



State aid under EU law

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Overview

- I. Introduction**
- II. What is State Aid ?**
- III. Can State Aid be authorised ?**
- IV. What are the procedures to follow ?**
- V. Transparency**

I. Introduction

- EU State aid control is part of competition law
- ... but different : also public policy objectives
- EU State aid control is unique in the world
- Why State aid control ?
 - Level-playing field for all companies in the internal market of the European Union
 - Avoid subsidy races
 - Preserve benefits of competition: system of incentives and sanctions creating efficiency, innovation and competitiveness
 - Role in cohesion policy: harmonious development of the European Union from the economic, social and territorial point of view
 - Role in liberalisation process

I. Introduction

•Basic principles:

- Principle interdiction: State aid is forbidden unless it is authorised
- Aid may be authorised for objectives of common interest (e.g. regional development, R&D&I, environmental protection)
- Only the Commission can authorise State aid
- Notification obligation and standstill clause: Member States shall notify to the Commission and wait for Commission authorisation before they grant the aid
- Exception: aid covered by a block exemption



II. What is State Aid ?

Article 107(1) Treaty on the functioning of the European Union (TFEU) :

"Save as otherwise provided in this Treaty, 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, insofar as it affects trade between Member States, be incompatible with the common market."

NB: Competition rules only apply to **undertakings**

"Any entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed"

- Economic activity: offering goods or services on a market
- Non-economic activity: state prerogatives (police, security), basic social security systems based on solidarity, ...

II. What is State Aid ?

1.State resources

- *"granted by a Member State or through State resources"*
 - including regional or local authorities
 - Including other public or private bodies designated or established by the State and under State control
 - Including public enterprises ? Only if the measures is "imputable" to the State

Imputability: no presumption, but no need to show clear instruction, set of indicators is sufficient (integration into the public administration; legal status; supervision by the State, ...)

II. What is State Aid ?

1.State resources

- *"in any form whatsoever"*: e.g.
 - Grants, subsidies
 - Loans where no market interest rate is paid
 - Guarantees where no market interest is paid
 - Income foregone: tax breaks, reductions of social security contributions; land sales below market price
 - Capital injections

II. What is State Aid ?

2. Advantage

- *"favouring certain undertakings or the production of certain goods"*
 - Positive transfer of resources or relief from charges which an undertaking normally has to bear

II. What is State Aid ?

2. Advantage

- **Market economy operator principle** (investor, creditor, vendor):
 - compare the behaviour of public authorities to that of similar private operators under normal market conditions.
 - if comparable: no advantage, no aid
 - if not comparable: State acted as public authority, not as private operator
- Market economy investor principle (MEIP)
 - No advantage if a Member State injects capital in an undertaking in circumstances which correspond to normal market conditions
 - How to demonstrate this ? e.g.
 - private investors invest in the company under same conditions (concomitance)
 - benchmarking; ex ante market studies, business plan, tender or expert evaluation, ...

II. What is State Aid ?

3. Selectivity

- *"favouring certain undertakings or the production of certain goods"*
 - Geographical selectivity (e.g. regional aid)
 - Sectorial selectivity
 - Selectivity regarding the type of company (e.g. SME, multinational companies) or activity (intra-group; off-shore)
 - Discretionary power
- Selectivity distinguishes aid measures from general measures: applicable to all companies

II. What is State Aid ?

3. Selectivity vs general measure: fiscal rules

- General measures: applicable to all companies in all sectors, *de iure* and *de facto*; no discretionary power
- Three step analysis
 - What is the system of reference ? E.g. corporate tax; special levy
 - Is there a derogation from the system of reference ? Are companies in a comparable legal and factual situation treated differently ?
 - Is the derogation justified by the intrinsic logic of the system ?

II. What is State Aid ?

4. Effect on trade and 5. distortion of competition

- *"which distorts or threatens to distort competition ..., in so far as it affects trade between Member States"*
 - Effect on trade and distortion of competition are often linked
 - Very broad interpretation
 - It is sufficient that a product or service is subject to trade between Member States,
 - ... even if the beneficiary does not export
 - ... or exports virtually all of its production outside EU

II. What is State Aid ?

4. Effect on trade and 5. distortion of competition

- No need to define the market or make a detailed economic analysis
- No need to demonstrate real effect on trade; sufficient that aid is liable to affect trade and distort competition

- Consequence: this criterion is almost always met, except sometimes:
 - Local transport?
 - Low amounts, small beneficiaries?
 - Example of no aid: Dorsten swimming-pool; local museum

II. What is State Aid ?

4. Effect on trade and 5. distortion of competition

- *De minimis aid*: Commission Regulation No 1998/2006
 - *De minimis aid* does not constitute State aid: it is deemed too small to affect trade or distort competition and thus not fulfilling all the criteria of Article 107(1) TFEU
 - Conditions: total *de minimis aid* per undertaking does not exceed EUR 200 000 over any period of three fiscal years (road transport: 100 000)



III. Can State Aid be authorised ?

- Article 107(2): automatic compatibility
 - a) Aid with a social character, granted to individual consumers without discrimination
 - b) Aid to repair damage caused by natural disasters or exceptional occurrences
- **Article 107(3): Commission has discretionary power**
 - a) Regional aid for most disadvantaged regions (GDP/capita below 75% of Community average)
 - b) Important project of common European interest or serious disturbance in the economy of a Member State
 - c) **Development of certain economic activities or certain economic areas** (disadvantaged regions compared to national average)
 - d) Culture and heritage conservation
- Article 106(2): services of general economic interest



III. Can State Aid be authorised ?

- Detailed compatibility rules based on Art. 107(3) set out in:
 - Block Exemption Regulation: aid is exempted, compatibility is presumed if criteria are fulfilled, no notification
 - Guidelines: notification, assessment by the Commission, compatibility is presumed if criteria are met, but more margin of appreciation, e.g.
 - Aid for R&D&I
 - Environmental aid
 - Regional aid
 - Employment aid
 - Training aid
 - Aid for rescuing and restructuring firms in difficulty

III. Can State Aid be authorised ?

- How are compatibility rules normally defined ?
 - Does the aid contribute to an objective of Community interest ? (e.g. regional development, R&D&I)
 - Is the aid well-designed to achieve the objective ? E.g.
 - Appropriate
 - Incentive effect: does the aid change the behaviour of the company ?
 - Proportionate: maximum aid intensities in relation to a set of eligible costs; possible modulation depending on size of the company and location (bonus for SME and for disadvantaged regions)
 - Are the distortions limited in relation to the positive effects so that the overall balance is positive?

IV. What are the procedures to follow ?

1. Notification

- Exclusive competence of the European Commission
- Member State must notify any plan to grant aid
- Aid cannot be put into effect before it has been cleared by the Commission
- Exceptions:
 - aid covered by a block exemption (2/3 of aid measures granted)
 - aid covered by an authorised scheme
 - *de minimis* aid
- Who must notify ? Member State (also for regional measures)
- How to notify ? notification forms; electronic notification system; possibility of pre-notification

IV. What are the procedures to follow ?

1. Notification: preliminary examination

- After notification: preliminary examination phase
- Time-limit: 2 months from complete notification
- If not complete: Commission sends information request; time-limit starts from receipt of the reply
- If no decision within two months: Member State can send a prior notice to the Commission that the aid will be implemented
If no Commission decision within 15 days, the aid is tacitly authorised
- Decisions after the preliminary examination phase:
 - No aid
 - No objections: aid is compatible
 - Opening of formal investigation: if doubts on compatibility

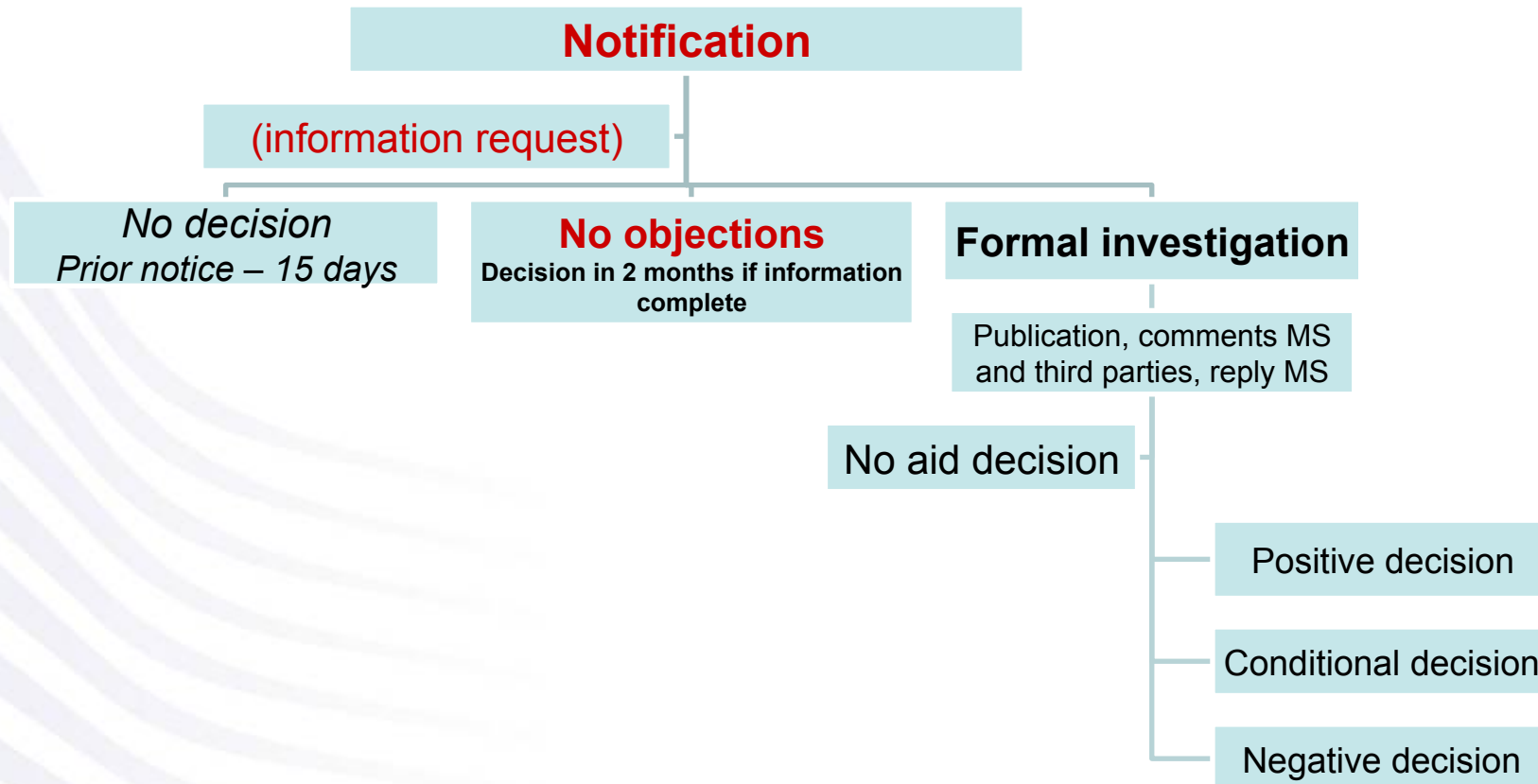
IV. What are the procedures to follow ?

1. Notification: formal examination

- Publication of opening of formal investigation
- Member State and third parties are invited to comment
- Member State can comment on the observations from third parties (right of defence)
- Final decision (normally within 18 months after opening):
 - No aid
 - Positive decision
 - Conditional decision
 - Negative decision

IV. What are the procedures to follow ?

1. Notification



IV. What are the procedures to follow ?

2. Unlawful aid

- Infringement of obligation of notification and standstill
- Procedure: similar as for notified aid. Differences:
 - Start of the procedure: complaint or *ex officio*
 - No time-limits
 - Commission can use injunctions, in particular
 - Information injunction
 - Suspension injunction

IV. What are the procedures to follow ?

2. Unlawful aid

- Final negative decision (aid is unlawful and incompatible): recovery
- Exceptions
 - General principles of Community law (e.g. legitimate expectations ?)
 - Limitation period: 10 years from the granting of the aid
- Recovery: aid amount + interests
- Recovery procedure: national law,
 - but cannot make recovery impossible and must allow immediate execution
 - principle of loyal cooperation between Commission and Member State
 - Action for annulment of the recovery decision has no suspensive effect
- Non-implementation of recovery decision: action Commission against Member State before ECJ: Member State can only invoke absolute impossibility

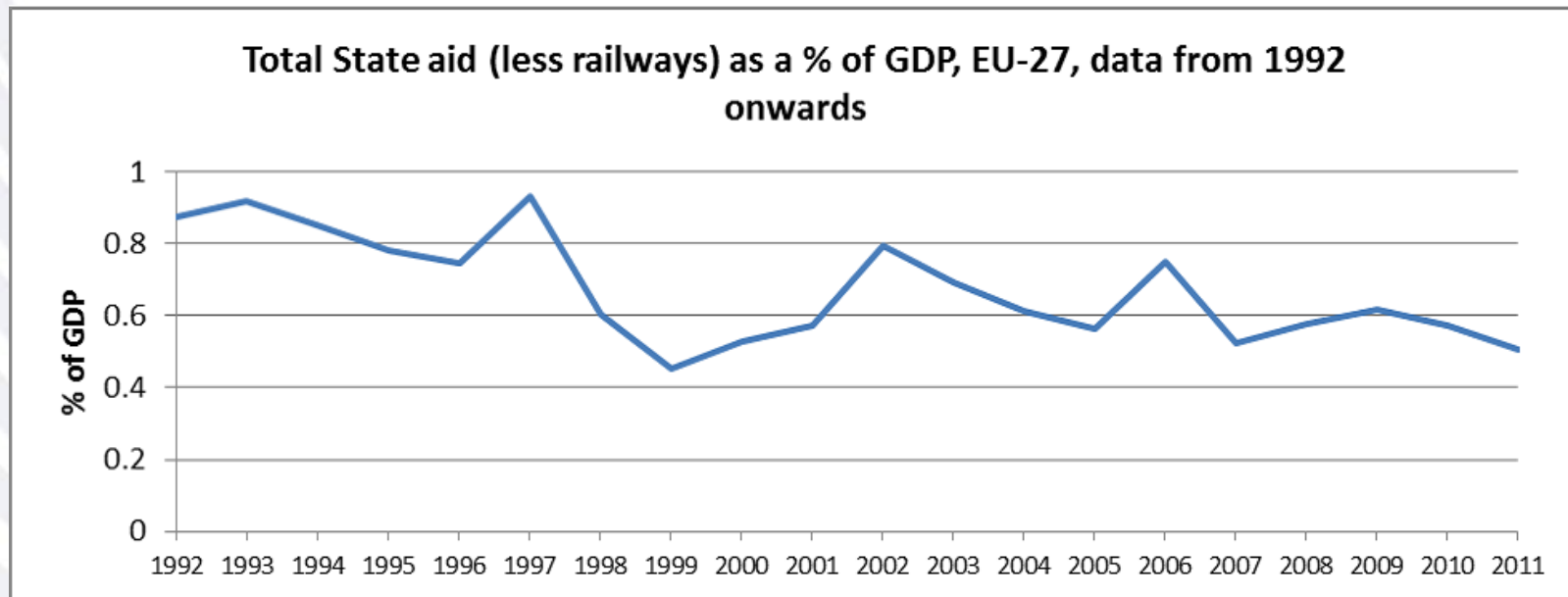


V. Transparency

- **State aid Register:**
 - Information on all Commission decisions on State aid cases (with link to text of decision)
 - http://ec.europa.eu/competition/state_aid/register/
- **State aid Scoreboard:**
 - Based on reporting from Member States
 - Picture of overall State Aid situation in Member States
 - http://ec.europa.eu/competition/state_aid/studies_reports/2012_autumn_en.pdf

V. Transparency

Scoreboard data



Information and conclusion

- DG COMP website: http://ec.europa.eu/competition/index_en.html
- State aid weekly news: e-mail news service
- Competition policy newsletter

Thank you for your attention