Antitrust & Competition

State Aid

A Place for State Aid Rules amid Global Financial Turmoil?

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When thinking of State aid, what in the past came to mind were national subsidies for farmers, shipyards or coal mines. In other words: State aid seemed to be a rather outdated concept of industrial policy dealing with the "old economy." However, the present financial crisis not only led to global economic turmoil, but also changed the profile of possible State aid beneficiaries. First, governments throughout Europe have attempted to stabilise beleaguered banks and other financial institutions with official rescue schemes. Now the car industry is calling for public help, either for an individual company such as German cash-strapped GM unit Opel, or for the whole industry such as Italian carmaker Fiat.

This recent development is a difficult challenge for the European Commission. On the one hand, the Commission must be aware that it can not apply EU State aid rules to impede essential Member States responses to the financial crisis. On the other hand, it is obliged to supervise and assess national bail-out plans in order to prevent Member States from giving an unfair advantage to national players and going beyond what is reasonable, even in these unusual times. Otherwise, Member States would enter into a subsidy race spending money; not to deal with the problems which triggered the present crisis, but to deal with the distortions in competition caused by other Member States' State aid. Therefore, State aid rules are not an undue formality, or what some might otherwise consider as typical EU red tape. Rather, such a legal framework is necessary to preserve the functioning of competition in the EU.

However, to be efficient, the State aid framework needs to be applied flexibly. At the beginning of the subprime crisis, Member States intervened in favour of individual banks, *e.g.*, Northern Rock (United Kingdom), SachsenLB, WestLB, IKB (both in Germany), or Roskilde Bank (Denmark). In handling these cases, the Commission used the classical legal framework of Article 87(3)(c) EC Treaty and the guidelines for Rescue and Restructuring aids (R&R guidelines).[1]

With the intensifying crisis, Member States started implementing general rescue measures such as guarantees or recapitalisation schemes rather than granting individual aid. The Commission encouraged national governments to stabilise the financial sector by adopting a Communication on the application of State aid rules in the context of the global financial crisis (Communication).[2] In doing so, the Commission set out a fast track scrutiny procedure which applies to State aid complying with the requirements of the Communication. The legal basis of the Commission's new approach is Article 87(3)(b) EC, which allows "aid to remedy a serious disturbance in the economy of a Member State." Previously, the provision was thought to be of no relevance for the State aid control procedure, but in the light of the exceptional circumstances of the present crisis, Article 87(3)(b) EC gained in importance. The Communication highlights that "the crisis equally affects financial institutions that are fundamentally sound and whose difficulties stem exclusively from the general market conditions which have severely restricted access to liquidity."[3]

The Communication covers different types of State aid: guarantees for financial institutions' liabilities, recapitalisation of financial institutions, controlled winding-up of financial institutions, and provisions of other forms of liquidity assistance. In contrast to the R&R guidelines, the Communication is broader in scope and its criteria are more flexible. Member States have a wider discretion in adopting rescue schemes for the financial sector as long as they comply with the key principles of the Communication. In general, it is crucial that State aid be granted in a non-discriminatory manner, *i.e.*, any discrimination based on nationality is prohibited. Moreover, all measures must be well-targeted, so as to achieve effectively the objective of remedying a serious disturbance in the economy; proportionate to the challenge faced, not going beyond what is required to attain this effect; and designed in such a way as to minimise negative spill-over effects on competitors, other sectors and other Member States.[4]

According to the Communication, Member States have to review their respective rescue measures schemes regularly, at least every six months, and report the results to Commission.[5]

To minimise anticompetitive effects of State aid, a large contribution from the beneficiary or the industry is required, *e.g.*, in the form of fees paid for the provision of the guarantee or clauses allowing Member States to receive compensation for the guarantee at a later date. Finally, the Commission undertakes, not only to address the acute symptoms of the present crisis, but to respond to its root causes. Therefore, Member States' rescue measures must be accompanied in due course by general adjustment measures for the sector as a whole or individual restructuring plans for an individual beneficiary.[6]

At the time of writing, the Commission has already approved eleven rescue schemes. Ten other national bail-out plans are currently being scrutinised. The Commission's quick response to the crisis underlines the importance of the

application of State aid rules even in times of a severe economic crisis. Moreover, these rules can help to target Member States' individual rescue plans better so that the state aid has optimal effect. Without the competition law framework, we would see a race for subsidies across Europe which would not solve the underlying problems of the present turmoil. It is clear that within the short period of time and considering the complexity of the rescue packages, the Commission can only assess Member States' rescue schemes on the surface. The Commission seems to accept the risk that not all plans would meet the criteria set out by the Communication if scrutinised in detail. However, even a short state aid control procedure by the Commission is better than temporarily suspending the whole system because Member States are forced to pay attention to the anti-competitive effects of their rescue measures. Thus, state aid rules contribute to preserving the competitiveness of the European financial industry.

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[1] Communication from the Commission – Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty (2004/C244/02), OJ C 244 of 1 October 2004.
[2] Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (2008/C270/02), OJ C 270 of 25 October 2008.
[3] *Supra.* note 2 at, para. 2.
[4] *Id.* at para. 15.
[5] *Id.* at para. 24. Provided that Member States comply with its review obligations, the Commission's approval of the rescue scheme may cover a period up to two years. It may be further extended, upon Commission approval, if the financial crisis requires such a renewal.
[6] *Id.* at para. 28.

Legislative and Regulatory Developments

Commission Issues New Notice on Remedies in Merger Cases

Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 276 of 22.10.08, p. 1–27

On 22 October 2008, the European Commission published its new notice (Notice) on remedies acceptable under Regulation 139/2004 (Merger Regulation) and Regulation 802/2004 (Implementing Regulation). Alongside, an amended version of the Implementing Regulation[1] updating the form (new Form RM) used for notification of concentrations and clarifying procedure was also published.

The 2008 Notice expands on the previous 2001 notice on remedies,[2] by providing guidance on the basic conditions for commitments to be deemed acceptable, the appropriateness of the different types of remedies offered and the attached procedure.

Background

Under Community law, relevant concentrations are notified to the Commission for it to assess their compatibility with the common market, as certain types of concentrations may give rise to competition concerns. In this context, parties may seek to effect "modifications" to the original concentration. These modifications are commonly known as remedies as their object is to eliminate those competition concerns.

Taking into consideration new legislation, the Commission's past practice in assessing and approving mergers and European court case law, the 2008 Notice sets out "to provide guidance on modifications to concentrations, in particular commitments by the undertakings concerned to modify a concentration."

General Principles

By way of introduction, the 2008 Notice reiterates a number of key general principles it applies.

First, the compatibility of a notified concentration is assessed on the basis of its effect on the structure of competition in the Community. The test remains whether or not that concentration would significantly impede effective competition in the common market or a substantial part of it – particularly if it might result in the creation or strengthening of a dominant position. Generally, in order to resolve competition concerns and gain clearance of a merger, parties will submit commitments to the Commission and implement them following clearance. It is for the Commission to demonstrate that a concentration raises competition concerns and then for the parties to put forward commitments to eliminate those concerns. The Commission cannot impose remedies unilaterally, although it may prohibit the merger if it is not satisfied with the volunteered commitments. In order to facilitate the Commission's assessment of the adequacy of the remedies, parties must provide all such information available that might be necessary. As well as the actual commitments, this includes detailed information on the content of those commitments, on conditions for their implementation and on their suitability to remove any significant impediment to effective competition.[3]

The 2008 Notice then gives an outline of the basic conditions for commitments to be acceptable. It emphasises the need for the commitments "to eliminate the competition concerns entirely", "to be comprehensive and effective from all points of view", and to be implementable "effectively within a short period of time" as market conditions may change rapidly. The degree of certainty – *i.e.*, the likeliness that those commitments will be implemented and the competition concerns will therefore not materialise – remains