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Competition Law II

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MINISTRY OF EDUCATION, YOUTH AND SPORTS

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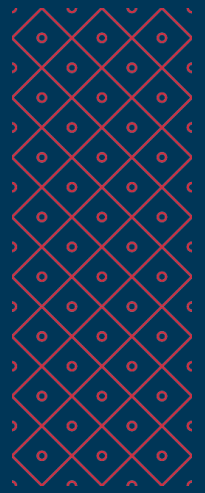
Content

1. Mergers and acquisitions
2. Public service and state monopolies
3. State aid



Chapter 1

Mergers and Acquisitions

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A '**concentration**' is the combination of two or more firms by **merger or acquisition**. Although such operations may have a positive impact on the market, they may also appreciably restrict competition, if they **create or strengthen a dominant market player** or **adversely affect the structure of the market** and thereby reduce the intensity of competition therein below a critical level.

The merger must therefore take place **between hitherto independent undertakings** and must lead to **a long-term result** which will be reflected in the competitive behavior of the merged undertaking and the structure of the market in which it operates.

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Will it be a concentration within the meaning of competition law if:

1. *Two competitors set up a joint venture as their subsidiary?*
2. *I buy a failing company to sell it off piecemeal: buildings and land, technical equipment, patents, parts of viable operations...*
3. *Two newsagents on opposite corners of the town square will come under one owner.*

EU competition law on mergers

TEC and now TFEU **do not** contain any provision to deal with mergers

- Up to 1989 (!) Art, 101 (prohibited agreements) and especially Art. 102 (threat of future dominance) were used to block certain merger plans

Council Reg. 4064/89/EEC "Merger control regulation", Art. 2:

- *"A concentration which **creates or strengthens a dominant position** as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be **declared incompatible** with the common market."*
- Until May 2004 only creation of a new individual or collective dominant unit used to be the reason for blocking the merger (unlike the US approach)!

EU: Competition law on mergers

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Adopting "**Modernized Merger control regulation" 139/2004/EC** the EU and its member states law switched to a so-called "**significant impediment to competition"** (SIC) test.

*"A concentration which **would not** significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared **compatible** with the common market."*

*"A concentration which **would significantly impede** effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared **incompatible** with the common market."*

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EU: When is the preliminary notification compulsory?

M&As are reviewed ex-ante = require a prior notification!
Art. 1 Regulation 139/2004/EC

- **Concentration with a "Community dimension"**

Everywhere the criteria of net turnover of the concerned parties on the world / EU market
Net turnover = *SUM* of business revenues of merging parties, plus revenues of competitors under their control or in control of them, *MINUS* VAT, other indirect taxes, selling discounts and part of revenues received from trade between merging parties and allied competitors.

EU: Duties of competitors concerned

Obligation to notify the concentration before its completion, i.e., before the control over competitor effectively changes

- After signature of an agreement with precedent (suspensive) condition
- After presenting a public offer to buy shares/ take over a company
- After an acquisition of majority interest in a company, however before any right of majority shareholder is exercised
- Before concluding an agreement, but after a solid, good-faith intention of parties can be proved (Offices cannot be tested by shams or makeshifts)

Duty of buyer = in case of acquisition
Duty of all parties = in case of merger or consolidation
Standstill obligation until the clearance by the Commission

The “gun jumping“ issue

Gun-jumping encompasses any behavior that infringes the closely related obligations a) to notify, b) to stand still by implementing the transaction either before its notification (“**procedural gun-jumping**”) or its approval (“**substantive gun-jumping**”).

Gun-jumping has become a hot topic in the EU, as the Commission has adopted an increasingly stringent and formalistic interpretation of the EUMR, and fines that were not imposed in early cases and then were initially relatively low (€33,000 in *Samsung/AST (1998)* and €229,000 in *A.P. Møller (1999)*, skyrocketed to €20 million in *Electrabel (2009)* and *Marine Harvest (2014)*; €28 million in *Canon (2019)* and €124.5 million in *Altice (2018)*. NCAs normally impose substantially lower fines, although the French Competition Authority slapped Altice with an €80 million fine (2016), and the Slovenian authority fined Agrokor with €54 million (2019)…

https://www.concurrences.com/en/dictionary/gun-jumping

EU: Who authorizes concentration?

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The notified body (i.e., administrative agency).

Competition office of a member state can ask European Commission to review the concentration not reaching the “community dimension“ however influencing the trade between member states.

European Commission can refer an already notified concentration to a member state Office if a concentration of “community dimension“ threats to restrict competition especially it that member state whose national market seems to be a separate RM.

Competitors who notify a concentration can ask the European Commission to:

- refer the case to the national level examination,
- attract for itself the case concerning at least 3 member states (providing none of them disagrees).

Council Regulation (EC) No 139/2004 - the EU Merger Regulation

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1. Concentrations… shall be appraised… with a view to establishing whether or not they are **compatible with the common market**.

*In making this appraisal, the **Commission shall take into account**:*

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

EU: How is the SIC calculated?

SIC test result may lead to ban of concentration that:

- would create individual of collective dominance,
- would induce such changes in market structure that number of relevant competitors would fall under critical level, i.e. concentration of Nr. 2 and 3 on the already very concentrated market would facilitate oligopoly even if would not create new dominant in itself.

Herfindahl-Hirschmann Index (HHI):

- calculates the degree of market concentration by summing the squares of each firm's individual market share
- HHI less than 2000 or market share of **merged parties** under 25 % of RM = refutable presumption of no harmful impact on competition.

Appraisal of effects of a merger

Market shares can indicate the future danger for competition, however, taken alone they do not say enough about real effects of a concentration:
Commission thus reviews its

- **Effect on prices** (of merged entity´s production as well as of the general price level on the relevant market(s)).
- **Non-price effects** (impact on quality, on kind and pace of innovations, recently also on personal data and privacy protection – IT mergers etc.).

Effects are of two kinds: **unilateral/non-coordinated** and **coordinated** (i.e. what the merged entity could do alone and what in likely concertation with others in an oligopoly…)

“Trade off“ between pros and cons of a merger

Similar to art 101(3) application the effects of a merger are balanced between positive and negative ones. E.g. a higher market share post-merger can be offset by a breakthrough technology… under the following conditions…

All acceptable positive effects (efficiencies of a merger) must be:

1. **Beneficial to consumers**
2. **Merger-specific**
3. **Verifiable**

Efficiencies must be produced within the EEA (markets affected) i.e. favor European consumers, European-based better quality or technology, NOT just better chances of the merger entity to succeed on US, China markets etc.

Watch the structure, not the behavior

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Beware of substantive differences between Arts 101 and 102 TFEU and the EUMR:

- *Arts 101 and 102 TFEU focus types of conduct that are incompatible with free and undistorted competition, sometimes regardless of their real impact (per se prohibitions).*
- *Art 102 TFEU does not prohibit "dominance" or its achieving, only its abuse, i.e. a certain behavior.*
- *EUMR does not "judge" the behavior, as mergers and takeovers are not per se types of anti-competitive behavior.*
- *EUMR, however, prohibits transactions that lead to dominant position, i.e. prevents achieving "dominance".*
- *EUMR protects the structure and the functioning of markets against behavior that is not anti-competitive as such.*

You know the answer?

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Does the current legal framework of the control of concentrations really fit the reality of digital markets, of globally operating online platforms?

Impact on market shares and price levels are of secondary or even no importance in cases of mergers between e.g. online platforms:

- *Low turnovers (in money terms);*
- *Small innovators, promising in the long term, unprofitable in the short one.*

Do not we need other criteria than the turnover to review a takeover?

Do not we need another "theory of harm", like deprivation of consumers of the benefit of improved and new products?

A way to capture “killer acquisitions“?

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Possible solution providing EC with an opportunity to review non-notifiable takeovers that threaten to liquidate a promising technology, or its irreversible control by a major industry player.

Article 22 EUMR allows Member States that come across transactions of concern to refer them to the Commission for assessment. This is permitted where such transactions **a)** affect trade between Member States and **b)** threaten to significantly affect competition within the territory of the Member State(s) making the request.

The Commission itself can invite MSs, which have by their national laws the power the control the transaction concerned, to make such a referral. The EC can review the merger on behalf of those who referred, not all MSs.

What if none of the MSs is empowered to control the concentration?

Important takeaways

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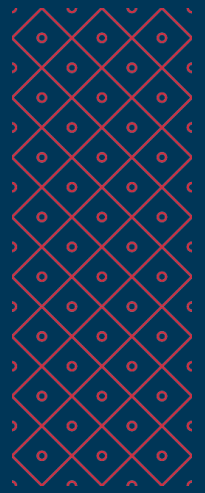
Mergers are not seen as harmful to competition in the same way as cartels and abuse of dominance - on the contrary, they are a natural and important part of the development of markets

They can have negative consequences for competition if the merger ***harmfully changes the market structure*** *- creating a dominant undertaking, narrow oligopoly, causing loss of incentives for rivalry and innovation.*

In contrast to ex-post enforcement of Articles 101 and 102 TFEU, the EUMR imposes ***ex-ante control - notification and stand-still obligations pending a Commission decision***

A merger not respecting this procedure is ***illegal*** *(so-called gun-jumping offence), a merger assessed as dangerous for competition is* ***incompatible*** *with the internal market.*



Chapter 2

Public Service and State Monopolies

Articles 106-109 TFEU

Concessions of market liberalism and the ubiquitous competition culture and law to a “mixed economy“ system, to MSs´ interest in active economic policies.

- Safeguarding competition “in principle“ while ceding ground to state interventionism “in fact“.
- Correcting market failures and externalities by political wisdom of Member States.

Aim is to **keep balance** between free competition and other non-economic goals recognized by the Treaty (**social-market economy model of Art 3(3) TEU**, services of general economic interests, regional development and cohesion, support to SMEs etc.).

Articles 106-109 TFEU

Addressed to Member states, not to undertakings – with the exception of 106(2) TFEU.

- Member States are limited in their freedom to create “public monopolies“ by EU competition rules, however undertakings entrusted with SGEI can enjoy well-founded exception from these rules.
- **State aids to undertakings are controlled and outlawed as incompatible with Single market if not assessed and authorized.**

Art 106 TFEU - Explanation

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EU respects different traditions in the Member States and a diversity of views on public service. However, the granting of exclusive rights is subject to a justification requirement.

If state monopolies are established or exclusive rights are granted, they must not violate competition law and the free movement rules.

At the same time, however, there is an exception for services of general economic interest whose importance is confirmed by other treaty articles (e.g. Article 14 TFEU as well as Article 36 CFREU), i.e. they may have exclusive rights/monopoly on a particular service, provided they pursue legitimate goals, are capable of fulfilling their task and act proportionally to it.

Article 106 (1) TFEU

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

I.e. *Prohibition to restrict competition **arbitrarily** by creating state or "natural" monopoly structures*

Article 106 (2) TFEU

2. Undertakings entrusted with the operation of **services of general economic interest** or having the character of **a revenue-producing monopoly** **shall be subject to the rules contained in the Treaties**, in particular to 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 EU.

I.e. For many "state" and SGEI monopolies ***the only existing "exception" from the 102 TFEU prohibition****.*

Public monopolies and Services of general economic interests (SGEI)

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Art 345 TFEU – EU law does not prescribe any (unique or preferred) **form of ownership**.

All law of the EU Single market however is based on principles of free movement and competition, i.e. any special (dominant or protected) position of public monopolies is questionable.

Art 14 TFEU (horizontal clause) – **SGEI** should get conditions enabling them to fulfill their missions, EU bodies should set principles and conditions through ordinary legislative procedure…

In EU policies and law the SGEI (and broader SGI) are not at all marginalized, they are treated as "***one of the pillars of the European model of society***", reflecting core EU-shared values and principles - see **Protocol 26 to the Treaties on SGI**.

Support to services of general economic interest

ECJ C-280/00 Altmark Trans GmbH – conditions to assess the assistance granted to a provider of a "public service" (2003)

1. **Real public service to discharge, i.e. that service clearly defined**
2. **Conditions and parameters of the compensation set in advance, in an objective and transparent manner**
3. **Compensation cannot exceed what is necessary to cover extra costs of the public service**
4. **Choice of the provider either through public tender or the compensation determined through analysis and comparison with adequate typical undertakings (*as-if* private investor)**

Art 106(1, 2) TFEU in practice

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What is "public" or "SGEI" and how it is organized is within Member State purview, only "manifest errors" (breaches of EU law principles) can be corrected by the EU.

Art 106 comes into play **only if the undertaking merely by exercising its exclusive rights cannot avoid abusing its dominant position.**

- If for instance MS creates a situation in which the provision of a service is limited when the undertaking with exclusive rights is manifestly not in a position to satisfy the demand.
  - CJEU C-41/90 Hoefner and Elsner (1991)

Art 106(1, 2) TFEU in practice

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Undertakings must **really be entrusted by a MS** with a SGEI – i.e. a **service offered to any interested subject** (universality, accessibility…) *but not necessarily gratis for all*.

Exercise of SGEI under "economically acceptable conditions" can require exclusive rights, i.e. shield against free-riding competitors.

- The criterion is not that strict as "this undertaking would bankrupt" if it has to provide SGEI without exclusive rights.
- ECJ accepts trade-off between exercise of a universal (non-profitable services) and certain profitable services for which the undertaking is also granted exclusive rights… like postal service or health care in peripheral areas etc.

Barrier to free movement within the EU and the harm to consumers (i.e. service cannot be provided to every interested) excluded the justification of an exception!

Case C-437/09 AG2R Prévoyance (2011)

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Social partners agreed (with State approval) on a scheme of for supplementary reimbursement of healthcare costs with compulsory affiliation to the agreement for all undertakings within the occupational sector concerned and entrusted the management to a private company.

CJEU: *Inasmuch as the activity consisting in the management of a scheme… is to be classified as economic, Articles 102 TFEU and 106 TFEU* ***do not preclude public authorities from granting a provident society an exclusive right to manage that scheme, without any possibility for undertakings within the occupational sector concerned to be exempted from affiliation to that scheme****. The annulment of such an obligation without possibility of exemption could have the result of making it impossible for the body concerned to accomplish the tasks of general economic interest which have been assigned to it under economically acceptable conditions.*

Applicability – direct or not?

Article 102 TFEU is directly applicable then also action of a MS under art **106(1)** that leads to breach of art 102 **can be invoked directly** by an individual before a national judge.

Art 106(2) TFEU is far more problematic: national courts are the best placed to assess whether there is a genuine SGEI, ***BUT*** the rights of individuals are not directly concerned and national judge can hardly assess whether EU trade is adversely affected.

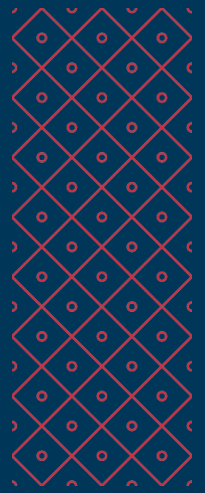
- Compatibility with state aid rules can be assessed **solely by the Commission**!

Art 106(3) TFEU

The Commission shall ensure the application of the provisions of Article 106 and shall, where necessary, address appropriate directives or decisions to Member States.

The Commission used this conferred power to "dissolve" monopolistic or oligopolistic market structure in network industries (telecoms, postal, energy, railway services…)

- Constant tension with the MSs´ right to decide on undertakings with exclusive rights or public monopolies!



Chapter 3

State Aid

State aid – general remarks

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State aid is not fully delegitimized under EU law!

- Acceptable state remedy to market failures (i.e. situations when market operation does not provide socially beneficial incentives or results: innovation, R/D, backward regions´ catch-up…)
- Only state aid caught up by **Art 107(1) TFEU** and not exempted by **Art 107(2)** by the decision of the Commission (or granted in breach of the procedure, i.e. without notification to the Commission or before its actual decision) is prohibited.

x

- State aid may not destroy a level playing field of the Single market by selecting winners.
- Competition of states´ willingness to support their own “national champions” is against principles of the EU integration.

…and a whole package of complicated rules is needed

EU State Aid legislation https://ec.europa.eu/competition/state_aid/legislation/legislation.html

- Treaty Provisions on State aid
- Rules on Procedure
- Forms for Notifications and Reporting
- Guidance on the notion of State aid
- Block Exemption Regulations
- Temporary rules in response to the crisis
- Horizontal rules
- Sector-specific rules
- Specific aid instruments
- Reference/discount rates and recovery interest rates
- Transparency of public undertakings
- Services of General Economic Interest (SGEI)
- Rules applicable to State aid in transport sector
- Rules applicable to State aid in coal sector
- Evaluation of State aid rules for health and social services of general economic interest (SGEI) and of the SGEI de minimis Regulation

State aid – general remarks

The role of the Commission is really central

- For its Treaty empowerment - wide discretion (see the changes introduced by the Commission during the crisis) + capacity to develop a substantive policy through exception from notification (support to SMEs, to training, to employment) and guidelines for whole areas of activities.
- For the fact that assessing a State aid means to consider and balance variety of socio-economic factors… that Courts cannot do on its own. Therefore, the review of Commission´s decisions is mainly procedural.

State aid definition

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Article 107(1) TFEU

Save as otherwise provided in the Treaties, any ***aid granted by a Member State or through State resources*** *in any form whatsoever which* ***distorts or threatens to distort competition*** *by* ***favoring certain undertakings or the production*** *of certain goods shall, in so far as it* ***affects trade between Member States****, be incompatible with the internal market.*

Directly applicable definition (can be invoked before national courts).

Almost unchanged in EU primary law since the Rome treaty 1957.

Actively applied since 1980s.

State aid definition

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Article 107(1) TFEU

5 elements of the definition to be right in place (all of them) before an act is classified as a state aid incompatible with the Single market (if not stipulated otherwise by TFEU):

1. **Undertaking**
2. **By the state or through state resources**
3. **Selective advantage**
4. **Distortion of competition**
5. **Effect on inter-state trade**

…the exact interpretation is however still in motion…

You know the answer?

Is there any State aid if a State merely extends the time limit for the tax levy of a particular business in trouble?

Is there a State aide when the mayor of a backward municipality, in an attempt to attract an investor, offers him municipal land for a symbolic €1?

Is there a State aid if a minister promises an unlimited implied guarantee against bankruptcy to a strategic company?

Is there a State aid when a State Export Bank gives a favorable export credit to a company executing an order in Australia?

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Specific situations of State resources involvement

Sale of public property at a price below market rates

Access to public domain or natural resources of the state or granting special rights without adequate remuneration

Preferential public ordering

Implied unlimited State guarantee against bankruptcy provided by public law or the fact of State ownership

Assistance to help a public undertaking prepare for privatization

Legislation to protect or guarantee market share

Public private partnership (PPP) and contract not open to competitive tendering

Free advertising on State owned TV

Infrastructure project benefiting specific users

Even arbitration awards can constitute a State Aid

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EC (24. 3. 2025) concluded that the arbitration award, to be paid by Spain in favor of company Antin, or any other entity that that has acquired or may acquire the award or any right thereunder, is incompatible aid under EU State aid rules. Spain must continue to resist attempts to enforce the award, in addition to not voluntarily paying out on the award.

Intra-EU arbitration - a dispute brought against a Member State by an investor from another Member State before an investor-State arbitration tribunal - violates fundamental rules of EU law on the ultimate jurisdiction of the Court of Justice of the European Union (CJEU) and the general principle of autonomy of the EU legal order. The dispute leading to the arbitration award was an intra-EU dispute: the two investors bringing the dispute against Spain are registered in Luxembourg and the Netherlands, respectively.

See: *https://ec.europa.eu/commission/presscorner/detail/en/ip_25_847*

Detailed analysis of the elements of State Aid definition given by 107(1) TFEU

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The following content is intended to partially replace an explanation that would normally merit several separate lectures.

Contents:

1. Undertaking
2. Aid by the State or State resources
3. Advantage
4. Selectivity
5. Distortion of Competition
6. Effect on inter-State trade

Ad 1) Undertaking - definition

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State aid rules only apply where the recipient is an "undertaking".

Single definition for the whole EU competition law?

- See CJEU C-480/09 P *Acea Electrabel Produzione SpA*: *"the concept of an economic unit in State aid matters can differ from that applicable in other areas of competition law."*

CJEU: Any entity engaged in an economic activity regardless of its legal status and the way of financing.

- Definition independent from the entity status under national law or law of its establishment.
- Definition dependent on the economic activity.

Economic activity = offering goods or services on a market.

- i.e. not just purchasing and always in a "market" = where private operators would be at least ***potentially*** willing to offer their goods or services.

Ad 1) Undertaking - consequences

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State aid rules do not apply where MSs exercise their exclusive public power.

- Army, police, justice, air and maritime safety and control, anti-pollution surveillance etc.

MSs can decide to convert some sectors into markets by their liberalization (mail service, airways, railways, water, energy, waste...)

- Health-care, education, social security, infrastructure management, etc. become market driven if MSs do not keep control over their non-profit and tax-based / solidarity-based provision.

However, MSs are not free to close potential markets to competition by in-house provision of goods and services.

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Ad 2) Aid granted by the State or through State resources

State resources = public funds administered by the MS through central, regional, local authorities, incl. independent ones (e.g. central bank).

- As well as funds controlled by the State through public or private bodies designated to exercise such control (agencies with delegated powers).

Aid should be **at least imputable to public authorities influence and control**, even if the resources were constituted from compulsory contributions of private entities.

- It includes not only direct "positive" transfers from those funds but also any negative impact on them caused by tax exemptions, non-collection of statutory contributions, any other waived revenues.
- Even a sufficiently concrete risk of an additional burden on the State in the future by a guarantee or a contractual offer would be sufficient.

France Télécom (56 % owned by the French State) got into financial troubles. French minister in charge publicly declared that "*if FT were to face any financing problems, the French State would take whatever decisions to overcome them*". Later on, a shareholder loan contract was drafting promising FT a 9 billion EUR of investment. This contract was **never signed nor implemented**. The mere declaration was sufficient to redress market investors trust in FT.

Commission considered the step of French State to be a state aid whose amount however could not be evaluated and recovered. **General Court** annulled the decision as no impact on State resources was determined.

CJEU however concluded that:

- **Such a close connection between the advantage and the commitment of State resources was not required by EU law. A sufficiently concrete risk of imposing an additional burden on the State in the future was sufficient to find a commitment of State resources. The announcement of a shareholder loan (if the State is the shareholder) was an advantage granted through State resources.**

Ad 2) Aid granted by the State or through State resources

The origin of the resources is <u>not</u> relevant provided that:

- Before being directly or indirectly transferred to the beneficiaries, they enter under public control (become available to the public authorities) even if they do not become the property of the public authority!

In T-358/94 *Air France v Commission* the aid granted by Caisse des Depots et Consignations was financed by voluntary deposits of private citizens which could be withdrawn at any time. Still those funds were “State resources“ as the State-controlled Caisse was able to use them as if they were at its disposal.

ECJ in 82/77 *The Netherlands v. Van Tiggele* decided that State-imposed price regulation/control that indirectly caused money transfer from consumers to producers was not a state aid. In C-72 and 73/91 *Sloman Neptun* law allowing employment of third country nationals, non-residents of FRG, on different conditions than EU nationals, although it diminished ultimately the tax revenues of FRG however did not represent any transfer burdening state resources (i.e. was not a state aid).

Ad 3) What is an advantage?

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Advantage = any economic benefit which an undertaking would not have obtained under normal market conditions.

Only the effect on the undertaking is relevant, not the cause or the objective of the State intervention (i.e. intention to protect environment etc. is irrelevant).

Also indirect advantages count (the final beneficiary is not the direct recipient) but not mere secondary effects spread over non-identifiable group of undertakings.

If State enters the business as investor, creditor or guarantor all measures that exceed the **market economy operator limits** provides an advantage.

- ***Market economy investor test; Private creditor test; Private vendor test***… methods of assessment , always comparing State behavior with normal market behavior.
- Important is not the “public policy“ rationality but a private operator´s one although even P.I. may pursue more objectives than just profitability (but never disregard it!).

Compensation for SGEI as state aid?

CJEU in **C-280/00 *Altmark Trans GmbH*** – conditions to assess the assistance granted to a provider of a "public service" (2003):

1. *Real public service to discharge, i.e. that service clearly defined.*
2. *Conditions and parameters of the compensation set in advance, in an objective and transparent manner.*
3. *Compensation cannot exceed what is necessary to cover extra costs of the public service.*
4. *Choice of the provider either through public tender or the compensation determined through analysis and comparison with adequate typical undertakings (as-if private investor).*

Conditions Acea Electrabel Produzione SpA updated and specified by the EC in 2012 – see for update:

http://ec.europa.eu/competition/state_aid/legislation/sgei.html

Ad 4) What is selectivity?

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General measures vs. selective measures (i.e. tax lowered to anyone or to just some undertakings or sectors)

- Favor given to certain undertaking(s) or industry(ies) (i.e. exact number of beneficiaries to distinguish between selective and general measures do not exist!)

Undertakings in the same position have been treated differently, and this differentiation could not be objectively justified.

- Selectivity can be material (advantage for certain undertakings or sectors) and geographical (i.e. regional, which under certain conditions would not be considered that problematic).
    1. Is there any kind of protectionist effect? (however, judged by the effect of the measure, not by declaration of objectives).
    2. Is there a certain degree of targeted advantage? (also judged by the effect).

Even if intention is irrelevant as justification, it plays a role in the “selectivity test“ as one of the indications of selectivity.

CJEU in C-143/99 Adria-Wien Pipeline

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Under Austrian Tax law goods manufacturers could benefit from partial refund of payments for electricity and gas supplies. A company building the A-W pipeline, classified as services provider, was refused the same tax advantage. **CJ held that**: *General system of refund does not constitute a state aid, however a selective system, that favors a sector of industry, or a certain category of undertakings does, unless it is based on objective criteria or enjoys an exception from the prohibition of state aid.*

The following **selectivity test** was devised:

1. **UNDERTAKINGS**: Are the compared undertakings in the same legal and factual situation?
2. **MEASURE**: What is the objective of a tested measure? Is not there from the outset an obvious discriminatory effect? What is the system of reference (i.e. normal rules applied on the basis of objective criteria) it is part of (for instance the VAT) system?
3. **LOGIC OF THE SYSTEM**: Is there a derogation from the general system that has different impact on undertakings in the same situation? If yes, is this selective measure justified by the nature or general internal logic of the system?

Selectivity vs. State policy objectives

CJEU in **C-78-80/08 *Paint Graphos*** and others recognized importance of cooperatives in the EU context, admitted their distinction from private "purely commercial" companies and therefore did not find various tax exemptions favoring cooperatives in Italy as a selective measure!

Preference for **EU set of values** ("importance in EU context") over purely national ones.

However, a noble goal in itself cannot exclude selectivity! **It can justify compatibility of State aid measure but cannot exclude the measure itself from state aid definition!**

Discretionary powers of administration applying the measure presented as "general" would convert it into selective. General measure would require transparent criteria and when these are met by an undertaking then the advantage shall be available to him.

Ad 5) What distorts competition?

Any measure granted by the state is considered to distort or threaten to distort competition when **it is liable to improve the competitive position of the recipient undertaking** compared to other undertakings with which it competes.

At least **potential negative effect on competition,** i.e. the distortion need not to be strong or material, real threat is enough. Only purely hypothetical threats are disregarded.

- Issue is the amount of the aid (*de minimis* excluded) and also the position of the company on the market. Commission compares the position of the company before and after the aid is supposedly granted.

Ad 5) What distorts competition?

State cannot refer to advantages existing for companies in other MSs as the necessity to meet the competition borne by subsidies provided by other MSs is not an excuse.

State cannot prevent threat to competition by simple assigning of a public service to an in-house provider (*do it yourself approach*, e.g. urban cleaning).

In-house assignment does not exclude competition only if:

1. A given service is subject to a legal monopoly and is not in competition with similar (liberalized) services. I.e. there is neither competition ***in*** the market nor ***for*** the market.
2. Service provider cannot be active (due to regulatory constraints) in any other liberalized market.

Ad 6) Effect on inter-state trade

GC in **T-288/07 *Friulia Venezia Giulia***: "*Where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid.*"

Reasonably expectable effect (trade likely affected) is a sufficient ground for action. No market analysis is required, just that the aid is liable to affect the trade.

Aid to locally acting company may also potentially hinder competitors coming from other MSs!

In principle trade can also be affected even if the recipient exports all or most of its production outside the EU!

Only aid with purely local or marginal effects excepted.

Purely local state aid without effect on trade

Swimming pools and other leisure infrastructure predominantly for local population;

Museums and other cultural infrastructure predominantly for local population;

Hospitals and health case infrastructure predominantly for local population;

News and media with impact restricted to specific region or linguistic area;

A conference center, where the location and the potential effect of the aid on prices is unlikely to divert users from other centers in other MSs;

Some cable ways and ski lifts (low capacity, local users, inside cities or villages etc.).

Source: EC Notice 2016

Determining what is state aid as such vs. what is permissible state aid

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General Court in **T-67/94 Landbroke v. Commission** held that:

- "State aid" is an **objective term of EU law** that cannot be interpreted nationally.
- Even the Commission has only a minimum discretion in deciding **what** constitutes a state aid.
- Art 107(1) TFEU is directly applicable.

➢ Commission however disposes of a relatively **wide and exclusive discretion** to assess whether a state aid qualifies for an exception laid down by the Treaty.

Exceptions: Art 107(2)

***Ex lege* exceptions**: 3 types of aid deemed compatible with the internal market - see a)-c)

a) Social aid to individual consumers granted without discrimination to the origin of the products concerned (that are provided for free or discounted).

b) Aid to make good the damage caused by natural disasters or exceptional circumstances (interpreted restrictively).

c) Aid to Ex-GDR in areas damaged by the former artificial border (i.e. not by an inefficient economic system as such).

In practice they are quite rare…

Exceptions: Art 107(3)

Discretionary exceptions: aid that may be deemed compatible with the internal market –depending on the Commission´s approval (case by case or *en bloc*)

- **107(3)a** – seriously backward or suffering regions: NUTS II with GDP/capita in PPP lower than 75 % of the EU average (remote islands, French DOM-TOMs…)
- **107(3)b** – aid to projects important for the EU (like HDTV, Galileo…) or in serious disturbance in the WHOLE economy of a MS

Exceptions: Art 107(3)

107(3)c – most widely used, most important for donors and recipients

- Aid to sectors (restructuring of “old“ industry, SMEs), regions (NUTS III) as parts of a coherent policy (conversion/modernization program).
- Must be matched by some initial investment, lead to job creation, to restructuration of a sector/activities in a region etc.
- EC adopts **Block exemptions** (26 categories of aid that need not be notified to EC, just compulsory info)

107(3)d – culture and heritage conservation projects (sport too).

107(3)e – door opened to other categories of exemptions deemed necessary if approved by the Council (used for aid to shipbuilding…)

Aid for specific purposes

Other TFEU provisions allow aid for specific purposes, under specific rules:

1. Aid necessary for the operation of CAP
2. Aid for public transport services
3. Aid necessary for undertakings providing SGEI

For instance, **Art 40(2) TFEU**

*"The common organization established in accordance with paragraph 1 may include all measures required to attain the objectives set out in Article 39, in particular regulation of prices, **aids for the production and marketing of the various products**, storage and carryover arrangements and common machinery for stabilizing imports or exports.*

*The common organization shall be **limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination** between producers or consumers within the Union."*

Aids permitted without notification

“General block exemption - GBER“ COMMISSION REGULATION (EU) No 651/2014 declaring certain categories of aid compatible with the internal market

- *“The block exemption regulation frees categories of state aid, deemed to bring benefits to society that outweigh the possible distortions of competition in the Single Market triggered by the public funding, from the requirement of prior notification to the Commission. Consequently, Member States may implement measures which fulfil the conditions of the Regulation without prior Commission scrutiny.“*
- Several times amended, the last time in December 2023.

COMMISSION REGULATIONS No 1408/2013, 1408/2013, 2023/2831 *de* ***minimis*** **aids** (general one, for agriculture, for fishery and aquaculture)

- *“The maximum de minimis funding any single recipient can receive is €300,000 (cash grant equivalent) over a 3-year fiscal period. The sterling equivalent is calculated using the Commission exchange rate applicable on the written date of offer of the de minimis funding.“*

See: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6567

State aid – procedural rules

Art 108 TFEU

Case law of CJ and General Court

COUNCIL Regulation 2015/1589 laying down detailed rules for the application of Article 108 TFEU

COMMISSION Regulation 794/2004 – implementing the Council Regulation – the latest amendment by **Commission Regulation 2016/2105** (detailed rules + annexes with notification and complaint forms): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02004R0794-20161222

Complete overview:

- ***https://competition-policy.ec.europa.eu/state-aid/legislation_en***
- ***https://competition-policy.ec.europa.eu/system/files/2021-04/state_aid_procedures_factsheet_en.pdf***

New state aid + standard procedure

Art 108 (2)(3) establishes two stage procedure

a) **prior notification and preliminary investigation** by the Commission = **notification** plus **standstill obligation** of MSs as future/potential donors;

- new aid approved if Commission does not take decision within 2 moths;
- no rights of other parties to be consulted;
- aids “solved” at this stage not deemed to cause difficulties to internal market.

New state aid + standard procedure

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b) **detailed investigation + decision and enforcement**

- compulsory for aids requiring complete review;
- other parties are entitled to be heard (informed through notice in O.J.E.U.) – must react within 1 month;
- applies also to cases of non-notification or other breach of rules by MS;
- no legal deadlines, just standard time: 18 months (does not apply to unlawful , i.e. non-notified, state aid);
- "balancing test" – positive v. negative effects of the aid;
- lead to ***approval - conditional approval – prohibition.***

Basic criteria for approval by the EC

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EC exercising it discretion under Art 107(3) examines whether:

- A) An aid measure **contributes to the promotion of public interest** contained in Art 107(3) paras a) to d).
- B) The aid´s potential **benefits** promoting this public interest **outweigh the potential distortions of competition** deriving from the aid (“balancing test“).

Basic criteria for approval by the EC

In practice, the EC must balance aid´s future (potential) positive and negative effects, focusing on whether:

- A) Aid is **well targeted** under Art 107(3) objectives; providing incentives to **change recipients‘ behavior** to attain the public policy interest (aid should not just cover operating costs without any other effects).
- B) Aid is **limited to necessary minimum** and is the least competitively distortive (i.e. corresponds the smallest volume needed for the attainment of the objective).
- C) Aid is **proportionate** under different angles (its impact on other competitors, sectors, MSs etc. minimised).

“Unlawful“ State aid - definition

COUNCIL REGULATION (EC) No 2015/1589 Art 1(f): *‘unlawful aid’ shall mean new aid put into effect in contravention of Article (now) 108(3) of the Treaty*.

EC Guidance Paper on State aid, 2012*: All state aid measures (individual measures and aid schemes) have to be notified to the Commission for approval and must not be put into effect before the Commission has taken a decision authorizing them ("standstill obligation"). All aid implemented before approval of the Commission is considered unlawful aid and may have to be recovered from the recipient with interests.*

Unlawful state aid = aid granted in breach of the prescribed procedure, i.e. not notified; no standstill observed; no respect for the EC´s decision.

Unlawful State aid - consequences

Under COUNCIL REGULATION (EC) No 659/1999 (now re-codified by **Council Regulation 2015/1598)**

Commission may order:

A) Suspension of such aid (“suspension injunction“).

B) Provisional recovery of such aid (“recovery injunction“).

… until the Commission takes a decision on the compatibility of the aid with the common market.

National court must order:

- Recovery of such aid.
- Definition of State aid provided by Art 107(1) TFEU is the objective one in EU Law and directly applicable. A national judge can subsume any contested measure to this definition and check it for the respect for the procedure.

“Incompatible“ State aid - definition

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Incompatible State aid = aid that fits the Art 107(1) definition and could not enjoy any of the exceptions provided by TFEU.

Declaration of Incompatibility requires a **thorough substantive assessment of the aid´s effects carried out by the Commission (only!)**

- See: *Basic criteria for approval by the EC*

Unlawful State aid does not necessarily mean an incompatible one!

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You know the answer?

1. *Is illegal state aid banned forever?*
2. *How do I know that illegal state aid has been granted?*
3. *How do I know if the State aid granted is compatible with the EU internal market and competition within it?*

Consequences of a negative EC´s decision

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Projected aid may not be granted / must be altered.

Aid already granted must be **suspended** during Commission´s investigation BUT can be found compatible.

Aid found incompatible must be recovered from the recipient by the MS that granted it with interest (referential rate set by the Commission).

- Commission **cannot order but a provisional recovery of an unlawful aid without substantive compatibility assessment!**
- **Legally existing schemes/programs of aid** in MSs can be only abolished or altered, no recovery of executed aid from recipients.

Important takeaways

*State aid has a **directly applicable definition** in EU law*

State aid is delegitimized if it is not compatible with the Treaty

In fact, State aid is very frequent and voluminous in all EU countries (due to industry transition, covid etc.)

The important thing is that state aid provision does not turn into a competition between states to see who can help more - the smaller and poorer ones would immediately close themselves off to businesses from the bigger and richer ones.

Ex-ante control, based on the notification obligation, on which the European Commission has a monopoly is to ensure that state aid is compatible with competition in the internal market.

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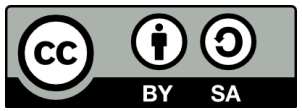

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