



State aid – Notion of aid (II)

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These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union.

Notion of aid - Overview

1. Undertaking / economic activity
2. State origin: Imputability & State resources
3. Advantage
4. Selectivity
5. Distortion of competition
6. Effect on trade



Selectivity - Overview

- Article 107(1) TFEU: “*favouring **certain** undertakings or the production of certain goods*”
- **Not** selective: **general measures** (apply to all companies in all sectors of a MS, no discretionary power)
- **Material** selectivity (differentiation by sector, size, legal, form...) and **regional** selectivity

Material selectivity

- ***De jure* selectivity:** selectivity derives from the “law”; measures targeted at certain undertakings
- ***De facto* selectivity:** although formally the measures seem general, it is so established that it favours a particular group of undertakings (C-106/09P Gibraltar)
- Selectivity based on **discretion**

Fiscal and similar measures

3-STEP APPROACH

1. Identification of the **reference system**
2. **Derogation**: does the measure differentiate between economic operators who, in light of the objective of the system, are in a comparable factual and legal situation?
3. **Justification** by the logic of the tax system

Regional selectivity

CRITERIA:

1. Institutional autonomy
2. Procedural autonomy
3. Financial autonomy

Jurisprudence: **Azores (C-88/03)**

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Effect on trade

- **Potential effect** on trade is sufficient
 1. Can exist if recipient is not involved in cross-border trade
 2. Can exist even if the recipient is exporting all products outside
 3. No need to define a market
- BUT: Effect cannot be hypothetical. It is missing when the measure has a **purely local effect**

Purely local effect

- Developed by **decision-making practice** (e.g. Leisure Pool Dorsten 2001)
- Case by case basis: depends on **facts**.
- Local **commercial radius**: Beneficiary will attract customers from other MS?
 - “Local” more likely for services than for goods
 - Less likely when beneficiary is part of national network
- **Examples**: Sports/leisure for local customers cultural events, health care, small ports and airports.

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Distortion of competition

- A measure *improves the competitive position* of the recipient compared to its competitors.
- **Potential** distortion is sufficient
- Member State grants a **financial advantage** to an undertaking in a **liberalised sector**.
- Distortion of competition might be excluded:
 - Legal monopolies
 - Infrastructure: natural monopolies
 - *De minimis* support

Legal Monopoly

- Distortion of competition is excluded if:
 1. **Service** subject to legal monopoly is in compliance with
EU Law
 2. Monopoly excludes competition “**on and for the market**”
 3. Service is **not in competition** with similar (liberalised services)
 4. If the service provider is active in another market that is open to competition, **cross-subsidization** has to be excluded

Natural monopoly

- In case of financing **infrastructure**
- Distortion of competition is **excluded** if:
 1. Infrastructure does **not** face **direct competition**
 2. **Private financing** for infrastructure is **insignificant**/replication of the infrastructure would be uneconomical
 3. Infrastructure is **not “dedicated”** (i.e. not designed to selectively favour certain undertakings and sectors).
 4. **No cross-subsidisation**

De minimis

- Regulation 1407/2013
- *De minimis* aid is **not aid** within the meaning of Article 107(1) TFEU. It is not deemed to affect cross-border competition
- **Requirements:**
 1. EUR 200 000/3 years/per MS
 2. Transparent aid only
- **Separate *de minimis* rules:** SGEIs (EUR 500 000), freight transport (EUR 100 000), primary agriculture production (EUR 7 500) and fisheries (EUR 30 000)