State aid rules: handling of complaints and gathering of information

2012/0342(NLE) - 05/12/2012 - Legislative proposal

PURPOSE: to amend the provisions of Council Regulation (EC) No 659/99 laying down the rules of procedure in State aid investigations as regards the handling of complaints and the gathering of information from the market.

PROPOSED ACT: Council Regulation.

BACKGROUND: the European State aid rules were first introduced in the Treaties establishing the European Coal and Steel Community in 1952 and the European Economic Community in 1957. They are currently enshrined in the Treaty on the Functioning of the European Union (TFEU):

- Article 107 TFEU contains the definition of State aid and the grounds on which aid may be considered to be compatible with the internal market;
- Article 108 TFEU sets out the main procedural principles governing the Commission's action to ensure Member States' compliance with the substantive State aid rules.

In 1999, the Council adopted Regulation (EC) No 659/1999 (the "**Procedural Regulation**"), setting out in more details the rules of procedure governing the enforcement of Articles 107 and 108 TFEU, which have been applied until today without any significant modifications. However, in the light of the experience gained in its application and of recent developments, such as enlargement and the economic and financial crisis, **certain aspects of that Regulation should be amended in order to enable the Commission to be more effective**.

On 8 May 2012, the Commission therefore adopted the Communication on "EU State aid modernisation (SAM)" which launches a comprehensive reform of the State aid framework. It will ensure that State aid policy contributes both to the implementation of the Europe 2020 agenda, which is Europe's growth strategy for the current decade, and to budget consolidation. The need to reform State aid procedures has also been emphasised by the Court of Auditors in its Special Report n°15/2011.

IMPACT ASSESSMENT: no impact assessment was carried out by the Commission. The reform of State aid procedures was presented to and discussed with the Member States at high-level meetings organised on 6 March and 11 July 2012. A public consultation on the handling of State aid complaints and on information gathering in State aid investigations was carried out from 13 July 2012 to 5 October 2012.

LEGAL BASIS: Article 109 of the TFEU which allows the Council, acting upon a proposal from the Commission and after consulting the European Parliament, to make any appropriate regulations for the application of Articles 107 and 108 TFEU.

CONTENT: the proposal to **reform the Procedural Regulation** concerns in particular two main areas:

(1) Improving the handling of complaints: the Commission receives on average more than 300 complaints every year, whether lodged by interested parties or not, among which many are either not motivated by genuine competition concerns or not sufficiently substantiated. In 2009, the **Best Practices Code** for the conduct of State aid procedures set out a staged and transparent procedure to handle complaints. Two years into its application, however, experience shows that the benefits it sought to offer – of shorter duration, increased efficiency and greater predictability – have not fully materialised.

Staged and transparent procedure: the proposed amendments to the Procedural Regulation aim at improving the quality of the information received by clarifying the requirements to lodge a complaint and formalising a staged, predictable and transparent procedure.

In the interests of transparency and legal certainty, the conditions to lodge a complaint which put the Commission in possession of information regarding alleged unlawful aid and thereby set in motion the preliminary examination should therefore be clarified. Indeed, it is appropriate to require that:

- **complainants submit a certain amount of compulsory information**. To that end, it is appropriate to empower the Commission to adopt implementing provisions to define the form and the content of a complaint;
- **complainants demonstrate that they are interested parties** within the meaning of the TFEU and the Procedural Regulation and that they therefore have a legitimate interest to lodge a complaint.

In cases where the information received will not be classified as a complaint since it will not have passed the admissibility criteria, the Commission will no longer be under an obligation to adopt formal decisions. Those submissions will be registered as market information and could be used at a later stage to conduct *ex officio* investigations. The Procedural Regulation should formalise the possibility for the Commission to deem complaints withdrawn if the complainant does not return to it with meaningful information or otherwise fails to cooperate during the procedure.

Cooperation with national courts: in 2009, the Commission adopted a Notice on the enforcement of State aid law by national courts in order to inform national courts and interested parties about the remedies available and has sought to develop its cooperation with national courts by introducing more practical tools for supporting national judges in their daily work.

The Commission proposes:

- to expressly provide that **national courts have the right to obtain from the Commission information** for the purpose of applying the rules of the TFEU and to ask for an opinion of the Commission on questions related to the application of State aid rules;
- to introduce the **right for the Commission to make submissions to national courts in written or oral form**. The proposed provision aims in particular at permitting the Commission to draw the attention of Member States' courts to issues of considerable importance for the consistent application of EU State aid law across the internal market. The national courts are not bound to follow an opinion of the Commission.

(2) Ensuring an effective and reliable gathering of information from the market: the compatibility assessment of an aid measure depends on the design of the measure and its impact on the market. A proper facts-based assessment has therefore become more important, in particular for complex cases.

To meet the Commission's needs in terms of information gathering, it is therefore proposed to: (i) introduce market information tools (MIT); (ii) provide a legal basis for conducting investigations into particular sectors of the economy and into particular aid instruments to enable the Commission to obtain timely, reliable, factually correct and complete information directly from the market.

Market information tools (MIT): it is proposed that the Commission may require information via **simple request** for information or by decision **from entities other than the Member State concerned** in notified and unlawful aid procedures after the opening of the formal investigation.

As in antitrust and mergers, those market information tools would consist in the possibility to request information from any undertaking, association of undertakings or Member State, coupled with the

possibility to sanction the companies concerned through fines or penalty payments if they fail to respond or to provide complete information.

The values chosen offer sufficient incentives for parties concerned to comply, being proportionate as to the potential gravity of the offence:

- **fines not exceeding 1% of the total turnover** for supplying incorrect or misleading information in response to simple requests or requests made by decisions or for not replying to requests made by decisions;
- **periodic penalty payments not exceeding 5% of the average daily turnover for each working day of delay**, calculated from the date set in the decision in order to compel them to supply complete and correct information which has been requested by decision.

Requests sent to Member States and public authorities **would not entail the possible imposition of fines or periodic penalty payments under the Procedural Regulation**. For reasons of legal certainty, it is appropriate to establish **limitation periods** for the imposition and enforcement of fines or periodic penalty payments.

Confidentiality of the sensitive information provided by the Member States will be fully guaranteed when using MIT. The Commission will also ensure that no sensitive information is disclosed when drafting requests to third parties. If certain data are considered confidential, the Commission will ensure that they are adequately protected. In cases where the information marked as confidential does not seem to be covered by obligations of professional secrecy, it is appropriate to establish a **mechanism** by which the Commission can decide the extent to which such information can be disclosed.

Investigations into sectors of the economy and into aid instruments: the Commission is committed to focusing its efforts on the most distortive cases for the functioning of the internal market. The need for **reinforced horizontal information** is particularly manifest in cases where the data in the possession of the Commission would raise issues linked to a specific sector in several Member States and there are indications that similar problems may exist in other Member States.

To complete the existing powers of the Commission and to obtain an ex ante holistic view of the market, it is proposed to introduce a specific legal basis to **launch investigations into sectors of the economy and into types of aid measures**.

Before formally launching a sector inquiry, the Commission would have to analyse all information which is already at its disposal or available in the public domain.

For proportionality reasons, launching a sector inquiry will therefore require indications from publicly available sources that State aid issues in a particular sector or concerning the use of a particular aid instrument exist in several Member States: e.g. that existing aid measures in a particular sector or based on a particular aid instrument in several Member States are not, or no longer, compatible with the internal market.

BUDGETARY IMPLICATION: this proposal for an amendment has no impact on the EU budget.