



# PRIORITIES FOR THE FUTURE OF EU STATE AID FRAMEWORK



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# Priorities for the future of EU State Aid Framework

## INTRODUCTION

EU State aid control has played a pivotal role in the EU for decades. It has been one of the **key tools to preserve the integrity of the internal market** whilst at the same time it also served to support other policy objectives clearly defined in the EU treaties. The crises of the past years (e.g. wars, pandemic, inflation) and the unprecedented challenges around energy, climate change mitigation, new global competitive scenario, aging population, economic and digital transitions, have placed State aid control front and center of EU debates.

This led to unprecedented steps by the EU with the adoption of **comprehensive temporary crisis frameworks** which must remain exceptional, limited, and temporary because they imply a relaxation of the ordinary system in terms of scope and procedure. It also led to the European Commission's latest efforts to develop a renewed EU industrial policy that will impact the way European and national decision makers are considering necessary investments to drive growth, boost competitiveness and provide quality jobs and prosperity to citizens.

This renewed industrial policy must provide for an adequate regulatory and investment environment. It must be flanked with other necessary measures in different areas, including red tape reduction and adjusting tax systems at Member State level, also to facilitate doing business in Europe. As an integral part of this industrial policy, **State aid needs to be well targeted and efficient, transparent, proportionate, limited in time and carefully monitored** to avoid distortions of competition and preserve a level playing field in the single market. These are fundamental principles that will help prevent disruptions to the internal market whilst at the same time help, when justified, accompany companies of all sizes in their transition and enable them to thrive.

BusinessEurope would like to contribute to this debate by setting out its priorities for the State aid rules for the next legislature in the context of a renewed industrial policy but also in relation to the necessary improvements to ordinary State aid procedures.



## FUNDAMENTAL STATE AID PRINCIPLES FOR BUSINESS

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- ✂ Efficient State aid can reliably **support EU companies in their well-defined transition efforts**. Supporting the competitiveness of European firms through active European industrial policies can be combined with preserving competition and the level playing field in the Single market.
- ✂ Effective State aid rules are key to **preserving fair competition and ensure the well-functioning of the single market**.
- ✂ State aid must be well **targeted, transparent, proportionate**, limited in time and carefully monitored.
- ✂ The EU must strive for more **streamlined, improved and faster State aid procedures**.

## Chapter 1 - How the State aid rules can fulfill their role ensuring a level playing field whilst contributing to the success of the twin transition

- ✂ **Facilitate public support to foster the twin transition and evaluate the generic temporary aid schemes.**

A balance has to be struck between the need to invest in European businesses and the requirements of State aid law, according to which State aid should be well targeted, limited in time and carefully monitored to avoid distortions of competition and preserve a level playing field in the single market to avoid fragmentation and a subsidy race.

**Public support is needed to accompany, when justified, companies in their transition**, help building the necessary infrastructure, support innovation and scale up new technology. The State aid rules already give the Member States considerable opportunity to support projects that contribute to the green and digital transition, but the relevant rules and frameworks can be improved to reduce administrative burdens, contribute to the long-term planning security of companies, and encourage more investment in sustainable projects.

The rules and the use of the **Temporary Crisis and Transition Framework should be thoroughly evaluated** in order to decide if it would be appropriate to let it phase out in 2025, as currently foreseen, to extend it or **to incorporate some of its elements that have proved to be beneficial** for the green transition into the regular State aid rules.

EU State aid rules should **focus on ensuring the efficiency in the use of State aid**, such as aid that effectively contributes to the green and digital transition, while fundamentally safeguarding a market driven European economy.



Having done their utmost during the Covid pandemic, European companies have faced the headwinds of the asymmetric shock of the consequences of the war in Ukraine and are still struggling with the higher energy costs which is hitting them harder than their American and Asian competitors. Moreover, incentives and subsidies by some of Europe's key trading partners, such as the US and China, are redirecting private investment away from Europe. With government debt in the Euro Area averaging over 90% of GDP, it will be important that the Member States **step up their efforts to undertake fiscal consolidation.**

Whilst Member States will need to prioritise public investment to support the green and digital transitions, they will also need to **step up enforcement of existing single market rules.** This includes the common State aid rules and a **comprehensive evaluation of the generic aid schemes,** introduced in response to volatile increases in price levels during the last years, to assess the need to phase out of (parts) of those crisis-related exemptions in the context of the Temporary Crisis and Transition Framework, which have weakened the level playing field in the single market.

## ✦ **Keeping subsidies proportionate and avoiding a subsidy race.**

It is important that subsidies do not over-compensate companies and that they address market failures or the other EU objectives as stipulated in Article 107 of the Treaty. **Any distortive effects of the subsidies should be limited.**

It is key to facilitate monitoring, **exchanging information and coordination among the EU and the US following the Inflation Reduction Act (IRA)** as it ultimately leads to less efficient use of public resources. This should be stepped up and, ideally, lead to modern and effective disciplines on industrial subsidies to maintain a global level playing field.

## ✦ **Drawing lessons from past experiences.**

Building on the lessons learnt from the crisis' measures in terms of procedural agility, strengthening procedural guarantees, while improving the flows of information between beneficiaries, national authorities and the European Commission to speed up decision making.



**Suggested improvements to help contribute to the green transition whilst taking account of global competition**

- ⇒ **Clearer rules, faster procedures and more efficiency.**
- ⇒ **Focus on ensuring the efficiency of State aid, such as aid that (efficiently / effectively) contributes to the green and digital transition.**
- ⇒ **Avoiding a subsidy race**
- ⇒ **Monitoring, exchanging information and coordinating among the EU and the US and other trading partners to help avoid a global subsidy race.**
- ⇒ **Evaluate the Temporary Crisis and Transition Framework to decide if it would be appropriate to let it phase out in 2025, to extend it or to incorporate some of its elements that have proved to be beneficial for the green transition into the regular State aid rules**
- ⇒ **Drawing lessons from past crisis measures in terms of procedural agility, exchange of information and safeguards**



## Chapter II - Suggestions to streamline the EU State aid framework at EU level

### 1. Clearer rules, faster procedures and more efficiency

European State aid law is often seen as too complicated and burdensome, especially in comparison to public support systems in third countries. Companies, including SMEs, should be able to understand the rules and apply for public funding without having to seek external legal advice. Therefore, rules should be simplified, where possible, bureaucracy reduced, and procedures accelerated. This applies in particular to aid measures in the research and innovation sector, where time is an important competitive factor. For State aid to become the necessary companion that enables industrial policies while preserving the Single market, its enforcement must be made **even less formalistic, administratively lighter, and more focused on substantive criteria of well-designed public intervention**.

#### ✦ **Reducing administrative burdens and speed-up decision-making**

Substantive assessment of the compatibility of an individual State aid or an aid scheme by the Commission is often subject to considerable delay. Notification processes are generally lengthy and place considerable demands on companies to produce and submit a variety of information. This creates legal uncertainty discouraging investment.

**Delivering decisions within business-relevant timelines is vital**, all the more when innovative R&D projects are concerned. More should be done to improve and streamline rules and procedures to further **reduce burdens, improve transparency and speed-up the approval process**. This would also reduce legal uncertainty and allow companies to better plan their investments. For example, the Commission could keep **running statistics on how long different types of cases take from (pre)notification to decision**. This will also increase predictability and focus efforts to further reduce delays. Ultimately, the Commission should consider introducing **strict time limits for certain or all State aid case types, comparable to those in merger control proceedings**. This would not only increase the predictability for companies but also force Member States to gather and submit the necessary information in a timely manner. The Commission should also continue evaluating the different existing rules and frameworks with a view to reducing burdens with respect to the relevant procedural requirements and eligibility criteria.

#### ✦ **Improving the handling of complaints**

In the interest of legal certainty and predictability, it is important to have **clear procedural rules** to be followed by the Commission in relation to disputes about new or existing aid and to deliver decisions within business-relevant timelines. The Commission should examine serious complaints and relevant information thoroughly. A credible and plausible



description of facts and indications that give rise to the suspicion of the granting of illegal aid should be necessary for an investigation by the Commission. Furthermore, directly affected parties, including the alleged beneficiaries, should always be included in a formal manner in the pre-evaluation process. BusinessEurope also **suggests appointing a Hearing Officer**, similar to the one existing in antitrust and merger procedures. This could further help ensuring effective procedures and safeguarding procedural rights.

## ✦ **Ensure sufficiency of resources in the European Commission.**

More active European industrial policies mean a significant increase of State aid measures that are already being notified to DG Competition, alongside new policy instruments like the Foreign Subsidies Regulation. The **Commission should have sufficient resources** to assess cases, handle complaints, and meet the other increasing requests.

## 2. Address fragmentation and encourage cross-border effects

✦ **Addressing fragmentation by using public funding schemes with a fair and transparent allocation mechanism**, for example through the European Commission and the European Investment Bank, that seek to help companies in all Member States to access funding for investment, for example based on industrial clusters. Accompany this with measures that help companies finding necessary information on funding in the internal market.

✦ The Commission could also introduce **new provisions** in some of the State aid rules to **encourage broad participation of more Member States and create spillover effects across borders in schemes**. For example, the focus could go to enhancing and strengthening **cross-border value chains and industrial clusters**, by allowing for higher aid intensities in cases with a clear spillover effect and without decreasing the existing aid intensities in other cases. This would contribute to reducing distortions of the internal market.

✦ In addition, **Member States** should consider other general policies to reduce costs for businesses, such as **reducing administrative burdens, and adjusting their tax systems to support the green and digital transition**. Such measures typically do not distort the market and can result in lasting positive effects for business.

## 3. Help IPCEIs meet their full potential

✦ The criteria regarding the amount and intensity of the eligible aid under the **IPCEI rules are vague**. It is determined by the “funding gap” in relation to the eligible costs of the project which would have prevented the project from being carried out and this is not an easy assessment.



- ✦ **The application process is also very complicated and lengthy**, and the selection process is uncertain. This discourages the development of relevant schemes, especially in fields where innovation cycles are very short, which is regrettable considering that IPCEIs can make an important contribution to sustainable economic growth and industrial competitiveness. An appraisal cap period of 4 months is essential to speed up industrial cooperation.
- ✦ From the policy point of view:
  - ❖ **more clearly defined targets** at European level,
  - ❖ **broader eligibility of projects without national limitations** at least for a percentage of the funding, by creating additional incentives for MSs of all sizes to increase the funding of those projects and / or by ensuring that MSs would be invited to add their own projects within a given and tight deadline,
  - ❖ **more transparent criteria to select the projects**,
  - ❖ **further use of competitive auctions at EU level**, amongst others.
  - ❖ **Enhance conditionality of the support to spillovers**.
- ✦ Capacity building at Member States level for the swift submission of proper assessments of funding gaps, based on business plans reflecting the investment decision making of firms, and additional resources for the Commission financial teams is also necessary to **ensure proportionality and speed of approval**.
- ✦ From the procedural side:
  - ❖ it would be advisable to **further streamlining the adoption procedures**.
  - ❖ Speeding up procedures also needs **more flexibility in the planning and notification phase**, in order to facilitate that authentic business plans for viable projects can be analysed beyond the current “ticking-the box-process”.
  - ❖ **Requests for Information** by the Commission should be **proportionate** and allow for an **adequate time-limit**.

#### **4. Improve transparency**

- ✦ It is important that **information** about available and granted State aid is **well-timed, accurate, complete and relevant** including the publication of the State aid scoreboard, which should be published while information is still relevant.
- ✦ The current separate requirements of supplying the Commission with information on State aid being granted, ensuring transparency of large aid decisions and aggregated State aid expenditures, should be coordinated to **avoid duplication and reduce administrative burdens for businesses and public authorities**. There should be updated information to resolve fragmenting information in different databases and it should be easy to use the information.
- ✦ The Commission should **evaluate the current transparency rules and** database in terms of design, data uploaded, and use, and **establish a uniform system** where legal documentation, such as all available State aid, Commission decisions, aid granted and





paid, can be accessed in one place for all aid granted and all aid schemes to improve transparency and monitoring. Publication of decisions should also be speeded up.

## Suggested improvements of EU state aid procedures

- ⇒ **Clearer rules, faster procedures and more efficiency.**
- ⇒ **Consider introducing stricter time limits for State aid cases.**
- ⇒ **Conduct periodical evaluations of the State aid rules with a view to reducing burdens.**
- ⇒ **Improve transparency and access to information on public support schemes.**
- ⇒ **Improve the handling of complaints, for example appointing hearing officers.**
- ⇒ **Address fragmentation by using public funding schemes to encourage broad participation of Member States and create spillover effects across borders in schemes, for example by focusing on value chains and industrial clusters.**
- ⇒ **Make criteria regarding amount and intensity of eligible aid under IPCEI rules more precise, for instance, by considering introducing shorter appraisal period.**
- ⇒ **Reinforce the resources of the European Commission**



## Chapter III - Suggestions to streamline the EU State aid framework at national level.

Differences at Member State level regarding issues such as the control process of illegal aid, the enforcement of decisions, and the recovery of aid, for example regarding the procedural rights of all affected parties, leads to uneven application of EU rules and the distortion of competition. A more active role for the Commission and national bodies, as set out in the suggestions below, could help resolve such differences and streamline the EU State aid framework at national level.

### ✧ **Periodic monitoring and evaluation**

The modernisation and the expanded GBER have helped to reduce administrative burdens, not only for the Commission, but also for national authorities and companies which is positive. However, a **more subjective and less uniform application of the State aid rules in the different Member States** can lead to legal uncertainty and transfers all the risk to companies as they cannot rely on good faith if the granting authority has failed to apply the rules correctly, with less coherence between Member States and the EU level. In such cases, aid risks being defined as incompatible (or illegal if the aid has not been notified and approved), with beneficiaries required to repay aid with interest or a competitor might file a complaint at a national court claiming that unlawful aid has been granted. It is therefore very important that the application of the rules is carefully monitored and periodically evaluated by the Commission.

### ✧ **Improve illegal aid recovery processes to level the playing field**

**Standards on aid recovery should not be different across Member States** as this leads to uneven application of EU rules and the distortion of competition. The Commission should also be more transparent about the recovery of unlawful aid which it has discovered in the context of a monitoring exercise. The enforcement of State aid decisions in the EU should be improved, for example by harmonising national procedural rules and remedial measures to obtain speedy injunctive relief and the effective award of damages.

**The Commission's investigatory powers could also be increased to verify compliance with a decision.** The Commission should also coordinate national review systems and ensure the availability of rapid and effective means of redress in all Member States, for example in cases where competitors consider that aid has been awarded unlawfully. The Commission could also require that the repayment of unlawful aid shall be made to a central authority even if the aid was granted by a local authority. This would help improve effective enforcement of the State aid rules and create a more level playing field. It could also be envisaged requiring Member States to set up centralised units that examine the impact of regional and/or sectorial aid schemes to professionalise control.



The State aid recovery process should also be modified to address the fact that the current process, whereby the aid is recoverable as soon as the Commission issues a decision ordering the recovery, ignores the fact that the Commission's decisions on State aid can be challenged before the Court of Justice. This leads to situations where the beneficiary could be forced to undertake drastic measures (e.g. selling off assets) to comply with a recovery obligation that could be overturned by the Court.

To avoid irreversible damage (e.g. in cases where the beneficiary has been forced to shut down operations and/or sell off assets), the Commission should in such justified cases **consider alternative possibilities for a preliminary recovery** (bank guarantee etc), prior to the conclusion of a possible appeal. Also, when a decision is annulled by the Court on formal grounds and the Commission adopts another decision, there can be many national court cases pending. The "standstill obligation" would just create uncertainty without protecting the market as the aid has already been granted. In these circumstances, **the Commission should be more pragmatic and not hide behind the national authorities**. For example, it could be envisaged that the Commission takes responsibility in case of annulment of decisions compensating companies for the time spent in national courts and the handling of recovery proceedings.

BusinessEurope also suggests **setting up a stakeholder expert group** to advise the Commission on how to improve the control and enforcement of EU State aid policy.

## ✦ **Prioritise enforcement decisions**

The Commission should **prioritise the enforcement process of negative and conditional decisions** to ensure their correct implementation and the recovery of unlawful aid whilst respecting procedural rights of affected companies. Enforcement at national level is still underdeveloped with differences between Member States for example regarding the procedural right of affected companies that fragment the internal market. Because of several legal requirements (e.g. proving causation and/or quantify losses), obtaining compensation for harmed competitors is not easy, which affects the efficiency of national courts as effective enforcers of State aid rules and creates legal uncertainty. In addition, the possibility of **seeking injunctive relief** should be made more realistic by ensuring more transparency on the aid measures that Member States are about to put in place.

## ✦ **Encourage effective private enforcement**

The control process of illegal aid is almost exclusively in the hand of national courts, again with differences between Member States that affect the level playing field and procedural right of affected companies. National courts are not always sufficiently familiar with EU State aid rules to deal adequately with questions of illegal aid and national procedural rules sometimes provide for short appeal periods that expire before a competitor becomes aware of unlawful aid. Foreign competitors may lack knowledge of the relevant legal system and competitors also often lack the incentive to bring a case before the national courts, as the costs of litigation may exceed possible benefits. They also lack



investigatory powers and may therefore be unable to establish that illegal aid was granted.

National competitors may have inhibitions to start a legal action against their own government or local authorities. **The Commission should play a greater role**, either directly by requiring the Member State concerned to stop granting the illegal aid, or indirectly through interventions before national courts. As stated above strengthening the Commission with appropriate resources is essential.

## ✧ **Encourage Member States to develop better national coordination through appropriate bodies**

**Enhancing the capacities [and competencies] of Members State to exercise State aid control** can be improved to complement the EC's competencies in this field. This will need capacity building at national level, streamlining procedures and nurturing agility and coordination which will multiply the resources and increase efficiencies of the EU State aid rules. Member States should be **encouraged to create or appoint a national body in charge of State aid coordination** to ensure appropriate monitoring, collection of data and more efficient procedures around national state aid. This would be beneficial for a more efficient, transparent and sound State aid control.

This could be complemented by initiatives that would **enhance coordination between Member States and with the Commission** through these coordination authorities/agencies by taking inspiration in the successful model of the European Competition Network.

Apart from streamlining procedures and reducing administrative burdens, the centralised approval process could also be improved by **increased involvement of national authorities or controlling bodies**. A more active role for national bodies in parts of the substantive assessment of an aid measure of scheme would divide the work and could help the Commission to gather the factual information it needs for its assessment. It could also help to further establish the necessary division of power between the twin roles of Member States as both controllers and grantors of aid. This would however only be appropriate if these authorities or bodies are sufficiently independent of their government or local authority and are sufficiently familiar with the issues at stake. Member States should **foresee adequate time-limits** between the publication of a national funding programme and the deadline for applications.

## ✧ **Improve guidance at national level and encourage coherent application of State aid rules**

Member States need to **improve their adherence to the rules and reinforce the effectiveness of State aid enforcement within their administrations**. And the Commission should continue to support their efforts by providing clear and coherent EU guidance and active monitoring. In this context, the 2016 Notice on the notion of State aid should



be updated regularly to reflect new decisions and jurisprudence and clarify unclear concepts, thereby **ensuring the uniform application and interpretation of key legal concepts and terms of State aid law**. Likewise, clarification of possible investigatory powers, such as on-site monitoring visits, and the rights of the defence, can also be improved. This guidance should specifically target national lawyers to increase their knowledge and skills as they are the ones directly involved in private enforcement and the protection of the (procedural) rights of affected companies.

The **platform e-State Aid Wiki** should play a more important role in this respect, and we suggest that the questions and answers (cleansed of any confidential information) from this platform are published on the Commission's website so that they are widely accessible, not only to public authorities but also for stakeholders.

The annual competition report also plays a role here to ensure clarity and effectively transmit information. All this is important, not only to avoid distortions but also to minimise the risk for companies and avoid problems related to the recovery of unlawful aid.

## Suggested improvements for the national level

- ⇒ **Conduct periodic monitoring and evaluation**
- ⇒ **Improve illegal aid recovery processes and prioritise enforcement decisions.**
- ⇒ **Encourage effective private enforcement.**
- ⇒ **Encourage Member States to create or appoint a national body in charge of State aid coordination.**
- ⇒ **A more active role for national bodies in parts of the substantive assessment of an aid measure of scheme.**
- ⇒ **Commission to provide clear guidance to Member States and monitor application of State aid rules. Promote use of State Aid wiki and the annual competition report.**

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Turkey



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Ukraine



United Kingdom

Avenue de Cortenbergh 168  
B - 1000 Brussels, Belgium  
Tel: +32(0)22376511 / Fax: +32(0)22311445  
E-mail: [main@businesseurope.eu](mailto:main@businesseurope.eu)

[WWW.BUSINESSEUROPE.EU](http://WWW.BUSINESSEUROPE.EU)

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