



State aid control and fiscal State aid

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Why State aid control?

- Distortions of competition in the internal market by State interventions – "level playing field"
- Article 107(1) TFEU
- State aid is only compatible if justified by an objective in the common interest (efficiency/equity – e.g. regional development or R&D or SME support) and proportionate

Some principles of State aid control

- Exclusive competence of the Commission
- Member States need to notify intended State aid before its implementation
- Decisions are decisions of the College of Commissioners

What is State aid?

- Article 107(1) defines five cumulative criteria:
 - Economic advantage
 - Certain undertakings (selectivity)
 - State Resources
 - Distortion of competition
 - Effect on trade between Member States
- In principle aid is prohibited
- However, possibilities for compatibility (Article 107(2) and (3))



Compatibility

- European Commission has exclusive competence to approve State aid
- In its assessment under Article 107(3) TFEU, the Commission disposes of discretion
 - Disadvantaged regions
 - Important project common interest
 - Serious disturbance in economy
 - Development of economic activities/areas
 - Culture and heritage conservation
- Guidelines, Frameworks, Notices, Regulations

Common Principles for Compatibility Assessment

- Contribution to a well-defined objective of common interest
- Need for state intervention
- Appropriateness of the aid measure
- Incentive effect
- Proportionality of the aid (aid limited to the minimum necessary)
- Avoidance of undue negative effects on competition and trade between Member States
- Transparency of aid



State aid procedure (1)

- Sources of State aid cases
 - Notification (most cases)
 - Complaints
 - Ex-officio (press and other sources)
- New measures involving State aid
 - Must be notified
 - Cannot enter into force before Commission approval
 - General Block Exemption Regulation
- If not notified, then unlawful aid

State aid procedure (2)

- Preliminary investigation
- If no problems: Commission approves notified measure
 - In case of complaint or ex-officio also administrative closure possible
- If doubts about compatibility: opening of formal investigation
- Final decision (positive, negative, no aid)
 - If negative decision on non-notified aid: recovery (unless legitimate expectations) – recovery is not a fine, but repayment of an unduly received advantage
- Existing aid: special cooperation procedure with Member State to change measure for the future

Fiscal aid – some elements

- Article 107(1) TFEU
 - EU Courts confirmed that State aid also covers fiscal measures (Court of Justice, Case 173/73, *Italy v. Commission*)
- Commission Communication on State aid in the field of direct business taxation (1998)
 - Explains rules for fiscal aid in light of case-law
 - Focus on tax advantages and selectivity: examples, general versus selective measures, discretionary powers of administration, logic of the tax system
- Forthcoming: Commission Notice on the notion of State aid
- Existence of aid: focus often on advantage and (regional or material) selectivity

Material selectivity

- Measure applies only to certain (groups of) undertakings or certain sectors in a Member State
- Comparison within one Member State (not with others)
- De jure or de facto
- Three-step analysis:
 - What is the reference tax system?
 - Is there a derogation from the reference system?
 - Is the derogation justified by the logic of the tax system?
 - Preventing double taxation, administrative manageability, etc.

Past cases on tax schemes favouring multinationals

- State aid control of tax arrangements not new
 - 1997 – Measures against the "harmful tax competition"/ Code of Conduct on Corporate taxation
 - 2001 – Commission opens 15 investigations
 - Focus on intra-group activities (financing companies and coordination centres), which allowed multinationals special conditions in determining their taxable liability and which did not ensure compliance with the OECD arm's length principle
 - Court judgment C-182/03 and C-217/03 *Forum 187* confirmed the Commission's approach
 - Concerns also other tax arrangements such as taxation of foreign income (offshore), e.g. the tax system of Gibraltar

The investigations into tax rulings

- In 2013 the Commission started looking into specific ruling practices in certain Member States
- In 2014 and 2015, it initiated formal proceedings into transfer pricing arrangements approved in tax rulings

Apple (Ireland)	Starbucks (Netherlands)	Fiat Finance & Trade (Luxembourg)
Amazon (Luxembourg)	Ruling practice in Gibraltar (UK)	Excess profit ruling scheme (Belgium)



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