

SLAUGHTER AND MAY /

THE EU RULES ON STATE AID

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1. Introduction

- 1.1 Where an undertaking receives financial or other assistance from the State or other public funds on a selective basis, there is a risk that this favoured treatment may operate as a form of protectionism to the detriment of other undertakings, so disrupting normal competitive forces and threatening the EU's internal market objectives.
- 1.2 This is why the competition rules in the TFEU contain provisions on the grant of State aid (and similar provisions are contained in the EEA Agreement). The European Commission regards the control of State aid as one of the most important aspects of EU competition policy. It maintains a detailed State aid register with information on pending and decided cases.¹ It also publishes surveys, reports and handbooks on State aid in the EU.²
- 1.3 This publication provides a general overview of the EU State aid rules:
 - [Chapter 2](#) focuses on the concept of State aid - in particular, the conditions that must be satisfied for there to be aid within the meaning of the TFEU;
 - [Chapter 3](#) considers the mandatory and discretionary exemptions to the general prohibition on State aid;
 - [Chapter 4](#) provides an overview of the block exemptions, guidelines and frameworks that have been adopted and developed over the years for the application of State aid policy (including the framework for financing of services of general economic interest (SGEIs));
 - [Chapter 5](#) explains the Commission's role in investigating State aid;
 - [Chapter 6](#) looks at the rules on recovery (i.e. repayment) of unlawful State aid;
 - [Chapter 7](#) and [Chapter 8](#) consider the role of the European Courts and the national courts, respectively, in enforcing State aid rules;
 - [Chapter 9](#) considers the impact of Brexit on State aid rules as applicable to the UK.

¹ See Commission website at http://ec.europa.eu/competition/state_aid/register/.

² One of the reports is the State aid Scoreboard, which is the Commission's "benchmarking instrument for providing a transparent and publicly accessible source of information on the State aid expenditure in the EU and the Member States." The information is based on the annual reports provided by Member States. An example of a handbook is the "Compilation of State aid rules in force".

2. The notion of State aid

- 2.1 Article 107(1) TFEU prevents “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods ... in so far as it affects trade between Member States”, unless the aid is permitted in accordance with TFEU rules.³
- 2.2 For there to be aid within the meaning of Article 107(1) TFEU, the following conditions must therefore be fulfilled:
- there must be aid;
 - the aid must be granted by the State or from State resources;
 - the aid must favour the aid beneficiary compared to other operators in the market (selective advantage);
 - the aid must distort or threaten to distort competition; and
 - the aid must affect trade between Member States.

What is aid?

- 2.3 The concept of “aid” is very wide, encompassing anything which may be of commercial benefit. Thus, State aid can take a variety of forms, including:
- grants or subsidies from the State or from regional or local government;
 - tax or social security exemptions;
 - the provision by the State (or State-controlled undertakings) of goods or services on preferential terms; or
 - State guarantees, loans, debt write-offs or shareholdings/investments from public funds on preferential/non-market terms.

Granted by a public authority or from State resources

- 2.4 “State resources” is interpreted broadly and includes all resources of central, but also regional and local government, and, under certain circumstances, even resources of public and private law undertakings or bodies.⁴ The decisive factor is whether the funds are under State control and therefore available to the public authorities.⁵

Selective advantage

- 2.5 For there to be aid within the meaning of Article 107(1) TFEU, the measure must also confer an economic advantage on the undertaking or undertakings that it/they would not have obtained under

³ The general EU rules on State aid are contained within the Chapter of the TFEU relating to competition (at Arts. 106 to 109). Special rules apply to the granting of aid for agricultural products (Art. 42) and for transport (Art. 93).

⁴ See, for example, Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission*, judgment of 8 May 2003, para. 33 and Cases T-267/08 and 279/08 *Région Nord-Pas-de-Calais v Commission*, judgment of 12 May 2011, para. 108.

⁵ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C262/1, 19.7.2016), para. 57. This reflects a line of cases including the decision in Case C-206/06, *Essent Network Noord*, judgment of 17 July 2008, para. 70.

normal market conditions.⁶ The latter is assessed by reference to the market economy operator principle (see below).

- 2.6 A selective advantage can be granted to an individual undertaking, to a group of undertakings or to undertakings operating in certain economic sectors. Any entity engaged in economic activity will be considered an undertaking for these purposes (including Government-owned undertakings and non-profit entities that offer goods or services on a market).

Distortion of competition and effect on trade

- 2.7 The “distortion of competition” condition is met if a measure is liable to improve the competitive position of the aid beneficiary compared to other undertakings with which it competes.⁷ Once a selective advantage is established, a distortion of competition is normally presumed to arise.⁸ However, there must exist a market within the internal market in which competition may be distorted.⁹ For example, a possible distortion of competition is excluded if there exists a legal monopoly for a particular service and there is no prospect of competition.
- 2.8 The “effect on trade between Member States” condition in Article 107(1) TFEU has been interpreted broadly by the Commission and the European Courts.¹⁰ Even where the aid beneficiary does not export its products or services, but operates only at a local level, the aid may still affect inter-State trade by increasing domestic production, with the effect that undertakings in other Member States have less chance of exporting their products to the markets in that Member State.

Market economy operator principle

- 2.9 A measure does not involve State aid if a Member State makes funds available to an undertaking on the same terms that would be provided in the normal course of events by a private investor applying ordinary commercial criteria (the “market economy operator” or “MEO” principle).¹¹
- 2.10 In demonstrating this, the Member State should normally be able to present analysis - prepared at the time of adoption of the measure - comparable to the analysis that a private investor would have prepared.¹² However, where a significant contribution is made by a private investor on equivalent terms, it can be inferred that the transaction is in line with market conditions and is therefore not aid.¹³ A measure is also not aid simply because with hindsight it was not a prudent investment. It is

⁶ See Case C-39/94 *SFEI and Others*, judgment of 11 July 1996, para. 60; Case C-342/96 *Spain v Commission*, judgment of 29 April 1999, para. 41.

⁷ See Case 730/79 *Philip Morris v Commission*, judgment of 17 September 1980; Joined Cases T-298/97, T-312/97 etc. *Alzetta*, judgment of 15 June 2000.

⁸ See Joined Cases T-298/97, T-312/97 etc. *Alzetta*, judgment of 15 June 2000, paras. 141 to 147; Case C-280/00 *Altmark Trans*, judgment of 24 July 2003.

⁹ See footnote 8.

¹⁰ See Case 102/87 *France v Commission*, judgment of 13 July 1988, para. 19; Case C-303/88 *Italy v Commission*, judgment of 21 March 1991, para. 27 and Case C-280/00 *Altmark*, judgment of 24 July 2003, para. 77. See also Case N542/2005 *Individual aid for literary periodical*, Commission decision of 21 December 2005.

¹¹ The Commission has published guidance applying this principle to a number of specific aid instruments. These include a 1997 Communication concerning aid elements in land sales by public authorities (OJ 1997 C209/3, 10.7.1997); a 1998 Notice on measures relating to direct business taxation (OJ 1998 C384/3, 10.12.1998); a 2008 Notice regarding State aid in the form of guarantees (OJ 2008 C155/10, 20.06.2008), and a 2015 Communication on short-term export credit insurance (OJ 2015 C215/1, 01.07.2015), which amended a 2012 Communication on the application of Articles 107 and 108 to short-term export-credit insurance (OJ 2012 C392/1, 19.12.2012).

¹² See Case T-971/16, *Real Madrid v Commission*, judgment of 22 May 2019, para 51.

¹³ Case T-296/97 *Alitalia v Commission*, judgment of 12 December 2000.

assessed on the basis of the knowledge available to the State at the time of the decision to grant the measure.¹⁴

- 2.11 The same principle applies to the privatisation/sale of a stake in a State-owned undertaking. In that context, to avoid aid to the purchaser the State must not bear costs or losses as a result of the transaction that a normal market operator would not have borne.¹⁵

Commission Guidance on notion of State aid

- 2.12 As part of its State aid modernisation exercise, in July 2016 the Commission published a Notice on the notion of State aid.¹⁶ This provides practical guidance to help identify State aid measures. In doing so, it covers the key constitutive elements of the notion of State aid discussed above.

¹⁴ Case C-482/99 *France v Commission*, judgment of 16 May 2002.

¹⁵ Commission Guidance Paper on State aid-compliant financing, restructuring and privatisation of State-owned enterprises (10 February 2012), Section 5.

¹⁶ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C262/1, 19.7.2016).

3. Mandatory and discretionary exemptions

3.1 Article 107(2)(a)-(c) expressly permit the following forms of aid:

- aid having a social character, granted to individual consumers, provided it is granted in a way which does not discriminate according to the origin of the products concerned;
- aid to make good the damage caused by natural disasters or other exceptional occurrences; and
- aid to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required to compensate for the economic disadvantage caused by that division.

3.2 These categories of State aid are exempted automatically. The measures still need to be notified however to the Commission (see further at [Chapter 5](#)), so that the Commission can verify whether the measures fall within an Article 107(2) category.

3.3 Article 107(3)(a)-(d) provide that the following forms of aid may be permitted:

- aid to promote the economic development of underdeveloped areas of the EU (with abnormally poor living standards or high levels of unemployment);
- aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- aid to facilitate the development of certain economic activities or areas (provided it does not adversely affect trading conditions to an extent contrary to the common interest); and
- aid to promote culture and heritage conservation (again provided it does not affect trading conditions and competition in the EU to an extent contrary to the common interest).

3.4 The Commission has considerable discretion in evaluating whether or not an aid measure is compatible under Article 107(3) TFEU. It has adopted block exemptions covering various categories of aid measures to reduce the number of cases that it is required to examine. It has also published various guidelines setting out the criteria that it will apply when assessing the compatibility of particular categories of aid measures with Article 107(3) TFEU (see [Chapter 4](#)).

3.5 If an aid measure falls outside one of the block exemptions or the relevant guidelines, or where no guidelines exist, the Commission will apply Article 107(3) TFEU directly to assess the compatibility of the measure on an individual basis, balancing the positive effect of the measure against its potentially negative effects.¹⁷

¹⁷ The Commission will assess whether: (a) the aid measure is aimed at a well-defined objective of common interest; (b) it is well designed to deliver this objective; (c) it is proportionate to the problem tackled (i.e. the same objective cannot be obtained with no or less aid); and (d) the distortions of competition and effect on trade are limited, so that the overall balance is positive.

4. Block exemptions, guidelines and frameworks for the application of State aid policy

Block exemptions for “horizontal aid”

4.1 The Commission has adopted two block exemptions for certain categories of “horizontal” State aid (i.e. aid that is not specific to particular industry sectors):¹⁸

- the De Minimis Aid Exemption Regulation - covers aid provided to a single undertaking not exceeding €200,000 over any three year period.¹⁹ Aid that falls within this block exemption is exempt from the notification requirement (see [Chapter 5](#)); and
- the General Block Exemption Regulation (GBER) - covers a range of categories of aid including regional, training, SMEs, R&D, infrastructure and environmental.²⁰ There is no need to notify aid that falls within this block exemption but details of the measure must be published in the Official Journal.

4.2 The Commission has also adopted guidelines for certain other categories of aid not covered by the GBER, but where it may be willing to take a favourable approach under Article 107(3) TFEU provided proper safeguards are in place and it is satisfied that the aid will not distort competition in the EU to an extent contrary to the common interest. These guidelines *inter alia* include the following:

- **national regional aid:** Revised and updated Guidelines on the criteria applied when examining aid to regions lagging behind in terms of development came into force on 1 July 2014.²¹ These Guidelines are applied to regional aid schemes except where they relate to particular industries covered by special rules. The Guidelines were intended to remain in effect until 31 December 2020. The Commission has since extended the applicability of the Guidelines to the end of 2021, and in response to the COVID-19 pandemic added applicability in respect of aid given to undertakings which were not in difficulty on 31 December 2019 but became undertakings in difficulty in the period from 1 January 2020 to 30 June 2021.²²
- **rescue and restructuring aid:** The Commission regards rescue and restructuring aid as one of the most distortive types of State aid. The Guidelines on State aid for rescuing and restructuring firms in difficulty therefore contain strict conditions that must be met for this type of aid to be found compatible.²³ The current Guidelines came into force on 1 August 2014 and were intended

¹⁸ These Commission block exemptions are based on a “block exemption enabling regulation” adopted by the Council on 13 July 2015 (Council Reg. (EU) 2015/1588 (OJ 2015 L248/1, 24.09.2015). This replaced as of 14 October 2015 Council Reg. (EC) No 994/98 (OJ 1998 L142/1, 14.05.1998).

¹⁹ Commission Reg. 1407/2013 (OJ 2013 L352/1, 24.12.2013), replaced Commission Reg. 1998/2006 (OJ 2006 L379/5, 28.12.2006) from 1 January 2014. On 2 July 2020, the Commission extended the application of the Regulation until to 31 December 2023 (Commission Regulation (EU) 2020/972 of 2 July 2020 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments (OJ 2020 L 215/3, 7.7.2020)).

²⁰ Commission Reg. (EU) 651/2014 (OJ 2014 L187/1, 26.6.2014).

²¹ Guidelines on regional State aid for 2014-2020 (OJ 2013 C209/1, 23.07.2013).

²² Communication from the Commission concerning the prolongation and the amendments of the Guidelines on Regional State Aid for 2014-2020, Guidelines on State Aid to Promote Risk Finance Investments, Guidelines on State Aid for Environmental Protection and Energy 2014-2020, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Communication on the Criteria for the Analysis of the Compatibility with the Internal Market of State Aid to Promote the Execution of Important Projects of Common European Interest, Communication from the Commission - Framework for State aid for research and development and innovation and Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (OJ 2020 C224/2, 8.7.2020).

²³ Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C249/1, 31.7.2014).

to remain in effect until 31 December 2020. The Commission has extended the applicability of the Guidelines until December 2023.²⁴

- **environmental and energy aid:** Guidelines on State aid for environmental protection and energy came into force on 1 July 2014.²⁵ These Guidelines set out the Commission’s approach towards the assessment of public support projects and measures in the field of the environment and energy. The Guidelines were intended to remain in effect until 31 December 2020. The Commission has since extended the applicability of the Guidelines to the end of 2021, and in response to the COVID-19 pandemic amended certain calculation methods and added applicability in respect of aid given to undertakings which were not in difficulty on 31 December 2019 but became undertakings in difficulty in the period from 1 January 2020 to 30 June 2021.²⁶

Special rules and guidance relating to particular industries

4.3 Special rules and/or guidelines have been established at the EU level for the approval of State aid to particular industries, notably:

- **public service broadcasting:** Given the significant number of State aid cases involving complaints from commercial broadcasters, in 2009 the Commission updated its Communication on the application of State aid rules to public service broadcasting.²⁷
- **audio-visual production:** In 2013 the Commission issued a new Communication relating to film and other audio-visual works.²⁸
- **broadband networks:** In 2013 the Commission also issued revised Guidelines on the public funding of broadband networks.²⁹
- **financial services:** The Commission has issued a variety of Communications outlining its approach to State aid being provided to the financial sector during the global financial crisis, including the 2013 Banking Communication.³⁰
- **aviation:** In 2014 the Commission issued revised guidelines on State aid to airports and airlines.³¹

Framework for financing of SGEIs

4.4 The TFEU recognises that Member States may grant special or exclusive rights to public or private undertakings to perform “services of general economic interest”. These special or exclusive rights generally correspond to responsibilities linked to the performance of a public service entrusted to the undertaking. When granting such special or exclusive rights to undertakings, Member States

²⁴ See footnote 22.

²⁵ Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C200/1, 28.06.2014). These replace and extend the previous Guidelines on State aid for environmental protection (2008).

²⁶ See footnote 22.

²⁷ Communication from the Commission on the application of State aid rules to public service broadcasting (OJ 2009 C257/1, 27.10.2009).

²⁸ Communication from the Commission on State aid for films and other audiovisual works (OJ 2013 C332/1, 15.11.2013).

²⁹ Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (OJ 2013 C25/1, 26.01.2013).

³⁰ Commission Communication on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ 2013 C216/1, 30.7.2013). An overview of the various communications is available at: http://ec.europa.eu/competition/state_aid/legislation/temporary.html.

³¹ Guidelines on State aid to airports and airlines (OJ 2014 C99/3, 04.04.2014).

must comply with the EU competition rules - including State aid rules (Article 106(1) TFEU). Member States have some flexibility in defining what constitutes a SGEI.

- 4.5 Certain types of State aid may be justified on the basis of Article 106(2) TFEU, which provides that undertakings entrusted with the operation of a SGEI or having the character of a revenue-producing monopoly are subject to the competition rules in so far as this does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Any measures that constitute State aid, and which are not covered by Article 106(2) TFEU, need to be authorised by the Commission.
- 4.6 The Court of Justice's (CJ) landmark decision in the *Altmark* case established the criteria that need to be satisfied for public service compensation not to constitute State aid.³² Where these criteria are met there is no need to notify the compensation to the Commission. The four cumulative criteria are:
- the recipient undertaking must be entrusted with clearly defined public service obligations to discharge;
 - the basis on which the compensation is calculated must be established in advance in an objective and transparent manner;
 - the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Cross-subsidisation that results in the compensation for discharging public service obligations being used for other activities of the undertaking is not allowed; and
 - where the undertaking that is to discharge the public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.
- 4.7 Where the *Altmark* criteria are not met, and the other State aid criteria are also present, the public service compensation constitutes State aid and the Member State will have to notify the aid to the Commission for approval.
- 4.8 In December 2011 the Commission adopted an SGEI package providing updated guidance on the conditions under which State aid in the form of public service compensation can be approved as compatible with the EU rules. The 2011 package comprised:
- a Communication clarifying basic concepts of State aid which are relevant to SGEI;³³
 - a Commission decision exempting from the need to notify public service compensation provided to: (a) undertakings receiving annual compensation of less than €15 million in areas other than transport and transport infrastructure; (b) hospitals and SGEI meeting essential social needs as regards health care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups; and (c) certain low-volume air and maritime transport services;³⁴

³² Case C-280/00 *Altmark*, judgment of 24 July 2003.

³³ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ 2012 C8/4, 11.01.2012).

³⁴ Commission decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2011 L7/3, 11.01.2012).

- a Commission Framework that establishes the criteria for the assessment of compensation for SGEIs that does not satisfy the *Altmark* criteria and where the Commission decision does not apply;³⁵ and
- a *de minimis* Regulation for the field of SGEI exempting from State aid rules aid of up to €500,000 per company over a three-year period granted as compensation for the provision of SGEI.³⁶

4.9 The period for which an undertaking is entrusted with the operation of the SGEI cannot exceed 10 years, unless significant investment is required.

State Aid and COVID-19

4.10 In response to the huge economic impact of the COVID-19 pandemic, Member States have put in place an unprecedented range of schemes to support businesses through the crisis. However, the State aid rules remain in force and may constrain the steps that a Member State can take without Commission approval.

4.11 In March 2020, the Commission issued a Temporary Framework for State aid measures to support the economy in response to the Covid-19 pandemic, which sets out certain categories of aid measures that it is able to review and approve on an expedited basis.³⁷ The Temporary Framework indicates that the Commission will approve (amongst other things):

- direct grants, equity injections, selective tax advantages and advance payments, up to a value of €1.8 million per company (for companies not engaged in production of agricultural products and fishery and aquaculture);
- State guarantees for new loans or subsidised public loans for up to six years for investment and/or working capital needs (with prescribed minimum guarantee premiums). For loans or guarantees that extend beyond 31 December 2021, the value is capped at the higher of (i) double the annual wage bill of the beneficiary; (ii) 25% of the turnover of the beneficiary; or (iii) the justified liquidity needs of the beneficiary for the coming 12 months (or the coming 18 months for SMEs); and
- subordinated debt and “last resort” equity recapitalisations by a Member State. Any recapitalisation will be subject to detailed conditions which, broadly speaking, are intended to minimise support given and incentivise exit (e.g. dividend bans and remuneration and acquisition restrictions).

4.12 The measures under the Temporary Framework expire on 31 December 2021, having been extended by a Communication in January 2021 that also increased the aid ceilings set out under the Temporary Framework.³⁸

³⁵ Communication from the Commission on the European Union framework for State aid in the form of public service compensation (OJ 2012 C8/15, 11.01.2012).

³⁶ Commission Reg. (EU) 360/2012 (OJ 2012 L114/8, 26.4.2012). In October 2020, Commission Regulation 2020/1474 amended Commission Reg. (EU) 360/2012, extending its period of application until 31 December 2023.

³⁷ Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, (OJ 2020 C191/1, 20.3.2020).

³⁸ Communication from the Commission, Fifth amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (OJ 2021 C34/6, 1.2.2021).

5. The European Commission's role in investigating State aid

Exclusive competence

- 5.1 The Commission has exclusive competence to decide whether or not State aid is permitted in accordance with State aid policy.³⁹ Within the Commission, DG Competition deals with State aid cases in most sectors.⁴⁰

Notification of State aid

- 5.2 Member States are required to notify the Commission of all plans to grant aid or to alter existing approved aid schemes unless an exemption applies. They must refrain from implementing the aid before the Commission's authorisation is obtained (the "standstill provision").⁴¹
- 5.3 An aid recipient cannot itself seek Commission authorisation for the aid; rather, it may need to raise with the public authorities in question the need for a notification.
- 5.4 The procedures for the notification and assessment of aid and the Commission's related powers and obligations are set out in the Procedural Regulation.⁴² The Commission has also issued a Code of Best Practices, covering pre-notification, case portfolio approach, preliminary examination of measures, streamlined procedure in straightforward cases, investigations, evaluation plans and proposed coordination with Member States.⁴³
- 5.5 Notifications must be made by the Member State concerned through the Member States' Permanent Representations in Brussels. The Implementing Regulation includes (as Annex 1) the form that should be used when notifying a measure to the Commission.⁴⁴
- 5.6 Prior to a notification being made it is common for a Member State to have pre-notification contacts with the Commission. The purpose of these contacts is to bring the case team up to speed with the relevant proposals. It can be a useful way to flush out and pre-emptively address potential issues. In its Manual of Procedures for State aid the Commission suggests that, for a standard case, the pre-notification phase should last no more than two months.⁴⁵ In difficult or novel cases, however, this phase can last considerably longer.
- 5.7 Following formal notification and a preliminary two-month investigation, the Commission will either approve the aid or open an in-depth investigation under Article 108(2). Where the Commission decides to open an in-depth investigation, it sends a letter to the Member State (which will also be published in the Official Journal). During the in-depth procedure, other Member States, the aid

³⁹ Exceptionally, under Art. 108(2) TFEU, para. 3, the Council may (acting unanimously) decide that a specific grant of aid by a Member State is not illegal. This exceptional power was used in 2002 in respect of diesel tax subsidies granted to road hauliers in France, Italy and the Netherlands.

⁴⁰ DG Competition deals with State aid in all sectors except agriculture and fisheries, which are handled by the Directorates-General responsible for these sectors (i.e. DG Agriculture and Rural Development; and Maritime Affairs and Fisheries). Prior to 2010, energy and transport cases were likewise handled by the DG with responsibility for energy and transport.

⁴¹ Art. 108(3) TFEU.

⁴² Council Reg. (EC) 2015/1589 (OJ 2015 L248/99, 24.9.2015).

⁴³ Code of Best Practices for the conduct of State aid control procedures (OJ 2018 C235/14, 19.7.2018).

⁴⁴ Commission Regulation (EU) 2015/2282 (OJ L325/1, 10.12.2015) amending Commission Reg. 794/2004 (OJ 2004 L140/1, 30.04.2004).

⁴⁵ Manual of Procedures, S. 4-3, para. 13. Available at: http://ec.europa.eu/competition/state_aid/studies_reports/sa_manproc_en.pdf.

recipient and other interested third parties (e.g. competitors and trade associations) have the opportunity to submit comments. Once a formal investigation has been initiated, the Commission also has the power under the Procedural Regulation to issue formal information requests to third parties as well as to Member States.

- 5.8 The Procedural Regulation envisages that the procedure for notified aid should generally not take longer than 18 months; if this time limit is reached, the Member State may request that the Commission issues a decision within two months, but these targets are not binding.⁴⁶
- 5.9 An in-depth investigation ends with the Commission issuing either:
- a “positive decision” to close the proceedings and authorise the aid, in which case a letter is sent to the Member State (and published in the Official Journal). Such a decision may be made subject to conditions and obligations (a “conditional decision”). Where the Member State has implemented the aid prior to the positive decision being issued (i.e. in breach of the standstill clause), the positive decision will not have the effect of retroactively authorising that aid. In such circumstances, while the Commission will have no power to order the aid to be repaid solely on the ground that the aid was not notified in advance,⁴⁷ the aid implemented in breach of the standstill clause would remain unlawful and national courts would be required to grant a remedy if an action were brought for damage caused by the unlawful nature of the aid;⁴⁸ or
 - a “negative decision” prohibiting the aid, in which case a letter and formal decision is sent to the Member State (and published in the Official Journal). Where the Commission has taken a negative decision and the aid has already been implemented, the Commission is required to order that illegally granted aid be repaid by recipients to the public authorities which granted it (see [Chapter 6](#)).⁴⁹

Monitoring powers

- 5.10 Where the Commission has serious doubts as to whether decisions it has taken with regard to individual aid are being complied with, the Member State concerned (after having been given the opportunity to comment on this) must allow the Commission to undertake on-site monitoring visits. The Commission officials have the power then to:
- enter premises;
 - ask for on the spot oral explanations; and
 - examine the company’s books and business records, and take copies.
- 5.11 Member States must ensure that the Commission’s right to undertake an on-site visit is enforced.⁵⁰

⁴⁶ Procedural Regulation, Arts. 9(6)-(7).

⁴⁷ Case C-261/01 *van Calster*, judgment of 21 October 2003, para. 76. See also Case C-354/90 *FNCEPA v Commission*, judgment of 21 November 1991, para. 13; Case C-39/94 *SFEI and Others*, judgment of 11 July 1996, para. 43.

⁴⁸ Commission Notice on the enforcement of State aid law by domestic courts (OJ 2009 C85/1, 9.4.2009), para. 30. See also Case C-384/07 *Wienstrom*, judgment of 18 December 2008, para. 28; Case C-199/06 *CELF*, judgment of 12 February 2008, para 46.

⁴⁹ Procedural Regulation, Art. 14(1).

⁵⁰ Procedural Regulation, Art. 27(6).

6. Recovery of unlawful aid

- 6.1 Following a Commission order for recovery, the Member State is required to recover the aid “without delay” in accordance with domestic procedures. The Commission’s policy in relation to the implementation of recovery decisions is set out in the Commission’s Recovery Notice.⁵¹
- 6.2 The purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the unlawful aid.⁵² This will generally be through the repayment by the recipient of all the unlawful aid plus interest at an appropriate rate fixed by the Commission. The Commission is not required to identify individual beneficiaries in its recovery decisions.⁵³ Interest is payable from the date on which the unlawful aid was at the disposal of the aid beneficiary until the date of its recovery.⁵⁴
- 6.3 Defences to recovery are limited, and in practice attempts to exclude recovery are rarely successful unless circumstances exist that would make it absolutely impossible (as a matter of fact) for the Member State to implement the recovery decision.⁵⁵ Neither the laws/representations of a Member State⁵⁶ nor the fact that aid had been initially approved by the Commission before being successfully challenged⁵⁷ will be a defence to a recovery decision. The limitation period for the recovery of aid is 10 years.⁵⁸
- 6.4 For statistics on Commission recovery decisions and the amount recovered, see the State aid section of DG Competition’s website.⁵⁹

⁵¹ Commission Notice on the recovery of unlawful and incompatible State aid (OJ 2019 C247/1, 23.7.2019).

⁵² Recovery Notice, para. 13.

⁵³ Case C-505/18 *COPEBI v Etablissement national des produits de l’agriculture et de la mer*, judgment of 13 June 2019.

⁵⁴ Procedural Regulation, Art. 14(2).

⁵⁵ Case C-404/00 *Commission v Spain*, judgment of 26 June 2003.

⁵⁶ Case C-24/95 *Alcan*, judgment of 20 March 1997, paras. 34 to 37.

⁵⁷ See Case C-199/06 *CELF I*, judgment of 12 February 2008, paras. 63 and 66 to 68.

⁵⁸ Case C-52/84 *Commission v Belgium*, judgment of 15 January 1986, para. 14; Case C-280/95 *Commission v Italian Republic*, judgment of 29 January 1998, para. 13.

⁵⁹ Available at: http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html.

7. The European Courts' role in enforcing State aid rules

- 7.1 State aid decisions are subject to judicial review by the General Court (GC) pursuant to Article 263 TFEU. There are however strict time limits. There are also strict rules on who can bring an appeal. With the exception of certain privileged applicants (i.e. a Member State or European Institution), to establish standing before the European Courts, potential applicants must demonstrate that the decision is “of direct and individual concern to them”⁶⁰ and that they have an interest in the annulment of the decision.⁶¹
- 7.2 The GC is restricted to assessing the legality of a Commission decision on the following grounds:⁶²
- lack of competence;
 - infringement of an essential procedural requirement (i.e. where, but for the irregularity, the outcome might have been different);
 - infringement of the Treaties (or of any rule of law relating to their application);
 - misuse of powers;
 - manifest error of facts; and/or
 - a failure to provide sufficient reasons.
- 7.3 In reviewing the decision, the GC will conduct a comprehensive review of the facts and law at the time of the decision.⁶³
- 7.4 The filing of an appeal before the GC will not automatically suspend the Commission's decision.⁶⁴ While the GC does have the power to grant interim measures including the suspension of a decision,⁶⁵ it will only do so in exceptional circumstances.⁶⁶ If an application for annulment is successful, the GC must declare the decision retroactively void (in whole or in part).⁶⁷ The judgment of the GC may be challenged before the CJ. Such an appeal will be restricted to points of law only.⁶⁸

⁶⁰ Art. 263 TFEU.

⁶¹ Case T-387/04 *EnBW Energie Baden-Württemberg v Commission*, judgment of 30 April 2007, para. 96; Case T-189/08 *Forum 187 v Commission*, judgment of 18 March 2010, para. 62.

⁶² Art. 263 TFEU.

⁶³ Cases 15 and 16/76 *France v Commission*, judgment of 7 February 1979, para. 7; and Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani SpA v Commission*, judgment of 28 November 2008, para. 238.

⁶⁴ Art. 278 TFEU.

⁶⁵ Arts. 278-279 TFEU; EGC Rules of Procedure, Art. 104.

⁶⁶ Case T-62/06 *RENV-R Eurallumina v Commission*, order of 9 June 2011, para. 17.

⁶⁷ Case C-295/07 P *Commission v Department du Loiret and Scott*, judgment of 11 December 2008, paras. 103 to 106.

⁶⁸ Art. 58 Statute of the Court of Justice of the European Union.

8. The national courts' role in enforcing State aid rules

- 8.1 National courts cannot rule on whether or not an aid measure is compatible with Article 107 TFEU, which is the exclusive competence of the Commission. They can however rule on whether a measure amounts to aid in the first place. If necessary, national courts may refer questions to the CJ for a preliminary ruling under Article 267 TFEU. They may also request guidance from the Commission.
- 8.2 National courts are expected to use all appropriate measures and provisions of national law to implement the direct effect of the Article 108(3) prohibition on implementation of unauthorised State aid.⁶⁹ This includes:
- interim relief to freeze or order recovery of illegally paid amounts;⁷⁰ and
 - awarding damages to third parties whose interests have been harmed.⁷¹
- 8.3 In 2009 the Commission issued guidance to help national courts apply the State aid rules, including the rules on recovery of unlawful aid.⁷² The guidance in particular explains the remedies available in the event of a breach of State aid rules, the role of national courts in State aid enforcement and the procedure for national courts to ask the Commission for information or opinions on the application of the State aid rules.

⁶⁹ Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, judgment of 21 November 1991, para. 12; Case C-39/94 *SFEI and Others*, judgment of 11 July 1996, para. 40; Case C-368/04 *Transalpine Ölleitung in Österreich*, judgment of 5 October 2006, para. 47; and Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, judgment of 5 October 2006, para. 41.

⁷⁰ The recovery of unlawful amounts can pose risks for purchasers of businesses who have received unlawful State aid. *Fortischem* (Case T-121/15 *Fortischem*, judgment of 24 September 2019) confirmed that the recovery of aid can be enforced against a purchaser of a business who has received unlawful aid, rather than the seller who would effectively have sold their business at a higher market price.

⁷¹ The availability of damages is a matter of national law subject to the possibility of a claim against the State. To claim against the State for failure to implement EU law, a claimant would need to satisfy the criteria in *Francovich* (Joined Cases C-6/90 and 9/90 *Francovich v Italian Republic*, judgment of 19 November 1991), which requires meeting a higher threshold than for a standard UK damages claim. In addition, there may in some jurisdictions be a basis for claiming against the aid beneficiary. This may, for example, be the case in France, where the acceptance by a company of unlawful aid may constitute a fault of the company.

⁷² Notice on the enforcement of State aid law by national courts (OJ 2009 C85/1, 09.04.2009). On 22 January 2021 the Commission started a consultation on a revised version of this guidance.

9. Brexit

- 9.1 Following the UK's withdrawal from the EU, EU State aid rules no longer apply in the UK with effect from 1 January 2021 (except as provided for in the Northern Ireland Protocol to the EU-UK Withdrawal Agreement and certain transitional measures, as discussed below). The UK Government has enacted legislation that dis-applies all EU State aid law that would have otherwise been retained in domestic UK law following Brexit.⁷³
- 9.2 However, under the Trade and Cooperation Agreement (TCA), the UK has agreed to implement a new domestic subsidy control regime. The UK has committed "*to ensuring that subsidies are not granted where they have or could have a material effect on trade or investment between the UK and the EU*". While the TCA uses different terminology, the concept of "subsidies" covers similar ground to the concept of "aid" under the EU rules, including incorporating a concept of selectivity/specificity. It is therefore likely that the UK's new subsidy control regime will in practice cover similar ground to the EU State aid rules.⁷⁴
- 9.3 The subsidy rules in the TCA are incorporated into UK law through section 29 of the EU (Future Relationship) Act 2020. The UK Government is currently consulting on the more detailed aspects of the new regime, including in particular the requirement to "establish or maintain an operationally independent authority or body with an appropriate role in its subsidy control regime" and the possible extension of the TCA subsidies regime to cover measures with an impact on intra-UK trade.⁷⁵ It is not yet decided how the independent body will be constituted, nor the extent of its powers to review and enforce the TCA subsidies regime.
- 9.4 EU State aid rules will continue to be relevant in the UK in three scenarios:
- Article 10 of the Northern Ireland Protocol to the EU-UK Withdrawal Agreement provides that EU State aid law will continue to cover subsidies provided in the UK which affect trade in goods and electricity between Northern Ireland and the EU. Arrangements that are covered by these provisions will therefore be subject to two parallel systems of subsidy control within the UK post-Brexit, and will continue to be subject to the EU notification regime. The precise scope of these provisions (and in particular the extent to which they might apply to activities outside of Northern Ireland, or in relation to services, in circumstances where there might be an indirect effect on trade in goods) has yet to be tested;
 - the Commission remains competent in respect of any State aid notifications to which it granted a case number prior to 11PM on 31 December 2020;⁷⁶ and
 - the Commission also retains enforcement powers in respect of any aid granted in the UK before the end of the transition period, up to 31 December 2020.⁷⁷

⁷³ The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020.

⁷⁴ Title XI, Chapter 3 of the EU-UK Trade and Cooperation Agreement.

⁷⁵ Article 3.9, Title XI, Chapter 3 of the EU-UK Trade and Cooperation Agreement.

⁷⁶ Article 92(1) of the EU-UK Withdrawal Agreement.

⁷⁷ Article 93 of the EU-UK Withdrawal Agreement.

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