State aid control and fiscal State aid

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Why State aid control?

- Distortions of competition in the internal market by State interventions – "level playing field"
- Article 107(1) TFEU
- State aid is only compatible if justified by an objective in the common interest (efficiency/equity – e.g. regional development or R&D or SME support) and proportionate
Some principles of State aid control

- Exclusive competence of the Commission
- Member States need to notify intended State aid before its implementation
- Decisions are decisions of the College of Commissioners
What is State aid?

• Article 107(1) defines five cumulative criteria:
  • Economic advantage
  • Certain undertakings (selectivity)
  • State Resources
  • Distortion of competition
  • Effect on trade between Member States
• In principle aid is prohibited
• However, possibilities for compatibility (Article 107(2) and (3))
Compatibility

• European Commission has exclusive competence to approve State aid

• In its assessment under Article 107(3) TFEU, the Commission disposes of discretion
  • Disadvantaged regions
  • Important project common interest
  • Serious disturbance in economy
  • Development of economic activities/areas
  • Culture and heritage conservation

• Guidelines, Frameworks, Notices, Regulations
Common Principles for Compatibility Assessment

- Contribution to a well-defined objective of common interest
- Need for state intervention
- Appropriateness of the aid measure
- Incentive effect
- Proportionality of the aid (aid limited to the minimum necessary)
- Avoidance of undue negative effects on competition and trade between Member States
- Transparency of aid
State aid procedure (1)

- Sources of State aid cases
  - Notification (most cases)
  - Complaints
  - Ex-officio (press and other sources)
- New measures involving State aid
  - Must be notified
  - Cannot enter into force before Commission approval
  - General Block Exemption Regulation
- If not notified, then unlawful aid
State aid procedure (2)

• Preliminary investigation
• If no problems: Commission approves notified measure
  • In case of complaint or ex-officio also administrative closure possible
• If doubts about compatibility: opening of formal investigation
• Final decision (positive, negative, no aid)
  • If negative decision on non-notified aid: recovery (unless legitimate expectations) – recovery is not a fine, but repayment of an unduly received advantage
• Existing aid: special cooperation procedure with Member State to change measure for the future
Fiscal aid – some elements

• Article 107(1) TFEU
  • EU Courts confirmed that State aid also covers fiscal measures (Court of Justice, Case 173/73, *Italy v. Commission*)

• Commission Communication on State aid in the field of direct business taxation (1998)
  • Explains rules for fiscal aid in light of case-law
  • Focus on tax advantages and selectivity: examples, general versus selective measures, discretionary powers of administration, logic of the tax system

• Forthcoming: Commission Notice on the notion of State aid

• Existence of aid: focus often on advantage and (regional or material) selectivity
Material selectivity

- Measure applies only to certain (groups of) undertakings or certain sectors in a Member State
- Comparison within one Member State (not with others)
- De jure or de facto
- Three-step analysis:
  - What is the reference tax system?
  - Is there a derogation from the reference system?
  - Is the derogation justified by the logic of the tax system?
    - Preventing double taxation, administrative manageability, etc.
Past cases on tax schemes favouring multinationals

- State aid control of tax arrangements not new
  - 1997 – Measures against the "harmful tax competition"/ Code of Conduct on Corporate taxation
  - 2001 – Commission opens 15 investigations
    - Focus on intra-group activities (financing companies and coordination centres), which allowed multinationals special conditions in determining their taxable liability and which did not ensure compliance with the OECD arm's length principle
    - Court judgment C-182/03 and C-217/03 Forum 187 confirmed the Commission's approach
    - Concerns also other tax arrangements such as taxation of foreign income (offshore), e.g. the tax system of Gibraltar
The investigations into tax rulings

• In 2013 the Commission started looking into specific ruling practices in certain Member States
• In 2014 and 2015, it initiated formal proceedings into transfer pricing arrangements approved in tax rulings

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<td>Apple (Ireland)</td>
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<td>Amazon (Luxembourg)</td>
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