



State aid: Selected developments

UK State Aid Law Association Berlin Roundtable

24 June 2016

Nicola Pesaresi
DG Competition
European Commission

The views expressed in this document are those of the author and may not in any circumstances be regarded as stating an official position of DG Competition or the European Commission.

Competition

Outline

1. Implementation of State Aid Modernisation (SAM)

- GBER & Partnership

2. Notice on the notion of State aid

- Main novelties with focus on infrastructures

I. Implementation of State aid modernisation (SAM)

SAM and its implementation

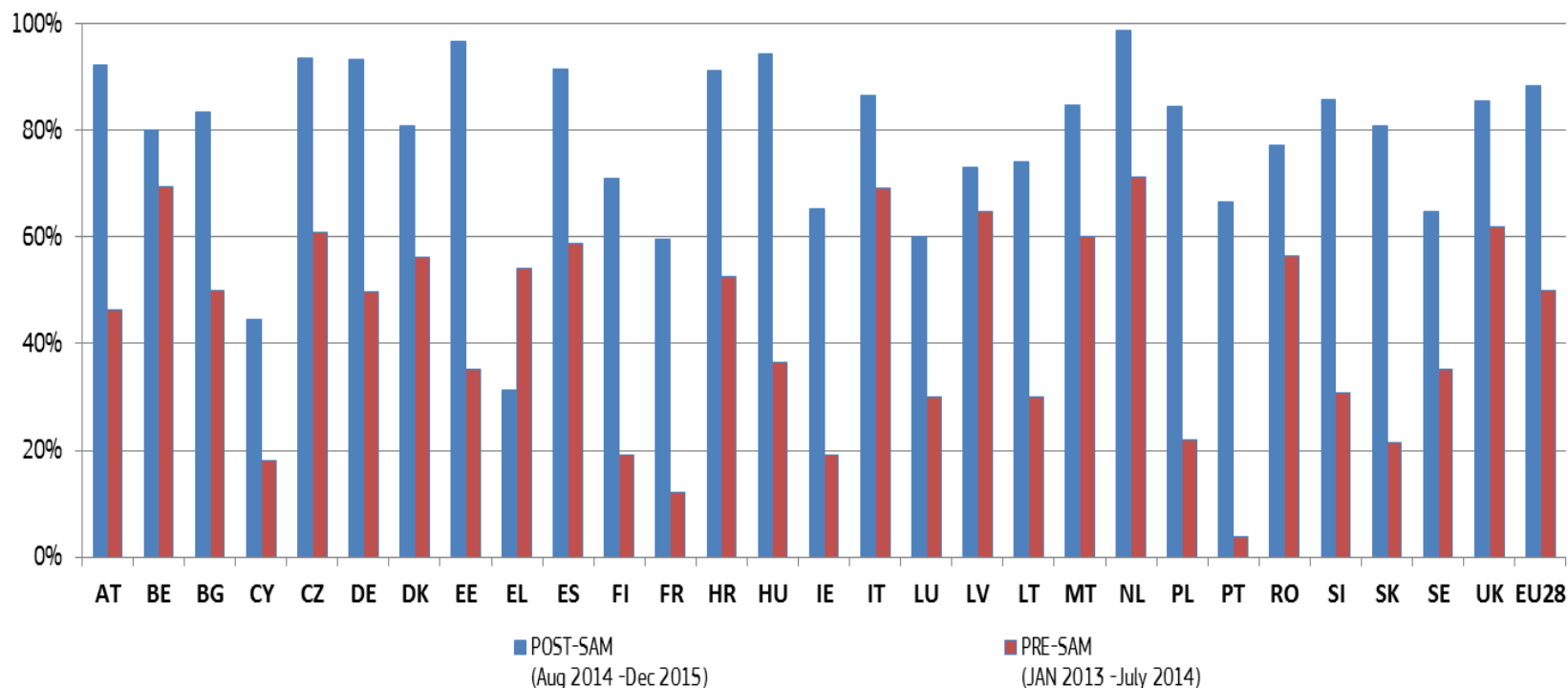
SAM = full review of the SA framework implying a paradigm shift in SA control

1. Better focus
 - Priority setting: "Big on big and small on small"
 - Less rubber-stamping, more room for *ex-officio* investigations
2. Simpler and faster procedures
 - Less notifications, more and larger exemptions
 - Less *ex ante* controls, more *ex post* controls
3. Better aid : Know where the money goes and what it achieves
 - Transparency
 - Evaluation
4. Rebalancing of MS/COM shared responsibilities for effective SA control
 - Partnership and support
 - Focus on implementation and compliance

GBER – State of play

The GBER now covers $\approx 90\%$ of new SA measures
All Member States are on board

Comparison of GBER uptake ratio before and after SAM



GBER – More to come

- On-going GBER targeted extension, mainly on:
 - Airports
 - Ports
 - Limited adjustments
- Timeline
 - March 2016 – 1st public consultation
 - Autumn 2016 – 2nd public consultation
 - Early 2017 – planned adoption

Partnership – multilateral side

- MS-led WG + thematic COM-led WGs (energy, infrastructures, transparency, ...) → High Level Forum
- Purpose: discuss and facilitate SAM implementation
- Focus on how to improve understanding and compliance
- Learn from each other's experiences
- Identification of best practices
- Recommendations
 - » Voluntary
 - » No one size fits all... *but good to know what fits others*

Some examples

NB : Keep in mind different legal and institutional settings

- Publication of awareness raising papers on specific SA issues (DE)
- SA "basics" guide and, more developed, SA Manual for granting authorities (UK)



Europa decentraal knowledge centre with information on
ilable for local authorities (NL)

- Launch of an internal audit on the SA control system (SE)
- Introduction of check-lists for aid grantors (SL)

Selected MS WG recommendations

On systems to detect the presence of aid:

- Review existing systems to ensure clarity on responsibilities
- Review processes and procedures to ensure coverage at all levels
- Where there is no centralised State aid control use check-lists or equivalent tools

On ex ante and ex post controls:

- Adopt a form of “four eyes” check as part of ex ante compatibility checking
- Review procedures and instruments for control → regular cycle of ex post checking proportionate to the nature, amount and scope of a (GBER) scheme

Partnership – bilateral discussions

Reinforced partnerships with some Member States, on a voluntary basis



Partnership – bilateral discussions

Common Understanding with Italy on strengthening the set-up for State aid control

1. Better State aid coordination and control at central level
2. Stronger State aid competences and accountability at all administrative levels
3. Faster implementation of recovery decisions
4. More effective co-operation for faster treatment of cases

II. Notice on the notion of State aid

Purpose of the Notice

- Clarify and explain the notion of State aid: easier, more transparent and more consistent application across the Union.
- Summary of the interpretation of the **NoA by the Union Courts** and the Commission's own case practice.
- Where Union Courts' case law is not available, guidance is provided in the form of the **Commission's own interpretation**.
- Public consultation on the basis of a draft Notice.
- Dedicated working group with Member States on State aid and infrastructure.

Main novelties

1. Infrastructures
2. Alignment with public procurement rules
3. Effects on trade
4. Culture and heritage conservation

Infrastructure – General guidance

- After several years of legal uncertainty (mainly after the judgment in Leipzig-Halle), the Notice clarifies **when public funding of infrastructures falls under State aid control**.
- The following does not fall under SA control:
 - Infrastructure not used for an economic activity (e.g. public remit infrastructure).
 - Small projects with only local impact.
 - Mixed use: concept of ancillarity (up to **20%** of overall capacity p.a.).

Infrastructure – General guidance

- The following does not fall under SA control (continued):
 - Construction of infrastructure has no effect on trade/competition if:
 - Infrastructure does not face direct competition from other infrastructures of the same kind or other infrastructures of a different kind offering services with a significant degree of substitutability, or with such services directly (likely for comprehensive network infrastructures that are natural monopolies).
 - Private financing insignificant in sector concerned on MS level.
 - Built for the benefit of society as a whole (not dedicated infrastructure).
 - Funding only falls outside SA rules if cross-subsidisation of other economic activities (including operation of the infrastructure) is excluded.

Infrastructure – Sectoral guidance

- State aid control typically does not apply to the construction of infrastructures in the following sectors:
 - Railway, Roads/Bridges/Tunnels, Canals/Inland Waterways, Water Supply and Wastewater Networks.
- State aid control typically applies to the construction of infrastructure in the following sectors:
 - Airports, Ports, Broadband, Energy.

Infrastructure: Operators and users

- If operators or users of an infrastructure built with public financing pay a market price, they do not receive any 'indirect' State aid (no advantage passed on to them).
- Clarification that:
 - Competitive tender excludes aid to the operator.
 - Incremental cost coverage (if no other methodologies are possible) excludes aid to users (approach from Aviation Guidelines).

Thank you!

Questions?

Background slides

NoA : Alignment with EU procurement rules

- Sale/purchase of assets, goods, services through tender
 - Past practice (2011 SGEI Communication): only "open procedure" and "restricted procedure" sufficient to exclude State aid to bidder; "negotiated procedure with publication of contract notice" not.
 - The Notice: all procedures allowed by Public Procurement Directives in principle sufficient to exclude State aid.
 - Greater consistency within EU legal order.
 - Member States free to use procedures like "competitive dialogue" and "competitive procedure with negotiation" (used for complex projects, in particular infrastructure).
 - Limited exceptions: "negotiated procedure without publication"; only one bid submitted (rebuttable presumption that the tender is not sufficient).

NoA: Culture and heritage conservation 1/2

- Recognition of the special features of culture and that most activities do not affect trade between Member States:
 - *“Only funding granted to large and renowned cultural institutions and events in a Member State which are widely promoted outside their home region has the potential to affect trade between Member States”.*
- Objectively non-substitutable: non-economic (not State aid).
 - E.g. keeping public archives holding unique documents.
- Benefitting exclusively certain undertakings rather than the general public: economic.
 - E.g. restoration of a historical building used by a private company.

NoA: Culture and heritage conservation 2/2

- Free of charge or entrance fee only covers fraction of the costs: non-economic.
 - E.g. museums, theatres or opera houses.
- Predominantly financed by fees or other commercial means: economic.
 - E.g. commercial exhibitions, cinemas, commercial music performance.
- Same principles apply to nature conservation.

NoA : No effect on trade – local services

- Confirmation that small local services do not affect trade, if:
 - Unlikely to attract customers from other Member States, and
 - Not foreseeable that more than a marginal effect on the conditions of cross-border investments or establishment.
- More detailed guidance for many areas:
 - Sports and leisure facilities, hospitals, small airports, small ports, ...
 - Culture: Only largest facilities subject to SA control because of particular features.