



Notice on the Notion of State aid

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** The information and views of this presentation are those of the speaker and do not necessarily reflect the official position of the EU Commission*

The purpose of the Notice

- Clarify and explain the notion of State aid: easier, more transparent and more consistent application across the Union.
 - Summary of the interpretation of the NoA by **the Union Courts** and the Commission's own case practice.
 - Where Union Courts' case law is not available, guidance is provided in the form of the **Commission's own interpretation**.

Wider context - State aid modernisation

- In 2012 the Commission launched a major reform of State aid control (*State aid modernisation* – "SAM")
 - Encourages **well-designed State aid** targeted at market failures and objectives of common European interest.
 - Focuses State aid control on **cases with the biggest impact** on the internal market.
 - Helps the Commission to **take decisions faster**.
- The Notice is the last missing part of the SAM

Overview

1. Introduction
2. Notion of undertaking and economic activity
3. State origin
4. Advantage
5. Selectivity
6. Effect on trade and competition
- 7. Infrastructure**
8. Final provisions

Undertaking and economic activity

1. General Principles

- **Undertaking** = every entity engaged in economic activity, regardless of legal status and way in which it is financed
- **Economic activity**: offering goods and services in the market
- **No economic activity**: regulatory tasks, supervisory tasks, activities based on solidarity, basic functions of the State (state education, customs, air safety, military & police ...)

2. Specific guidance for **social security, health care and education**

-> in principle non economic

Culture and heritage conservation -1

- "Culture is a vehicle of identities, values and meanings that mirror and shape the Union's societies."
- Vast array of purposes and activities – can fall both inside or outside of SA control
- **Free of charge or entrance fee only covers fraction** of the costs: non-economic

VS

- **Predominantly financed by fees** or other commercial means: economic

e.g. commercial exhibitions, cinemas, commercial music performance



Culture and heritage conservation -2

- Objectively **non-substitutable**: non-economic
 - ✓ *Eg. keeping public archives holding unique documents*
- **benefitting exclusively** certain undertakings rather than the general public: economic
 - ✓ *Eg. restoration of historical building used by private company*

Same principles apply to **nature conservation**

Effect on trade section: recognition of the **special features** of culture and the fact that most activities do not have an effect on trade between Member States: "*only funding granted to **large and renowned cultural institutions** and events in a Member State which are **widely promoted** outside their home region has the potential to affect trade between Member States*"

State origin

Imputability + Transfer of State resources

- **Imputability:** whether the **State exercised control** over the action in question
- **State resources:** Includes **all resources that are under the control of the State** (irrespective whether the granting institution is autonomous)

Clarifications in particular on

- Imputability and obligations under EU law
- Union resources: MS discretion on its use vs. direct award

Advantage

- State intervention **improves financial situation** of undertaking or prevents it from getting worse
- Any **economic benefit** which the undertaking could not have obtained under **normal market conditions**
- State can participate on the market, but has to act as any private actor would (State aid vs commercial transaction)
- Test: **Market Economy Operator Principle (MEOP)**: no State aid if MS acts like normal buyer / seller / investor

Advantage: Application of MEOP

1. Competitive tender
2. Pari passu situation
3. Benchmarking
4. Other assessment methodologies
 - ✓ IRR
 - ✓ Expert valuation
 - ✓ ...
5. Specific guidance for loans/guarantees: Reference Rate Communication and Guarantee Notice

Competitive Tender: Alignment with EU procurement rules

The Notice: **all procedures allowed by Public Procurement Directives** in principle sufficient to exclude State aid

- ✓ *Greater consistency within EU legal order*
- ✓ *Member States free to use procedures like "competitive dialogue" and "competitive procedure with negotiation" (used for complex projects, in particular infrastructure)*
- ✓ *Limited **exceptions**: "**negotiated procedure without publication**"; only **one bid** submitted (rebuttable presumption that the tender is not sufficient).*

Selectivity

- State aid is only present for State measures that grant an advantage in a selective way to **certain undertakings or certain categories of undertakings or certain economic sectors**.
- This criterion is relevant mainly for fiscal measures

Guidance on:

- **Material selectivity** (*de iure* and *de facto*)
- **Regional** selectivity
- Fiscal and similar measures ("three step test")
- One section on specific issues concerning tax measures

Effect on trade between Member States and distortion of competition

- The two conditions are very closely linked
- The Union Courts gave a **very broad interpretation**: in principle enough that the product or service is subject to trade between Member States (in a liberalised market)
- **No distortion** of competition possible for services that are subject to a **legal monopoly** in line with EU law (under very strict conditions)

No effect on trade – local services

Confirmation of Commission's decision making practice that small local services do not affect trade, if:

- **unlikely to attract customers from other Member States**
and
- **not foreseeable that more than a marginal effect on the conditions of cross-border investments or establishment**

More detailed guidance for many areas:

- Sports and leisure facilities, hospitals, small airports, small ports, ...
- Culture: Only largest subject to SA control because of particular features

Infrastructure

- Need for specific clarifications; requested by Member States and many stakeholders
- Very high practical relevance
- Evolution: from "general measures of public policy" to measures subject to State aid control (Aéroports de Paris; Leipzig/Halle)
- Legal uncertainty in the wake of Leipzig/Halle

Infrastructure - economic activity

- **Economic exploitation** = economic activity (Leipzig/Halle)
- No economic exploitation = no economic activity
 - Exercise of public powers (public remit = police, military, customs,...)
 - Not used for offering goods/services on a market (roads for free public use)
- **Legitimate expectations for aid before Aéroport de Paris**
- Mixed use:
 - concept of **ancillarity** (up to **20%** of overall capacity p.a.)
 - "customary amenities" (restaurants/shops/...): normally no effect on trade between MS



Infrastructure – construction/development

- Exclusion of effect on trade: **Local cases** (Commission's "no effect on trade" decision-making practice)
- Conditions excluding **distortion of competition** (cumulative criteria of natural monopoly):
 - ✓ **Infrastructures do not face direct competition** from other infrastructures of the same kind or other infrastructures of a different kind offering services with a significant degree of substitutability, or with such services directly (*likely for comprehensive network infrastructures that are natural monopolies*)
 - ✓ **Private financing insignificant** in sector concerned on Member State level
 - ✓ **Not dedicated infrastructure**

=> Typically **no aid at the level of the construction**

Infrastructure – how to exclude state aid

- Entire funding outside SA rules if cross-subsidization/indirect subsidization of other economic activities is excluded, e.g.:
 - ✓ Owner not engaged in (other) economic activity **OR** separation of accounts + ensured that other activities cannot benefit
 - ✓ **Tendering out** of operation => no indirect aid for operator

Infrastructure – Operators & Users

- If operators or users of an infrastructure built with public financing pay a **market price**, they do not receive any 'indirect' State aid (no advantage passed on to them).
- Clarification that:
 - **Competitive tender** excludes aid to the **operator**
 - **Incremental cost coverage** (if no other methodologies such as **benchmarking or tender** are possible) excludes aid to **users** (approach from *Aviation Guidelines*)

Infrastructure – Sectoral guidance

- *State aid control typically applies to the construction of infrastructure in the following sectors:*

Airports, Ports, Broadband, Energy

- *State aid control typically does not apply to the construction of infrastructures in the following sectors:*

Railway, Roads/Bridges/Tunnels, Canals/Inland Waterways, Water Supply and Wastewater Networks

- Available for free: no economic activity
- Against fee (toll): *construction* typically fulfills conditions for no effect on competition/trade (as opposed to operation)



Thank you!

Questions?