

# Concept of State aid: the principles

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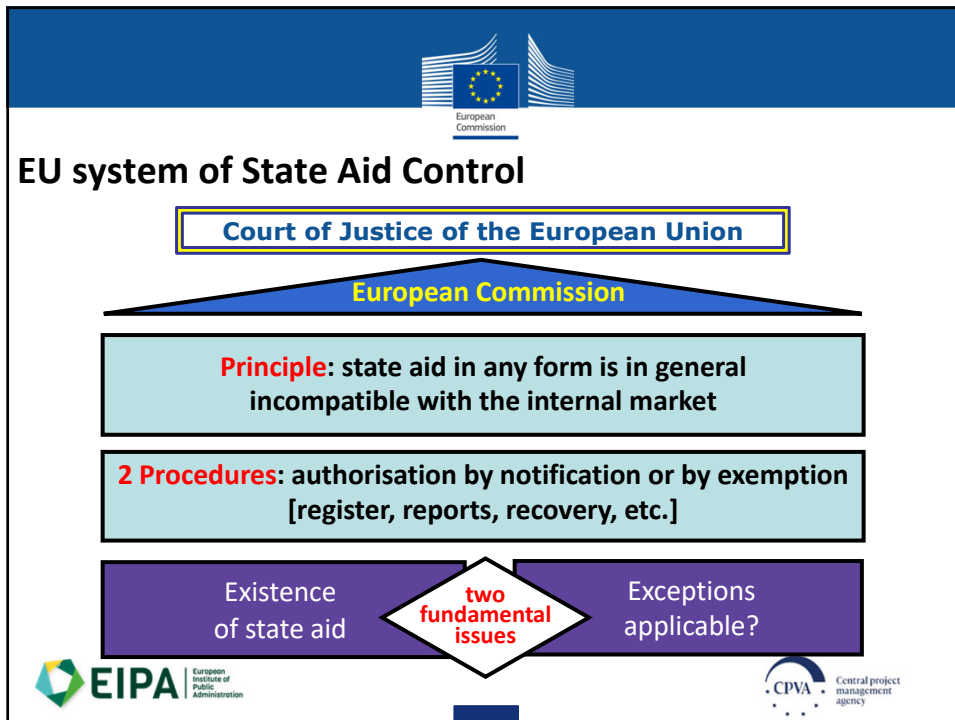
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1

## 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**

2



3

**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**

4



## 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**



5



## 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



6

## 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

7

## 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
  - Case Regina Judgement C492/21

### Economic activity

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

8

### 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**
- Ex. Motorway with charge
- Or with limited access

### 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 have 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



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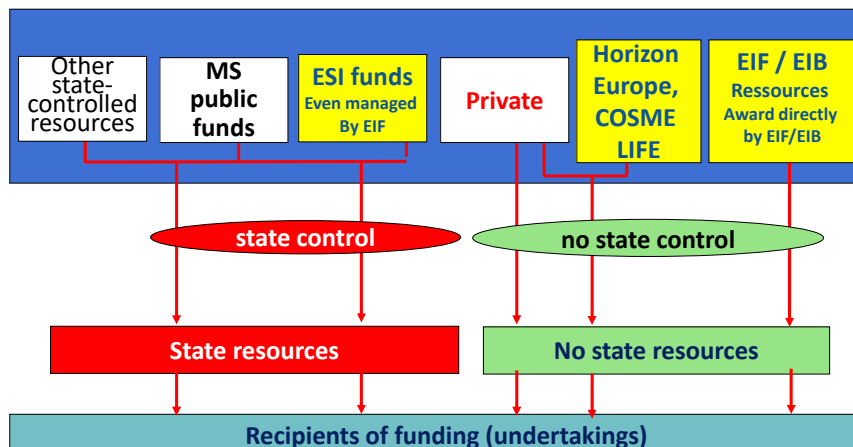


Central project management agency

13



## Sources of aid including structural funds



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14

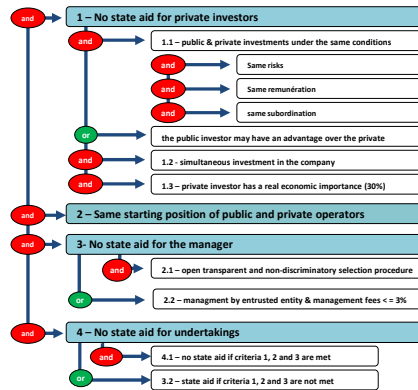
### CRITERION 3 : distortion of competition

- **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 Decembre 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



17




## 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



18

  
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## 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) :

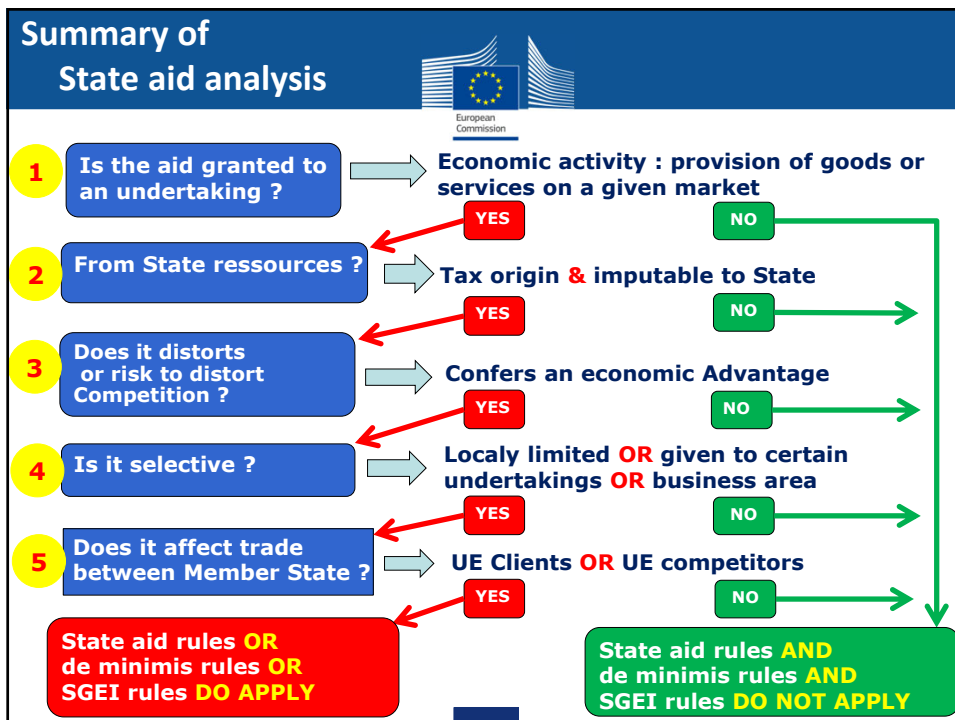
- **1) The activity is intended for a local clientele (or marginally European)**
- **2) The activity is not aimed at attracting european customers or european investors (or marginally)**
- **3) The beneficiary is not in competition with cross-border operators (with European dimension)**

▪ **Examples:**


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

19





20


  
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## 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

21

  
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## Compatibility

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

- 1 Use directly «DE MINIMIS » exemption regulation: Rgt 2023/2831 GENERAL, Rgt 2023/2832 SGEI  
Rgt 1408/2013 - 2019/316 – 2023/2391 AGRICULTURE, Rgt 717/2014 – 2023/2391 FISHERIES
- 2 Use an existant AID SCHEME
  - Already exempted of notification on the basis of
    - GENERAL BLOCK EXEMPTION REGULATION (GBER) Regional aid - SME aid - finance for SMEs - RDI - Environment - ETC.
    - AGRICULTURE EXEMPTION REGULATION
    - FISHERIES EXEMPTION REGULATION
  - Already notified, and approved by the EC on the basis of
    - State aids GUIDELINES : regional aid – environment – risk financement - RDI – Agriculture, ETC.
- 3 SGEI public funding meets the 4 criteria of the Altmark judgment  
Use directly SGEI exemption Decision 20/12/2011
- 4 Create an AID SCHEME Or Individual AID
  - Exempted of notification Via National MS Authority on the basis of
  - Notified to EC via National MS Authority, on the basis of

22



**Thank You!**

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