

Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures

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Abstract

The Commission's proposal for a regulation on third country subsidies *inter alia* provides for *ex officio* supervision by the European Commission, comparable to its supervision in the field of state aid. Nevertheless, there are significant divergences. This article compares the instruments with regard to *ex officio* proceedings and analyzes similarities and differences in the procedures and investigative powers, most importantly that the addressee of a decision under the new regulation is an undertaking, not a Member State, and that the decisive facts for assessing whether a benefit to an undertaking was granted have taken place in a foreign country.

Keywords: Third Country Subsidies Regulation, State Aid, *ex officio* Procedure, Discretion of the Commission

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A. Introduction

The proposed Third Country Subsidies Regulation¹ (hereinafter: Proposed Regulation) covers not only the specifically addressed situations of merger and public procurement, but any type of economic activity in the EU.² Whereas Chapters 3 and 4 of the Proposed Regulation contain the specific rules in the two specific contexts, Chapter 2 contains the provisions that deal, with a general purview, with the European Commission's *ex officio* control over third country subsidies (Art. 7 – Art. 16 Proposed Regulation).

The object of my contribution is a comparison of the general procedures under the Proposed Regulation to the state aid procedures. Therefore, one first has to identify which state aid procedures are suitable for a comparison.

State aid procedures distinguish between existing state aid and new state aid, and the applicable review is different, as in the case of new state aid, preventive, *ex ante* control operates whereas for existing aid, review by the European Commission can be done only *ex post*, as the state aid already pre-existed.³ Existing state aid is defined as aid which existed prior to the entry into force of the EU state aid rules in a MS, and still apply.⁴ As the third country subsidies regulation is new law, it might appear more suitable to compare it with the rules on existing state aid.

In the case of new state aid, the procedure usually starts with a notification to the Commission. Such a notification requirement would not be useful for third country subsidies as third countries cannot be obliged to notify any planned subsidies to the Commission. If new state aid is not duly notified, state aid is then termed unlawful state aid and subject to investigation by the Commission as well: the Commission may on its own initiative examine any information; it may in particular examine complaints (Art. 12, Art. 14 Procedural Regulation).⁵ Hence, in procedural terms, procedures for existing state aid may appear to be best suited for a comparison with third country subsidies review, as a notification obligation is not feasible.⁶

The review of existing state aid by the Commission also is subject to an *ex officio* procedure by the Commission (in conformity with Art. 108 (1) TFEU) and requires

1 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, Commission (2021) 223 final.

2 See Art. 1 Proposed Regulation.

3 *Micheau*, in: Hofmann/Rowe/Türk (eds.), p. 463.

4 See Art. 1 b) i) Regulation (EU) No. 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248 of 24/9/2015, p. 9 ff. (hereinafter: Procedural Regulation) for the definition of existing state aid.

5 The handling of complaints has been subject of reform to limit the rights of complainants, see Art. 24 (2) Procedural Regulation and the related provisions of the Implementing Regulation (Implementing Regulation (EU) No. 2015/2282 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets, OJ L 325 of 10/12/2015, p. 1 ff.); see also *Micheau*, in: Hofmann/Rowe/Türk (eds.), p. 461.

6 Chapter 3 and 4 of the Proposed Regulation dealing with merger and procurement situations, provide for a notification requirement, but this obliges the undertaking concerned, which is active on the EU internal market and hence subject to EU jurisdiction.

the provision of “all necessary information” by the MS (Art. 21 Procedural Regulation). The Commission then assesses whether the existing aid is compatible with the internal market. If in the Commission’s preliminary view the subsidy is not in conformity with Art. 107 TFEU, it gives the MS the opportunity to submit comments (Art. 21 (2) Procedural Regulation). If the Commission then, in its preliminary examination, still has doubts about the subsidy’s conformity with the internal market, the Commission will then open a formal investigation (Art. 23 (2) i.c.w. Art. 4 (4) Procedural Regulation). Thus, in case of both unlawful aid and existing aid, the Commission’s review starts *ex officio/proprio motu*, and follows a two-step procedure. Hence, it appears that the procedures for review of unlawful or existing aid are, *in particular*, most suitable for a comparison between state aid and the Commission’s *ex officio* review over third country subsidization.

B. Commission Procedure under Chapter 2 of the Third Country Subsidies Regulation

I. Broad Leeway in initiating a Review Procedure *ex officio*, subject to General Administrative Principles

The *ex officio* review is a task ascribed to the Commission by Art. 7 Proposed Regulation, giving the Commission the mandate to examine information. The Commission may do so, as the text says, which implies a leeway for the Commission to initiate proceedings.⁷ The Commission appears to enjoy broad discretion in this respect,⁸ which is in line with its generally quite broad room for manoeuvre under the Proposed Regulation. There are no complaints procedures or procedural rights for complainants provided for in the regulation, which is different to state aids.

The broad discretion the Commission has under the third country subsidies’ review is partially different to the EU state aid procedure, because in case of notification of new state aid or in case of existing state aid, the Commission does not have a leeway as to whether it acts or not. It has to start at least a preliminary review. It only has a certain discretion about how to act in the end. In case of complaints (Art. 24 (2) Procedural Regulation), the Commission has to examine the complaint “without undue delay” (Art. 12 Procedural Regulation). Besides, the CJEU grants the Commission leeway to consider its workload and its priorities for investigations in deciding about prioritizing in dealing with the contested measure.⁹ In case of unlawful aid, the Commission enjoys comparatively broad latitude in how it handles information about alleged state aid, how intensively it investigates suspicions, whether it obtains further information or even enters into a preliminary state aid in-

⁷ The Commission allegedly expects about 30 to 45 investigations per year, see *Luja*, EStAL 2021/20, p. 194.

⁸ *Luja*, EStAL 2021/20, p. 194.

⁹ See GC, case T-475/04, *Bouygues and Bouygues Télécom v. Commission*, ECLI:EU:T:2007:196, para. 159.

vestigation. Compared to these requirements in state aid control, the discretion in *ex officio* intervention under the third country subsidies regulation is rather unlimited.

But also here, the Commission as an administrative authority is committed to the general principle of efficient and impartial administration (see Art. 298 TFEU, Art. 41 (1) FRC).¹⁰ Under the principle of inquisitorial/*ex officio* investigation, the Commission has to carefully and impartially investigate, to apply due diligence in the determination of the facts and the subsequent exercise of discretion, and to include the information necessary for its decision.

Accordingly, the burden of investigation and of proof for incriminating measures lies in principle with the Commission.¹¹ This does not exclude the possibility that the lack of cooperation by a party may lead to a decision based on the available information,¹² as foreseen in Art. 14 Proposed Regulation. The Commission can take decisions pursuant to Art. 8 or 9 on the basis of facts available if an undertaking or a third country impedes the review or investigation process. Art. 14 (4) explicitly clarifies that a decision based on the facts available may be less favourable to the undertaking concerned. Art. 14 (3) allows for a further facility for the Commission: If a company fails to provide the information necessary to establish the existence of a benefit from a subsidy, the Commission may presume the benefit, so that in effect the burden of proof is reversed.¹³ These provisions are more explicit and disadvantageous for the undertaking than under state aid law.

II. Two-Step Procedure

The Investigation Procedure is basically divided into two parts, as in the case of state aids: A preliminary review (Art. 8 Proposed Regulation) and an “in-depth investigation” (Art. 9 (1) Proposed Regulation). In the former, the Commission assesses, on a preliminary basis, whether the financial contribution constitutes a foreign subsidy and distorts the internal market, which is quite comparable to the Commission’s assessment with regard to state aids. In the latter, the Commission assesses more deeply the foreign subsidy with regard to its distortive effects on the internal market (in state aids, the “formal investigation procedure” serves the aim of clarifying doubts that still exist after a preliminary review).

10 CJEU, case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, ECLI:EU:C:1991:438, para. 14; case C-405/07 P, *Netherlands v. Commission*, ECLI:EU:C:2008:613, para. 56; GC, case T-333/10, *ATC and Others v. Commission*, ECLI:EU:T:2013:451, para. 84. See *Craig*, pp. 367–369; *Nehl*, p. 323. For the individual rights context of rights of defence insofar, see *Fehling*, in: Terhechte (ed.), § 10 mn. 28.

11 For a closer look at the burden of official investigation and burden of proof in EU anti-trust proceedings, see *Weiß*, in: Terhechte (ed.), § 18 mn. 13.

12 As is the case in Antidumping law, see Art. 18 (1) Regulation (EU) No. 2016/1036 on protection against dumped imports from countries not members of the European Union, OJ L 176 of 30/6/2016, p. 21 ff., or in State Aid law, see Art. 15 (1) s. 2 Procedural Regulation.

13 This does not apply if the third country itself is uncooperative, *Luja*, EStAL 2021/20, p. 195.

The intermediate step between the preliminary examination and the formal examination consists in both cases of a Commission decision initiating the deeper investigation. Under EU state aid control, the decisions are addressed to the MS only; the beneficiary is not a formal addressee of the substantive decision.

Under third country subsidies' review, the decisions are addressed to the undertaking concerned.¹⁴ So, the relevant counterpart of a third country subsidies' review is the undertaking receiving a foreign subsidy,¹⁵ which is different from EU state aid control. The addressee definitely cannot be the third country granting the subsidy as the Commission has no powers in respect of them, but "the EU has jurisdiction over companies active on the EU internal market."¹⁶ Thus, the Commission can impose redressive measures (as well as investigative ones).

The aforementioned two procedural steps differ in their procedural design and in the decisions that the Commission can take at the end of each step.

Compared to state aids procedures, there appear to be two main differences. First, in the preliminary review under state aids procedures, the Commission may only request information from the Member State concerned. Other Member States or undertakings can only be asked to provide information once the formal investigation has been opened, Art. 12 (2) Procedural Regulation. By contrast, the third country subsidies' review is more flexible as it allows necessary information requests to be made earlier. Secondly, the decision-making powers of the Commission in state aid law are quite the same at the end of each procedural step (with the exception of a "negative decision"). After the preliminary phase (Art. 15 (1) s. 1 Procedural Regulation), the Commission may adopt a decision indicating that there is no state aid, or that it does not raise objections because the measure is compatible with the internal market, besides taking the decision to open a formal investigation. After the formal investigation (Art. 15 (1) s. 2 Procedural Regulation), the Commission can again decide that there is no aid, or that it is compatible with the internal market (maybe subject to certain conditions and constraints), or – and this is new, as such a decision cannot be taken after preliminary review – that the measure must not be adopted (see Art. 9 (2) to (5) Procedural Regulation). The latter has to be combined with a decision to recover the unlawful aid (Art. 16 Procedural Regulation). By contrast, the Commission's decision-making powers at the end of the in-depth review of third country subsidies are much more differentiated.

14 See Art. 37 (1) Proposed Regulation.

15 However, the third country is also given the opportunity then to express its views, Art. 8 (2) c) Proposed Regulation. This may raise the question as to whether also a third country may have legal standing (due to this procedural privilege) to challenge the Commission's decision against an undertaking before the EU Courts under Art. 263 TFEU, even though the country is not the addressee of the decision, see *Luja*, EStAL 2021/20, p. 195.

16 *European Commission*, Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, SWD(2021) 99 final, p. 49.

III. Decision-Making Powers under the Proposed Regulation

The Commission enjoys a rather broad decision-making power at the end of the in-depth investigation: the Commission may, besides the decision not to raise objections, either adopt redressive measures or accept commitments, which may take very diverse shapes (Art. 9 (2) – (4) Proposed Regulation) and require mainly behavioural or structural measures: According to Art. 6 (3), (5) of the Proposed Regulation, commitments or redressive measures may oblige an undertaking to offer fair and non-discriminatory access to infrastructures, reduce its market presence, license assets acquired under FRAND conditions, repay the foreign subsidy inclusive of interests, make publicly available certain R+D results, refrain from certain investments or divest certain assets, or to undo a merger. In addition, the Commission can impose reporting and transparency requirements (Art. 6 (4) Proposed Regulation). Such decisions cannot be taken after the preliminary investigation.

Thus, in comparison to state aid, where the Commission may either adopt a positive or a negative decision about the state aid measure, the Commission has quite a broad leeway when it comes to the content of a decision in third country subsidies review.

This difference in decision-making power can easily be explained by the different subjects of the proceedings. While EU state aid law is concerned with approving or prohibiting national aid, third-country subsidy review is concerned with offsetting their adverse effect on competition in the internal market. The shape of the measure depends on the type of subsidy measure and its effects on the internal market. Unlike under EU state aid law, the Commission cannot prohibit a third country from granting aid, but can only take compensatory measures. And these measures must be precisely tailored to the distortion of competition caused by the subsidy, which is why the Commission needs a wide margin of manoeuvre in its decision-making. Hence, redressive measures under the Proposed Regulation have to prefer “behavioural or structural remedies” as they might be more effective (reimbursement of a third country subsidy cannot be monitored),¹⁷ whereas under State Aid law, behavioural or structural remedies are only adopted comparatively rarely.¹⁸

IV. Interim Measures

Both state aid law and third country subsidies review provide for interim measures which the Commission can adopt in order to avoid rendering its final decision irrelevant.

17 See also *Luja*, EStAL 2021/20, p. 191.

18 *European Commission*, Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, SWD(2021) 99 final, p. 48, refers to remedial measures under the Rescue and Restructuring Guidelines, the financial sectoral guidelines or the Covid19 Temporary Framework.

Under the proposed third country subsidies' review, the Commission may take interim measures if "there are indications that a financial contribution constitutes a foreign subsidy and distorts the internal market" and if there is a serious risk of substantial and irreparable damage to competition on the internal market (Art. 10 Proposed Regulation). Whereas the latter requirement is almost the same as in state aids, the threshold for interim measures under the former requirement is lower in third country subsidies review: There is no need for "no doubt about aid character", but "indications" for existence of a foreign subsidy and distortions of competition are sufficient. Even more, whereas under state aid, the Commission can only decide upon a suspension or a provisional recovery, in third country subsidies' review, the Commission enjoys a very broad leeway, and might finally adopt a measure which may provisionally have similar effects to the final redressive measures. The type of measures the Commission may adopt, however, is not restricted at all.¹⁹

V. Procedural and Investigative Rights

In the third country subsidies' review, the Commission has more intensive investigative rights (information requests, inspections) vis-à-vis undertakings than under state aids rules.

The difference in investigation rights may be explained by the fact that the subsidies review is directed against undertakings and not against third countries, against which the Commission does not have effective competences. Furthermore, the assessment of detrimental effects of third country subsidies requires the availability of market information, in particular with a view to the internal market, which is in the hands of undertakings economically active in the internal market. By contrast, under EU state aid law, as the distortion of EU competition is deemed to flow from the beneficial effect of a specific benefit, there is usually no need for the Commission to specifically assess or evaluate the distortive effect of a benefit, i.e. establishing the specificity of an advantage is the cornerstone of the EU's legal assessment (where the Commission actually does not enjoy leeway as it is a concept legally defined by the TFEU)²⁰ which to establish can usually be done based on information provided by the granting MS.

VI. Rights of Defence

As the third country subsidies' review is addressed to undertakings concerned, the Proposed Regulation provides basic rules for respecting the rights of defence, in particular the right to be heard. This right, however, only applies to decisions at the end of the in-depth investigation or a decision imposing fines. Consequently, the right to be heard is not granted before the Commission decides to open an in-depth

19 See the critique by *Luja*, EStAL 2021/20, p. 196.

20 *Micheau*, in: Hofmann/Rowe/Türk (eds.), p. 464 f.

investigation, nor in case of a Commission decision under Art. 16 Proposed Regulation to revoke a decision.

Under third country subsidies rules, the right to be heard appears more comprehensively respected than in state aid procedures.²¹

C. Conclusion

The procedures under the Proposed Regulation and those under State Aid rules share many similarities.²² But there are considerable differences as well. The most important one, which engenders several consequences, is the circumstance that the addressee of a decision under the Proposed Regulation is an undertaking, not a Member State, and that the decisive facts for assessing whether a benefit to an undertaking was granted have taken place in a foreign country. The more robust investigative powers and the broader decision-making competences of the Commission are witness to the fact that establishing a case of third country subsidization, assessing their distortive effects on the internal market competition, and addressing these effects by effective countermeasures is an endeavor which requires a more powerful executive that enjoys flexible powers and competences for enabling effective review and counteraction. Another difference is the great procedural leeway the Commission enjoys in the third country subsidies' review.

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21 For the lacunae in the field of state aid, see *Micheau*, in: Hofmann/Rowe/Türk (eds.), p. 460; *Laprévote*, *EStAL* 2014/13, p. 426; *Nehl*, *EStAL* 2006/5, p. 57. The CJEU has taken advantage of the fact that effective rights of defence do not exist until the opening of the formal investigation under State aid rules to grant the companies affected by the outcome of a State aid control procedure a right of action against the decisions at the end of the preliminary phase, see CJEU, case C-322/09 P, *NDSHT v. Commission*, ECLI:EU:C:2010:701, paras. 52, 56–60.

22 *Luja*, *EStAL* 2021/20, p. 194.

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