EU Competition Policy Via Controlling State Aid

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Abstract

The European Commission has controlled State aid that would distort competition and affect trade between Member States. The State aid control is, in fact, one of the most important provisions of EU law, aiming at ensuring the process of competition and the integrated internal market. However, its State aid control does not seem very successful, since the current data indicate that the number of unlawful State aid is still significant, although the overall amount of granted aid has not increased considerably despite the current financial crisis in the EU. In particular, it does not give an impression that there are proper guidelines of the State aid exemption to a certain sector, such as R&D. This article discusses about its control of State aid for R&D that can cause incentive loss of the R&D investments due to its comparative advantage. Even though the Commission stresses that State aid for R&D should serve as an incentive for firms to commence R&D activities, it is still difficult to decide which R&D aid can encourage them to carry out R&D efforts effectively. When the Commission lacks the legal techniques to implement an adequate balance test of positive and negative effects of State aid, its State aid policy will fail to contribute to achieving social and pro-competitive goals of the EU.

Key Words: EU Competition Law, State Aid, Treaty on the Functioning of the European Union, Research and Development, Block Exemption Regulation

I. Introduction

The EU competition authority’s policy of the Member State aid (or subsidization)\(^1\) control is unique,\(^2\) compared with the traditional ways of other competition authorities around the world, since they do not have such a monitoring regulation. In fact, other competition regimes do not have concerns of market integration that the European Commission (hereinafter, the Commission) and courts have considered one of the most important objectives of EU competition law.\(^3\) Any State aid that distorts competition and affects trade in the internal
market is prohibited under the Treaty on the Functioning of the European Union (the TFEU).4

In addition, the State aid control is somewhat different from the mainstream of competition law in the EU, i.e., enforcements of cartels, abuse of market dominance, and merger of private parties.5 The primary aim of the State aid control is to guarantee that each Member State’s market intervention through its aid on private undertakings6 does not distort competition. In particular, the principle rationale of the aid control is based on not only microeconomics but also on macroeconomics, and State aid policy is related to the achievement of social and public objectives.7 Therefore, the legal provision of the State aid control is an important instrument for a scrutiny of balance or trade-off between pro-competition and public interest.8

The State aid control ensures the function of the internal market, thereby preventing the possibility for less efficient undertakings from receiving benefits of a competitive advantage at the expense of more efficient ones.9 State aid is mostly unfair, and it triggers and generates an aid race among Member States in the internal market,10 since each Member State is willing to maintain and raise her national champions. Furthermore, State aid may reduce financial burdens of certain undertakings and impose burdens on taxpayers.11 Due to the overall problems of State aid, the Lisbon European Council of 2000 called on the Commissions, the Council, and Member States to give efforts to reduce the general level of State aid.12

In particular, considering the negative effects of State aid, the Commission provides general conditions and criteria of the State aid control, admitting that government’s interventions are necessary in order to make market economy perform well in a certain circumstance. It arranges for a number of exemptions to the State aid ban, although it does not ignore the harmful outcomes of aid. Therefore, the discretionary power of offering exemptions to the prohibition on State aid rests exclusively with the Commission,13 by means of notification system, except where the undertaking satisfies criteria of block (group) exemption regulation.14 The conditions for exemption cover most of the social issues,15 regarding not only economic activities but also ensuring the internal market function.16 However, examining whether a State aid should be granted through the exemption provision is not an easy task in legal and political perspectives. State aid has, thus, been considered as a controversial and politically sensitive subject in the EU.17