Some reflections (1) on the structure of the state aid rules in the Treaty of Rome

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The concept of state aid is defined in article 87 §1 of the Treaty. Four criteria are mentioned. State resources (1) have to be involved, specific undertakings have to be favoured (2), competition has to be distorted (3) and trade between Member States has to be affected (4).

But first let us put the question: why rules on state aid?

1. The Treaty has as underlying philosophy, as approach to the basic problems in society: increase of the welfare of the people concerned. The Treaty is based on the axiom that the best way to achieve this is through competition, mitigated only by considerations of social protection, solidarity and harmonious development. Competition can be distorted, i.e. biased by parties having an interest to avoid or at least mitigate competition: companies, individuals, trade unions and professions on the one hand, the State on the other hand.

Let us limit ourselves to the latter for the moment.

2. Why should States want to limit competition? Internally they may want to protect interests of social welfare for their citizens by imposing solidarity or — through regulation — a particular non-voluntary behaviour on market operations (respect of safety rules f.e.). They may also want to grant different forms of financial transfers to market operators (different categories of aid, e.g. in favour of regions, research, etc.) inducing a non-competitive behaviour of these operators in order to make them deliver goods or services of a particular quality or at lower than market price. Such behaviour ‘distorts’ competition. Art. 87 § 1 limits these possibilities of the Member States, but only in so far as the distortion is due to the favouring of specific undertakings by the Member State through state resources, by putting them under the control of an independent body, the Commission, with the task to ensure that they do not affect trade to an extent contrary to the interests of the Community.

3. It follows directly from this that the financial interventions for the State’s own consumption by purchases of goods or services from the market do not come under this definition. Indeed no state resources are involved as state funds are exchanged for goods or services provided to the State; the State receives, in exchange for funds, property or is provided with a service, in other words, the State receives itself an equivalent counterpart. Of course, in doing so, the State should not favour by its choice certain undertakings from an Internal Market point of view, for which reason the non-discrimination principle plays a central role in the public procurement rules. On top, state aid may be present if the State pays a price to a certain operator which exceeds the market price; only the excess price is however state aid.

4. Regulatory or financial interventions of the state, on the other hand, often involve the forgoing of state resources, i.e. value is transferred to (and not exchanged with) the operators. No state resources are involved, for instance, if the state imposes a non-competitive behaviour on all operators by regulation, f.e. opening hours, emergency requirements to hospitals or pure solidarity systems for sickness funds. In this case the State usually does not pay the operators, as the latter can make the cost be born by the consumer.

But apart from this, regulation usually creates scarcity. The increase in economic value caused by such scarcity could in principle be turned into revenues by and for the State, f.e. licences, exclusive or other special rights can be sold. The economic value inherent to such special rights constitutes state resources and, if such revenue is forgone without equivalent counterpart, state aid, even if granted to a whole sector. Indeed, taking over of cost by the State, of any cost which normally is to be borne by the undertakings of a sector constitutes a favouring of these undertakings over all other undertakings, and investors in such a sector are favoured over those investing in other sectors (see also under 5.)

It follows that any state resource transferred to operators, not exchanged against the same value in a different form flowing back into the property of

(1) This article expresses the personal opinion of Mr Feltkamp, former Head of Unit of DG COMP.H.3, and does not prejudge or bind in any way DG Competition or the European Commission.
the State, is state aid if the other conditions in Art. 87 § 1 are fulfilled.

5. The Treaty is of course only interested in state intervention in as far as it has an influence on trade between Member States. As the treaty introduces free competition between operators of its member states, it has to create a protection against aid granted by Member States to support their ‘own’ undertakings; this protection is found in the Treaty’s state aid rules and in the independent surveillance by the Commission.

Therefore whilst internally an aid to a sector might not seem a state aid, from the Community and Treaty point of view it is; income of strong sectors, not as exposed to competition from other Member States, might be used through fiscal tools to support sectors much more exposed to such competition (ex. Maribel)(see also under 4.).

‘Favouring’ means therefore not only selectivity with regard to individual operators but also selectivity with regard to groups of operators.

6. The Treaty goes even a step further. Even if all operators — without discrimination — receive funds from the state with the obligation to transfer these funds with a social character integrally to consumers, the Treaty presupposes in Art. 87 § 2a that such funds are state aid. If the transfer of funds under these conditions was not considered to involve state aid, Art. 87 § 2a would lose its meaning. Art. 87 § 2a declares such aid to be compatible ex lege. However, it follows a fortiori from this that if such funds are transferred only through part of all possible operators, aid is involved, which, moreover, is not automatically compatible.

Consequently, all transfers by the State, involving a below market return through a loss or foregoing of value for the State itself, constitute in principle state aid in the sense of the Treaty.

The logic behind this, as it was conceived by the authors of the Treaty, must be that state aid is any behaviour of the state through such transfers aiming at changing the normal market behaviour of the operators. The state may have different objectives: regional development, environmental protection, energy saving, cultural heritage protection, research stimulation, restructuring of undertakings in difficulty or provision of products or services below the normal market price. It all boils down to the state covering costs of operators, which these operators would or could not accept to bear themselves. The rather inexact term ‘market failure’ is generally used for this; the market would indeed provide the respective products or services in most cases but not at the socially acceptable or otherwise politically defined conditions at a given point in time in a given country. F.e. it may be justified to subsidise anti-cholera medication in certain countries and not in others at a given point in time.

There is no difference between all these objectives with regard to competition between operators and their corresponding interventions with regard to the question whether there is state aid or not. Such interventions thus constitute state aid, in so far they affect trade between Member States, which is in principle banned (Art. 87 § 1).

The Treaty foresees for certain interventions exemptions from the ban on state aids, as laid down in Art. 87 § 2 and § 3. For public support of services of general economic interest, this exemption is embedded in Art. 86 § 2, in so far as such services are not provided by all operators but the provision thereof is entrusted to a particular operator. Such services constitute clearly an advantage transferred to consumers.

7. Again: It is important to realise that state aid is involved, even if no discrimination is present (Art. 87 § 2a). Indeed, as regards all operators channelling through funds to consumers, the Treaty gives to ‘favouring’ a much larger meaning than simple ‘selectivity’.

The presence of state aid can therefore not be ruled out by any specific procedure. Tender procedures can only make sure that the aid is reduced to the minimum necessary. It has then to be decided if the aid is compatible; such compatibility is practically automatically given (1) for aid in favour of public services (services of general economic interest) if entrusted through a tender procedure, in other cases the compatibility qualification falls under the normal discretionary powers of the Commission under Art. 87 § 3 and Art. 86 § 2.

Tender procedures can make aid compatible but cannot change the qualification as aid. The opposite would a contrario lead to the conclusion that any aid granted by a non-discriminatory procedure would be no aid in the sense of the Treaty.

Otherwise, any restructuring aid could f.e. be granted to an operator, which through a tender procedure would come out as the operator ready to restructure a company in difficulties for the lowest

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(1) Only the fourth criterion of 86§2 would not be covered by such tender procedure. A tender without clear definition and control should be economically and politically unthinkable.
cost to the state, and be considered as involving no state aid under the Treaty rules for the company to be restructured.

The same reasoning can *mutatis mutandis* be made with regard to the theory that an aid which just compensates the cost of an operator for something it would not be ready to bear itself, in other words any aid just eliminating the extra-cost of this operator’s action, would not constitute an advantage anymore and therefore not be a state aid in the sense of the Treaty. In general, under such reasoning, public support for investment in disadvantaged regions would not constitute aid as operators are just compensated for the extra-cost of investment in such a region in which they would normally not invest.

The automobile framework was a good example of the inaccuracy of such reasoning, as only the real extra cost of establishment in a particular region was eligible for coverage by state aid; Member States could have justly claimed that no final advantage existed and that therefore no state aid was involved!

8. It can be concluded that the authors of the Treaty developed a more coherent structure of the state aid rules than is usually thought.

They had a meaning of ‘favouring’ in mind, larger than that of a simple selective (net) advantage, which is currently often used. This favouring is to be assessed independently of the objectives of the respective State intervention.

9. In conclusion, when Member States intervene in the economy by interacting with certain undertakings, two fundamental situations can be distinguished:

- Either Member States receive in exchange an economically equivalent counterpart flowing back into their property, and thus no state resources in whatever form go to undertakings. In such case, a private market investor’s exchange takes place, and there is no state aid.

- Or they do not receive an economically equivalent counterpart, but want to achieve certain public policy objectives (e.g. territorial cohesion in case of regional aid) or want the public funds to be transmitted to a third party either in the form of a service or in the form of social support, through one or more undertakings. In this case, any state resources transferred to undertakings to induce them to such behaviour, which would spontaneously not be generated by the market, and, if applicable, to ‘compensate’ them for the extra-cost, constitutes state aid in the sense of the Treaty, if the condition ‘affectation of trade’ is fulfilled.