From ex ante to ex post control

KULeuven – ULg – Departement LNE
Staatsteun: de rechtspositie van steunverlenende overheden
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Outline

- *Ex ante* control: origin and *raison d'être*
- Concept issue: *ex ante* v *ex post* control
- State aid modernisation impact
- Can we "trust" Member States?
- Various obligations
  - de minimis
  - GBER (and specific frameworks, guidelines)
  - existing aid
Ex ante control: origin and raison d'etre

• 1956 Spaak Report
• Article 108(3) TFEU
  • Commission
  • National courts
• Article 109 TFEU
  • Block exemption regulation: exception
  • de minimis regulation (validity?)
Concept issue
\textit{ex ante} v \textit{ex post} control

- From suprational control to trust MS behaviour
- Proactivity (if MS notifies...) v reactivity
- Preemptive remedy v "too late" remedy
- Different resources actually required?
- Different types of information provided
- However, risk of harm different
  - \textit{ex post} control within a predetermined exemption framework
  - national courts & Commission's powers
State aid modernisation and the GBER

Type of aid

Aid amount

Notification (guidelines/Treaty)

- Notified aid
- Block-exempted
- De minimis

GBER extended (notification and intensity threshold)

GBER extended (new types and categories)

Existing GBER

De minimis

• Notified aid
• Block-exempted
• De minimis

GBER extension
Use of GBER in the European Union*

- **Total GBER reported state aid expenditure as % of total reported expenditure** (left axis)
- **Total state aid measures registered under GBER on which expenditure is reported as % of all measures with reported expenditure** (left axis)
- **Total new state aid measures registered under GBER on which expenditure is reported as % of total new measures registered with reported expenditure** (right axis)

*New SA RES schemes for which only 2014 expenditure has been reported have been excluded (SA.33995, SA.38632 & SA.37232)

** Entry into force of most rules on 1st July 2014
Use of GBER per MS

Comparison of GBER uptake ratio before and after SAM

Statistics – from ex ante to ex post

• Before SAM
  • < 50% of measures and about 32% of spending under GBER

• After SAM
  • 90% of measures and about 45% of spending under GBER
  • Reduction of notifications:

<table>
<thead>
<tr>
<th>Year</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>GBER</td>
<td>41.37%</td>
<td>70.14%</td>
<td>89.44%</td>
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<tr>
<td>Notifications</td>
<td>578</td>
<td>332</td>
<td>192</td>
</tr>
</tbody>
</table>

Press release, 15 March 2017: 95% of new aid measures

Source: DG COMP – 2016 State aid Scoreboard
Can we "trust" Member States?

• Antitrust is not State aid - Reg. 1/2003 is not Reg. 2015/1589

• However, … State aid pathology rather endemic…

• State grantor – are sanctions for violations commensurate to the legal issues?
  • comp. "cartelists/fines/damages" and "States/(Art. 260)"

• Conflict of interest
  • Violation of Article 108(3)
  • Recovery obligation on MS
  • Limited private enforcement against MS
  • Politics and law

• SAM: trading off notification v transparency obligations
<table>
<thead>
<tr>
<th>de minimis</th>
<th>GBER</th>
<th>existing aid (schemes)</th>
<th>existing aid (individual)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Publication</td>
<td>Art. 9 website Art. 11/Annex II (summary/text) Annex III (on website &gt;€500,000 as from 1.7.2016) (C-493/14, Dilly’s Wellnesshotel)</td>
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<td>Recording</td>
<td>10 years for further questions Art. 16-21 Webgate (1,700 aid measures in 19 MS on 15.3.2017)</td>
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<tr>
<td>Reporting</td>
<td>Art. 11 Annual report</td>
<td>Art. 26 Ex post evaluation (&gt;€150m/year)</td>
<td>Decision</td>
</tr>
<tr>
<td>Monitoring</td>
<td>Art. 6 beneficiary (unique obligation on beneficiary)</td>
<td>Art. 12 Amount</td>
<td>-</td>
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</tbody>
</table>
Some loopholes in transparency

• Assymetrical Article 108(2) procedure
• Notifications
  • when possible
• *Amicus curiae* opinions
  • proposed in 2006 (State aid Study)
Thank you for your attention!

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