



Introduction to State Aid Control: Substance

19/20 January 2015

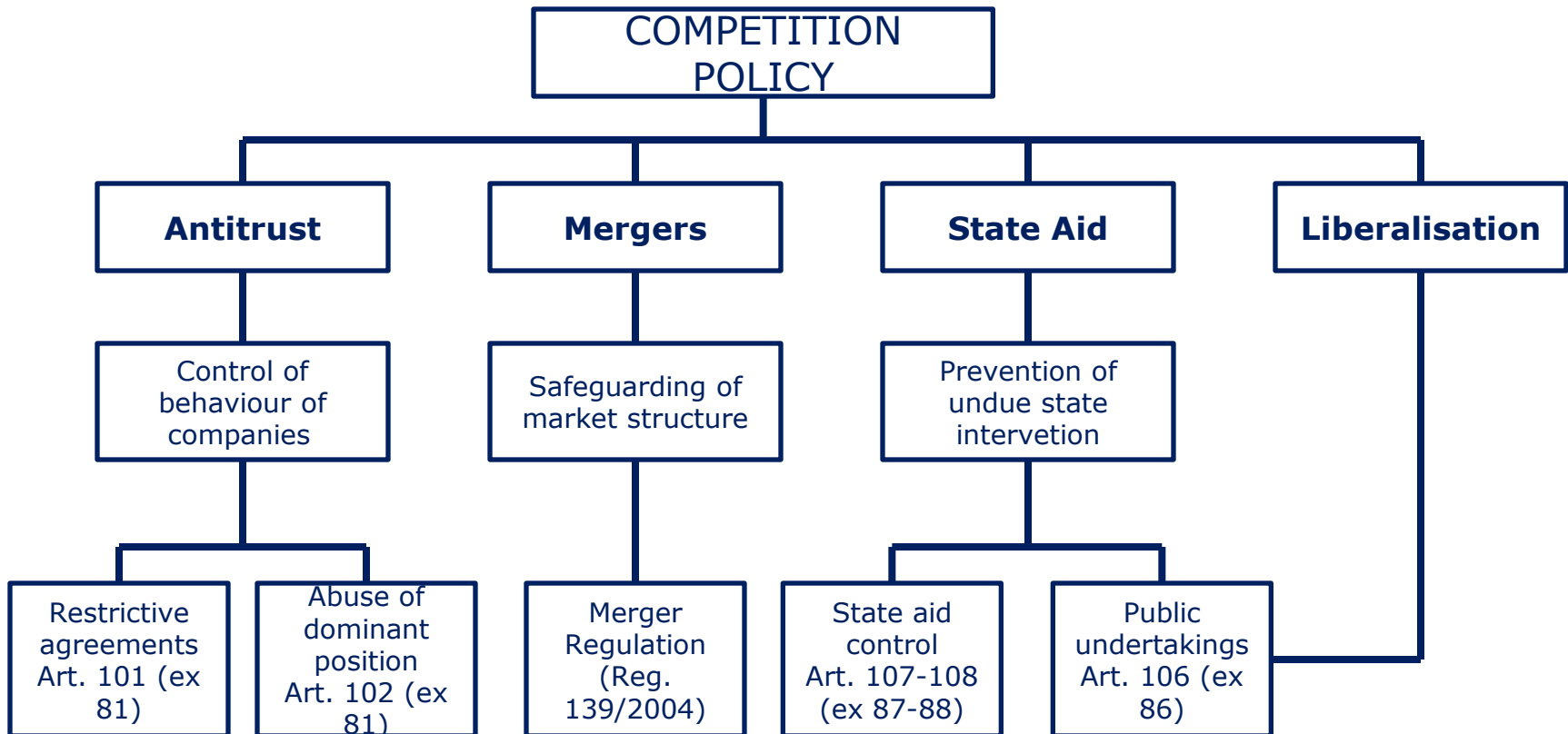


Overview

- Introduction
- Notion of aid: what is state aid?
- Compatibility: can an aid measure be authorised?
- Brief introduction to secondary legislation and other texts

INTRODUCTION

State Aid and EU Competition Policy



Why Do We Control State Aid?

- state aid control = part of competition policy
- some reasons for state aid control:
 - internal market, level playing field
 - role in liberalisation
 - competitive European industry
 - avoid subsidy race
 - element of cohesion

State Aid Rules in the EU Treaty

- Art. 107(1) TFEU: notion of aid and general prohibition
 - *"Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market".*
- Arts. 107(2-3), 106(2), 93 TFEU: derogations



NOTION OF AID



Basic Principles ⁽¹⁾

Art. 107(1) TFEU:

- granted by a Member State or through State resources
- advantage: “favouring”
- selectivity : “certain undertakings or the production of certain goods”
- effect on trade between Member States
- distortion or risk of distortion of competition

Basic Principles ⁽²⁾

- **objective** notion
- measured in relation to its **effects**
- **burden of proof** on Commission
- finding of aid must be justified in Decision

Reflection: some time before accession, a Member State rescued a failing company. Does this qualify as state aid?

Key Concepts

- undertaking
- state resources
- advantage
- selectivity
- effect on trade
- distortion of competition

Undertaking

- *"every entity engaged in an **economic activity**, regardless of the legal status of the entity and the way in which it is financed" (Höfner, C-41/90)*
- test: is the activity **economic** or not?
 - economic activity: offering goods and services in the market (*Pavlov*, C-180/98 to C-184/98)
 - not economic activity: regulatory tasks, supervisory tasks, activities based on solidarity, basic functions of the State (state education, customs, air safety, treatment of prisoners ...)

Undertaking

Reflection: Is a non-profit organisation an undertaking?

Reflection: Is an airport an undertaking?



State Resources

- *"granted by a Member State or through State resources, in any form whatsoever"* (Art. 107)
- translates into:
 1. is there a **transfer**
 2. of **State resources** and
 3. is this transfer **imputable** to the State?



Transfer– Granting of Aid

- aid is granted as soon as there is a **challengeable act** under national law
- not necessary that aid was actually paid out (or the guarantee triggered)
- actual payment important for recovery only

What are State Resources?

- funds under **control** and at disposal of State
 - includes EU structural funds
- transferred in **any form whatsoever**:
 - **positive transfer**: direct grants, loans, capital participation
 - **foregone revenues**: tax waivers or deferrals, sale of assets below market price, failure to collect or enforce debt
 - **exposure of State funds**: guarantees

What are State Resources?

Reflection: The French president steps on the balcony of the Elysee Palace and declares: "We will not let France Telecom go bust!"

Is this a transfer of State resources?

Source of the Funds ⁽¹⁾

- money must have been in the State pocket or otherwise controlled by the State
- if money controlled by State, source is irrelevant



- if money paid directly from citizen/undertaking to undertaking without ever being controlled by State, no state resources (even if e.g. amount set by State):
Preussen Elektra (C-379/98)



Source of the Funds ⁽²⁾

- note: state control not limited to direct control over money
- example: parafiscal levies/charges
 - compulsory levy from group of specific producers/service providers to finance activities of same group
 - can be state resources if sufficient degree of state control
 - often complex question in practice





Imputability ⁽¹⁾

- what is "the state"?
 - central, regional or local authorities
 - other public or private bodies designated or established by the state
- what if there are 3 players: state – intermediate body – beneficiary?



Imputability ⁽²⁾

- if intermediate body is publicly owned company, question of who is really taking decision
- principle of **neutrality** of public and private ownership: cannot just equate publicly owned company with state
- depends on whether decision is **imputable** to the State (*Stardust Marine*)

Advantage

- *"favouring certain undertakings or the production of certain goods"* (Art. 107)
- various definitions, e.g.:
 1. A state measure is capable of favouring an undertaking if it produces an economic advantage that the company would not have obtained under normal market conditions.
 2. A transfer of resources to the company or relief from charges which a company normally has to bear, whereby the financial advantage is for free or without adequate remuneration.

Test Tool MEOP ⁽¹⁾

- **Market Economy Operator Principle (MEOP):** no advantage if state behaves like "normal" player on market (pari passu)
- reasoning:
 - state has right to act on market like any other market player (principle of neutrality)
 - if state behaved like a private player, alleged beneficiary did not obtain anything outside "normal market conditions"
- key question: what would commercial operator do?



MEOP ⁽²⁾

- different applications of test:
 - **M**arket **E**conomy **I**nvester **P**rinciple (MEIP)
 - state as creditor
 - state as vendor
- not relevant:
 - revenues related to state prerogatives (tax revenues, savings on unemployment benefits)
 - positive externalities related to public policy remit (regional development, industrial / employment policy)
 - philanthropic, social considerations

MEOP ⁽³⁾

- test can be difficult in practice:
 - what are normal market conditions, how to calculate correct return, what is correct benchmark?
 - complex financing structures (e.g. infrastructure investment cases, PPP-arrangements...)
 - no hindsight!
- ⇒ check if CET should be involved

Who is the Beneficiary?

Reflection: A regional authority grants aid to an airport owner. The airport owner builds a new runway, which increases the income of the airport operator. The airport operator uses the extra income to attract a low cost carrier with low service fees. This increases the number of passengers, which in turn benefits the car rental companies.

Who is the beneficiary?

- The airport owner?
- The airport operator?
- The airline?
- The car rental companies?



Services of General Economic Interest (SGEI)

- compensation for discharging SGEI not state aid if 4 *Altmark* criteria (2003) are met:
 1. beneficiary must actually have public service obligations to discharge, and obligations must be clearly defined by an entrustment act
 2. parameters for compensation: established in advance in objective and transparent manner
 3. no overcompensation (all or part of costs + reasonable profit)
 4. tender or comparison with costs of typical well run undertaking, with adequate means

Selectivity

- "*favouring **certain** undertakings or the production of certain goods*" (Art. 107)
- test: is the measure **selective** in comparison to a **system of reference**?
- not selective: **general measures** (apply to all companies in all sectors of a MS, no discretionary power)
 - rate of corporate tax
 - progressive tax systems
- but watch out for *de facto* selectivity!

Material Selectivity

- ***de jure*** selectivity: selectivity derives from the "law"; measures reserved to certain undertakings
- ***de facto selectivity***: although formally measure seems general, structure of measure is such that it "*significantly favours a particular group of undertakings*" (C-106/09P *Gibraltar*)
- selectivity based on discretion

Material Selectivity

- 3-step test:
 - identification of **correct reference system**
 - **derogation**: does measure differentiate between economic operators who, in light of objective of system, are in comparable factual and legal situation
 - **justification** by nature or general scheme of system



Material Selectivity

- Paint Graphos (C-78/08):

"In order to classify a domestic tax measure as 'selective', it is necessary to begin by identifying and examining the common or 'normal' regime applicable in the Member State concerned. It is in relation to this common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation."

Material Selectivity

- identification of reference system for fiscal measures:
 - rules that generally apply, on basis of objective criteria, to all undertakings falling within its scope as defined by objective (e.g. general corporate income tax system, VAT system, anti-abuse rules, etc.)
- derogation:
 - differentiation between undertakings such as "to favour certain undertakings or the production of certain goods"

Material Selectivity

- derogation (cont'd): Spanish tax lease judgment (T-140/13)

"a different tax burden resulting from the application of a 'general' tax regime is not sufficient on its own to establish the selectivity of taxation for the purposes of Article 107(1) TFEU. The criteria applying to the different tax burden must, in order to be capable of being recognised as conferring selective advantages, be such as to characterise the recipient undertakings, by virtue of properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring 'certain' undertakings or the production of 'certain' goods within the meaning of Article 107(1) TFEU". (see also T-219/10 Spanish Goodwill)

Material Selectivity

- justification by nature or general scheme of reference system: examples
 - cooperatives which distribute all profits to members are not taxed themselves as cooperatives - justified provided that tax is levied on individual members
 - profit in country A not taxed provided it is taxed in country B - justified by need to avoid double taxation

Regional Selectivity

- *Azores* (C-88/03): when infra-state body is sufficiently autonomous from MS, selective character of its decisions must be assessed with respect to factual and legal situation within its territory rather than within MS
- criteria:
 - institutional autonomy
 - procedural autonomy
 - financial responsibility



Effect on Trade

- *"insofar as it affects trade between Member States"* (Art. 107)
- *Heiser (C-172/03):* "...since it is not inconceivable ... that medical practitioners specialising in dentistry, such as Mr. Heiser, might be in competition with their colleagues established in another MS, the second condition of Article 92(1) of the Treaty must be considered to be fulfilled"



Effect on Trade

- broad interpretation:
 - sufficient that product or service subject to trade between MS
 - even if beneficiary does not export, or exports virtually all of its production outside EU
- exceptions: local services; *de minimis*
- *WAM* (T-304/04), *Le Levant* (T-34/02): justification needed

(Risk of) Distortion

- "*which distorts or threatens to distort competition*" (Art. 107)
- aid strengthens competitive position of beneficiary in relation to competitors and thereby distorts competition
- distortion need not be substantial or significant (small aid amount, small size of beneficiary or small market share do not exclude distortion)
- exception: *de minimis*



De Minimis

- Regulation No 1407/2013: de minimis aid **not aid** within meaning of Article 107(1) TFEU
- assumption: amount so low that it cannot affect cross-border competition
- €200,000 over 3 years
- €500,000 for SGEI (Regulation No 360/2012)
- exceptions: transport (€100,000), primary agriculture production (€7,500), fisheries (€30,000); export, coal, companies in difficulties not eligible
- transparent aid only

State Aid Modernisation (SAM) ⁽¹⁾

- objectives:
 - foster growth in a strengthened, dynamic and competitive internal market
 - focusing enforcement on cases with the biggest impact on internal market
 - streamlined rules and faster decisions

State Aid Modernisation (SAM)⁽²⁾

- revision of most rules and guidelines (completed)
- harmonisation of compatibility assessment: common principles
- significant extension of categories of aid that do not need to be notified (GBER)
- Communication on Notion of Aid: planned for adoption in 2015

Last Words (on the Notion of Aid)

- remember: objective notion of aid
- existence of aid \neq prohibition
- purpose of aid, low impact etc. taken into account in compatibility assessment
- conclusion on existence of aid can be left open in exceptional cases only



COMPATIBILITY

Legal Bases ⁽¹⁾

- Art. 107(2): automatic compatibility
- Art. 107(3): margin of discretion to define criteria
 - frameworks and guidelines
 - General Block Exemption Regulation
- Art. 106(2): SGEI
- Art. 108(2): unanimous Council decision

Legal Bases ⁽²⁾

- Art. 107(2) TFEU: "*shall be compatible*"
 - (a) aid having a social character, granted to individual consumers, without discrimination related to the origin of the products concerned
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences
 - (c) aid granted to compensate for disadvantages caused by the division of Germany [obsolete]



Legal bases ⁽³⁾

- Art. 107(3) TFEU: *"may be considered"*
 - (a) economic development of most disadvantaged regions of Community
 - (b) important common European project or serious disturbance in the economy of a Member State
 - (c) development of certain economic activities or certain economic areas
 - (d) culture and heritage conservation
 - (e) other categories as may be specified by a decision of the Council



Legal Bases ⁽⁴⁾

- Art. 106(2) TFEU: services of general economic interest
 - Undertakings entrusted with the operation of SGEI or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

Assessment of a Measure

1. under secondary legislation
2. directly on the basis of the Treaty:
 - only if measure not covered by existing secondary legislation

Basic Principles of Compatibility

- general goal: positive effects of aid should outweigh negative effects
- pre-SAM: balancing test
- post-SAM: common principles
- used for assessment directly under the Treaty
- incorporated directly into secondary legislation

Common Principles

1. contribution to well-defined objective of common interest
2. need for state intervention
3. appropriateness of state aid as policy instrument
4. existence of incentive effect
5. proportionality of the aid amount (aid limited to minimum necessary)
6. avoidance of undue negative effects on competition and trade
7. transparency

Objective of Common Interest

- depends on Guidelines concerned
 - Regional Aid: reduce developmental gap between regions
 - R&D&I: promotion of R&D&I
 - Aviation (aid to airports): increase mobility of Union citizens and connectivity of regions by establishing access points for intra-Union flights, combat air traffic congestion at major Union hub airports or facilitate regional development

Need for State Intervention

- general principle: target aid to bring about material improvement which market cannot deliver
- efficiency and equity considerations
- specific qualifications in guidelines:
 - Aviation: no market failure for large airports
 - Risk Finance: *ex ante* assessment of funding gap required

Appropriateness

- aid must be appropriate policy instrument
- selection of least distortive tool
- potential alternatives:
 - other policy instruments (e.g. regulation)
 - other forms of aid (e.g. grant vs loan / repayable advance)

Incentive Effect

- aid must induce recipient to change behaviour in line with common objective
- need to ensure that, in absence of aid, same objective would not have been reached
- counterfactual analysis : what would company do with and without aid?
- application for aid must precede work
- different degrees of factual evidence required

Proportionality

- aid must be proportionate = limited to minimum
- limits expressed as caps on aid amount and/or aid intensity:
 - aid amount: e.g. net extra cost to achieve objective
 - aid intensity: proportion of eligible costs

Negative Effects

- aid must avoid undue negative effects on competition and trade
- positive effects must outweigh negative effects
- depends on relevant product and geographical markets

Transparency

- regional or national website (by July 2016)
- full text of aid measures
- details of beneficiaries
- individual aid awards above certain sizes



BRIEF INTRODUCTION TO SECONDARY LEGISLATION AND OTHER TEXTS

Texts Clarifying the Notion of Aid

- examples:
 - Guarantee Notice
 - Land Sale Communication
 - Reference Rates, Recovery Rates
 - *De Minimis* Regulation
- **Communication on Notion of Aid:**
adoption in 2015?

Texts Concerning Compatibility

- **GBER (General Block Exemption Regulation):**
 - regional aid; SMEs; access to finance for SMEs; research and development and innovation; training; disadvantaged workers and workers with disabilities; **environmental protection; natural disasters; transport for residents in remote regions; broadband infrastructure; culture and heritage conservation; sport and multifunctional recreational infrastructures; local infrastructures**
- standard measures considered not very harmful → deemed to be compatible
- do not need to be notified to the Commission

Texts for Specific Sectors

- examples:
 - broadband
 - public service broadcasting
 - air transport
 - other forms of transport

Horizontal Rules

- examples:
 - rescue and restructuring (R&R)
 - environmental protection and energy (EEAG)
 - regional aid (RAG)
 - research, development and innovation (R&D&I)
 - risk capital



SGEI Rules

- current package in force since 1 February 2012:
 - **Communication:** on the notion of aid in SGEI cases
 - **Decision:** exempts specific SGEI cases from notification
 - **Framework:** guides the assessment of large compensation amounts granted to operators outside the scope of the Decision
 - **De minimis Regulation** (adopted April 2012): €500,000 over 3 years

SMEs in Secondary Legislation

- SMEs generally get more advantageous and/or simpler treatment than big companies
- most secondary legal bases contain specific provisions for SMEs
- definition of "SME": Commission Recommendation of 6 May 2003 + case law

Last Words

- always start with existence of aid
- compatibility: common principles = same key questions for all cases
- but application depends on sector / measure concerned