

I. State aid in general

1. General aspects concerning State aid control (Articles 107 – 108 TFEU)

- As a general rule, the granting of State aids is prohibited (cf. Article 107(1) TFEU). Following the jurisprudence of the Court of Justice of the EU, in principle even the granting of aid under co-financed EU-programmes (such as RD) may constitute State aid. Therefore, in principle, the rules of Articles 107 – 108 TFEU apply in such cases, too.
- However, in some cases the Commission will authorise certain types of State aids (Article 107(2) TFEU) or may do so (Article 107(3) TFEU), as aid compatible with the internal market.

2. Notifications of individual State aid or of State aid schemes

If a Member State wants to grant a State aid or intends to introduce a State aid scheme, it has to inform the Commission of its intention in advance ("notification") and wait for an authorisation by way of a Commission Decision before putting the proposed measure into effect ("standstill obligation"). The Commission has to adopt a Decision within 2 months of the moment when the notification is complete, either concluding that it is non-aid, or authorising the aid as being compatible with the Treaty, or opening an investigation procedure.

According to the jurisprudence of the European courts, beneficiaries cannot, in principle, claim legitimate expectation if the Member State concerned has not notified its intentions to the Commission.

A State aid (individual aid or scheme) that is granted (and disbursed) in breach of the standstill obligation (and does not fall within the exception cases from the notification obligation) and that is found incompatible with the internal market by means of a Commission Decision has to be recovered from the beneficiaries.

3. Exception from the notification obligation

However, the Member States are **not obliged to submit a notification** to the Commission if:

- The aid in question does not constitute a "State aid" (= **non-aid**).

MS may nevertheless ask the Commission for clearance. It is not always clear whether or not a certain form of public support constitutes a State aid within the meaning of the Treaty and therefore Member State may wish to notify non-aid measures for reasons of legal certainty.

Where an aid granted to a given beneficiary does not exceed certain pre-defined maximum thresholds and meets other specific conditions of the applicable Commission "*de minimis*" Regulations (currently Commission Regulation 1535/2007 in the primary agricultural sector and Commission Regulation (EC) No 1998/2006 for all other sectors – both Regulations are scheduled to be replaced by new *de minimis* Regulations as from 1/1/2014), such aid is not considered to constitute State aid.

- The aid in question is covered by a "**block exemption**:"

The Commission may use the instrument of block exemptions to allow the Member State to derogate from the notification requirement for categories of aid listed in Council Regulation 994/98 ("Enabling Regulation" as last amended by Council Regulation (EU) No 733/2013 of 22 July 2013). Block exemptions can only be provided for by the Commission as regards aid categories that are explicitly mentioned in the Enabling Regulation and for which the Commission has gained sufficient practical experience. Moreover, the conditions under which the Member States may grant aids exempted from notification should be based on clear compatibility criteria. Member States have to inform the Commission of their exempted measures and the Commission then publishes that information. There are two block exemption Regulations which are relevant in the agricultural sector:

- Regulation (EC) No 1857/2006 for SMEs in the primary agricultural sector and ("ABER")
- the "general" block exemption Regulation (EC) No 800/2008. ("GBER")
- Further exceptions may be applicable (e.g. "existing aid")

4. Commission Guidelines and Frameworks

In order to establish clear rules and for reasons of transparency in competition law, the Commission has issued **Guidelines and Frameworks** in which it lays down its policy with regard to the conditions under which it will consider that an individual aid or an aid scheme is compatible with the internal market and can therefore be authorised.

5. State aid authorisations directly based on the Treaty

If a particular aid is not covered in any of the Commission Guidelines, it is nevertheless possible for the Commission to authorise the aid, directly based on the Treaty. Such cases are analysed on a case by case basis, taking into account the compatibility principles laid down in Article 107(3) TFEU.

II. State aids in the agricultural sector

The application of the general State aid rules (Articles 107 to 109 TFEU) to the agricultural sector is limited by Article 42 TFEU, which determines that:

"The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

..."

It is therefore in the competence of the legislator (EP and Council) to specify that State aid rules only apply to a limited extent or not at all to production of and trade in agricultural products. The reference to "production of and trade in agricultural products" makes it clear that **this Article applies exclusively to economic activities related to products listed in Annex-I of the Treaty.** In the context of rural development this means that exceptions or derogations from State aid rules cannot be provided for with regard to activities not related to products listed in Annex-I (e.g. processing and marketing of Annex-I products into non-Annex-I products, diversification into tourism, and forestry measures).

When legal acts speak about such derogations from the State aid rules in agriculture, reference is normally made to operations, payments, or measures "**falling within the scope of Article 42**".

In principle, the law governing the CAP lays down that the **State aid rules do apply**. In respect of payments made in the framework of Rural Development, this is currently laid down in Article 88 of Council Regulation (EC) No 1698/2005 – "RD-Regulation") and specified in more detail in Article 57 of Commission Regulation (EC) No 1974/2006.

Several exceptions are provided for, in respect of payments falling within the scope of Article 42 of the Treaty, in Articles 88 and 89 of the RD-Regulation:

- According to Article 88, second paragraph, **State aid rules do not apply** (at all) to **payments made under co-financing** (i.e. neither to the EU-financed part nor to the part financed of the Member State). This means that such payments do not require a notification nor are they subject to block exemption or *de minimis* rules.
- As regards additional national financing for which Union support is (also) granted (the so-called "**top ups**"), Article 89 of the RD-Regulation provides for a **derogation from State aid procedural rules but not from substantive State aid rules**, i.e. the Member States do not have to submit a formal notification nor do they have to take into account whether these measures are covered by block exemption. Member States may submit the relevant **information sheet** for their top ups as part of their RDP and the Commission then assesses the State aid aspects as part of the programme assessment. In that case, the

Commission only adopts one single Commission Decision covering both aspects (Rural Development and State aids). Therefore, the so-called "one window" approach had already been applied during the 2007-2013 programming period. However, this approach constitutes a *possibility* for the Member States but they may of course also decide to follow the normal State aid rules by notifying their top-ups to the Commission for authorisation, or apply the block exemption or *de minimis* rules.

- As it has been agreed in June 2013 in the political compromise on the CAP reform, as of the new rural development programming period, there will be a ***total derogation from the application of State aid rules (both procedurally and substantially) for top ups falling within the scope of Article 42 of the Treaty***. Member States will only have to indicate their top up intentions in the RDP. If they have not done so in their initial RDP, they may still do so at any time during the programming period by way of a programme amendment. The Commission will assess (and, where compliant, approve) the RDPs or its amendment according to the criteria of the RD-Regulation.
- However, **State aid rules did - and will also in the future - apply fully** (i.e. the derogations from procedural and substantial State aid rules do not apply) in the following cases:
 - In cases where a Member State intends to finance an RD measure (even if it falls within the scope of Article 42 of the Treaty) **exclusively from national funds**; i.e. without any co-financing at any moment during the programming period (N.B.: such measures must not be included in the RDP);
 - In the case of **processing and marketing of products where the outcome of the products is not an Annex-I product**;
 - In the case of **forestry measures**: Forestry measures are not Annex-I-related measures and do not, therefore, fall within the scope of Article 42 of the Treaty.
 - In the case of **other non-Annex-I related economic activities** (for example, tourism).

With a view to the future rules of State aids, for these cases:

- It is the intention to provide for block exemption rules to cover as many aid measures as possible, provided that the Commission has acquired significant experience in the past. This will significantly alleviate the administrative burden for the Member States and reduce the cases subject to the notification requirement.
;
- For operations or measures not falling within the scope of Article 42 of the Treaty, where block exemptions will not be possible and where there is, therefore, a need to submit a formal State aid notification to the Commission and wait for a Commission approval decision before putting the measure in effect, the it is intended that the procedures for the RDP-approval and the State aid authorisation are handled in parallel as far as this is possible.