Comments on the Draft Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU

Centre of European Law, King’s College London

1. INTRODUCTION

1.1. The Centre of European Law at King’s College London welcomes the initiative of the Commission to issue a notice on the notion of State aid. There are two reasons for which this is an important regulatory development. First, the notice increases legal certainty for businesses and national administrations alike. Second, the Commission is undertaking pioneering work by including in the notice important guidance on fiscal policy.

1.2. The notice fulfils a pedagogical function, by offering an explanation of Article 107 (1) case law, and it also streamlines policy developments in the sector. Such task is not an easy one, and the Commission should be commended for its efforts. Given the complex body of case law in this area, it is understandable that the Commission wished to be at times selective in its references to Court judgments. The following comments should be therefore understood as an attempt to outline specific points that might benefit from supplementary clarification.

1.3. As a general point, we would like to stress that the explanations with regards to the decisional practice of the Commission and the references to Commission decisions throughout the draft notice are certainly very useful. However as mentioned in paragraph 3 of the Draft notice, the Commission aims at clarifying its understanding of the notion of aid, in line with the case law of the Courts. It is thus surprising that there are many instances throughout the notice where the Commission refers to its own decisional practice, without referring to the case law as well. We consider that certain sections and paragraphs might be rendered stronger by relying on the judgments of the EU Courts. Alternatively it should be made clear that reference to Commission practice is merely illustrative or explanatory of a certain specific issue. Throughout our comments below we will point out to the particular instances where further references might be necessary.
2. THE LEGAL VALUE OF THE NOTICE:

2.1. It is important to spell out in clearer terms what the legal value of the notice is. Undoubtedly, the notice is an Article 288 (5) instrument, deprived of legally binding force. Nonetheless, it should not be forgotten that the Court of Justice of the European Union stressed that such instruments are binding on the discretion of the European Commission,² which cannot depart from the provisions of notices and communications without giving reasons that are consistent with the principles of legitimate expectations, legal certainty, or equality.² Consequently, we suggest adding to paragraph three the following sentence:

‘When deciding on State aid cases, the Commission will be guided by this notice, and can depart from the text thereof only after giving reasons that are consistent with the principle of legal certainty and equality.’

2.2. In order to stress the important contribution made by the notice towards enhancing constitutional principles such as transparency and legal certainty, reference to these principles should be made in the Introduction of the notice. Such references are often found in communications and notices issued in the area of competition law and we see no reason for this practice not to be more frequent also in the area of State aid. This will offer both the necessary grounding of policy documents in hard constitutional principles, and will inject a welcomed rights-oriented approach in the State aid decisional practice of the Commission. Thus, the second sentence of the fifth paragraph could start as follows (in italic):

‘Article 107(1) TFEU defines State aid as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States. In the interest of transparency and legal certainty, the present Communication will clarify the different elements which, according to the case-law, constitute a State aid pursuant to that provision: the existence of an undertaking, the imputability of the measure to the State, its financing through State resources, the grant of an advantage, the selectivity of the measure and its potential effect on competition and trade within the Union.’

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3. SEVERABILITY OF ECONOMIC/NON ECONOMIC ACTIVITIES

3.1. In the interest of legal certainty, the Commission should insist more on the severability of economic/non-economic activities under the ‘general principles’ of section 2 of the Draft Notice. Thus, paragraph 10 is currently underdeveloped, and might read as follows:

‘Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.

In order to determine the severability of economic activities from the main non-economic objective pursued by an entity, the Commission looks at different indicators, such as:

- the list of activities authorized by the act establishing the entity,
- whether the entity can freely set the price for the goods and services it offers,
- whether the secondary economic activities undertook by the entity are essential for the achievement of the main non-economic objective of the entity.\(^3\)

3.2. Paragraph 13 states that ‘the question whether a market exists for certain goods and services may depend on the way those services are organized in the Member State concerned and may thus vary from one Member State to another.’ However, the case law\(^4\) suggests rather the opposite, as the European notion of economic activity should be interpreted in the same way in all Member states. The presence of an economic activity may depend on the fact that an activity can be delivered by private operators, which in turn may be inferred from the way the service is organized in other Member States. Thus, what paragraph 13 presents as the principle is rather the exception which only applies in certain specific sectors, like social security, where the Court has decided to depart from the general principle. Paragraph 15 becomes redundant in this context and should be deleted. The specificity of certain sectors can be made clearer later on, as discussed below in our submission under point 3.5.

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3.3. Furthermore, having a separate subsection 2.2 titled ‘Exercise of public powers’ appears rather artificial, given that it is the logical complement of the Höfner rule. We therefore suggest merging section 2.2 with section 2.1.

3.4. In the same vein, we suggest deleting paragraph 19 that has essentially the same content as paragraph 10 discussed above. Paragraph 19 is inherently redundant, in that it mentions in the first sentence that ‘In so far as a public entity exercises an economic activity which can be separated from the exercise of public powers, that entity, in relation to that activity, acts as an undertaking.’ We believe it is of little value to mention, in the second sentence that ‘if that economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected with the exercise of those public powers and therefore fall outside the notion of undertaking.’ Thus, the second sentence of Paragraph 19 is implied in the first, and overemphasizing these points is of little use, especially because no clarification is given as to the criteria that might be employed in order to determine whether the exercise of public powers/economic activities can be separated.

3.5. A new sentence should be added at the end of the new section 2.1, along these lines:

‘The case law of the Court clarifies that the application of the notion of economic activity in specific sectors is subject to the following rules.’

3.6. The notice can then go on to the new section 2.2 Social Security, 2.3. Health care; 2.4 Education, research activities; 2.5. Infrastructure.

3.7. Paragraph 16 is rather ambiguous, as it does not explain to what extent the interpretation of Court of the notion of economy/non-economic activities in the context of internal market, competition and State aid is different. Further explanations are needed in this regard – or alternatively the paragraph should be deleted altogether. This is especially so as many footnotes in Section 2 of the draft Notice, refer interchangeably to internal market/competition case law suggesting an identical application.

3.8. The last statement in paragraph 28 with regards to independent pharmacies could be complemented to reference to the Judgment in Case T-23/09 Conseil National de l’Ordre des Pharmaciens (CNOP) and Conseil Central de la Section G de l’Ordre National des Pharmaciens (CCG)/Commission, [2010] ECR II-05291 para. 71.

3.9. There is further ambiguity in paragraph 31 of the draft Notice, as the first sentence talks about services financed predominantly by parents or pupils, and the second sentence gives the example of higher education financed entirely by students. We believe that in order to ensure consistency, the second sentence should also refer to services predominantly financed by students.
3.10. Footnotes 46 and 47 in paragraph 33 refer solely to the framework on R, D&I. We wonder as to the utility of paragraph 33, given that it only restates existing Commission documents, without amending them or without referring to the case law.

3.11. Paragraph 36 mentions that the Commission will not put into question measures definitely adopted before the Aéroports de Paris judgment, due to the uncertainty existing prior to that ruling. In this connection, footnote 51 refers to a Commission decision. However, the Commission does not have the competence to decide to limit in time the consequences of judgments issued by the Court. Such limitation was implied in the Leipzig/Halle ruling itself, when the Court decided that the application of State aid rules to airports cannot be excluded anymore as of 2000. Thus, the Commission might want to refer to the Leipzig/Halle judgment instead of its own decisional practice (T-443/08, para. 106 upheld in appeal judgment C-288/11 P, paras. 38-39).

3.12. Paragraph 38 would benefit from a case law reference alongside the reference to the Commission decisional practice in footnote 53. We would also suggest moving this paragraph up, and inserting it in the general remarks of paragraph 34.

3.13. It is surprising to read in footnote 54 that the economic use of the infrastructure may be considered ancillary when the capacity allocated each year to such activity does not exceed 15% of the infrastructure’s overall annual capacity. In particular, we are wondering whether a reference could be included here, in order to account for the 15% figure.

4. STATE RESOURCES:

4.1. Section 3.2 as currently drafted is underdeveloped. It does not cover the existing case law; it is too short and does not offer enough guidance. The section creates the false impression that it is straightforward to establish whether an advantage was granted directly or indirectly through State resources.

4.2. As it currently stands, Paragraph 53 might be changed as to better reflect the case law of the court as follows:

‘Imposing a potential burden on State resources in the future, by a guarantee or by a contractual offer, is sufficient for the purposes of Article 107(1), provided that a sufficiently direct link is established between, on the one hand, the advantage given to the beneficiary and, on the other, a reduction
of the State budget or a sufficiently concrete economic risk of burdens on that budget.\(^5\)

4.3. Paragraphs 55 and 57 lay down the same principle, and should be merged. Furthermore, they do not find unequivocal support in the case law. The reference to the granting of exclusive or special rights without remuneration as constitutive of aid may also be misleading, since in almost all cases such granting is done by the State in its role of regulating the market and therefore falls outside the scope of Article 107(1) - as implied by paragraph 56 - and is instead covered by 106(1) TFEU.

4.4. Footnote 83 would benefit from clarifying in which way Case C-279/08 differs from the other cases mentioned in that footnote. In particular, a sentence would be welcomed here stating the criteria that might be employed in order to determine regulatory reasons justifying certain State measures.

4.5. The reference to the ESM in paragraph 61 appears rather surprising, as it includes considerable crystal ball gazing. We suggest either to delete it, or to add further explanations as to why does the Commission find this example particularly relevant in this context.

4.6. Subsection 3.2.3 of the Draft Notice could be amended in order to reflect recent case law developments, in particular C-262/12 Association Vent de Colère (19 December 2013, nyr). As mentioned in paragraph 27 of that judgment, the fact that the undertakings retain a part of the chargers received from final consumers, with the result that part of the funds is not channeled through a private or public entity, is not sufficient to exclude there being an intervention through State resources. This statement appears to challenge the views expressed by the Commission in paragraphs 63-66 of the Draft Notice. Indeed, it seems that the role of a public of private entity designated to channel resources to beneficiaries is overemphasized in the test suggested by the Commission in its Draft Notice.

We suggest the following amendment to Paragraph 63 of the Notice:

‘Regulation that leads to financial redistribution from one private entity to another without any further involvement of the State does not, in principle, entail a transfer of State resources, if the money flows directly from one private entity to another, without passing through a public or private body designated by the State to administer the transfer, and without the sums in question remaining under public control and available to the national authorities’.

Paragraph 65 can be amended as follows:

‘However, State resources are present where a part or all the charges paid by private persons transit through a public or private entity designated to channel them to the beneficiaries.’

Paragraph 66 may be completed by adding the following sentence:

‘A mechanism for offsetting in full surcharges imposed by law on undertakings that is financed by final consumers may be considered an intervention through state resources, even if not all the charges paid by private persons transit through a public or private entity designated to channel them to the beneficiaries.’

4.7. Paragraph 70 is slightly confusing as it seems to convey the idea that the notion of advantage might be assessed by reference to undertakings active in other Member States. It could be clarified as follows:

‘The notion of advantage is based on an analysis of the financial situation of an undertaking in its own legal and factual context existing in its own Member State, with and without the particular measure.’

4.8. Last sentence of paragraph 72 should be redrafted in order to convey a more accurate description of the Commission competence in the area of Article 107 (1). We suggest replacing ‘spelt out these conditions’ with ‘interpreted these conditions.’

4.9. Paragraphs 74 and 75 are unclear as they do not lay down the criteria to distinguish between indirect advantages and secondary economic effects inherent in State aid measures.

5. THE MEO TEST

5.1. Paragraph 84 advances a kind of ‘pollution principle’: once State aid has been granted to an undertaking, the Commission appears to believe that any subsequent interventions taking place within a relatively short period of time should be also considered to be State aid. Such assumption is not supported by the case law, and, in this context, the general terms in which paragraph 84 is drafted are problematic. We recommend that the Commission makes clear that a case by case assessment needs to be done for each measure, regardless of the frequency of State interventions.

5.2. Paragraph 91: current decision making practice appears not to be entirely supportive of the presumption that sales and purchases done in compliance with
public procurement directives are automatically in line with market conditions. Furthermore, consistency with the rules contained on the SGEI package should be ensured.

5.3. Paragraphs 103 and 105 do not contain any references and they do not reflect the margin of appreciation recognized in the case law to Member States with regards to benchmarking. When there is a range of possible values there is no need to determine, as stated in the notice, one single acceptable value (being the average or the median). As far as we know such a proposition does not have any support in the case law. Instead, according to the case law, the Member State has a margin of discretion in order to choose within the different reasonably acceptable values. This point is contained in the 1993 manufacturing Communication (Commission communication Application of State aid rules to public undertakings in the manufacturing sector; OJ C 307, 13.11.1993, p. 3–14, paragraphs 27 to 29) whose content should be incorporated. References to the Case law confirming this margin of appreciation by the Member State should also be included: Case C-256/97, DM Transport [1999] ECR I-03913, para 30; case C-73/11 P Frucona Kosice, 24 Jan 2013, nyr.

5.4. Typo in paragraph 103: delete ‘or not’ before the first comma in sentence two.

5.5. Paragraph 105 rightly recognizes ‘the specific features of the sector’ as one of the factors to take into account in order to determine what would be the normal expected return. However, it would be appropriate to include here a reference to the case law: for instance the judgment in cases T-228 and 233/99 WestLB [2003] ECR II-00435 para 255; case C-405/11P Buczek, 21 March 2013, nyr. para 46.

6. SELECTIVITY STEMMING FROM DISCRETIONARY ADMINISTRATIVE PRACTICES

6.1. Paragraph 125 appears too broad. Given that in the fiscal area it is quite usual to require administrative authorizations for different types of relief, the Commission might want to clarify more the boundaries of administrative discretion. The Court of Justice case law indicates the criteria that need to be satisfied by Member States in order to make the exercise of administrative discretion compatible with EU law. Thus, the notice should reflect the fact that the system needs to be based on ‘objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities’ discretion, so that it is not used arbitrarily. Such a system must furthermore be

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7 See in particular paragraph 66 of SGEI Communication, cited also in footnote 146 of the draft notice on the notion of aid.
based on a procedural system which is easily accessible and capable of ensuring that
a request for authorisation will be dealt with objectively and impartially within a
reasonable time and refusals to grant authorisation must also be capable of being
challenged in judicial or quasi-judicial proceedings.8

7. MATERIAL SELECTIVITY FOR MEASURES MITIGATING THE NORMAL CHARGES OF
UNDERTAKINGS

7.1. Paragraphs 129-131 are most unclear and might attract controversy. We
wonder in particular what the value of these paragraphs is. Indeed, paragraph 129
does not explain where the three steps analysis does not apply. In reference to the
Gibraltar case, the Commission indicates in paragraph 130 that ‘verification’ needs
to be done presumably in order to check whether the design of tax/levy system is
not arbitrary or biased. However, the Commission does not specify the criteria for
such verification, and we wonder whether establishing clear cut criteria to this
effect is at all possible.

7.2. It seems that the Commission wished to single out Gibraltar as an exceptional
case in the Notice. We are not convinced that such an approach will be beneficial,
given that a different reading can be given to this judgment, as a rather general
application of the principle of equality. Thus, in the interest of legal certainty, we
suggest deleting paragraphs 129-131 altogether from the final notice.

8. REFERENCE SYSTEM IN RELATION TO SELECTIVITY

8.1. The last sentence of Paragraph 134 refers to two paragraphs in the notice
which do not directly concern the subject matter. It would be better to directly refer
to cases that the Commission thinks relevant in this point.

8.2. Footnote 195 does not seem particularly accurate as it includes a very broad
statement in its first sentence and it gives the false impression that judgment in
Paint Graphos is an exception to the rule.

8.3. Paragraph 152 would benefit to a footnote referring to the Judgment in
Joined Cases T-211 & T 215/04, Gibraltar and UK v. Commission, [2008] ECR II-3745,
para 106, containing the definition of the expression ‘to offset’.

8.4. In paragraphs 140 and 161 the Commission relying on an existing judgment
(Paint Graphos) that specifically mentions the principle of proportionality when
assessing whether derogatory measures are consistent with the logic and general
scheme of the tax system. However, we consider paragraphs 140 and 161
dangerously close to be ultra vires, to the extent that they generalize a single
pronouncement that was strictly cast in terms of guidance to the referring court, as

8 Judgment in Case C-157/99 Smits and Peerbooms [2001] ECR I-5473 par. 90; Judgment in Case C-203/08
to introduce a proportionality assessment under Article 107(1). Proportionality is a test that generally applies whenever Member States want to justify measures that fall in the ambit of Article 107 (1) prohibition, and thus it needs to be carried out under paragraphs 2 and 3 of that Article. It is not clear whether the Commission is introducing a subjective element within paragraph 1 of Article 107 TFEU. Consequently, it would appear that Member States are required to carry out a proportionality test within the notion of aid itself.

8.5. Paragraph 166 mentions that amnesty measures might be considered as general measures. Such statement does not reflect reality because amnesty measures are by excellence selective. Indeed, the beneficiaries of amnesty measures are those companies that have not been abiding the law, and they are clearly singled out by this attribute. The paragraph does not refer to case law, but only to Commission decisional practice, and the reference is therefore quite weak.

9. DISTORTION OF COMPETITION AND EFFECT ON TRADE

9.1. Para 196 refers to the idea that in certain cases ‘due to their specific circumstances, certain activities had a purely local impact and consequently did not affect trade between Member State’. The Commission then merely lists a series of its decisions. It might be advisable to cast this section of the draft Notice within the EU courts case law. First it should be restated that the there is a specific duty for the Commission to provide reasons on why effects on intra-Community trade and competition can in certain cases ‘less immediate and even less discernible.’9 The Commission by analogy with recent case law on free movement should discharge its duty by providing ‘conclusive evidence’10 which could include reliable estimates, figures and even patterns of trade.11

9.2. Paragraph 195, second sentence might read: ‘However, evidence must be brought that the aid is such as to be liable to affect trade between Member States and to distort competition.’

10. SCOPE OF THE NOTICE

10.1. Paragraphs 198 and 199 include crucial provisions, and should be more precise. We would like to make the following observations:

a. ‘repeal’ is a slightly infelicitous choice of word, as it suggest potentially overreaching effects of a mere soft law instrument;

b. in the interest of legal certainty it would be advisable either to mention what are the particular Communications that the present notice replaces, or to delete

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9 Judgment in Case C-494/06 Commission v Italy and Wam [2009], E.C.R. I-3639, para. 62, nyr.
the paragraph altogether. In particular, the expression ‘any contrary statements’ in paragraph 199 is rather unclear, it does not have any legal meaning, and sits oddly after a strong legal word such as ‘repeal.’

c. It would have been desirable to incorporate in the current notice previous notices that have proven to be very useful, such as the notice on manufacturing.  


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Centre of European Law
Dickson Poon School of Law
King’s College London

CEL – School of Law King’s College London:

Prof Andrea Biondi – Professor of EU Law and Director of CEL
Dr Jose Buendia Sierra – Visiting Professor
Mr Gian Marco Galletti – PhD Student
Dr Oana Stefan – Senior Lecturer in EU and Public Law

Jointly with the LLM class – State aid course – King’s College London 2013/14.

Angerbauer, Timo
Berneman, Samuel Gabriel
Bozhikov, Valeri
Brousseau, Julie
Christensen, Louise
Ciccioli, Giovanna
Cutrupi, Antonino
De Marnix De Sainte Aldegonde, Paul
De Mullewie, Leonore
Derenne, Catherine
Detroz, Emilie
Do Vale Faria Carter, Marta
Dubernet De Boscq, Maud
Fliche, Pauline
Janke, Rebekka
Lambert De Rouvroit, Marie
Lindenmann, Yannick
Marco Perpina, Laia
Marolla, Clemence
Meltvedt, Mathilde
Monsted, Sarah
Previti, Giacomo
Rey, Claire
Reinecke, Philipp
Rojo Prada, Ana
Sabbe, Charles
Schaldemose, Gustav Krohn
Semey, Sam
Sodeikaite, Ieva
Sernotte, Yannick
Sernotte, Yves
Titze, Julian.
Waegeman, Dagmar
Zaccaria, Mariavittoria