



# Introduction to State Aid Control: Substance II

# Overview

- Notion of aid II
  - Selectivity
  - Distortion of Competition
  - Effect on Trade
  - Special aspects of infrastructure funding
- Compatibility: can an aid measure be authorised?
- Very brief introduction to "secondary legislation" and other texts

# Selectivity

- *"favouring **certain** undertakings or the production of certain goods"* (Art. 107)
- not selective: **general measures** (apply to all companies in all sectors of a MS, no discretionary power)
  - rate of corporate tax
- **Material** selectivity (differentiation by sector, size, legal form,...) and **regional** selectivity

## Material Selectivity

- ***de jure*** selectivity: selectivity derives directly 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 (an otherwise general measure becomes selective when the public authorities responsible for its implementation can exercise discretion, *P Oy*, C-6/12)

## Tax and similar measures

- If MS adopts ad hoc measure only benefitting one company – selectivity straightforward
- Less straightforward if MS adopts broader measures in principle applicable to all undertakings - 3-step test for selectivity:
  - identification of **correct reference system**
  - **Derogation from reference system:** 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

# Tax and similar measures

- 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 that are in the same or similar factual and legal situation in light of intrinsic objective of the reference system, such as "to favour certain undertakings or the production of certain goods" (if yes – prima facie selective)
  - Cannot take external policy objectives into account

## Tax and similar measures

- **Justification by nature or general scheme of reference system:** follows from basic or guiding principles or result of inherent mechanisms necessary for functioning and effectiveness of system. No external policy objectives can be taken into account.
- 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

- In principle: only measures covering entire MS not regionally selective
- *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
- **3 different scenarios:**
  - Central government decides on lower tax in one region – selective
  - Symmetrical devolution of tax powers (all regions have the same competence) – not selective (no „normal“ tax rate)
  - Asymmetrical devolution of tax powers (only certain regions have certain tax powers) – not selective if three conditions cumulatively fulfilled:
    - institutional autonomy
    - procedural autonomy
    - financial and economic autonomy

# Selectivity: Tax rulings

- Tax rulings can create legal certainty and predictability but have to respect State aid rules
- Does the tax ruling just apply the ordinary tax rules or does it misapply the tax rules, resulting in a lower amount of tax?  
    ➡ Selective advantage
- **Tax ruling on transfer prices for intra-group transactions:** selective advantage if it does not respect arm's length principle because standalone company would be taxed on accounting profits (reflecting prices determined on the market)
- Principle requires that transfer pricing must result in a reliable approximation of a market-based outcome

# Distortion of competition

- If a measure is liable to improve the competitive position of the recipient compared to its competitors (see NOA pt 187)
- Potential distortion is sufficient
- Is in general the case where a MS grants a financial advantage to an undertaking in a liberalised sector.
- Distortion of competition may be excluded in case of:
  - Legal monopolies
  - For infrastructure, natural monopolies
  - De minimis support

# Legal monopoly

- Distortion of competition is excluded if (NOA pt 188):
  - Service is subject to a legal monopoly (in compliance with EU law), and
  - Monopoly excludes competition 'on and for the market', and
  - Service is not in competition with similar (liberalised) services.
  - If service provider is active in another market that is open to competition, cross-subsidisation has to be excluded (separate accounts)

# Natural monopoly

- (NOA pt 211 and 212) For infrastructure financing distortion of competition (or effect on trade) is excluded if:
- Infrastructure does not face direct competition (Examples: network infrastructures in water supply, rail, roads)
- Private financing for the infrastructure is insignificant / replication of the infrastructure would be uneconomical
- Infrastructure is 'not dedicated' (ie not designed to selectively favour specific undertakings or sectors but provides benefits for the society at large)
- No cross-subsidisation to other economic activities

## De Minimis

- Reg. No 1407/2013: de minimis aid is not aid within meaning of Art. 107(1) TFEU; it is deemed not to affect cross-border competition
- Requirements: €200,000 over 3 years /per 'single undertaking'/ per MS; 'transparent' aid only; for road freight transport the threshold is €100,000
- Separate de minimis rules for SGEI (Reg.No 360/2012; threshold €500,000); separate rules for primary agriculture production (€15,000) and for fisheries (€30,000)

# Effect on trade between Member States

- Potential effect on cross-border trade is sufficient
  - Can exist even if recipient is not involved in cross-border trade (e.g. undertakings established in other Member States have less of a chance of providing their services in the market in that Member State)
  - Can exist even if the recipient is exporting all products outside the Union (e.g. products may enter the market from another MS. However the effect on trade cannot be assumed from the mere fact that the market is open to competition)
  - No need to define a market or to investigate effects in detail
- BUT: effect may not be merely hypothetical; is missing when the support has a purely local effect

## Purely local effect

- Long decision-making practice (e.g. Leisure Pool Dorsten, 2001), confirmed in NOA
- No presumptions: depends on facts
- Local commercial radius: will beneficiary attract customers from other Member States?
  - “Local” more likely for services than for goods
  - Less likely when beneficiary is part of national network
- (Potential) impact on investments and establishment must be foreseeable (evidence of exchanges in the relevant sector) + more than marginal.

## Examples for purely local effects

- NOA pt 197 lists case examples:
- Sports/leisure for predominantly local customers (swimming pool, marinas, outdoors sports centre, community golf clubs)
- Cultural events unlikely to attract visitors from other MS
- Health care aimed at local population: emergency or « standard » medical services
- Small ports and airports,
- Cable ways/ski lifts for predominantly local users

# Infrastructure financing

- **Until 2000:** Construction and operation of infrastructure (e.g. airport) is general measure of public policy
- **Aéroports de Paris (2000):** operation of an airport = economic activity
- **Leipzig/Halle (2011):** All public funding of infrastructure (including its construction) that is meant to be commercially exploited subject to State aid rules
- **NOA pt 209:** For financing granted before 2000 legitimate expectations for MS that financing is not State aid

# Infrastructure financing

- **Separate chapter in the NOA**
  - Need for specific clarifications; requested by Member States and many stakeholders
  - Very high practical relevance
  - Legal uncertainty in the wake of Leipzig/Halle
- **'Analytical grids'; support tool for MS indicating the most relevant possibilities to achieve State aid compliance**

# Infrastructure – owner, operator, user

- **Distinction between 3 levels of actors**
  - Owner/developer of the infrastructure
  - Operator of the infrastructure
  - End-users of the infrastructure
- State aid control for all levels
- Following slides present issues which are typically relevant for the checks

## For developers/owners

- **Economic activity:** Infrastructure that is meant to be commercially exploited
  - Excludes for instance toll free roads or public remit activities (police, military, customs,...)
- **Mixed used** infrastructure (non-economic/economic)
  - If parts can be separated (cost/revenues) separate treatment (see NOA pt 205)
  - **Ancillarity** (see NOA pt 207): fully non-economic if economic part is
    - Directly related and necessary or intrinsically linked to main non-economic use (same inputs)
    - Not more than 20% of overall annual capacity

## For developers/owners

- No distortion of competition or no effect on trade between MS for:
- Local cases (Commission's "no effect on trade" decision-making practice)
- Natural monopolies
- Customary amenities (cafeterias/washing rooms/parking/...): normally no effect on trade between MS (see NOA pt 207)

## For operators or for users

- If operators or users of an infrastructure built with public financing **pay a market price**, they do not receive any 'indirect' State aid (no advantage passed on to them).
- Clarification that:
- Competitive tender excludes aid to the operator (see NOA pt 223 referring to pts 90-96)
- For users, incremental cost coverage (if no other methodologies are possible) excludes aid (approach from Aviation Guidelines)

## Infrastructure – Sectoral guidance

- **State aid control typically applies to** the construction of infrastructure in the following sectors: Airports, Ports, Broadband, Energy
- **State aid control typically does not apply to** the construction of infrastructures in the following sectors: Railway, Roads/Bridges/ Tunnels, Canals/Inland Waterways, Water Supply and Wastewater Networks
  - Available for free: no economic activity
  - Against fee (toll): *construction* typically fulfils conditions for no effect on competition/trade (as opposed to operation)

## 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

## Main Legal Bases

- 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 (also margin of discretion)

## Legal Bases

- 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

- 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

- Art. 106(2) TFEU: services of general economic interest
- Art. 93 TFEU: coordination of transport + certain SGEIs in the transport sector
- Rare exception: Council decision

## 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

# 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
- Substantive test: counterfactual analysis – what would company do with and without aid?
- Formal test: application for aid must precede work

## 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
- Often: List with manifest negative effects

# Transparency

- **Member States** have an obligation to establish **comprehensive State aid websites**, at regional or national level, for the publication of **information on aid measures and their beneficiaries**
  - if the aid award **per individual beneficiary** is equal or above **EUR 500.000**
  - with **sectorial exceptions** (SGEI, Rail, road, maritime transport, banking, broadcasting, coal, ETS, short term export credit)

# Transparency

- **Legal basis** for enforcement
  - Aid granted under **GBER**: Automatic
  - Aid granted under **guidelines** or **Treaty**:  
Reference to the Transparency obligation in the notification (MS/COMP) and in the decision (COMP)
- **Essential** that Case Handlers obtain a **commitment** from MS in the **Notifications** and recall this commitment in the **Decisions**.
  - Units involved: B5, C4, E3, F2, H1, H2, H3, H5 (F3 and D12 when applicable)
  - **Standard wording** for commitments and decisions provided in **Wiki**

# Evaluation

## Rationale

The overall objective of State aid evaluation is to assess the relative **positive and negative effects of a scheme**, in terms of:

- a) Its **direct impact on the beneficiaries**, (i.e. whether the aid has caused the beneficiary to take a different course of action, and how significant the impact of the aid has been).
- b) **Indirect impacts** (the general positive and negative effects of the aid scheme on the attainment of the desired policy objective and on competition and trade) and
- c) The **proportionality and appropriateness** of the chosen aid instrument.



# Evaluation

- **New requirement** introduced with State Aid Modernisation (SAM);
- Applies to selected **large schemes** (GBER and approved above 150 M€/year) in areas such as Regional aid, R&D&I, Broadband infrastructures, Energy, Risk finance, SMEs, Transport.
- In the MS, independent experts conduct the evaluations on the basis of **evaluation plans** examined and approved by the Commission in accordance with **Methodological Guidance**.
- For **notified schemes**: The EP is an **integral part of the Commission's assessment of the scheme**, and it is recalled among the common assessment principles.
- For **GBER schemes**: Evaluation is foreseen by Art. 1(2)(a) GBER. Art. 3 of the GBER explicitly subordinates both the legality and the compatibility of GBER measures to MS' observance of all the general conditions laid down in Chapter I (Art. 1-9 GBER). On this basis, the **evaluation of large aid schemes under the GBER fully qualifies as a compatibility criterion**.



# **BRIEF INTRODUCTION TO "SECONDARY LEGISLATION" AND OTHER TEXTS**

# Texts Clarifying the Notion of Aid

- **Communication on Notion of Aid**
- Specific texts:
  - Guarantee Notice
  - Reference Rate Communication
  - *De Minimis* Regulation

# Texts Concerning Compatibility

- **GBER (General Block Exemption Regulation):**
  - regional aid; SMEs; access to finance for SMEs; research and development and innovation; training; aid 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; **ports; airports**
- standard measures considered not very harmful → deemed to be compatible
- do not need to be notified to the Commission

# Horizontal Rules

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

# Texts for Specific Sectors

- examples:
  - broadband
  - air transport
  - other forms of transport



# SGEI Rules

- **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:** €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 (= Annex I GBER)

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

**Any questions?**