

GIOVANNI LUCHENA\*

### *State aid law: general outlines\*\**

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#### **1. General principles**

In order to declare a State aid<sup>1</sup> as incompatible with EU law, it is necessary that the measure is referred to the State (*subjective profile*) and

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\* Associate Professor of Economic Law, Department of Economics and finance, University of Bari Aldo Moro.

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<sup>1</sup> E. TRIGGIANI, *Gli aiuti statali alle imprese nel diritto internazionale e comunitario*, Bari, 1993; M. ORLANDI, *Gli aiuti di Stato nel diritto comunitario*, Napoli, 1995; G.M. ROBERTI, *Gli aiuti di Stato nel diritto comunitario*, Padova, 1997; T. BALLARINO, L. BELLODI, *Gli aiuti di Stato nel diritto comunitario*, Napoli, 1997; J.-Y. CHEROT, *Les aides d'État dans les Communautés européennes*, Paris, 1998; C. PINOTTI, *Gli aiuti di Stato alle imprese nel diritto comunitario della concorrenza*, Padova, 2000; O. PORCHIA, *Il procedimento di controllo degli aiuti pubblici alle imprese tra ordinamento comunitario e ordinamento interno*, Napoli, 2001; A. BIONDI, P. EECKHOUT, J. FLYNN (eds.), *The Law of State Aid in the European Union*, Oxford, 2004; L. SALVINI (ed.), *Gli aiuti di Stato in materia fiscale*, Padova, 2007; B. LUBRANO, *Le sovvenzioni nel diritto amministrativo. Profili teorici ed evoluzione storica nel contesto del diritto europeo*, Torino, 2008; K. BACON, *European Community Law of State Aid*, Oxford, 2009; M. INGROSSO, G. TESAURO (eds.), *A agevolazioni fiscali e aiuti di Stato*, Napoli, 2009; C. SCHEPISI (ed.), *La “modernizzazione” della disciplina sugli aiuti di Stato. Il nuovo approccio della Commissione europea e i recenti sviluppi in materia di public e private enforcement*, Torino, 2011; C. FONTANA, *Gli aiuti di Stato di natura fiscale*, Torino, 2012; A. DI PIETRO, A. MONDINI

financed, directly or indirectly, through State resources, has to produce a selective economic advantage to the beneficiary, distorts or threatens to distort competition and, ultimately, hinders intra-Community trade (*criterion of the sensitive effect*).

State aid is not to be considered as a measure totally hostile to competition because of the derogations provided for by the Treaty on the Functioning of the European Union which allows, after assessing its possible compensatory justification, the authorization of the aid scheme. The discretion of the Commission shows itself in all its breadth, especially when the assessment is based on an economic nature.

In this regard, it can be pointed out that, in the light of the principle of the private investor in a market economy<sup>2</sup>, it is supposed that there is a suspected State aid in the event that no rational justifications give good reason for the allocation of public resources, which implies, consequently, that the examination must be conducted on the basis of the same parameters that would use, in fact, a private investor.

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(eds.), *Aiuti di Stato fiscali e giurisdizioni nazionali: problemi attuali. Atti e documenti del progetto di formazione e ricerca National Tax Judges and Fiscal State Aids*, Bari, 2015; C.E. BALDI, *La disciplina comunitaria degli aiuti di Stato. Manuale critico ad uso delle amministrazioni e delle imprese*, Sant'Arcangelo di Romagna, 2017; P. NICOLAIDES, *State aid undercovered. Critical analysis of developments in State aid 2016*, Berlin, 2017; P. PIVA, *Giudice nazionale e aiuti alle imprese fra public e private enforcement*, Bari, 2018; M. ORLANDI, *Le discriminazioni fiscali e gli aiuti di Stato nel diritto dell'Unione europea*, Napoli, 2018.

<sup>2</sup> Judgment of the General Court of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v. Commission*, Joined Cases T-129/95, T-2/96 and T-97/96, par. 104; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission*, Joined Cases T-228/99 and T-233/99, 57.

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To identify the existence of a prohibited aid pursuant to art. 107, §1, TFEU, in addition to the advantage determined in favour of the beneficiary undertakings, apart from its *form* (which refers to a very broad type of aid, including grants, loan guarantees, reductions in the tax burden, total or partial reduction of the amount of tax, such as exemption or tax credit, deferment or renegotiation of tax debt, granting of public land, cross-subsidization, etc.), further elements must also be recognized, among which the substantial indifference as to the origin of the measure, favouring in a specific way certain undertakings or productive sectors (*selectivity* criterion) and, finally, affect trade between Member States and be able to provoke potentially distorting effects of the competition.

*Imputability*<sup>3</sup>. Any measure whose nature appears to be originally as *public* determines its *status* as State aid. For example, it is considered to be part of the “public sector” an “institution established by the law of a Member State as a special institution under the supervision and guarantee of the legislative authority”. The presence of the State in the economy, in its capacity as owner or controller of undertakings operating in the market, is one of the most sensitive factors checked by the Commission.

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<sup>3</sup> Judgment of the Court of Justice of 16 May 2002, *France v. Commission (Stardust)*, C-482/99, paragraphs 55 and 56; Judgment of the Court of Justice of 23 October 2014, *Commerz Nederland*, C-242/13, paragraph 35.

*State resource*<sup>4</sup>. The notion of “state resource” does not refer exclusively to financial management but also to any assets and liabilities on public accounts. Likewise, a State measure, although not an incentive payment, can have effects on asset management mitigating, for example, the flow of public revenues not attributable to taxes. This means that the actions of the State affect its assets, confirming the orientation of the relevance/prevalence of the effects of the measure as a potential distorting element of the market. State resources, therefore, is certainly what comes, directly or indirectly, from public finance (the burden on the budget), without excluding the measures that can produce, even potentially, distorting repercussions on competition and on public interest, which, in these circumstances, can conflict with the law of the Union.

State aid intervention can be classified as abnormal if it results from the application of derogation from a general provision.

*Selectivity*<sup>5</sup>. One of the most important criterion significantly rises: selectivity. Partial exemption from the payment of certain social security

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<sup>4</sup> Judgment of the Court of Justice of 24 January 1978, *Van Tiggele*, 82/77, paragraphs 25 and 26; Judgment of the General Court of 12 December 1996, *Air France v. Commission*, T-358/94, paragraph 63; Judgment of the Court of Justice of 8 May 2003, *Italy and SIM 2 Multimedia SpA v Commission*, Joined Cases C-328/99 and C-399/00, paragraphs 33 and 34; Judgment of the General Court of 4 July 2007, *Bouygues SA v. Commission*, T-475/04.

<sup>5</sup> Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, paragraph 27; Judgment of the General Court of 6 March 2002, *Territorio Histórico de Álava — Diputación Foral de Álava et al. v Commission*, Joined Cases T-127/99, T-129/99 and T-148/99, paragraph 149; Judgment of the General Court of 29 September 2000, *Confederación Española de Transporte de Mercancías v Commission*, T-55/99, paragraph 40;

contributions for undertakings in a given industrial sector is considered as *aid* because the referred measure allows beneficiaries to derogate from a general rule.

In this sense, the measure can be qualified as selective because it is aimed at favouring a given economic sector. Ultimately, it is the derogation from a general rule that integrates the selectivity of the aid, which is precisely because it is abnormally granted by the public authority.

The Commission has, moreover, mitigated the narrow scope of application of this rule by specifying how such a derogation could possibly be admitted, particularly in tax matters, if it is justified by *economic rationality* so as to make it necessary or functional with respect to the effectiveness of the system<sup>6</sup>.

As already made clear by the Court of Justice<sup>7</sup>, however, the contribution must have a horizontal nature and be based on objective elements, such as, for example, the unlimited duration and the wide scope of implementation. This conclusion also appears to be consistent with the principle of equality, according to which measures derogating from the formal equality criterion may be admitted, proving that the derogation is justified by the general objectives of the legal system and does not conflict with the system where it is applied (for example, tax ruling).

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Judgment of the General Court of 13 September 2012, *Italy v Commission*, T-379/09, paragraph 47.

<sup>6</sup> Judgment of the Court of Justice of 2 July 1974, *Italy v. Commission*, C-173/73.

<sup>7</sup> Judgment of the Court of Justice of 2 July 1974, *Italy v. Commission*, C-173/73.

An additional indicative criterion of the presence of public aid in contrast with the internal market rules is then identified in the impact of the measure «on trade between Member States»<sup>8</sup>. In order to be able to ascertain the impact on trade it is necessary to verify whether the incentives have, first of all, national relevance (thus being able to exclude incompatibility) and, subsequently, if there are undertakings in the aided “sector” already operating under competition. Both the conditions mentioned above must be satisfied: the effects provoked by the aid on a community basis and the existence of a competitive market in the sector in which the aided enterprise is located. The Court of Justice, in fact, considers *aid* to be a financial intervention granted by the State to the undertaking which strengthens its position in the market at the expense of other competitors of the latter in intra-Community trade<sup>9</sup>. It is not, however, excluded that a measure to encourage exports to third countries could concretely threaten competition in the internal market<sup>10</sup>. If public aid were granted to support business ventures abroad, the assessment of the impact on trade should therefore be carried out by assessing its *sustainability* in the reference market, in particular taking into account the situation at the time the benefit was granted. This means that subsidized goods trades, which are not subject to import or export

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<sup>8</sup> Judgment of the Court of Justice of 19 September 2000, C-156/98, *Germany v. Commission*, in *Racc.*, I-6857 ss.

<sup>9</sup> Judgment of the General Court of 17 September 1980, *Philip Morris Holland BV v Commission*, C-730/79, in *Racc.*, 2671.

<sup>10</sup> Judgment of the General Court of 21 March 1990, *Belgium v Commission*, C-142/87, in *Racc.*, I-961.

flows within the European Union, do not constitute aid. The criterion that can be deduced from the previous considerations can therefore be defined as the above mentioned *sensitive effect*. This criterion must be considered as a reference point for all those situations, legally determined, which operate *ad excludendum* with respect to the prohibition of granting State aid.

For example, the *de minimis non curat praetor* principle (which allows for the granting of a small amount of financial benefit), being mainly aimed at supporting small and medium-sized undertakings, allows both the exclusion from the quantitative compatibility check, as the effects of economic assistance do not threaten (at least *prima facie*) distorting competition, and the removal from the obligation of prior notification to the Commission, which admits, in this case, a presumption of compatibility with the internal market, although the Courts decisions have not totally ruled out that aid deemed to be of negligible size is capable of distorting, even potentially, intra-Community competition.

The minimum threshold would serve to return to the State certain forms of intervention in the economy. The equalizing function of the State with respect to serious situations of economic and social disadvantage remains an evaluation parameter left to the Community bodies because it is better not to leave self-regulatory tasks to the States in a sector such as public aid, naturally exposed to the interference of political bodies. Consequently, even setting the minimum parameters for granting the aid, while appearing as a sort of political guarantee aimed at the individual States for the recovery of its reference values, should instead be framed

as a mere attribution of residual powers in favour of institutions providing public subsidies to businesses.

## 2. Eligible aids

Eligible aids are subdivided into two major *categories*: those compatible by law and discretionary ones (only if the market disruption hypothesis is excluded<sup>11</sup>).

A) The *ipso iure* compatible aids are listed in art. 107, §2, TFEU and concern social aids granted to individual consumers, provided that they are granted without discrimination determined by the origin of the products; aid intended to remedy damage caused by natural disasters or other exceptional events; the support measures for the areas of federal Germany that are affected by the previous territorial division.

With regard to the cases listed above, the Commission has no discretionary power, at least in the first instance; in fact, it may carry out subsequent checks on the correspondence of the measures adopted with the aforementioned provision. However, the notification of the aid is required in order to allow the Commission to verify that the implementation of the measure is not carried out in an irregular way.

B) In applying the derogations, the Treaty gives the Commission a broad and necessary discretion to ensure functionality for the techniques of pursuing the objectives of the internal market and the more general

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<sup>11</sup> A. EVANS, *Law, Policy and Equality in the European Union: the Example of State Aid Control*, in *Economic Law Review*, 1998, 438-439.



policy of common interests. The derogatory system gives, in reality, a certain flexibility to the legislation, since the device constituted by the rules of the Treaty leaves to the Council or the Commission the task, according to the cases, to rule on the compatibility of any aid or category of aid, in relation to the stated criteria, under the control of the Court of Justice.

While in the assessment of the conditions that satisfy the application of art. 107, §1, TFEU, the Commission operates, in principle, through criteria, so to say negative, the compatibility of the aid subject to the derogation, instead, it is assessed on the basis of the “case by case” examination, on the basis both to the substantial legislation and to situations of fact such as, for example, the economic situation or the gross domestic product / purchasing power standard.

The so-called *discretionary aids*, for which there is a prior notification obligation, concerns: aid to promote the economic development of regions where the standard of living is abnormally low, or there is a serious form of underemployment, as well as of the regions referred to in art. 349 of the Treaty of Lisbon, taking into account their structural, economic and social situation; 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 activities or of certain economic regions, provided that they do not alter the conditions of trade to an extent contrary to the common interest, aid to promote culture and heritage conservation, when they do not alter the conditions of trade and

competition in the Union to an extent contrary to the common interest; the other categories of aid, determined by a Council decision, on a proposal from the Commission.

It should be stated that the list of potentially eligible aid contained in art. 107, §3, TFEU, does not bind the scrutiny powers of the Commission, preserving its wide margin of discretion. The derogation from the principle of incompatibility is justified on the basis of the balance between the Community interest and the internal one. State aid must be granted not only for purposes of interest, so to speak, domestic, whose motivation is the basis of any aid measure, but must also contain elements enabling a test to carry out possible positive effects for the Union as a whole.

It is therefore a very important task for the Commission because it indirectly deals with the areas within which the States can legitimately perform their economic incentive activity. The Community institution therefore acts as a synthesis between the objective of the Member State and the harmonious economic expansion of the Union. Thus, for example, the classification of national aid in the dimension of the principle of economic and social cohesion allows the Commission to assess the State aid measure within the more general objectives of the Union, “opening up”, in favour of the Member States, operating margins from the point of view of their economic policy, particularly in the direction of support for depressed areas.

The norm is inspired by the criterion pursuant to art. 107, §3, b), TFEU, which acknowledges the compatibility of an important European project

of common interest, clearly showing the will of the European Union both of the maintenance of a “common” political line and of the manifest hostility to the “big” (“important”) investment projects that may threaten to distort free competition. This fee can also be identified in the provision contained in art. 107, §3, c), TFEU, where it is established that the measure intended «to facilitate the development of certain activities or of certain economic regions' may be considered eligible, provided that it does not alter 'the conditions of trade to an extent contrary to the common interest».

The assessment concerning the purpose of Community interest is particularly incisive in the case of regional aid. For this typology, the Treaty governs two hypotheses: the first concerns «aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment» [art. 107, §3, a), TFEU]; the second relates to «aid to facilitate the development of certain economic activities or of certain economic areas, where such aids does not adversely affect trading conditions to an extent contrary to the common interest» [art. 107, §3, c), TFEU].

It should be noted that the State assumes, among the criteria of qualification of its action, that of the rebalancing of any differential situations of development in the national territory and that, for the purposes of rationalization in the use of public resources, of the equalization between the territories of the State with respect to the overuse and underuse of human, territorial and environmental resources. It is precisely with regard to these considerations that the European

Union itself believes that a territorially oriented aid policy is «one of the indispensable instruments of balanced regional development».

Pursuant to art. 107, §3, a) and c), TFEU may be regarded as «compatible with the common market for State aid granted to promote the economic development of certain less-favoured areas within the European Union». This is «investment aid for large undertakings or, in certain particular circumstances, for operating aid, in both cases destined to specific regions in order to rebalance regional disparities». The fundamental aim of these aids is to promote economic, social and territorial cohesion, «support for investment and job creation and the expansion and diversification of economic activities of undertakings located in the most disadvantaged regions».

In this respect, it is necessary to make the granting of such aid conditional on the maintenance of a minimum period of investments and jobs created in the less-favoured region' and to allow operating aid only in exceptional cases of structural delays in the regions. Community interest is protected only if such aid is «used sparingly and if it remains concentrated in the most disadvantaged regions».

The conditions for granting the derogation must, on the one hand, also concern the objective of the common interest, on the other, concerning situations such as to suggest to the Community institution that the distortions of competition are justified by reasons, for example, of structural retardation, for instance from needs connected to the increase in jobs and, furthermore, from a coherent sectorial development policy.

The derogation therefore stands as a point of equilibrium between the distortions of competition (if any) caused by the aid and the development of the less favoured regions, even if, precisely by virtue of the control instruments on regional aid, marked, indeed, by elements of «extreme obstinacy and dogmatism», most of the economic support actions for the development of disadvantaged areas are deeply conditioned.

### **3. The economic and financial crisis**

The economic and financial crisis has put a strain on the system of rules on state aid, especially in the financial sector. It is known that the State aid intervention through the use of economic incentives is not considered as the ideal remedy for any crisis because it would risk producing sterilization of competition in other sectors.

Nevertheless, one of the first initiative taken by the “European” authorities was to allow member States to admit support measures to help undertakings hit by the crises, without compromising the given regulatory framework<sup>12</sup>.

In the immediacy of the explosion of the crisis, some governments suggested a sort of general suspension of the provisions on aid, for which an unanimous decision of the Council, however, would have been required pursuant to art. 108, §2, TFEU, perhaps interpreting the

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<sup>12</sup> C. BRADLEY, *Transparency and Financial Regulation in the European Union: Crisis and Complexity*, in *Fordham International Law Review*, 2012, 1197

exceptions system set out in Article 107, §3 TFEU in an excessively extensive way, considering the possible granting of the measure as a consequence of a «serious disturbance in the economy».

The Commission has preferred to envisage a series of actions in order to make aid «less numerous and more targeted», as advocated in the *Action Plan of 7 June 2015*, including the disincentive allocation of harmful aid and its simultaneous reorientation towards horizontal objectives, the modernization of control procedures also through closer collaboration with the States and the consolidation of the role of the national judge, as well as the encouragement of the appeal of private enforcement by individuals injured by the violation of state aid rules.

It was thought that the over twenty hypotheses of exemption from prior notification (as aids deemed compatible) provided by regulation n. 800 of 2008<sup>13</sup> would have nullified the control by the Commission, especially in light of the use of the criterion of the necessity of the aid.

The apparently less intransigent control, in any case *calculated*, of the Commission, far from being oriented towards the abdication of its supervisory role on the rules of the Treaty, moves in the direction of a reconsideration of the policy of granting aid.

Anyway, the State can nevertheless represents a factor of development and economic growth, also in implementing the aforementioned principle of economic social and territorial cohesion.

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<sup>13</sup> *Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation)*, OJ L 214, 9.8.2008.

Above all, the exemption from prior notification for certain categories of aid presupposes an upstream assessment that made it possible to ascertain its substantial compatibility with EU law, for instance the non-impact on competition.

Furthermore, the exemption regulation functions as an indirect instrument to support the economy, without prejudice to the powers of the Commission, which can rely on all its “strength” regulates in detail the cases, not a few, of inapplicability of the system of exemptions by category.

It should not be forgotten that the basic objective of the control action carried out by the Commission remains to put in place every useful and appropriate instrument that discourages initiatives aimed at surreptitiously strengthening the enterprise's economic capacity to the detriment of its European competitors.

In this delicate phase characterized by a persistent instability, there were no lack of lightening of the aforementioned screening, obviously under certain conditions. For example, in 2008 the Commission issued a Communication in which it indicated some possible remedies to meet the needs of the States wishing to adopt measures to support the economy<sup>14</sup>. The document itself, an indicator of a political orientation, has acted as a trailblazer to allow States to adopt transitory and

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<sup>14</sup> *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*, OJ C 270, 25.10.2008.

exceptional measures aimed at tackling the difficulties deriving from the particular economic contingency.

One of the first measures taken by the Union authorities after the explosion of the crisis, in any case, was precisely to allow the States a certain, albeit limited, margin in preparing business support measures, without compromising the general regulatory framework.

So the *quaestio* is not to evoke conflicts between neutral (liberal) state and welfare state, but to seek feasible solutions, taken quickly and with immediate effect, in accordance with the current legal order, to try to get out of the anticyclical development.

For this reason, it has become *necessary*, in general, to speed up certain decision-making processes: it is enough to turn the attention, for example, to the *new temporary arrangements* issued in the context of the initiatives to combat the crisis, which assign to the Commissioner for competition the power to approve aid measures very quickly in order to respond quickly to the needs of economic operators in difficulty; at the same time, a more collaborative phase was started with the Member States as regards the pre-notification phase in order to allow greater inter-institutional cooperation both to facilitate decision-making and to analyse the subsidy, also to avoid that states may incur subsequent negative assessments and, therefore, even more damaging to the beneficiaries, who, in the case of the declaration of incompatibility, are obliged to repay what has been illegitimately obtained.

After a first phase, coinciding with the explosion of the economic crisis, the Commission assessed the aid to banks (granted in the form of a



deposit guarantee, opening of lines of credit, guarantees on the emissions of vehicle undertakings, capital injections) the legislation concerning undertakings in difficulty using the one-off aid criterion and adopted a series of communications relating to the banking sector in order to make its position known, given the continuation of the financial crisis. The legal basis for the compatibility assessment is anchored to art. 107, §3, b), TFEU (to remedy a serious disturbance in the economy).

Subsequently, an organic regulation was introduced, partially integrating the previous communications<sup>15</sup>, through the Communication of the Commission of 30 July 2013 on the application, from 1 August 2013, of the rules on state aid to measures to support banks in the context of financial crisis, (2013 / C 216/01).

#### **4. The General Block Exemption Regulation**

Member States and the Commission, while remaining distant as to the finalistic reasons that move their respective activities, may have found a point of convergence in considering as possible, say compatible, certain forms of intervention in the economy: the formers, having to confront the internal social problems; the second, no longer *deaf* facing the European social question.

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<sup>15</sup> *Communication from the Commission 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 ("Banking Communication")*, OJ C 216, 30.7.2013.

This scenario includes the new provisions of the General Block Exemption Regulation (GBER)<sup>16</sup> concerning State aid exempted from prior notification, provisions which, at least in terms of intentions, could give back “power” to the State as an economic actor.

It must be added the reform of the procedural regulation and the new rules for rescue and restructuring aid, with particular reference to banks, prime recipients of substantial aid contributions in terms of cash flow that, in a certain way, have produced a freezing effect, even if temporary, of the systemic crisis, and to industries.

Looking at the total amount of aid granted in 2011, it is noted that 13% refers to individual aid, 32% to those exempted and the remaining 55% to aid schemes, while 14% of aid is for individual aid, 63% for exempted aid and 23% for individual aid. These data indicate that the percentage of aid granted without notification has grown enormously over the last few years demonstrating a progressive responsibility on the part of the States that have chosen to plan support measures by making use of the legislation that allows the implementation of measures of subsidy - that is incentive policies - which potentially do not hinder intra-Community competition. It is estimated, for the 2014-2020 period, that 66% of the total amount of aid and 75% of the measures could be extended in the light of the new rules contained in the GBER. On a practical level, this

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<sup>16</sup> *Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.*

trend will make it possible to shift the effects of controlling a substantial amount of aid from the Commission to the Member States<sup>17</sup>.

A larger amount of aid subject to State “liability” should be realized.

This regulation is strictly connected to that of the Structural Funds programming, in order to facilitate and channel information flows between the Commission and the States (in this case the regional autonomies), to monitor the amount of individual support actions, to identify and resolve issues stemming from administrative and organizational problems and to propose, if necessary, recommendations to individual Member States in the context of the European Semester.

In this way, state policies can be addressed in specific sectors and activities to which it is considered necessary to focus more attention, in a more favourable regulatory context characterized by the simplification and improvement of the procedural rules.

As for the process of simplification of the rules, GBER makes it easier to control the effects of the incentive and the proportionality of the measure, increases transparency and allows a more accurate assessment of broader aid systems.

The regulation in question does not apply, *inter alia*, to fishery and aquaculture aid – which is the subject of specific regulations – to certain activities connected to exports, to aids in agricultural products and to

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<sup>17</sup> *Commission Staff Working Paper – Autumn 2012 Update {COM(2012) 778 final} – Facts and figures on State aid in the EU Member States, Accompanying the document State Aid Scoreboard 2012 Update – Report on State aid granted by the EU Member States*, Brussels, 12/12/ 2012, SEC(2012) 443, *final*.

those linked to the closure of uncompetitive coal mines and certain categories of regional aids such as those provided for steel, coal, shipbuilding, synthetic fibers, transport and related infrastructure sectors, production and distribution of energy and energy infrastructure, and so forth.

On a general level, in any case, the GBER should not generate much an enthusiastic feeling, taking into account the general framework on State aid, which, in fact, does not change its substantive elements, placing itself in line with the previous control activity carried out by the Commission.

It is enough to consider the *common interest*, a criterion that must inspire the domestic action or the incentive character possessed by the support measure. This criterion, well known in the application of the rules on the subject of State aids, involves evaluations not divorced from political opportunity and close economic analysis.

As far as *ad hoc* aid is concerned, moreover, the State must have previously verified that the documentation submitted contains the proof that at least one of the following results has been achieved.

A) The case of regional investment aid: in the absence of the aid, the implementation of the project would not have taken place in the area concerned or would not have been sufficiently profitable.

B) in other cases, there must be a significant increase in the scope of the project or activity, the total amount spent by the beneficiary and a significant reduction in the time frame for completion.

With regard to tax incentives, the incentive effect will occur if certain conditions are met, for example if the measure introduces a right to

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receive aid on the basis of objective criteria and without the further use of discretionary powers of the State; if the measure came into force before the start of the project or activity.

Further conditions are foreseen for regional aid to the operation, for those in favour of SMEs to finance, for the employment of disadvantaged workers, to compensate for the extra costs related to the employment of workers with disabilities, such as remission deriving from environmental taxes, to remedy the damage caused by natural disasters, for social transport aids for remote areas residents and for culture and heritage conservation.

The new and broader block exemptions should lead to a greater accountability, an expression that can indicate both the organizational profile and the political address by the Member States in applying the guidelines for aids thus “facilitating” support measures for undertakings. In this case, the said responsibility would indicate a dual competence, shared between the States and the European Union for the purposes of greater control and a more accurate monitoring of the measures to help businesses. Ultimately, it is an organic/functional set of measures that tend to lighten / modernize the work of the Commission, also to direct the action of control over the aid of greater consistency and complexity. With regard to the *ex post* examination, the GBER contains certain definitive safeguard clauses, that is to guarantee compliance with the organic regulatory framework on state aid.

Firstly, transparency is envisaged – considered as essential for the correct application of the Treaty rules – consisting of the obligation to publish

information concerning the granting of aid on state and regional websites and in the communication of any useful information on both aid schemes and individual aid beyond € 500,000 and in the publication within 6 months from the date on which the aid was promised or endorsed (for fiscal aid, the reference period is extended to one year from the declaration date). A transparent aid should also indicate, as accurately as possible, the amount of the aid itself in terms of gross *ex ante* grant equivalent in order to allow an estimate of the measure, also to exclude it from the obligation to notify, without it being necessary to carry out a risk assessment. Thus, for example, in the case of urban development aids, the investment must not exceed the threshold of 20 million euro, as regards the risk financing 15 million euro and for energy efficiency projects no higher than 10 millions of euros. A differentiation in terms of thresholds is established for the different types of aid to undertakings in the start-up phase in the light of article 22, reg. 651/2014.

Secondly, the *ex post* evaluation of the overall aid granted, which will concentrate on a series of checks on the actual achievement of the objectives set, is addressed to check the potential effects of spill-over and the induced benefits, whose non-positive outcome can also lead to the revocation of the block exemption.

These assessments are explicitly envisaged for certain categories of aids, for example those deemed more “*sensitive*” such as regional aids, those for small and medium-sized undertakings, research, development and innovation, environmental protection and, finally, aids for the

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implementation of broadband. This assessment can be extended by the Commission after the approval of a programme describing the aims of the evaluation itself, the result indicators, the methods and the timeline. Finally, the monitoring of the approved block exempted schemes is carried out, consisting in verifying the existence of aid granted in excess, the possible omission of the communication concerning the legal conditions of application of the measure, the repeated failure or partial application of certain specific rules concerning, for example, the control of the effects of the incentive.