

European State Aid Law I

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What is state aid?

- Company sells land to the state at higher than market price
- Restructuring plan in order to restore the long-term viability of an energy company
- Compensation for farmers for various losses due to bad weather
- Recapitalization of national airline company
- Compensation of public service obligations
- Privileged access to infrastructure for certain companies
- Dual rate of corporation tax: 10% for manufacturing sectors, 45% for other sectors
- Aid to social housing corporations to compete with private housing agents on the market for housing for higher incomes or lower incomes

What is state aid?

■ **State aid is**

- a wide variety of ways in which states, governments provide assistance to the economy
- “worst area of competition law with regard to legal certainty”

■ **Objectives:**

- remedy market failure, pursue non-economic objectives
- Social (earthquake victims) – economic (high inflation)

■ **Forms:**

- state grants, interest relief, tax relief, state guarantee or holding, provision of goods and services on preferential terms

Rationale behind state aid

■ Correcting market failures

- Cure externalities, imperfect information, coordination problems
 - ameliorate financial other market failures that affect small and medium sized firms
 - promote the development of peripheral regions, facilitate survival of fundamentally sound firms
- BUT validation remains crude: not clear if it can solve externality problems and government failures

■ Intergovernmental competition

- Other governments do it
- Financial crisis, national banks

■ Political economy motives

- Political pressure from special interest groups
- political influences on trade policy

State aid control and competition law

- Is it a necessary component of an effective competition law framework?
- Maintaining a level of playing field
- Restraint of trade by agreements between governments and private industry
- Effective framework for state aid control:
 - EU most developed framework control
- International rules on particular form of state aid, export credits

State aid control outside the EU

- US: no state aid rules
 - Sherman Act: no jurisdictional reach to regulate state measures
 - Parker v. Brown 317 U.S. 341 (1943) : state action immunity from antitrust regulation
- WTO: Agreement on Subsidies and Countervailing Measures
 - Subsidies: financial assistance from a government to a company or group of companies
 - Prohibited, actionable, non-actionable
 - Remedies:
 - Countervailing measures: importing countries can take action against certain kinds of subsidised imports
 - Dispute settlement procedure for the resolution of disputes over the use of the instruments

State aid rules US v. EU

- Different approaches
- EU: market integration + business competition
- US:
 - already integrated market + strong constitutional tradition of state sovereignty under US federalism
 - State action doctrine
 - Legal inconsistency: same economic rational and similar objectives as Sherman Act
 - state aid is granted when the US economy so requires
 - Airbus v. Boeing dispute before WTO

The geography of European State Aid rules

- Articles 107 -109 TFEU
- Regulations
- Guidelines, notices, frameworks,
- Actors
- State Aid Modernisation

Article 107 (1)

■ **5 elements:**

- state resources
- economic advantage
- selectivity v. general measures
- effect on trade
- distortion of competition

■ Elements are interdependent

- Exemptions: Article 107 (2) (3)

■ Several new elements of defining state aid

■ Dynamic development of case-law since 2000

(1) Aid granted by a Member State or through state resources- a wide notion

- **Steinike & Weinlig** para 21
- **Banco Exterior de España** para 13:
 - “the concept of aid is thus wider than that of a subsidy because it embraces not only **positive benefits**, such as subsidies themselves, but also **interventions** which, **in various forms**, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect”
- Budgetary expenditure or a loss of public revenue, charge on the public account
- Aid does not necessarily need to be granted by the State itself, may also be granted by a private or public intermediate bodies appointed by the State
- Controversy as to the question whether a measure always has to involve an additional burden on public finances

Aid granted by a Member State or through state resources

- Is aid granted by a Member State and aid through state resources cumulative conditions or indicate two alternative criteria?
- Economic advantages granted to certain undertakings through some form of state action?
- Is financing through state resources a constitutive element of the concept of state aid?
- When is a measure imputable to the state?

Cases

- C-67,68-70/85 *Van der Kooy* : preferential gas tariffs granted to Dutch horticulturists by an undertaking controlled by the Dutch state
- T-358/94 *Air France* and C-83/98 *Ladbroke*: financial contribution by private bank under control of special status public institution: assets permanently at the State's disposal
- C-200/97 *Ecotrade* and C-295/97 *Piaggio*: authorization to continue trading while that would not be allowed if the usual insolvency rules were applied
- C- 72-73/91 *Sloman Neptun*: partial non-application of the national employment and social security legislation to foreign seafarers did not involve direct transfers of money, altering in favour of shipping undertakings framework within which contractual relations with employees are formed

C-379/98 *Preussen Elektra*

- Stromeinspeisungs-Gesetz 1998 (StrEG)
- obliged electricity companies operating a general supply network to purchase electricity produced by downstream undertakings from renewable sources (wind, water, sun, biomass) at minimum price higher than the real economic value of that type of electricity
- Allocates financial burden arising from that obligation among electricity supply undertakings and network operators

C-379/98 *Preussen Elektra*

- Government action i.e. StrEG made private undertakings to provide financial advantages to other undertakings
- Are the advantages for the producers of electricity from renewable sources caused by the StrEG 1998 'granted by a Member State or through State resources within the meaning of Article 107(1)'?

Previous case law **narrow reading** of Art.107 (1)

- aid must necessarily be financed through State resources
- not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State
- C-78/76 Steinike und Weinlig para 21
- C-82/77 Van Tiggele paras 24-25
- C- 83/98 Ladbroke, C-189/91 Kirsammer-Hack v Sidal, C-52-54/97 Viscido, C-200/97 Ecotrade v AFS and C-295/97 Piaggio

Previous case law **extensive reading** of Art.107 (1)

- any measure which confers economic advantages on specific undertakings, and which is the result of conduct attributable to the State, constitutes State aid independently of whether it involves any financial burden for the State
- C-290/83 Commission v. France
- C- 67,68-70/85 Van der Kooy
- C-57/86 Greece v. Commission

Parties' arguments

- German government: narrow reading of 'granted by a Member State or through state resources'
 - no government expenditure was involved therefore there is no state aid
 - financing through state resources is a necessary element of the concept of state aid
- Preussen Elektra + Commission: extensive reading of 'granted by a Member State or through state resources'
 - any measure which confers economic advantages on specific undertakings, and which is the result of conduct attributable to the State, constitutes State aid independently of whether it involves any financial burden for the State
 - Teleological argument

Preussen Elektra

- The Court refused to reconsider its earlier case-law regarding the narrow reading of Art.107 (1)
- paras 59-66
 - the obligation on private electricity supply companies to purchase electricity from downstream operators at a fixed minimum price did not involve any direct or indirect transfer of state resources to the producers of electricity from renewable sources
 - neither constituted the allocation of the financial burden arising from that obligation for the electricity suppliers as between them and other undertakings direct or indirect transfer of state resources

Opinion of AG Jacobs in Preussen Elektra

- Narrow or broad interpretation of Art.107 (1)
- points 151-156
- Narrow interpretation is more natural and raises less consequential problems
 - systematic interpretation of the Treaty
 - fundamental problem with the teleological argument of the extensive reading
 - Risk application to all state measures
 - procedural argument
 - No rules in Article 108 for private undertakings financing state measure
 - legal certainty
 - “no exaggeration”

So what about the extensive interpretation of the Court in *Commission v. France, Van der Kooy*?

- The Court did not originally regard financing through state resources a constitutive element of Art.107
- If the state had a dominant influence over the way a company spent his money there was no need to see whether the money was state resources
 - C-200/97 *Ecotrade*
 - C-295/97 *Piaggio*
- Catch parafiscal charges, waiver of revenue, guarantee

The aftermath:C-482/99 *Stardust Marine*

- publicly owned or controlled enterprises
- Confirmation of the narrow interpretation
 - first, be granted directly or indirectly through State resources, and, second, be imputable to the State, the status of the body or undertaking in question is not regarded as a determining factor for the application of the state aid rules
 - the mere fact that a public body is involved does not entail the automatic application of Article 107 , just as the fact that the measures are taken by a private body does not preclude its application

Imputability

- When is a measure imputable to a Member State?
 - AG Jacobs in *Preussen Elektra*: no explicit instruction is needed, analysis of facts and circumstances of the case
- *Stardust Marine* para 55-56: inferred from a set of indicators arising from the circumstances of the case
 - the need to take account of public bodies' directives, the undertaking's integration into the public administration, the nature of its activities, its legal status, the intensity of its supervision, any other indicator showing an involvement by the public authorities
- Controlling influence over resources: origin of resources not relevant (private –public funds) but entering public control and available to national authorities is, even if resources do not become public property

C-559/12 P *La Poste*

- Public entity former state company split in 2
- State as a guarantor of last resort
- “in order to prove the existence of such a guarantee, which does not result expressly from any legislative or contractual document, it is permissible for the Commission to rely on the method of a firm, precise and consistent body of evidence to determine whether there is, in domestic law, a real obligation on the State to use its own resources for the purposes of covering losses of an EPIC in default and therefore, in accordance with settled case-law, a sufficiently concrete economic risk of burdens on the State budget”

Recent cases

- *C-242/13 Commerz Nederland NV v. Havenbedrijf Rotterdam NV*
 - The director of a port authority operates a service department of the municipality of Rotterdam, agreed to act as a guarantor for a EUR 25 million credit granted to RDM Vehicles by Commerz Nederland
 - Organizational links between port authority and municipality See paras 30-38
- *Case C-275/13 Elcogas SA*
 - Elcoga's owned a thermal power plant, operates by virtue of the carbonisation of coal and other alternative fuels, extra costs for this technology through financing mechanism, which compensates electricity companies for these extra costs,
 - financed by electricity tariff charged to all end-consumers, and were to be distributed by a public entity in accordance with predetermined legal criteria
 - Difference with *Preussen Elektra* paras 23,30,32

Imputability: regulatory measures

- *C-399/10 Bouygues et Bouygues Telecom*
 - Access to public domain, natural resources, special or exclusive right
 - State; manager of public assets and regulator pursuing public policy objectives
 - Is there an inherent link between regulatory purpose and foregoing of revenue?
- *Deutsche Bahn* para 100: Article 107 (1) refers to autonomous and unilateral decisions of Member States, imputability is separate and cumulative condition with aid granted by state resources
 - Question Member States' discretion in transposing EU law: does state aid control apply?