

State Aid Law

Nienke Saanen

7 March 2013

Content

1. The provision
2. The definition
3. The prohibition
4. Notification
5. Decisions
6. Recovery

Treaty provisions

1. Rules for undertakings: art. 101 – 105 TFEU
 - a) cartels (art. 101 TFEU)
 - b) abuse of a dominant position (art. 102 TFEU)
 - c) merger control (Reg. 139/2004)
 - d) undertakings with a special status (art. 106 (2) TFEU)
2. Rules for Member States: art. 106 – 109 TFEU
 - a) state aid
 - b) undertakings with a special status (art. 106 (1) TFEU)

Historical context state aid law

- Before 1952: National perspective → States supported 'national champions'
- Negotiations on economic integration → States refuse to accept other states providing aid
- After 1952: European perspective → State aid prohibition

State aid – art. 107 TFEU

Article 107
(ex Article 87 TEC)

1. 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 favouring 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.

Definition: the six elements

1. State resources
2. Undertaking (or productions)
3. Advantage
4. Selectivity
5. Distortion of competition
6. Effect on trade between MS

State resources

- Not only subsidies but every advantage (soft loans, guarantees, tax exemptions, nice prices, ...) because of which the State misses resources
- Granted directly by the State or through public or private bodies established or appointed by that State
- 'State' includes central and local governments
- Imputable to that State

Undertaking as beneficiary

- Every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed
- Aim of making profit is not decisive
- Crucial factor is the performance of economic activities: activities of industrial or commercial character, consisting of producing or distributing goods or providing services on the market

Advantage

- The measure lightens the burden normally placed upon the undertaking (comparison with other undertakings in a similar situation)
- Positive, e.g. a subsidy
- Negative, e.g. a tax exemption

Note: paying the market price is not an advantage; paying more than the market price is, as well as selling below market value

Advantage – Altmark case (C-280/00)

- Is a compensation provided for by the government to an undertaking for the costs of performing a service of general economic interest state aid as laid down in article 107 (1) TFEU?
- Changed in time (no-yes-no)
- Changing views between the Commission, the General Court and the Court of Justice

Advantage – Altmark case (C-280/00)

- A compensation like that is no state aid because there is no advantage for the undertaking, if four conditions are met:
 1. Charged with a clearly defined SGEI
 2. Compensation based on objective parameters that are known in advance
 3. No overcompensation
 4. Public procurement or benchmarking of costs

Selectivity

- The measure has to favour certain undertakings
- A general measure is not a state aid measure
- Justification: measures creating different treatment of undertakings in relation to charges where that difference is attributable to the nature and general scheme of the system of charges in question are not considered state aid measures

Distortion of competition and effect on trade between Member States

- Easily fulfilled: distortion does not actually have to exist; the possibility of distortion will suffice
- The favored undertaking itself does not have to participate in the trade between Member States

Local swimming pools, local museums, small marinas → no distortion of competition or effect on trade

State aid measure - notification

- When all elements are present: state aid!!
- Basic rule: prohibition
- Every plan to grant state aid has to be notified to the Commission
- The measure may not be executed before the approval of the Commission (standstill obligation)
- It is to the exclusive competence of the Commission to declare a state aid measure compatible with the internal market (approval)
- Sometimes, an exemption of the obligation to notify is applicable

Unlawful aid and incompatible aid

- Unlawful aid:
 - State aid that is granted before approval by the Commission (before or after notification), even if it is declared compatible afterwards (approved)
- Incompatible aid:
 - State aid that is declared incompatible with the internal market by the Commission (not approved)

Exemptions of the obligation to notify

- Regulation no. 800/2008: General block exemption regulation (GBER)
 - 9 'goals', like environmental protection, R&D, disadvantaged and disabled workers
- Regulation no. 1998/2006: de minimis aid
 - € 200.000 per undertaking per 3 year
- SGEI Decision (2005/842/EC) → legal basis is art. 106 (2) TFEU: undertakings entrusted with a service of general economic interest
- Regulation no. 360/2012: de minimis aid for SGEI
 - € 500.000 per undertaking per 3 year

SGEI Decision (1)

- The *Altmark-criteria* weren't met that often, especially with regard to public procurement and benchmarking
 - European Commission thought that there were some aid measures that still didn't need to be notified
- ➔ Set out the conditions and criteria

SGEI Decision (2)

- Compensation for services of general economic interest (not transport), when the compensation is < € 15 million per year
- Hospitals, health care, child care, housing corporations
- Air and sea connections to the islands with a maximum of 300.000 passengers per year
- Airports and ports with a maximum of 200.000 passengers respectively 300.000 passengers per year

SGEI Decision (3)

- Criteria:
 - Undertaking is explicitly entrusted with a clearly described SGEI through a government decision
 - Parameters for the calculation of the compensation are determined beforehand and in an objective way
 - Max. net costs + reasonable profit

➔ Aid measure does not have to be notified

Investigation by the Commission

When the measure

1. is a state aid measure, and
2. is not exempted from the obligation to notify

the MS (also if it is a measure by a local government) has to notify it to the European Commission

Aid that is compatible with the Treaty

- Art. 107 (2) TFEU:
 1. Social aid
 2. Aid to recover from natural disasters
 3. Aid directed at certain areas of the Federal Republic of Germany to deal with the division
- ➔ Still has to be notified!!!!

Aid that may be compatible with the Treaty

- Art. 107 (3), e.g.:
 - To promote regional economic development
 - To remedy a serious disturbance in the economy of a MS
 - To facilitate the development of certain economic activities
 - To promote culture
- Art. 106 (2) EC: undertakings entrusted with a service of general economic interest

Soft law

- The Commission has adopted many guidelines and communications, in which criteria are given for state aid measures to be considered compatible, e.g.
 - Public service broadcasting
 - Stranded costs in the electricity sector
 - Guarantees
 - Risk capital
 - Rescue and restructuring aid
 - SGEI Framework

SGEI Framework

- Also based on art. 106 (2) TFEU
- All compensatory measures regarding services of general economic interest that do not meet the Altmark-criteria or fall outside the ambit of the SGEI-decision, have to be notified
- The SGEI framework lays down the criteria on the basis of which the commission assesses these measures
 - Clear description and entrustment
 - Objective and transparent parameters
 - Maximum of the net costs including a reasonable profit

SGEI in categories

1. Criteria *Altmark* → no state aid measure
2. SGEI Decision → state aid measure but no prior notification
3. SGEI Framework → state aid measure that has to be notified (but is probably declared compatible when criteria are met)

Balancing test for approval (done by European Commission!)

1. Is the aid measure aimed at a well-defined objective of common interest?
2. Is the aid well designed to reach the objective of common interest; does the proposed aid address a market failure or other objective?
 - a) is State aid an appropriate policy instrument?
 - b) is there an incentive effect, i.e. does the aid change the behaviour of undertakings?
 - c) is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
3. Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

Decision of the Commission

- A. No state aid measure (MS did not have to notify)
- B. Incompatible with the internal market
- C. Compatible with the internal market

When the state aid measure is incompatible and has already been granted, the Commission orders recovery of the amount, with interest

*CEL*F case (C-199/06)

- It is in the competence of the national courts to decide whether or not unlawful state aid was given
- If so, national courts can order recovery of the aid
- What if the state aid was unlawful because it was not notified, but it was, in the end, approved by the Commission and from then on lawful?

*CEL*F case (C-199/06)

- ECJ:
 - 1) Interest over the period of unlawfulness (minimum)
 - 2) Whole or part of the amount (optional)
 - 3) Compensation for damage if claimed

Summary: Types of measures

1. Measure, but no state aid (one or more of the elements is not fulfilled)
2. State aid measure that is exempted from the obligation of prior notification (block exemptions)
3. State aid measure that has to be notified but is compatible with the internal market
4. State aid measure that has to be notified in advance but it will probably be approved when certain criteria are met
5. State aid measure that is prohibited

Question

- I. National courts can rule on whether a state aid measure is unlawful or not
 - II. State aid measures that are, according to the member state, compatible with the internal market, do not have to be notified to the European Commission
- a) Both proposition are correct
 - b) Both propositions are incorrect
 - c) Proposition I is correct, proposition II is incorrect
 - d) Proposition I is incorrect, proposition II is correct

Another question

Terpstra BV wants to build a museum about the history of salt mining in Glanerbrug, a small village between Enschede and Gronau (Germany). The community council is willing to financially participate because the initiative fits into the youth policy of Glanerbrug. It contributes a sum of € 250.000. This measure is:

- a) Lawful (no state aid)
- b) Lawful (de minimis aid)
- c) Lawful (culture)
- d) Unlawful (state aid)