



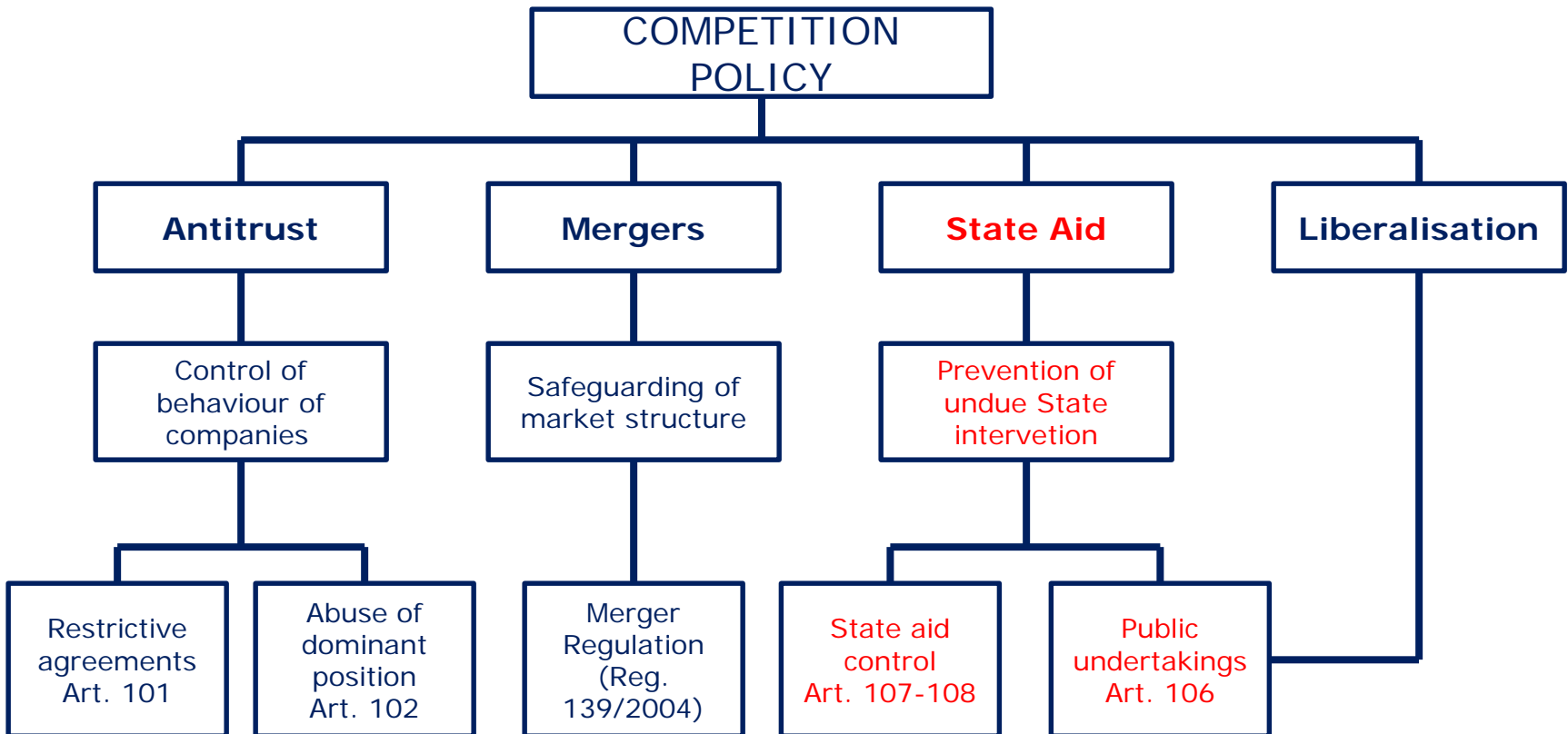
Introduction to State Aid Control: Substance I

Overview

- Introduction
- Notion of aid I
 - Undertaking: an economic activity
 - State resources and imputability
 - Advantage
- Services of General Economic Interest (SGEI)

INTRODUCTION

State Aid and EU Competition Policy





Why Do We Control State Aid?

- State aid control is part of competition policy
- Reasons for State aid control:
 - avoid undue market distortions
 - internal market safeguard, level playing field
 - avoid subsidy races
 - competitive European industry
 - element of cohesion

How Do We Control State Aid?

- Check on the presence of State aid
- If State aid is present, verification if the aid is compatible
- In case of illegal and incompatible State recovery of aid

State Aid Rules in the Treaty

- Art. 107(1) TFEU: notion of aid and general prohibition of State aid
 - *“... 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”.*
- Derogations: Art. 107(2) + (3), 106(2), 93 TFEU

Other rules on State aid control

Examples:

- Notice on the Notion of aid (NoA)
- *De minimis* Regulation
- General Block Exemption Regulation (GBER)
- SGEI Decision
- Guidelines/Frameworks for the compatibility assessment
- Procedural rules

State Aid Modernisation (SAM) (2013-2014)

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**

SAM (2013-2014)

- Harmonisation of compatibility assessment: **common principles**
- Significant extension of categories of aid that does not need to be notified (**GBER**)
- Notice on **Notion of Aid**
- NB: GBER targeted revision 2017

MFF - GBER Revision: Ongoing

- **Adopted:** Amendment of the Enabling Regulation (legal basis for the adoption of the GBER) (Nov 2018)

- **Planned:** Targeted revision of GBER to accompany next MFF, covering
 - InvestEU
 - RD&I: Seal of Excellence, Co-fund, Teaming
 - ETC: extension of current block exemption

NOTION OF AID

Notice on the Notion of Aid (2016)

- Clarification of the notion of aid:
- Summary of the interpretations by **the Union Courts** and the Commission's own case practice.
 - Where Union Courts' case law was not available, guidance is provided in the form of the **Commission's own interpretation**.
- NoA was the last missing part of the SAM

Basic Principles

- Notion of aid is an **objective** notion
- Relevant are the **effects** on competition and trade
- Not relevant: legal/administrative form

Elements of the notion of aid

- Undertaking
- State resources
- Advantage
- Selectivity
- Effect on trade
- Distortion of competition

Undertaking and economic activity

Undertaking = every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed

- Relevant: nature of the activity
- Irrelevant: legal form of the entity, the way of financing (e.g., part of a municipality), or that it is a non-profit/charity organisation
- Classification as 'undertaking' always relates to a specific activity (i.e., for one activity an entity may qualify but for another it may not qualify as 'undertaking') e.g., national registry of cars sells automobile insurance

Economic activity

Economic activity = offering goods and services on the market

- Whether market exists depends on the situation in the MS (legal differences between MS, developments over time)
- Examples for non-economic activities:
 - Public remit functions: e.g. police, customs control
 - Social security/health systems if based on solidarity principle
 - Public education, certain research activities
 - Certain cultural activities and heritage conservation

Example: public remit activities

Non-economic:

- State is exercising public powers or acts in its capacity as public authority, or it is intrinsically part of these activities (see pt 17 NOA)
- E.g.: army, police, air+maritime safety control, anti-pollution surveillance, enforcement of prison sentences, revitalisation of public land by public authorities, public data collection on the basis of a statutory obligation

Economic:

- For activities which can be separated from the public remit function the entity can be an undertaking
- A legal obligation (e.g. to ensure safety) is insufficient to make it 'public remit'

Example: social security systems

Depends on the way the systems are set up and structured (see NOA pt 19-22)

- Distinction between schemes based on the system of solidarity and economic schemes

Typical features of solidarity schemes (non-economic):

- Compulsory membership
- Exclusively social purpose
- Scheme is non-profit
- Benefits are independent of the contributions made
- Scheme is supervised by the State

Balancing if system involves solidarity and economic elements

Example: health systems

Depends on national set-up:

- distinction between solidarity principle and services for remuneration (see NOA pt 23-27)

Non-economic:

- Principle of solidarity, services free of charge, universal coverage;
- Activities carried out merely for the purpose of providing a non-economic activity (e.g., purchase of goods)

Economic:

- Services provided for remuneration (patients/insurance), competition on the market => not sufficient that they are carried out in a public hospital to exclude 'economic'.

Example: education, universities, research

Economic:

- if predominantly financed by revenues

Non-economic:

- national educational system (funded + supervised by the State);
- remains non-economic despite fees if fees cover only a fraction of the costs (see NOA pt 28-31)
- universities and research organisations (RO) for the following activities:
 - Education
 - Independent research including collaborative R&D
 - Dissemination of research results
 - Knowledge transfer (licensing etc) if 1) conducted by university/ RO and 2) all income is reinvested in the primary activity

Example: culture and heritage conservation

NOA Pt 33-37

Economic:

- Activities predominantly financed from revenues (e.g. visitors fees) such as cinemas, commercial music performance, festivals, art courses, or
- Activities that benefit only certain undertakings (dedicated) (e.g. restoration of a certain building)

Non-economic

- Cultural or heritage conservation if:
 - Accessible to general public, and
 - Free of charge (visitors fees are irrelevant if they cover only a fraction of the true costs)
- Activities that cannot be substituted since there is 'no market' (e.g. archives with unique documents)

Undertaking and economic activity

Case Study:

- In State A, emergency medical services (EMS) are organized in a **solidarity-based system**, free at the point of delivery.
- The service is mainly implemented by **municipalities**, through their EMS departments, as required by law.
- State A foresees in its law that **private services providers** can be called to provide EMS, as part of the solidarity-based system.
- State A grants municipalities (incl. public EMS providers) **tax exemptions** and **unlimited guarantees**.
- A private EMS provider complains to the Commission this represents illegal State aid.

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), but concrete risk: foregoing state revenue is sufficient
- actual payment important for recovery only

What are State Resources?

- funds under **control** and at disposal of State who have discretion as to their use
 - includes EU structural funds, resources from EIB or EIF or from international financial institutions such as IMF or EBRD
- transferred in **any form whatsoever** (directly and indirectly):
 - **positive transfer:** direct grants, loans, capital participation
 - **foregone revenues:** tax waivers or deferrals, sale of assets below market price (e.g. land sale, privatisations), omission to collect or enforce debt
 - **exposure of State funds:** guarantees (special issue: unlimited guarantees)

Source of the Funds

- 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 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

- 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

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

Imputability

- if intermediate body is publicly owned company, question of who is really taking decision and the degree of intervention of the state
- principle of **neutrality** of public and private ownership (art. 345 of TFEU): cannot just equate publicly owned company with state
- depends on whether decision is **imputable** to the state (*Stardust Marine, C-482/99*)
- Not imputable if mandatory under EU law

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, or prevents it from getting worse.
 2. A transfer of resources to the company or relief from charges (e.g. tax advantages or reduction of social security contributions) which a company normally has to bear, whereby the financial advantage is for free or without adequate remuneration.

Advantage

- **Only the effects** of the measure on the undertaking are relevant and not the cause or objective of the State intervention (thus even if the advantage is compulsory for the undertaking)
- To assess the existence of an advantage the financial situation of an undertaking, in its own legal and factual contest, following the measure should be compared with its financial situation if the measure had not been taken.
- However only **the foreseeable effects** and not the actual effects are relevant to establish the presence of an advantage: reference has to be made when the SA is granted (the time that the right to receive it is conferred)

Test Tool MEOP

- **Market Economy Operator Principle (MEOP):** no advantage if state behaves like "normal" player on market
- 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

- different applications of test:
 - **M**arket **E**conomy **I**nvestor **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

- 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

Services of General Economic Interest (SGEI)

- compensation for discharging SGEI not state aid (no advantage) if 4 *Altmark* criteria (C-280/00 of 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



Services of General Economic Interest (SGEI)

SGEI Communication -Clarification of the notion of State Aid relevant for SGEI

SGEI de minimis Regulation -Compensation which is no aid: € 500.000 over 3 fiscal years

SGEI Decision - Compatible aid exempted from notification

SGEI framework -Compatibility criteria for aid requiring notification



Services of General Economic Interest (SGEI)

The SGEI Decision

- Compatible aid exempted from notification for compensation below € 15 millions/year
- Entrustment max 10 years
- Hospitals, social housing & other social services
- Airports < 200.000 passengers
- Air and maritime links to islands < 300.000 passengers
- Ports < 300.000 passengers

**Thank you very much for your
attention!**

Any questions?