the contrary, it creates the obligation for companies to answer to the Commission’s questions. Moreover, it also tries to facilitate the Commission’s possibility to dispose of certain complaints without adopting a formal decision. Apart from being legally questionable, this would certainly not encourage the undertakings to complain against State aid granted to their competitors.

Indeed, despite the recent ‘modernization,’ the EC still considers that complainants are mere ‘sources of information’ that do not have the right to say anything during the preliminary phase. It is only if and when the formal procedure is opened - and this is a big ‘if’ - that they would have – like any interested party - the mere right to express their opinion formally before the EC. However, if the Commission really wants a more active application of State aid rules and more private input in this area, it should have advocated for a more prominent role for undertakings in the administrative phase.

The situation of competitors before the European Courts is not much better, as witnessed by the current case law on locus standi of complainants against positive decisions. If the EC approves aid without opening the formal phase, the complainant can only attack this formal infringement. If the EC has adopted the positive decision at the end of the formal procedure,
it is very difficult under the existing case law to prove that the competitor/complainant is individually affected by the aid that has been approved. The case law on ‘individual concern’ in State aid cases remains excessively strict and its actual application is rather confusing. As a result, it is difficult to predict ex ante whether a competitor would pass or fail the Plaumann (C-25/62) test. A more flexible interpretation of the said requirement, so as to open it to all competitors of the beneficiary – or at least those who made a complaint and those who participated in the administrative procedure - seems legally possible but has so far been opposed by the Commission and avoided by the Courts.

The above elements suggest that, as of today, the State aid procedure is not entirely coherent with its declared aims. If it is really true that State aid control is about competition between undertakings and not just between Member States, then the undertakings should have a role in the procedure similar (or at least closer) to that of Member States. This is obviously not at all the case and neither the EC nor the Member States have shown any willingness to change it.

The paradox is blatant: despite the latest ‘modernisation,’ undertakings have no real say in a system whose main aim is supposed to be protecting competition between them. The current situation of competitors in State aid law reminds us of the attitude of the enlightened rulers of the XVIII Century towards their people: ‘Everything for the people, nothing by the people.’ It is enough to replace the word ‘people’ by the word ‘competitors.’

In our opinion a greater role for undertakings in State aid procedures would greatly benefit State aid law. Indeed, without competitors taking a more active role, both in the administrative and judicial phases, it will be impossible to achieve a more effective State aid system in the long run. We can only hope that both the Commission and the Courts will end up realizing this and adopting a more open attitude in this regard.

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