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Analysis of New Legal Provisions for Granting of “De minimis Aid”

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Abstract

The European legislator pays special attention to the state aid, appreciated as a form of state intervention in the economy, because of the risk of immediate discrimination or competition distortion. Taking into consideration all these aspects, it was established that the state aid prohibition rule affects trade between Member States. However, the rule is not an absolute prohibition and state aid can be granted to prohibited categories, strictly within a law frame, involving a special procedure for granting them the aid and also to monitor them, in order not to distort competition. But granting a lower amount of the state aid is without question a measure necessary in any economy, lawfully, without affecting competition within the European single market. “Minimis aid” does not follow the usual procedure for granting the aid, it has a specific granting procedure, on which we will focus in the current study.

The new provisions for granting the “minimis aid” come in support of the European and national authorities by simplifying competition rules, while having the practical role to facilitate the administrative work of these authorities.

This study aims to introduce and analyze the new measures, reporting also to the existing jurisprudence on the matter, aims to highlight the positive contribution made by the legislative changes, and the controversial issues that may be subject to future changes.

Keywords: state aid; minimis aid; enterprise; aid scheme; minimis ceiling

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1. Introduction

State aid, defined in a simplified manner as state intervention in the economy, is regulated in all countries because the need for state intervention in some cases is undisputed, particularly to support a company, a business or a region in difficulty.

The size of state aid must be clearly regulated. Any state intervention under the influence of various political, social factors, under the influence of interest groups pressure can seriously misplace the economy of the state and the EU economy in terms of the European single market. The state must be an impartial arbitrator and also must assist the competitor in difficulty, given certain criteria and effects that could occur. The role of the state is delicate not only because its resources are limited and insufficient, but also because any support under any form for an enterprise can distort national and European competition.

Even if the procedure for recovery of the aid granted illegally is regulated, granting it even for a short period of time can lead to major negative consequences on the market, irretrievably damaging competition.

For these reasons, the European legislator is always concerned with market knowledge, the legislator is preoccupied with the extent to which the market is affected by aids, and also the legislator is interested in the involvement and effectiveness of national authorities that approve proposals for new aids and supervise existing ones.

In order not to affect competition, a procedure, concerning the reception of state aid involving the intervention of the national and European authorities, appeared; nevertheless this procedure can be considered an useful filter necessary to avoid the infringement of competition rules.

On the other hand, this procedure runs the risk of pressing authorities through an affluence of applications that require a thorough investigation without some of these requests could actually carry any real threat to the market. Based on this, it was rightly considered as necessary to regulate a distinct aid category called “de minimis aid” which may not affect trade between Member States and of which businesses can benefit without falling under the prohibition regulated by the Treaty.

2. The rule concerning the state aid prohibition

Based on the European interest, Article 107 of the Treaty, concerning European Union activity, establishes that state aids or aids obtained through state resources, are incompatible with the internal market under any form whatsoever, this attitude leads to the distortion or threat of distorting competition by favouring certain companies or production of certain goods, in so far as it affects trade between Member States.

Article 107 of the Treaty stipulates the rule applicable to the state aid, that rule of granting interdiction but also the necessary conditions for State intervention to be assessed as prohibited State aid: to involve state resources; to be a potential risk to competition; favouring certain businesses or activities; this could affect trade between Member States.

If Article 107 establishes prohibition rule, in exchange, Article 108 of the Treaty, concerning the Functioning of the European Union, provides the possibility through derogation from Article 107 or from the regulations provided in Article 109, if such a decision is justified by exceptional circumstances, given the fact that the aid is compatible with the internal market. In terms of our law, state aid is regulated by Government Emergency Ordinance no. 117/2006 on the national procedures in State aid, as amended and supplemented, complemented by secondary relevant legislation (Gheorghiu, Nita, 2011).

State aid signifies both direct and indirect aid granted through State resources. A support from public funds, public funding is not automatically equivalent to state aid. Using public funds may take the form of subsidies, certain tax exemptions, reductions of financial or social tasks (Alistar, Banciu, 2013, 62-65) loan guarantees, granting low interest loans or delaying their refund. Even if public funds are involved or there is an intrinsic connection with the public budget, the presence of the State aid is not necessarily needed and the accomplishment of other conditions drawn from Article 107 of the Treaty thus becomes necessary.

Moreover, there are situations within which state aid does not rise from state but from a body designated by the state which can be public or private (Mihai, 2008, 14-16).

Regarding the potential risk to competition, it often occurs that state aids distort or threaten competition and the
business environment, because through preferential treatment of certain enterprises over others, normal competition is distorted. However, exceptions are permitted to the application of this rule in cases where it is considered as beneficial the impact of a scheme for granting aids under the general conditions set by the European Community Treaty.

Any support from the state, any of its intervention gives rise to an economic advantage which would not have been beneficial to the entity. From this point of view, it can be considered that the intervention of the state is a form of discrimination between enterprises, claiming the one in difficulty at the expense of another facing financial difficulties, the enterprise that does not benefit from state intervention finds solutions through own management strategies, but however there is serious risk of business failure (Popa, 2008, 137). Thus, the question arises why a company is supported by state and another company does not benefit from state help? On the other hand, the state lack of intervention can have disastrous consequences for a certain activity, for a disadvantaged area, for a disadvantaged firm in difficulty and can lead to irretrievable social effects. The state does not intend to destabilize the economy but attempts to support a weak sector.

Regarding the role of the State in the procurement of State aid, one must take into account also its ability to sustain such aids, since we could say that that State resources are being ineffectively spent because some of the firms targeted by the aid are in a very critical economic condition and State aid only prolongs the inevitable agony.

Through these measures the State aims to protect its internal market, national producers with a risk of excessive protection. That is precisely why the decision-making role of granting the State aid is attributed to the European Commission, the Commission examines and decides on granting/not granting aids, it establishes ways and the level of aid granted by Member States to their own industries. The Commission is the one that supervises the use of State aid, it is designed to monitor and control the compliance with its decisions, with the help of national authorities.

The State does not aim to destabilise the national economy or the common European market but aims to support a struggling sector, essential to its economy, and the means are sized, controlled in order not to affect competition.

In this respect, the Treaty on the functioning of the European Union provides in article 107 paragraph 2 compatible aids with the internal market, considered as the strictest law (Cotutiu, Sabau, 2008, 237) and eligible for a normal competitive environment: the social aids granted to individual consumers, on condition that they are granted without discrimination in relation to the origin of the products; aids to repair damage caused by natural disasters or other extraordinary events; aids granted to the economy of certain regions of the Federal Republic of Germany affected by the Division of Germany, in so far as they are necessary to compensate the economic disadvantages caused by that division. Within five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision of repealing this law.

Another category of exceptions that are based on the compatibility of the aid with the internal market are provided in paragraph 3 of article 107, appreciated as being of potential eligibility: aids intended to promote the economic development of the regions where the standard of living is abnormally low or within which there is a degree of employment work force extremely low, as well to promote development for regions in article 349, taking into account their structural, economic, social situation; aids intended to promote the execution of an important project of common European interest or to remedy a serious disturbance of the economy of a Member State; aids aimed to facilitate the development of certain activities or of certain economic areas, where they do not adversely alter the conditions of trade to an extent contrary to the common interest; aids intended to promote culture and heritage conservation, where they do not adversely alter the conditions of trade and competition in the Union to an extent contrary to the common interest; other categories of aids established through a decision of the Council acting on a proposal from the Commission.

3. The legal framework and the role of „de minimis aid”

Starting January 1, 2014 Regulation (EU) No. 1407/13 of 18 December 2013 became effective concerning the application of articles 107 and 108 of the Treaty regarding the functioning of the European Union, of the “minimis aid”. This regulation replaces Regulation (EC) No. 1998/2006 on “de minimis aid”, taking effect on 31 December 2013. The new regulation was drafted taking into account the suggestions received from States that were consulted in order to modernize the legislation on State aid, including the “minimis” threshold.
This type of help aims at liberating national authorities and competent Commission and in exchange investigating state aid projects, establishing thus a “de minimis” threshold value, up to which aids may be granted without falling under the incidence of the interdiction established by article 107 of the Treaty and for which the parties do not have the obligation of notification. The necessity of building this category of aid appeared for practical reasons, as there were numerous demands, they are of little value and could not infringe upon competition, there was no danger of its distortion. However, at the moment of the adoption of the new regulation, it was put into discussion, within the common decision of the member states, whether it was highly necessary increasing the “de minimis” threshold to a higher value but that does not bring prejudice to the competition. Member States of the Union appreciated that the initial value provided in Regulation 1998/2006 to be maintained, any increase represents threat to the market.

4. “De minimis aid” qualification

“De minimis aid” is the aid granted to an unique enterprise for a given period of time, not exceeding a certain fixed established amount and which cannot be applied to article 107 of the Treaty.

According to the Regulation (article 3) there are two categories of “de minimis aid”, which envisioned a different threshold value:

a. aid granted to an unique enterprise that cannot exceed the amount of EUR 200000 over a period of three financial exercises.

b. aid granted to an unique enterprise which carries out goods transport on behalf of third parties, or for a fee not exceeding the amount of EUR 100000 over a period of three financial years. As a peculiarity, the condition of these “de minimis aids” is that they cannot be used for the purchase of vehicles for the carriage of goods by road. If the enterprise also carries out other activities up to a ceiling of EUR 200000, the company will pursue compliance with the ceiling of EUR 200000, under the condition that the Member State concerned shall ensure that the benefited amount of the transportation activity of goods by road shall not exceed EUR 100 000, and that the “de minimis aids” shall not be used for the purchase of vehicles for the carriage of goods by road.

As we can see the reference period referred to for the calculation of the received “de minimis aids” must be constantly assessed, so that, when granting a new “de minimis aid”, to take into account the total amount of “de minimis aids” granted during the financial year concerned and during the two previous financial years (paragraph 10 of the Regulation preamble)

The “de minimis aid” may be granted to any enterprise, regardless of size, and the provider of the aid can be any public institution.

However, to the above-mentioned rules, within the regulation, there are provided exceptions from the application of the “de minimis aid” for the following areas:

- fisheries and aquaculture;
- those areas where enterprises operate within the primary production of agricultural products;
- those areas where enterprises operate within the sector of processing and marketing of agricultural products, where the amount of the aid is determined on the basis of the price or quantity of such products purchased from primary producers or put on the market by the companies concerned and the moment when aids were conditioned by their partial or full transfer to primary producers;
- aids aimed at export-related activities towards third countries or Member States, namely aids directly linked to the quantities exported, aids intended for the establishment and functioning of a distribution network or intended for other current expenses linked to the export activity;
- the aids subject to the preferential use of domestic over imported products.

In a situation within which an enterprise operates both in the sectors exempt from the application of the “de minimis aid” as well as in those included in the “de minimis regulation”, the company may qualify for the “de minimis aid” to the sectors approved by regulation, however the State has the task of ensuring that the amounts of aid shall be used within the areas provided by the legal framework.

In exchange, the new face of the old regulation, which excluded from applying the enterprises in difficulty, the present form adopted enables companies facing financial difficulties to be eligible for the “de minimis” aid.
5. „De minimis aid” beneficiary

Among other things, the reform which has been subject to the “de minimis” regulation aimed at clarifying concepts such as the notion of enterprise as a recipient of State aid. By a careful examination of the regulation we can notice the use of the two notions: that of enterprise and that of small enterprise.

The concept of enterprise has many meanings within the European competition law (Mihai, 2004, 37-45). By enterprise, in the sense of the regulation, we understand any entity engaged in an economic activity, regardless of its legal status and the way it is financed.

The unique enterprise is made up of all enterprises which have at least one of the following relations (in accordance with article 2 paragraph 2 of the regulation):

(a) an enterprise has a majority of voting rights of the shareholders or associates of other companies;
(b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;
(c) an enterprise has the right to perform a dominant influence over another enterprise pursuant to a contract concluded with that enterprise or pursuant to a provision within the partnership deed memorandum or within its status;
(d) a company which is a shareholder or member of another enterprise, and that supervises by itself, pursuant to an agreement with other shareholders or members of that enterprise, a majority of the voting rights of the shareholders or associates of that company.

Authorities will need to take into account the classification of a group of companies as a single enterprise, the existing relationships between them. If they have in common just the relationship with the same public body, they shall not be regarded as interlinked companies, they would rather be decisionally autonomous.

6. The procedure for granting „de minimis aid”

The European legislator has attempted to adopt a simple procedure of granting “de minimis aid” as a low value without involving the European control, but there must be a way to control, to monitor aids both in terms of collection but also in terms of compliance with the “de minimis” threshold established by Regulation 1407/2013 of the Commission. Thus, the aid provider establishes the conditions envisaged through granting the “de minimis” scheme and then the aid provider will inform the national authorities of its intention. Minimis aid applicants will check if they fit into the provisions of the Regulation and will give a statement to this regard either paper format or electronic format showing the “de minimis” aids received during the three financial years (the previous two financial years and within the current financial year) under this Regulation or under other “de minimis” regulations. If the conditions of the Regulation are accomplished, the supplier will inform the company, in written, about the amount of aid, about its “de minimis” character and about the basis on which it was granted. In order to simplify the emphasis on those aids, member states are given the freedom to choose the way by which they monitor all granted aids attributed to the supplier, and also the way they monitor received aids within the responsibility of the recipient.

The state may hold a central register of “de minimis” aids containing information concerning all “de minimis” aids granted by any of the authorities of the respective Member State, in which case the award procedure is simplified and does no longer necessary follows the procedure shown above.

As a conclusion to consultations with the Member States of the Union, not all were enthusiastic about this record through a central registry, considering that as a burden for administrative authorities, complicating their work.

Towards this position of states, the regulation allows to the Member State to monitor through registry or to impose an obligation to the supplier and to the beneficiary to keep track of specific “de minimis” aids received (value, granting time, granting possibility, origin, duration and method of calculation).

I appreciate that inventory through central registry provides safety by eliminating any errors in the statements of the beneficiaries who could be required to repay the state aid that does not comply with the regulation; this also leads to an administrative charge of the authorities but also to lasting procedures that can be avoided. Obviously, the up to date of this registry is not an easy process but its goal would help both the authority and the beneficiaries.
7. Conclusions

“Minimis aid”, even though apparently would not be of particular interest to the authorities and competitors, is of little value that does not require notification, it has significant importance for the functioning of the competitive market because there are sectors of the economy where even a smaller size of aid could significantly disrupt competition, be it an emerging market or a stable one, but their peculiarities require special attention from authorities.

A higher “de minimis” threshold could distort competition or lead to the addition of new categories of exemptions from the application of the regulation, which would hinder the functioning of “de minimis” aid.

State intervention is beneficial for all market actors: authorities, potential aid recipients and consumers.

Clarifications on the enterprise concept, the new approach to firms in difficulty, the creation of a viable monitoring mechanism in an attempt to simplify the procedure outlines the concern of the European legislator to protect the market, to meet new demands in the field of state aid.

References

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