

CHAPTER 15

Should We Adapt the Centralised Enforcement System in the New Era?

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1 THE ORIGINS

Back in 1955, under the auspices of the Belgian Minister of Foreign Affairs, Mr Paul-Henri Spaak, the idea and future of the European integration were, again, relaunched at the Messina Conference (1 to 3 June 1955). Referred to as the Intergovernmental Committee, a working group, the ‘Spaak Committee’, was created and vested with the paramount task of designing the future of the then European Economic Community. Among the various delicate topics was that of reconciling the dichotomy between the State as an economic operator and the State as a regulator of the market.

The results of the Committee were reflected in the Spaak Report of 1956,¹ where the completion of the common market was at the core of the proposals put forward, aiming at integrating the national markets into a single whole. This objective inevitably required the elimination of the main competition distortions such as all artificial advantages granted by the Member States through taxation, social security benefits, price regulations, working conditions and other means. In this sense, it was warned that any State assistance, in whatever form, was to be closely examined and declared incompatible as a general rule of it were to distort fair competition. In parallel, harmonisation of legislation was seen as a path to mitigate competition distortions, but

* The author is grateful to Ana Álvarez Vidal for her assistance in the drafting of this chapter, which contains the substance of the oral presentation made at the conference on 26 March 2022.

1. ‘Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères’, Comité intergouvernemental créé par la Conférence de Messine, Bruxelles, 21 avril 1956 – *Report of the Heads of Delegation to the Ministers of Foreign Affairs*, unofficial translation of the main portions of the ‘Brussels Report on the General Common Market’. See http://aei.pitt.edu/995/1/Spaak_report.pdf.

also to boost the free movement of labour. In this sense, the Spaak Report encouraged to mitigate disparities among national legislation in a number of fields.

Overall, for the completion of the then called common market to be attained, it was necessary to prevent Member States from engaging in subsidies races, provide aid to exports or to promote protectionism of their own economies. As the report indicated, ‘it would be contradictory to establish this common market in the name of greater productivity which will result for our economies while at the same time maintaining the previous protective measures’.²

In this context, the Spaak Report entrusted the Commission with the task of distinguishing between different forms of State aid, while at the same time imposing on Member States the obligation to notify such aid, as well as the possibility for the Commission to examine a given measure on its own initiative or at the request of another Member State. In this way, the European Commission was already seen as a supranational, independent and exclusive authority whose role was *consubstantial* to State aid control, in the sense of the ancient Greek meaning of *ousia*, inextricably linked to its essence or substance.

2 THE EUROPEAN UNION SYSTEM

Such supranational and independent authority with the duty to assess the aid granted by Member States implied an *ex ante* control, now regulated in Article 108(3) Treaty on the Functioning of the European Union. Indeed, it is a fact that State aid control is part of the substance of competition policy as a way to control competition between Member States and, indirectly, competition between undertakings, in line with the central objective of integrating the European Union (EU) internal market.

In this context, the discussion has been constant over the need to strike a balance between the objectives of public policy that Member States aim at promoting and the potential distortive effects on competition that their intervention might produce. This is where the EU system intervenes, ensuring that undue distortions are avoided,³ refraining negative spillovers on other Member States and preserving an adequate functioning of the internal market. This results from confronting the potential of trading against the obstacles to trade, monitoring closely the creation of ‘national champions’ by trading partners via subsidies and suppressing market failures without affecting an efficient functioning of the market.

3 STATE AID ACTION PLAN (SAAP) OF 2005

After the impactful accession of new Member States of 2004, the EU State aid policy was reviewed by the Commission in order to adapt it to the new scenario as well as to achieve a clearer, more predictable and better targeted framework which would

2. Spaak Report, p. 3 of the English summary.

3. Any State aid is a distortion of competition, therefore the objective is to avoid ‘undue’ distortions and accept those distortions which are weighed in by more positive externalities than negative externalities (aid compatible with the internal market).

guarantee more efficient State aid procedures.⁴ The new approach also counted on a shared responsibility between the Commission and the Member States (and their national courts) to achieve that improved enforcement and transparency and for which the notification procedure had to be applied adequately. The underlying principles of the reform as a whole followed the aims to have less and better targeted State aid, with a finer economic approach⁵ and more efficient procedures to improve the application, predictability and transparency of State aid.

In this context, the Commission examined, as part of the public consultation conducted, the possibility of instituting independent authorities in the Member States as enforcers of the State aid policy, more specifically ‘whether independent authorities in Member States could play a role as regards facilitating the task of the Commission in terms of state aid enforcement (detection and provisional recovery of illegal aid, execution of recovery decisions)’.⁶ However, it resulted in one of the measures raising more controversy among the responding stakeholders and the one more strongly opposed with 28 negative replies, including 8 Member States, 8 regions and several business associations.⁷ The negative feedback emphasised, among other elements, on the possible conflict of interests that such independent national authorities would have considering the political and public national pressure, as well as the impact on bureaucracy and a likely unequal application in each Member State:

1. The *independence* of such national authorities: there might be a conflict of interest (the State controls the State); political and public pressure against national surveillance authorities might be high.
2. This measure could *increase bureaucracy* and slow down procedures.
3. There is a risk of implementation standards varying from one MS to another because national authorities could monitor with differing levels of rigour, leading to *uneven application* of State aid controls.
4. There is a general concern about the legality and operation ability of a full *delegation* of responsibility to independent authorities in MS. The final responsibility should remain with the EC in order to avoid any legal uncertainty.
5. Creating such authorities would be at variance with the *principle of the institutional autonomy* of the MS.

4. ‘State aid action plan, Less and better targeted state aid: a roadmap for state aid reform 2005 – 2009’, consultation document, COM(2005) 107 final of 7 June 2005. See also Competition Policy Newsletter, 2-2005, pp. 3-16.

5. See Jacques Derenne & Massimo Merola (eds), ‘Economic Analysis of State Aid Rules: Contributions and Limits’, Proceedings of the Third Annual Conference of the Global Competition Law Centre (GCLC), College of Europe, 21-22 September 2006, Lexxion, Berlin, p. 220.

6. Results of the consultation on the State aid action plan (SAAP) – Detailed summary, 9 February 2006, p. 26.

7. ‘This proposal had the *highest disapproval level* of all the proposals for modernising State aid practices and procedures. [...] *15 respondents* (6 business associations, 5 MS, 2 law firms, 1 region and 1 non-business association) *confirm their support* for the proposal while *28 respondents* (8 MS, 7 regions, 3 law firms, 2 institutions, 6 business associations, 1 company and 1 mixed entity) *question it*. In general, the private sector is in favour of independent national authorities, but it often calls for more details or clarification; the public sector, on the contrary, disagrees with the idea of creating independent national authorities’ (*ibid.*, p. 26).

6. *Comparison with the experience of accession MS*: this experience was different; it was limited in time and scope.⁸

Therefore, the idea was disregarded and the reform followed the support expressed for a strong central role of the European Commission and a lack of power delegation to national instances.

4 **REVOLUTION: FROM EX ANTE TO EX POST?**

The next update of the State aid framework, apart from the exceptional intervention and communications to tackle the financial crisis, was launched in 2012 with the Commission Communication on State aid Modernisation programme (SAM).⁹ With the Europe 2020 sustainable growth strategy as guiding light, one of the objectives of the SAM was ‘to focus Commission ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement’.¹⁰ This aim put the focus on the use of an extended general block exemption regulation (GBER), already developed in the SAAP but which however only caught less than half of the measures and about 32 % of the budget under its scope.

The newly adopted texts in the context of the modernisation included three interdependent objectives:

First, the updated system aimed at supporting the objective of sustainable growth and helping to improve the quality of public spending, which implied working on the revision and rationalisation of certain existing texts (environmental guidelines, regional aid, risk capital, rescue and restructuring of undertakings in difficulty).

Second, the target was to focus on cases with the most significant impact on the internal market, for which it was required to have a closer scrutiny of large amounts of aid that could distort competition, launch sector enquiries and also to revise regulations such as the GBER or *de minimis*. In this sense, the modernisation framework shifted the weight from an ex ante control to an ex post one for most of the cases, thereby implementing nearly all new measures (representing about 65 % of the total expenditure) under the 2014 GBER and leaving only the more challenging measures for the deep scrutiny of the Commission.¹¹ In this way, the SAM brought a drastic reduction of

8. *Ibid.*, pp. 26-27.

9. EU State Aid Modernisation (SAM), COM(2012) 209 final of 8 May 2012, pp. 9.

10. *Ibid.*, point 8.

11. More than 97% of all State aid measures are now implemented by Member States without the need for prior approval by the Commission. This is mainly the effect of the extension of the GBER, although about 40%/45% of State aid in value are still notified and approved by the Commission (individual aid or aid schemes not falling under the GBER): see Commission’s press release of 6 October 2021, IP/21/5027. The 2021 State aid scoreboard indicates that new block-exempted measures (GBER, ABER (Agricultural Block Exemption Regulation), and FIBER (Fishery Block Exemption Regulation)) represented +98.8% of total new measures in 2019 (this percentage decreased since March 2020 because of the massive increase in notified COVID-19 measures).

notifications that diminished from 578 in 2013 to around 150 in 2019. While this application of the GBER plays the role of a ‘collective’ ex ante control,¹² it also inevitably limits State actions and makes them significantly more rigid.

Third, the reviewed regime also aimed at simplifying procedures, especially the analysis of cases with only a limited impact on trade, as well as improving the quality of information provided by Member States and ensuring a strict compliance with procedures and substantive rules.

The next stage of modernisation then commenced in 2019 with the ‘Fitness Check’ of the 2012 SAM package, including an evaluation of GBER and *de minimis*, regional aid and the remaining instruments and further adding a revision of the railways guidelines and short-term export credit insurance. The conclusions, published at the end of 2020,¹³ showed that overall the State aid rules are still fit for purpose, but certain clarifications, revisions, simplifications and adjustments are to be welcomed in order to keep up with the development of some markets and technologies.

5 TODAY

In light of the above, recent illustrations that confirm the initial wisdom of the Founding Fathers design in 1957 can be identified.

The different crisis that the European Union has (and is) surmounting play a key role in shaping the State aid policy. Already in the context of the financial crisis the then Commissioner in charge of competition policy, Ms Neelie Kroes, together with the Ministers of Finance, realised in 2008 how a centralised EU vision and coordinated actions at the national level were urgently needed, avoiding any intergovernmental approach (against the intentions of some Member States who wanted to ‘deactivate’ competition rules). That crisis, in a pattern that we have seen repeat in the following ones, required some procedures to be adjusted as reflected in the six financial crisis communications adopted by the Commission until 2013. However, even if the crisis during the framework constituted a derogation from some general State aid principles and requirements, a strong ex ante control was firmly maintained in order to avoid the *jungle* that would be created if State aid control was to be abandoned (‘State aid rules are part of the solution, not part of the problem’),¹⁴ as it was also considered with

12. Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, para. 65: ‘... it follows from [the GBER], that the Commission, in essence, exercised *ex ante*, by adopting that regulation, all the powers conferred on it by Article 107(3) TFEU with respect to all such aid as satisfied the criteria laid down by that regulation, and only with respect to such aid’.

13. Commission Staff Working Document – Fitness check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, SWD(2020) 257 final of 30 October 2020, pp. 135 and annexes – press release of 30 October 2020. See also C. Barbu-O’Connor et al., ‘Impact Assessment’ (Chapter 6, pp. 88-102) in ‘The Future of EU State Aid Law – Consolidation and Expansion’, J.-J. Piernas-López, L. Hancher and L. Rubini (eds), EU Law Live Press, 2022, p. 283.

14. Neelie Kroes, Competition Policy Newsletter, 2008; Briefing to Economics and Finance Ministers on financial crises measures on 2 December 2008, MEMO/08/757.

respect to the COVID-19 outbreak through the Temporary Framework.¹⁵ A similar approach is currently taking place through the Temporary Crisis Framework for State Aid measures to support the economy implemented to mitigate the effects from the aggression against Ukraine by Russia.

Closely related, but at the level of non-EU countries, the new ‘Regulation of foreign subsidies distorting the internal market’, which entered into force on 12 January 2023,¹⁶ will grant the Commission the exclusive competence to assess aid (rather, ‘subsidies’) given by a non-EU country and affecting the internal market in order to fill the legislative gap that existed from the lack of implementation of the State aid rules in third countries. This regulation introduces three new tools, two (entering into force on 12 October 2023) based on a prior authorisation by the Commission subject to specific thresholds for mergers and public procurements and one (entering into force on 12 July 2023) in the form of a general market investigation tool by the Commission. The procedural aspects of the application of the Regulation are detailed in the Implementing Regulation.¹⁷ The EU legislator agreed that the Commission will be the exclusive enforcer of the regulation, although Member States will be involved via the advisory procedure. This is the last testimony of the virtue of prudence (the ‘*phronesis*’ – *φρόνησις*, under the meaning of Aristotle’s *Nicomachean Ethics*) shown by the Founding Fathers in 1957.

Within the rules governing non-EU countries we also find the paradoxical case of the United Kingdom (UK) after Brexit and its apparent tendency to use domestic legislation to overcome certain aspects of the Trade and Cooperation Agreement signed with the EU. In the same vein, the UK Subsidy Control Act 2022, which entered into force on 4 January 2023, establishes the Competition and Markets Authority (Subsidy Advice Unit of the CMA) as the ‘independent’ authority in charge of reviewing Subsidies of Interest and Subsidies of Particular Interest, voluntarily and mandatorily respectively. However, the CMA has only an advisory role, the final subsidy decision being taken by the administration concerned. The Competition Appeal Tribunal reviews subsidy decisions following judicial reviews which may be brought by any interested party, unless the subsidy is the result of a decision contained in the primary legislation of the devolved parliaments or Westminster. One may raise doubts about the alleged ‘independent’ character of the CMA in a subsidy context: as shown by the EU State aid control, a true and effective control can only be made by a supranational authority truly independent from the State concerned to the extent that the decision-making process should be made in the interest of the Union (for the EU) and ‘against’ the interest of the State concerned.

15. Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak (https://competition-policy.ec.europa.eu/system/files/2021-11/TF_consolidated_version_amended_18_nov_2021_en_2.pdf), now phased out since 30 June 2020.

16. Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

17. Commission Implementing Regulation on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market.

6 CONCLUSION

Against all the above background, the EU way forward is marked by a lack of decentralisation (which would be contrary to the *essence* of State aid control), but reinforced by an increase of resources and powers for the Commission (and, more specifically, to DG Competition).

However, the extreme extension of the ex post control (through the GBER even though it represents an ex ante control legally) is not in line with the *essence* of State aid control. It is perhaps realistic in view of the number of cases and the lack of resources of DG Competition. But, this extension implies a too much rigid system: the Member States' main objective is often to avoid by any means any Commission's control (even if the latter could be made efficiently and quickly) and they are too much tempted to follow the rigid framework of the GBER, losing any creativity which should rather be required for their national measures in view of the evolving and unprecedented economic issues.¹⁸ This creates an efficiency gap to the detriment of the beneficiaries and the consumers ultimately.

In parallel, a better national enforcement is still needed, as well as harmonised procedures, following the example in the State aid field of other areas such as the damages directive in antitrust. However, we can doubt of the genuine intentions of the Member States to adopt efficient EU legislation to control and sanction their illegal behaviours as they do for cartels and abuses of a dominant position by undertakings. This unbalance is the fundamental original sin of EU competition law.

Overall, the steps forward require a firm deterrence on Member States and beneficiaries to apply remedies to unlawful aid, while improving the prevention and detection tools by the legislators.¹⁹

18. The COVID-19 and Ukraine crises confirm this tendency: the Member States responses are 'shaped' by the interpretative communications of the Commission. This is good for coordination. This is less appropriate, to a limited extent, for the 'tailor made' response by Member States to the economic difficulties.

19. Both in terms of *remedies* (see J. Derenne, C. Barbu-O'Connor & C. Chilaru, 'Remedies in State Aid' in 'Remedies in EU Competition Law – Substance, Process and Policy', Proceedings of the 2019 Annual Conference of the Global Competition Law Centre (GCLC) of the College of Europe, D. Gerard & A. Komninos (ed.), Kluwer Law International, June 2020, p. 350, pp. 95-118) and of *better involvement of the 'interested parties'* in the procedure of State aid control (see Concurrences-On Topic, 'Les tiers et le contrôle des aides d'État / The Role of Third Parties in State Aid Cases', Concurrences n° 4-2022).

