

Concept of State aid: the principles

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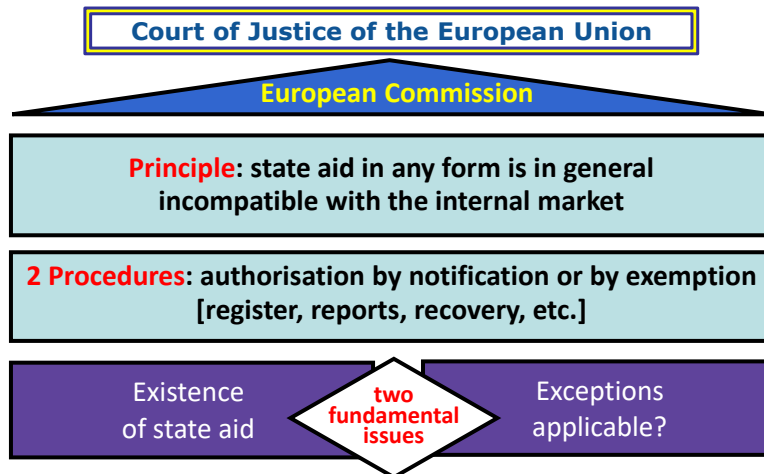


LEGAL BASES:

- Article 107 (1) of the TFEU
- Commission Notice on the notion of State aid as referred to in Article 107 (1) of the TFEU **OJ C 262/1, 19.7.2016**
- case law of the Court of Justice and decisions of the European Commission



EU system of State Aid Control



What is state aid?

Article 107(1) of the Treaty

“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”

-> **5** criteria hidden in this article



When state aid rules apply ? 5 Criteria analysis

- 1) Aid granted to **undertakings**
- 2) From **state origin (public funds** - MS or State resources)
- 3) Aid **confers advantage** that distorts or risk to distort competition
- 4) Aid is **selective**
- 5) Aid **affects trade between MS**

-> **Criteria are cumulative**

-> **if only one criterion is not met, state aid rules do not apply**



CRITERION 1 : Aid is given to undertakings

- Definition in Article 1 of Annexe 1 of GBER N°651/2014
- **“any entity engaged in economic activity”**
 - Regardless of legal status & way it is financed and
 - Regardless of whether entity intends to make profit
 - Regardless of whether it offers the services free of charge to its users or customers
- **Définition of the economic activity by the Court of Justice:**
 - *“Any activity consisting in the provision of goods or services on a given market.”*
- **As a result : almost all activities shall be considered as economic except** for those defined by Court of Justice & EC

Examples of non-undertakings (non economic activities) according to CJEU or EC

■ 1) Public entities exercising public powers:

- activities related to **army, police, security**
- air navigation safety and control ,
- maritime traffic control and safety
- organisation, financing and enforcement of prison sentences
- anti-pollution surveillance
- **development and revitalization of public land**

Nb: construction of buldings is considered as an economic activity

2) Health care

Non economic activity

- Public hospitals integral part of the national health service
 - Free of charge
 - Or charges which only cover a small fraction of the true cost of the service
- Integral part of the national health service
- Almost entirely based on the principle of solidarity
- FENIN Judgement C-205/03
- Cas Regina Judgement C492/21 P

Economic activity

- Health services for remuneration
 - Public or private health care services
 - Pharmacies
 - Emergency medical care
 - Ambulance services

3) Education

Non economic activity

- Public education integral part of the national educational system
- financed predominantly by public resources.**
 - Private schools can be non economic if they are predominantly financed by public resources and under control of MS
- Schools, kindergartens, universities ...

Economic activity

- Educational services given for remuneration
- financed predominantly by parents or pupils or commercial revenues.**
- Higher education financed entirely by students
- Vocational training

4) research activities (ref. State Aid Framework for RDI 27/11/22 p.2.1.1/2)

Non economic activity

- Research and knowledge dissemination organisations (RKDO) with the following main objectives:
 - Education** (financed by public funds)
 - Independent R&D** including collaborating R&D
 - Wide dissemination** of R&D results
 - knowledge transfer activities** even with **profits** if they are reinvested in R&D

Economic activity

- Research and knowledge dissemination organisations when they :
 - Rent out equipments or laboratory to undertakings
 - supply services to undertakings
 - perform contract research (provisions of services)
- NB:** in certain cases **these activities can remain non-economic if they represent less than 20% of the organisation's activity (ancillary economic activity)**

costs, financing and revenue must be clearly separated in cost accounting

5) Cultural or heritage conservation activities including nature conservation

Non economic activity

- Museums, libraries, theatres, opera houses, archaeological sites, historical buildings, natural heritage etc.
- **financed predominantly by public resources.**
- Non- substitutable activities
 - Public archives

Economic activity

- **Activities financed predominantly by commercial revenues**
- Cinemas, commercial music performances, restoration of private historical buildings etc.



6) infrastructures

Non economic activity

- Infrastructure **without commercial exploitation**
- Public, open and free infrastructure
 - Ex. Streets roads city parks...

Economic activity

- Infrastructure **with commercial exploitation**
- Or with limited access
 - Ex. Motorway with charge

Infrastructure with economic and non economic activity

- If annual capacity allocated to economic activity **< 20%** of overall annual capacity
 - > *economic activity is considered ancillary ; public funding is not subject to state aid rules*
- If annual capacity allocated to economic activity **> 20 %** of overall annual capacity
 - > *public funding to economic activity must comply with state aid rules*
- Separate accounting or cost accounting is required



CRITERION 2 : from state origin

2 cumulative conditions :

▪ 1°) aid is from state resources : (tax origin)

Aid granted by a Member State

- Central government, ministries or departments
- Regional governments, local authorities or councils

or through State resources

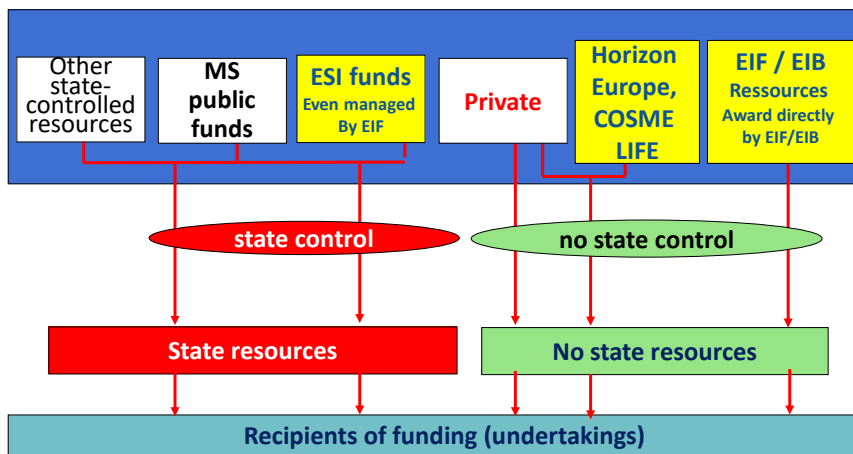
- Public undertakings or agencies of the State
- Funds or associations controlled by the State

▪ 2°) aid is imputable to the state:

are the actions imputable to the State?

- Does the State has discretion to control the actions of its bodies?
- Level of companies' integration in the public administration & nature of activities
- Legal status of companies (i.e. subject to public law or ordinary company law)
- Intensity of public supervision over the management of companies

Sources of aid including structural funds





CRITERION 3 : distortion of competition

- **Economic advantage** given by public measure, directly or indirectly
- **Subsidies always give an advantage to the undertaking**
- the recipient of the aid gets a better position in the market
- **Advantage** is any relief from normal costs that are inherent in the economic activity of the beneficiary undertaking
- Advantage at different levels (e.g. owner, operator and user of infrastructure)
- **Even when the company is alone in its market**
 - in the event that other companies could enter the market "one day"
- **Examples of no distortion (no economic advantage):**
 - If MS issues a **call for tenders** -> no state aid for the beneficiary of the contract
 - A **service subject to a legal monopoly** (established in compliance with EU law)
 - Public intervention carried out in line with **normal market conditions**

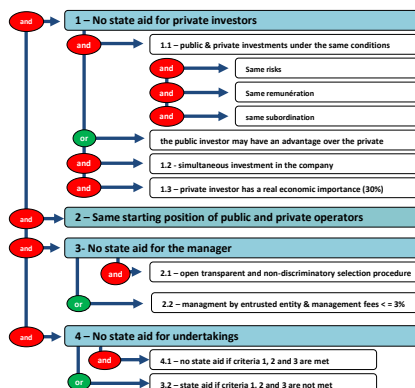


NO ECONOMIC ADVANTAGE IN « PARI PASSU » TRANSACTIONS



Example of normal market conditions:

- § 86 à 88 of the 2016 Commission notice on the concept of state aid
- 16 Decembrer 2021 Guidelines on state aid to promote risk finance investments
- « pari passu »
- Public & private investors « moving at the same pace »





CRITERION 4 : Selectivity

*“by favouring **certain** undertakings or **certain** productions ”*

- Aid favours certain regions, sectors, undertakings, products
- **In practice almost all aid are selective**
 - all subsidies are selective
 - ERDF ESF grants are selective because limited to the region
- **Only general measures are not selective** and do not involve state aid:
 - **criteria for general measures**
 - aid applicable to all companies
 - established by law
 - without limitation of size, zoning, or sector of activity
 - without discretionary instruction



CRITERION 5 – Effect on trade

- **The principle**: the European single market and its principle of free movement of activities **makes that trade between Member States is almost systematically affected by state aids**
- **BUT** : There is no presumption that a measure affects trade between Member States (notice on the notion of state aid p. 195)
 - « an effect on trade between Member States **cannot be merely hypothetical or presumed.** »
 - « It must be established why the measure (...) is liable to have an effect on trade between Member States »
- **In practice** :
 - if the company produces manufactured goods, the effect on trade is almost certain due to the single market
 - if the company has a service provision activity, the effect on trade may in some cases not be proven





Cases where there is no effect on trade

- the analysis must be done on a **case-by-case basis**
- 38 decisions of the European Commission & CJEU** on purely local impact measures with no effect on trade between Member States.

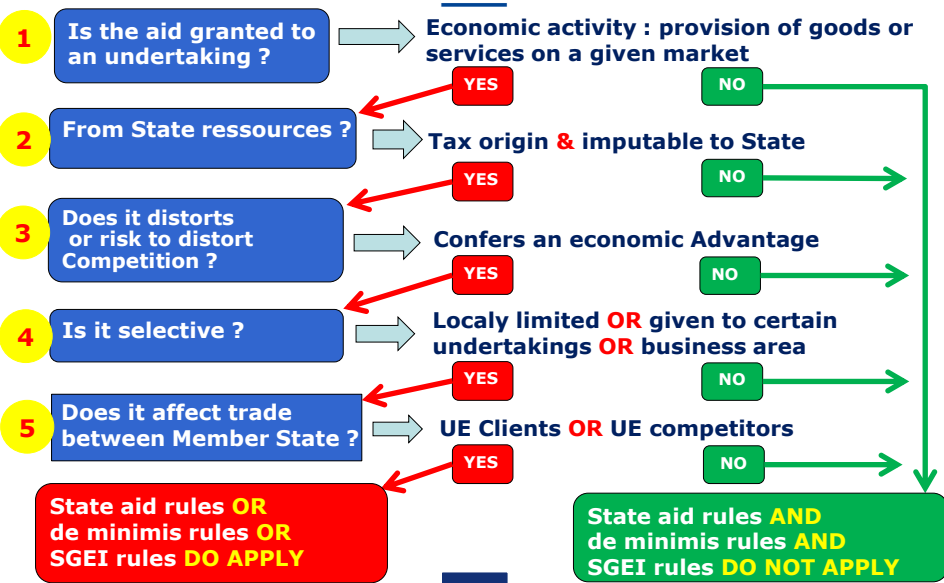
3 cumulative CRITERIA for purely local impact measures (no effect on trade) :

- 1) The activity is intended for a local clientele (or marginally European)**
- 2) The activity is not aimed at attracting european customers or european investors (or marginally)**
- 3) The beneficiary is not in competition with cross-border operators (with European dimension)**

Examples:

- Small museums in Sardaina (ITA)
- Medical center in Durmersheim (GER) near French border
- Conference center in Gotland Island (Sweden)
- National Training center in Scotland (UK)
- Etc.

Summary of State aid analysis





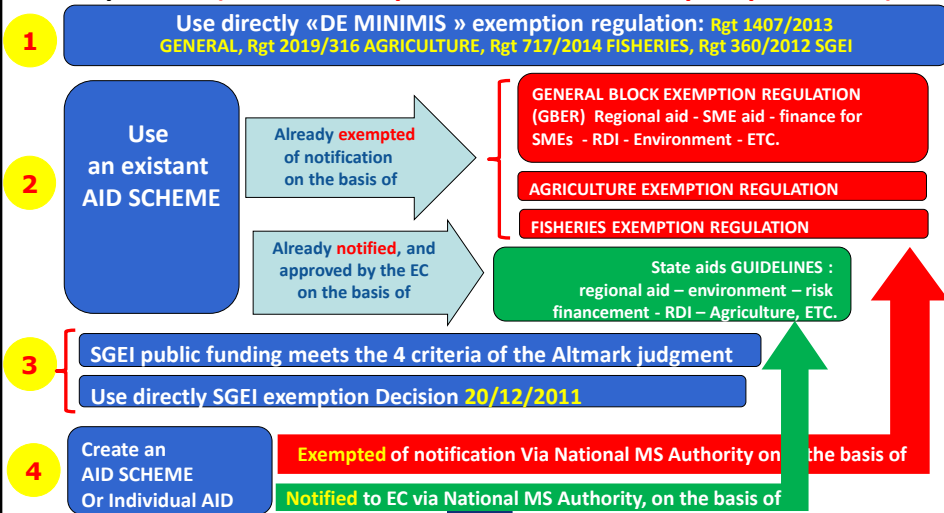
Where to make the 5 criteria analysis ?

- in a simple operation: analyze the 5 criteria at the beneficiary level
- in a complex operation, such as the financing of an **infrastructure**, do the analysis at several levels:
 - the **owner** of the infrastructure
 - the infrastructure **manager**
 - the **users** of the infrastructure
- in **financial instruments**, do the analysis at **3** levels:
 - The **private investors**
 - The **manager** of the fund
 - The **undertaking** beneficiaries of the fund

Compatibility



- if the 5 state aid criteria apply **several options** to make aid compatible: **(from the simplest to the most complex procedure)**





Thank You!

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