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2018/0222 (NLE)

Proposal for a

COUNCIL REGULATION

amending Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

On 2 May 2018 the Commission presented its proposal for the next Multiannual Financial Framework (MFF) (COM(2018) 321 final). Building on that, the Commission is proposing a number of horizontal and sectorial EU funding programmes, responding to new challenges whilst continuing successful established activities.

This proposal for an amendment of the EU's State aid Enabling Regulation (Council Regulation (EU) 2015/1588) aims to improve the interplay of those EU funding programmes with State aid rules. It will enable the Commission to make targeted modifications of current State aid rules so that national money – including from the European Structural and Investment Fund managed at national level – and EU funds managed centrally by the Commission can be combined as seamlessly as possible, without distorting competition in the EU's Single market.

The purpose of EU State aid rules is to ensure that public spending does not distort competition between companies in the EU's Single Market, based on three basic principles:

– Common interest: Public spending should serve general policy objectives such as stimulating investment, education and training, regional cohesion, research and development, improving digital, transport and energy networks and combatting pollution and climate change.

– Additionality: Public spending should fill a gap, not crowd-out or merely replace private investment.

– Cost-effectiveness: Public spending should not exceed what is needed to reach the policy objective.

EU funds managed centrally by the Commission that are not subject to any discretion by Member States (such as COSME, Horizon Europe or the Digital Europe Programme), are not State aid within the meaning of Article 107(1) Treaty on the Functioning of the European Union (TFEU).

However, where Member States provide additional national funding to a project, a financial instrument supported by a centrally managed EU fund or contribute resources over which they retain a certain degree of discretion to a centrally managed fund, State aid rules apply to the part of the funding under discretion by a Member State.

Similarly, Member States have greater control over EU money under shared management, as is the case for the European Structural and Investment Funds (ESIF), including the European Regional Development Fund (ERDF) as well as the European Agricultural Fund for Rural Development (EAFRD). This type of funding therefore represents State resources within the meaning of Article 107(1) TFEU and is subject to State aid control.

In this context, the right articulation between EU funds rules and State aid rules is important to guarantee the best possible impact of the MFF and to avoid unnecessary complexities. This is especially important for situations in which a project is funded both by EU funds managed centrally by the Commission as well as by funds under the control of Member States. To simplify the treatment of such situations for Member States, financial intermediaries and project developers EU funds rules and State aid rules should be consistent. That is why the Commission’s EU funds proposals incorporate certain key principles of State aid control, such as the need that State interventions are additional to private funding rather than crowding out such funding, which should be further developed and guide implementation. And it is also why, at the same time, the Commission is proposing to further simplify the relevant State aid rules.

Commission Regulation (EU) 2017/1084 of 14 June 2017[1] (General Block Exemption Regulation – GBER) plays a key role in this context. It declares certain categories of aid compatible with the internal market and enables Member States to directly implement aid measures without prior approval by the European Commission.

There are three areas in which modifications of the GBER could improve the interplay of EU funding programmes with State aid rules.

National financing combined with InvestEU Fund's instruments

The Commission presented today its proposal for the new InvestEU Fund[2], a single set of rules for all financial instruments and budgetary guarantees in the next EU budget. The proposal ensures that the Commission plays a strong role in the selection of supported projects and schemes in accordance with a common EU interest, and that public support will complement private investment, will be transparent and that its effects will be evaluated. The design of the InvestEU Fund already incorporates key State aid principles. Once these principles are translated into sufficiently clear rules on the operations of the Fund, only limited additional State aid requirements are needed to protect competition in the Single Market, when Member State money is combined with EU money within the InvestEU fund. On that basis, the relevant State aid requirements could be laid down in the GBER, to accompany an InvestEU Fund Regulation and the InvestEU Fund's Investment Guidelines that contains the necessary safeguards. Such a modification of the GBER could exempt Member State money that is channelled through the InvestEU Fund or supported by the InvestEU Fund from prior notification to the Commission under State aid rules, thereby ensuring a streamlined and efficient implementation of the InvestEU Fund.

Research, development and innovation

The Commission also presented today its proposal for Horizon Europe[3]. Under that proposal, certain research projects by small and medium-sized enterprises (SMEs) can be awarded the 'Seal of Excellence' label. This requires that they are evaluated by the Commission as being "excellent" and that they are eligible under the strict requirements under EU rules for EU funding, with the only reason they cannot actually be funded being budget constraints of the EU fund. Such projects could be allowed to secure their whole funding from Member States (including from structural funds) without requiring the Commission's prior approval. The design of the Commission's Horizon Europe proposal as regards 'Seal of Excellence' projects and the relatively limited size of financial support remove any competition concerns.

Similarly, RDI projects evaluated and selected in line with the rules applicable to Horizon Europe and jointly funded by Horizon Europe and Member States (including from structural funds), where at least three Member States participate, could be allowed to be implemented without an additional State aid assessment for the Member States' part of the funding. This would be possible because the rules for projects to qualify for support from Horizon Europe – as designed in the Commission's proposal – remove any competition concerns, in particular by requiring projects to meet common EU interest objectives and to address well-defined market failures.

European Territorial Cooperation

For many years, the promotion of European Territorial Cooperation (ETC) has been an important priority in EU cohesion policy. Under the current State aid rules, such projects can

[1] OJ L 156, 20.6.2017, p. 1.
[2] COM(2018)439
[3] COM(2018)441

already be supported through public money. In the last years the Commission has gained significant experience in relation to aid measures aimed at the promotion of ETC projects. A further extension of the scope of aid measures allowed under the GBER could therefore be considered.

The legal basis of the GBER, i.e. Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 TFEU to certain categories of horizontal State aid (codification) (the 'Enabling Regulation')[4], therefore needs to be modified, to allow the Commission to include all appropriate measures into the GBER following a consultation of all interested stakeholders and of the advisory committee of Member States.

1. OBJECTIVE AND CONTEXT OF THE PROPOSAL

The Enabling Regulation allows the Commission to declare, by means of regulations, that certain categories of State aid are compatible with the common market and are exempted from the notification requirement provided for in Article 108(3) TFEU. Those categories include, for example, aid to SMEs, aid for research and development or aid for environmental protection. The Commission now proposes to add two additional categories.

The proposal to include **two new categories** in the Enabling Regulation enables the Commission to adopt block exemptions, based on a definition of clear compatibility criteria, ensuring that the effect on competition and trade between Member States is limited. By adopting such block exemptions it would be possible to significantly simplify administrative procedures for Member States and the Commission on the basis of clearly defined *ex ante* compatibility conditions. However, the proposal for new categories in the Enabling Regulation neither entails the immediate block exemption of these categories, nor does it mean that all measures that fall within a category would be block-exempted in their entirety.

New categories proposed for inclusion in the Enabling Regulation

Member States' financing channelled through or supported by EU financial instruments or budgetary guarantees managed centrally by the Commission

The importance of EU financial instruments and budgetary guarantees for delivering support in a wide range of areas has increased over the past years. It is set to increase even further under the post-2020 Multiannual Financial Framework. The Commission's proposals for EU financial instruments and budgetary guarantees managed centrally by the Commission contain important safeguards to prevent undue distortions of competition. Furthermore, they are typically less distortive than grants of a similar amount, since they usually involve smaller amounts of aid. For example, a non-market conform guarantee for a loan of EUR 100 million typically only entails an amount of aid corresponding to the difference between a market conform guarantee premium and the actual guarantee premium paid by the beneficiary, which is considerably lower than the full amount of EUR 100 million.

It is therefore appropriate to enable the Commission to block-exempt aid provided through Member State financing, which is further channelled through or supported by EU financial instruments or budgetary guarantees managed centrally by the Commission, provided that certain conditions are fulfilled. In the Commission's experience, the alignment of such aid with the conditions applicable to EU centrally-managed financial instruments and budgetary guarantees, as implemented by Union bodies, ensures that the aid provided by Member States

4 OJ L 248, 24.9.2015, p. 1.

does not give rise to any significant distortions of competition and that it is possible to define clear compatibility conditions for this aid.

Aid for European Territorial Cooperation

For many years, promoting European Territorial Cooperation (ETC) has been a major priority of EU cohesion policy. Support for SMEs for costs incurred in ETC projects is already block-exempted under the GBER. Special provisions for regional aid for investments by undertakings of all sizes are also included in the Guidelines on regional State aid for 2014-2020[5] and in the regional aid section of the GBER. This means that the Commission has gained significant experience in relation to aid measures aimed at promoting ETC projects. It is therefore appropriate to enable the Commission to block-exempt financing provided in support of these projects.

2. CONSISTENCY WITH THE UNION'S OTHER POLICIES AND OBJECTIVES

This proposal is closely linked to the Multiannual Financial Framework and to the various spending programmes proposed by the Commission.

Additional national funding provided to projects supported by centrally-managed EU funds constitutes State aid under Article 107(1) TFEU. This proposal aims to facilitate the combinations of such state resources with EU financial instruments and budgetary guarantees managed centrally by the Commission to give legal certainty while ensuring that distortions of competition remain limited.

Promoting ETC projects has been an important priority for EU cohesion policy for many years, and will be facilitated further by this proposal.

3. LEGAL ASPECTS

- **Legal basis**

The legal basis of this proposal is Article 109 TFEU, which allows the Council to make any appropriate regulations, in particular to determine the conditions in which Article 108(3) TFEU applies, and the categories of aid exempted from that procedure. The Council must decide by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

- **Subsidiarity and proportionality**

The proposal falls under the exclusive competence of the Union. The subsidiarity principle therefore does not apply.

The proposal does not go beyond what is necessary to achieve its objective, and therefore complies with the proportionality principle.

- **Choice of instruments**

Proposed instrument: regulation.

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5 OJ C 209, 23.7.2013, p. 1.

A regulation is the only appropriate legal instrument for amending Regulation (EU) 2015/1588.

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the Union budget.

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(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 109 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament[6],

Whereas:

(1) Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid[7] empowers the Commission to declare by means of regulations that certain specified categories of aid are compatible with the internal market and are exempted from the notification requirement of Article 108(3) of the Treaty.

(2) Centrally-managed EU funds, meaning funds under direct or indirect Union management (to the exclusion of funds under shared management with Member States), increasingly support activities in the common EU interest through financial instruments or budgetary guarantees, and thereby provide a particularly valuable contribution to growth and cohesion. The Commission should be enabled to declare that, under certain conditions, aid granted by Member States, which is channelled through or supported by such centrally-managed financial instruments or budgetary guarantees, is compatible with the internal market and not subject to the notification requirement. In the Commission's experience, such aid does not give rise to any significant distortions of competition, as it is aligned with the conditions applicable to the relevant financial instruments or budgetary guarantees, as implemented by Union bodies, and clear compatibility conditions can be defined.

(3) The promotion of European Territorial Cooperation is an important priority of EU cohesion policy. The Commission should be enabled to declare that, under certain conditions, aid for European Territorial Cooperation projects is compatible with the internal market and not subject to the notification requirement. In the Commission's

6 OJ C, p. .
7 OJ L 248, 24.9.2015, p. 1.

experience, such aid only has limited effects on competition and trade between Member States and clear compatibility conditions can be defined.

(4) Therefore, the scope of Council Regulation (EU) 2015/1588 should be extended to include such categories of aid.

(5) Council Regulation (EU) 2015/1588 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

In point (a) of Article l(1) of Regulation (EU) 2015/1588, the following subpoints are added:

‘(xv) financing channelled through or supported by EU centrally-managed financial instruments or budgetary guarantees, where the aid consists in the form of additional funding provided through State resources;

(xvi) projects supported by EU European Territorial Cooperation programmes’.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council
The President