# NEWSLETTER NO. 45

## EUROPEAN UNION GUIDELINES ON STATE AID FOR RESCUING AND RESTRUCTURING NON-FINANCIAL UNDERTAKINGS IN DIFFICULTY

### 1. Introduction: the New Guidelines in the Context of the State Aid Modernization Programme

The European Commission (the "**Commission**") has recently completed the review process of its guidelines on how assessing Member States' support measures to rescue and restructuring companies in difficulties[1]. The review of the rescue and restructuring guidelines must be considered as a key element of the Commission's State aid modernization ("**SAM**") programme, which is part of a more comprehensive coordination of national economic policies to achieve the common objective of continued, inclusive and sustainable growth of Member States and to improve the quality of their public spending.

At this purpose, on 8 May 2012 the Commission has adopted the Communication on SAM[2], setting out an ambitious State aid reform programme aimed at the three main goals, as follows.

First, the Commission proposal is determined to identify common principles for assessing the compatibility of aid with the internal market. State aid control shall support sustainable growth and contribute to improving the quality of public spending by discouraging aid that does not bring real added-value and distorts competition. To this purpose, the Commission has revised and streamlined some existing State aid guidelines, including guidelines for the rescue and restructuring of firms, to make such texts consistent with those common principles[3].

Second, the Commission wants to strength its enforcement activities on the most significant cases for the internal market, in order to obtain a deeper *ex ante* scrutiny of large and potentially distortive aid as well as enquiries by sector across Member States.

Third, an additional purpose of the Commission consists of streamlining rules and allowing for a faster decision-making process in the field of State aid. In particular, regulations have to be revised; the notion of State aid needs to be clarified and the

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[1] See the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.07.2014, p. 1 ff.. More in general, with reference to the development of the State aid rules, see SANTA MARIA, *European Economic Law*, 3rd Ed., Kluwer Law International, 2014, p. 470 ff.

[2] Communication from the Commission – EU State Aid Modernization, COM (2012) 209 final.

[3] See, in particular, Regional Aid Guidelines, adopted on 19 June 2013; Research & Development & Innovation Framework, adopted on 21 May 2014; Draft Commission Guidelines for State aid in the agriculture and forestry sector and in rural areas 2014 to 2020; New draft Block Exemption Regulation for the agriculture and forestry sector and for rural areas; Environmental and Energy aid Guidelines, adopted on 9 April 2014; Communication from the Commission concerning the Criteria for the analysis of the compatibility with the internal Market of State aid to promote the execution of important projects of Common European interests, published on 20 June 2014; Risk Finance Guidelines, adopted on 15 January 2014; Broadband Guidelines, adopted on 18 December 2012; Aviation Guidelines, adopted on 20 February 2014.

Procedural Regulation has to be modernized with regard to complaint-handling and introduce market information tools and sector inquiries in State aid.

## 2. Genesis of Rescue and Restructuring State Aid Guidelines

On 9 July 2014, the Commission adopted the **new guidelines on State aid for rescuing and restructuring firms in difficulty** (the "**New Guidelines**"), after a consultation on draft guidelines launched on 5 November 2013. The New Guidelines entered into force on 1 August 2014 and will apply until 31 December 2020, replacing a set of rules on rescue and restructuring of companies that have been in force since the '90.

In fact, the Commission had adopted its **original guidelines** on the subject matter in 1994[4]. In 1999, the Commission issued an amended version of the guidelines[5]. Then, in 2004, **a further version of the guidelines** followed[6].

The revision of the 2004 guidelines, which were originally due to expire in 2009, was postponed a number of times[7] as a result of the financial crisis, during which the Commission applied a special rescue and restructuring regime for the financial sector[8]. Originally, the idea consisted in adopting new rescue and restructuring rules applicable to both the financial sector and the real economy. In the end, the New Guidelines only apply to non-financial firms in difficulty.

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[4] Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 368, 23.12.1994, p. 12. On this matter see BISCARETTI DI RUFFIA, *State Aid and Insolvency Proceedings*, in SANTA MARIA (Ed.), *Competition and State Aid. An Analysis of the EC Practice*, Kluwer Law International, 2007, p. 123 ff.

[5] Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2.

[6] Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2.

[7] First, until 9 October 2012, (see Commission Communication concerning the prolongation of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 156, 9.07.2009, p. 3) and subsequently, until their replacement by new ones (see IP/12/1042 and Commission communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1 October 2004, OJ C 296, 2.10.2012, p. 3), in line with the reform programme and to avoid pre-empting the discussions on SAM (see IP/12/458 and the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU SAM of 8 May 2012, COM(2012) 209 final).

[8] The revision also takes into account the "Europe 2020 strategy" adopted by the Commission (Communication from the Commission: EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final) and the fact that the negative effects of State aid might interfere with the need to boost productivity and growth, preserve equal opportunities for undertakings and combat national protectionism.

However, the New Guidelines drawn on all of that work, as well as on the basis of the Commission's experience in applying the existing rules and in assessing rescue and restructuring aid for banks during the crisis. As a consequence, the Commission has considerably tightened the conditions under which rescue and restructuring aid may be approvable under the New Guidelines.

## 3. Basic Principles of the New Guidelines

The New Guidelines define the criteria for Member States, in line with EU State aid rules, to grant public funding to companies in financial difficulty.

Specifically, in the New Guidelines the Commission sets out the conditions under which State aid for rescuing and restructuring non-financial undertakings in difficulty may be considered to be compatible with the internal market, on the basis of Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU)[9].

First of all, it must be pointed out that in the New Guidelines some key principles of the 2004 guidelines remained unchanged. In particular, the New Guidelines confirm the so called "**rescue aid**" to companies undergoing financial difficulties, to allow them to stay in business for long enough to prepare a restructuring plan. Rescue aid may be granted *temporarily* for a maximum duration of six months[10].

Beyond such period either the aid must be reimbursed or a detailed restructuring plan must be notified to the Commission for the aid to be approved as "**restructuring aid**". Restructuring aid aims at supporting firm's restructuring and it can be granted for a longer period, but only once over a period of ten years, to prevent companies that are not viable being kept artificially alive through public support. The aforementioned plan must ensure that:

(i) The long-term viability of a company is restored without further State support;

(ii) The distortions of competition induced by the State support are addressed by specific and adequate measures[11] to minimize them; and

(iii) The company contributes to the costs of restructuring, bearing a sufficient proportion of the costs of its restructuring.

[9] For a criticism of the extensive application of Article 107 TFEU by the Commission in respect of State aid schemes, see SANTA MARIA, *European*, cit., p. 470 ff.
[10] See BISCARETTI DI RUFFIA, *State Aid*, cit., p. 124.
[11] Such as asset sale or capacity reductions.

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### 4. Key Novelties Introduced in the New Guidelines

While the guidelines of 2004 focused mainly on ensuring that when the aid was granted measures were taken to minimize competition distortions, the New Guidelines include "**filters**" designed to check that aid is truly in the public interest to avoid waste of taxpayers' money.

First, Member States must demonstrate to pursue an objective of *common interest*, so that the aid is needed to prevent hardship or address market failures[12]. Second, Member States have to present a comparison with a credible alternative scenario not involving State aid[13].

In addition, the New Guidelines introduce a new concept of **temporary restructuring support for small and medium enterprises (SMEs)**[14], specifically designed to simplify the granting of State funding for restructuring while reducing distortions of competition by favouring measures that are less distortive, such as loans and guarantees, over structural aid, such as direct grants or capital injections.

Differently, under 2004 guidelines all forms of restructuring aid were treated alike[15] and, as said above, rescue aid could be granted temporarily for a period of up to six months, giving the company the necessary time to prepare a restructuring plan. Beyond this period, the aid would have either be reimbursed or a restructuring plan notified to the Commission for the aid to be approved as restructuring aid.

Now, SMEs that need such support can obtain it on the basis of a simplified restructuring plan for at most eighteen months. Up to six months of that can be in the form of rescue aid, which simply needs to meet certain basic conditions[16]. After the end of the six-month period, the recipient of such support has to submit a simplified restructuring plan to continue to receive temporary restructuring support. In the simplified plan it must be only explained how the aid is intended to be used to achieve a long-term viability, but not also own contribution and measures to limit distortions of competition[17].

Among the useful concepts and clarifications contained in the New Guidelines, there is also that concerning "**undertakings in difficulty**". Such definition has been significantly simplified in comparison with the 2004 guidelines, by removing any subjective elements

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[12] The New Guidelines provide for a non-exhaustive list of situations in which aid would be justified under this provision: for example in areas of high unemployment where the granting of restructuring aid will reduce the scale of job losses; or where the failure of the firm would lead to irremediable loss of technical know-how.

[13] This requirement does not apply to rescue aid or temporary restructuring support.

[14] For a definition of small and medium-sized enterprises (SMEs) and an overview on State aid to SMEs, see LANDI, *Exemptions from the General Incompatibility Principle under Article 87(2) and (3) of the EC Treaty*, in SANTA MARIA (Ed.), *Competition and State Aid*, cit., p. 63-68.

[15] No differences were provided among loans, guarantees, debt waivers, capital injections and even outright cash grants.

[16] For example, conditions concerning the minimum interest rate.

[17] This information is required to be contained in the detailed restructuring plan.

and replacing them with objective criteria, linked to financial ratios to assess the health of a company[18].

Finally, to ensure that aid is used to maintain viable economic activity and jobs and not to bail out shareholders, the Commission has refined the concept of "**burden sharing**"[19]. The New Guidelines require that the stakeholders[20] of companies, which receive aid, contribute to the costs of restructuring. Specifically, the company investors will be primarily responsible for covering incurred losses before any State aid is granted and the State[21] will receive a fair share on any future gains in case the restructuring plan succeeds. With respect to the nature of the contribution, now the New Guidelines also require that the company's own contribution be similar to that of the State aid[22]. As a result, taxpayers' costs are reduced and the company may obtain a better outcome by ensuring that private investors are committed to its future.

## 5. Practical Implications and Conclusions

The main practical implication of the New Guidelines consists of making it more difficult for companies to be eligible for rescuing and restructuring aid and to comply with the compatibility criteria for the Commission approval.

However, in exceptional cases, to simplify the process of granting small amounts of aid to companies in difficulty, the New Guidelines allow Member States to set up **aid schemes**. Once a scheme has been approved by the Commission, grants of aid to individual companies do not need to be notified for prior authorization, provided they meet the conditions of the scheme. The New Guidelines make clear that schemes are the best way to grant aid to SMEs.

With respect to the application range, the New Guidelines apply to all non-financial firms, except to those operating in the steel or coal sector and without prejudice to specific rules concerning undertakings in difficulty in particular sectors[23]. The Commission will also apply the New Guidelines to the fisheries and aquaculture sector

[18] For instance, whether the company burden of debt is sustainable and whether it generates enough profits to cover its interest payments.
[19] This concept was developed during the financial crisis, when burden sharing became necessary to protect the interests of taxpayers and consumers where large amounts of public money were made available to banks, and is now extended to apply to non-financial firms.
[20] Including subordinated creditors.
[21] Hence taxpayers.
[22] For example, if the State grants capital, the company must also contribute through an equity injection.
[23] See Community Guidelines on State aid for railway undertakings, OJ C 184, 22.07.2008, p. 13.

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as well as to the agriculture sector, including the primary agricultural production sector[24].

The Commission assesses aids for companies in difficulty that are notified from 1 August 2014 under the New Guidelines. All notifications made before such term are assessed under the 2004 rules, even if the Commission reaches a decision after the date of entry into force of the New Guidelines.

Member States have now a six-month time limit to bring any existing rescue and restructuring aid schemes in line with the New Guidelines.

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[24] "Primary agricultural production" means production of products of the soil and of stock farming, without performing any further operation changing the nature of such products.