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Definition and characteristics of state aid

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Abstract

The paper deals with the definition of state aid and the determination of general characteristics of this institute particularly in terms of the decision-making practice of the Court of Justice and the Commission. Especially, this paper analyses the characteristics of state aid, i.e., “measure granted by a State or through State resources”, “economic advantage to particular undertaking (business) or sector (industry)”, “distortion of competition” and “effect on trade between the EU Member States”. Furthermore it also refers to a system of exceptions where it is possible to provide state aid.

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1. Introduction

State aid law is a specific part of European Union competition law. Having regard to the fact that a whole series of legal instruments of state aid will expire by the end of 2013 and taking into account the experiences with this institute, the European Commission (hereinafter referred to as “Commission”) decided to proceed to the modernization of the rules on state aid.

Objectives of the modernization of state aid and measures for their implementation the Commission are summarized in a communication “EU Modernization of the State Aid Rules”, COM (2012) 209, issued on May 8th 2012, to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

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The document states that: “The Commission is obliged to examine all allegations concerning potential aid without in practice being able to set priorities for complains handling. In addition the Commission is not always in a position to obtain complete and correct information from parties, which may prolong procedures. There is a need to streamline and reform procedures in order to deliver decisions within business-relevant timelines, in close cooperation with Member States.”

According to the Commission the above mentioned objective should be achieved by clarification and better explanation of the notion of state aid.

The aim of this paper is to analyze the characteristics of state aid, particularly in terms of the decision-making practice and interpretation of the Court of Justice and the Commission; this analysis might also facilitate the clarification and better explanation of the notion of state aid.

In this paper the methods of analysis and interpretation of current State aid law framework at the level of primary law and decision-making practice are used.

2. Definition and characteristics of state aid

Regulation of granting of the state aid in the European Union (hereinafter referred to as “EU”) is an integral part of the standards used for the protection of the economic competition.

State aid law framework is formed at the level of primary law by Article 107 to 109 Treaty on the Functioning of the European Union (hereinafter referred to as “TFEU”) (the former articles 87 to 89 of the Treaty establishing the European Community). Notion of state aid is defined by the legal definition contained in article 107 par. 1 TFEU, which lays that: “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.”

Decision-making practice as well as theory identifies the following 4 characteristics (attributes) of state aid (sometimes theory recognizes 5 or 6 characteristics (attributes); however these are the same characteristics, only divided into more details):

- Measure (aid) granted by a State or through State resources, in any form (includes the loss of public resources attributed to public bodies);
- Economic advantage to particular undertaking (business) or sector (industry) (confers a selective advantage to certain undertakings or the production of certain goods);
- Threat of disruption or distortion of competition within internal market of the EU, which is by the article 26 par. 2 TFEU (the former article 14 of the Treaty establishing the European Community) defined as an area without internal frontiers in which the free movement of goods, persons, services and capital in accordance with the Treaty's provisions;
- Effect on trade between EU Member States.

In order for a measure to be qualified as state aid, all the above mentioned characteristics (attributes) have to be met cumulatively.

To each of the characteristics (attributes) of state aid we can emphasize the following:

Attribute “Measure (aid) granted by a State or through State resources”

For the purposes of the state aid rules it is necessary to interpret the concept of “State” widely; so it should be interpreted as “public administration” or “public institutions”. In terms of state aid rules the “State” should be considered as regional, territorial or local government, public institutions, institutes, government facilities, public schools and universities, as well as other entities, which are directly or indirectly controlled by public administration. The concept of “State” is similar to term “state aid provider”, which is legally defined in the provision of par. 2 a) of the Act No. 215/2004 Coll., on Regulation of Certain Relationships within the Area of State Aid, as amended. According to above mentioned provision the state aid provider is the one who decides on the grant of state aid.

Concept of “State resources” is necessary to be interpreted widely again; it includes not only the “State funds” but also “public funds” and “funds from public resources”, i.e. the State budget resources and municipality (territorial self-governing units) budget resources. Public resources are also considered to be EU funds (e. g. the

resources of the European structural funds, operational programmes) or international funds (e.g. the EEA Financial Mechanism and the Norwegian Financial Mechanism (so-called “The Norwegian funds”), and Switzerland-Czech Cooperation Programme).

Case law indicates that there is no difference between the form and character of ownership; state aid can be distributed by state, public bodies and/or private bodies (distributing the aid instead of the State), no matter the status of the body that administers and distributes the aid (Case C-78/76 *Steinike und Weinlig vs. Germany*).

It is not even important how much influence State has in the body that administers and distributes the aid. Majority participation of the State or of self-governing body is not required; it is sufficient, if there exists influence on the decision-making process by which can be affected the conditions under which the state aid would be granted (Cases C-67/85, C-68/85, C-70/85 *van der Kooy vs. Commission*). On the other hand, measure granted by that body may be considered state aid only if the State is able to influence the flow of the money and by that also a certain undertaking receiving the benefit (Case C-482/99 *France vs. Commission*). Therefore, if the entrepreneur acts itself without the involvement of State resources and its behaviour favours another entrepreneur, it cannot be considered state aid.

Furthermore it is necessary that the measure has direct or indirect impact on the “state aid provider’s” budget (Case C-379/98 *Preussen Elektra AG vs. Schleswig AG*). Direct impact on budget has expenditure of money (typically grants and subsidies), on the other hand indirect impact on budget has not collecting money (typically tax reliefs, the sale of assets of public institution at a lower price than the market price).

Thus the concept of “state aid” is wider than the concept of “subsidy” because it includes not only payments or donations (such as subsidies or grants), but also it includes measures which reduce the entrepreneur’s costs in various ways (Case C-387/92 *Banco Exterior de Espana*).

Attribute “Economic advantage to particular undertaking (business) or sector (industry) (confers a selective advantage to certain undertakings or the production of certain goods)”

For the purposes of the state aid rules the competitive advantage is considered to be a situation when a certain undertaking, sector, or region is treated by a manner which is not common in economic relations. The case law points out that the competitive advantage is when the recipient obtains benefits which would not be granted under common market conditions (Case C-39/94 *SFEI*). Competitive advantage therefore means any measure that is selectively granted to an undertaking without adequate consideration or the compensation provided by the undertaking as a beneficiary is not corresponding to the extent of advantage it received.

Kind of provided advantage is not decisive. It is not only about the subsidies or grants, but it also includes measures that reduce the usual business costs that would normally the undertaking as a beneficiary has to bear itself (e.g. the already mentioned tax reliefs, or so-called operating aid, i.e. aid granted for regular running of business, without any ties to specific investment). Competitive advantage in this case lies in the fact that such support saves the beneficiary’s funds. Furthermore, competitive advantage can be also a less obvious support, such as free training of staff, or the providing of State assets under advantageous conditions.

State aid must be selective (i.e. it provides advantages to certain undertakings, sectors, or territories, in the context of their activities) and thus affects the balance between certain undertakings and their competitors. Selectivity is what differentiates state aid from so-called general measures (namely measures which apply without distinction across the board to all undertakings in all economic sectors in an EU Member State (e.g. most nation fiscal measures)). A scheme is considered selective, if the authorities administering the scheme have a degree of discretionary power. The selectivity criterion is also satisfied if the scheme applies to only part of the territory of an EU Member State (this is the case for all regional and sectoral aid schemes).

It is possible to talk about selectivity if the state aid is granted only to certain undertakings (for example, only those companies that have a certain number of employees) and also if the state aid is granted only when certain conditions are met by the beneficiaries (and these conditions are not easily fulfilled by the undertakings).

State aid should not be related to the “nationality” of beneficiary; the beneficiary can be a foreign undertaking operating in the State which grants the state aid.

Selective can be also a measure which is open to all undertakings on an equal basis, however the competent

national authority may, within the framework of administrative discretion, favour a particular undertaking (national authority may for example decide on the amount the state aid or on the selection of beneficiaries, or it may modify the conditions under which the state aid is granted).

In this context, it is necessary to deal with the concept of an “undertaking” and the concept of “economic activity”. Rules of the internal market, economic competition and state aid shall apply only in the case of economic activities not in the case of non-economic activities (Commission decision in Case K (2005) - 429, 2006/225/ES, on the aid scheme implemented by Italy for the reform of the training institutions).

The concept of “undertaking” is in the EU competition law interpreted more widely than for instance in Czech law (Commercial code). According to settled case law of the Court of Justice the concept of “undertaking” in the EU competition law includes every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (Cases C-41/90 Höfner a Elser, C-244/94 Fédération française des sociétés d'assurance and next, C-55/96 Job Centre, in joined cases C-180/98 to C-184/98 Pavlov and next. This view was also expressed in the Commission Communication of 1996 (OJ. C 281, 26 September 1996, p 3) and 2000 (OJ. C 17, 19 January 2001, p 4) on services of general economic interest in Europe). This definition identifies two issues relevant to the determination of the scope of the competition rules - first the nature of the entity (private or public, wholly funded from private or State resources), secondly the nature of the activity (profit or non-profit). Undertakings are usually business entities (corporations, commercial companies, co-operatives, self-employed persons, or self-employed persons conducting business in the liberal professions (e.g. lawyers, notaries, auditors, private doctors). Undertakings are also hospitals, universities, sports clubs, contributory organizations, foundations, when carrying out the activities for which in the market competition exists. However, an international organization does not constitute an undertaking (Case C-364/92 Eurocontrol).

According to case law the “economic activity” means any activity consisting of offering goods and/or services on a given market (Cases 118/85 Commission vs. Italy, C-35/96 Commission vs. Italy). In state aid law however the economic activity includes also activity, which is not primarily focused on making profit; therefore in the EU competition law non-profit making entities are considered as entrepreneurs, if they sell goods and/or provide services and participate in the competition with other competitors (these are subject to the competition rules).

From the EU competition rules are excluded the activities which are by their nature distant to economic relations (Cases C-159/91 and C-160/91 Poucet a Pistre) or which are associated with the exercise of public authority (Case C-364/92 SAT Fluggesellschaft, C-343/95 Diego Cali & Figli). Economic and non-economic activities can coexist in the same sector and sometimes may even be provided by the same entity (Commission decision in Case K (2005)-429, 2006/225/ES, on the aid scheme implemented by Italy for the reform of the training institutions).

Attributes “Threat of disruption or distortion of competition” and “Effect on trade between EU Member States”

So that the measure can be qualified as state aid, it has also to disrupt or distort competition or at least to threaten with disruption or distortion of competition, and furthermore it has to affect trade between EU Member States; these two conditions, in case of state aid, are often associated. For the purpose of categorising a national measure as state aid, it is not necessary to demonstrate that the aid has a real effect on trade between EU Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition.

The concept of “trade between EU Member States” implies that there has to be cross-border economic activity involving at least two EU Member States; without trade between EU Member States it is impossible to effect it. Impact on trade between EU Member States occurs primarily in cases where the recipient of the support “exports” its production or services; i.e. it sells goods or provides services in other EU Member State or to customers from these States (Commission decision in Case 2000/536/EC – Seleco). However according to case law, it is not excluded that the state aid granted to an undertaking which provides only local or regional services and does not provide services outside of its state of origin, could have an impact on trade between EU Member States.

If an EU Member State grants a state aid for an undertaking, it is not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Aid granted by an EU Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other EU Member States have less chance of penetrating the market of the EU Member State concerned (Case C-280/00 Altmark Trans vs.

Regierungspräsidium Magdeburg). In addition, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another EU Member State (Case C-66/02 Italy vs. Commission). Furthermore, when aid granted by an EU Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter has to be regarded as influenced by that aid (Case C-730/79 Philip Morris vs. Commission, and C-53/00 Ferring).

The other important point emerging from the case law is that there is no threshold or percentage, which would determine the limit, under which trade between EU Member States could not be considered to be affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it, do not exclude the possibility that trade between EU Member States could be affected (Case C-142/87 Belgium vs. Commission, “Tubemeuse”). Even a relatively small amount of support may affect trade between EU Member States, especially if the beneficiaries operate in the sectors in which intense competition exists (Case T-214/95 Vlaams Gewest vs. Commission). In this context, it should be noted that according to the opinion of the Commission so called “de minimis aid” does not have an impact on competition and does not affect trade between EU Member States.

The above mentioned can be demonstrated on the following Commission decisions:

Commission decision N 258/2000 Germany – Leisure Pool Dorsten: In this case, subsidy was granted from budget of the municipality. This subsidy was intended for the reconstruction and modernisation of aged swimming complex (leisure pool) to a new, modern one. Competitive swimming complexes (leisure pools) argued that the state aid was granted, and they invoked the cancellation of the granted measure by the Commission. After examining the case the Commission decided that the swimming complex (leisure pool) in Dorsten is located at a distance of about 80 km from the Belgian border, which is the distance that can be assumed to discourage tourists from neighbouring Belgium from long paths for visiting swimming complexes (leisure pools). The Commission therefore decided that the subsidy for the swimming complex (leisure pool) in Dorsten cannot be qualified as state aid, since the measure is not potentially capable of affecting trade between EU Member States.

Commission decision 2006/63/ES Italy – The project of extension of the distribution network of methane as a fuel: In this case, the region of Piedmont in Italy, planned, in order to reduce air pollution over its territory, to carry out the scheme involving the financing of companies that were planning to establish a distribution network for the sale of methane as a fuel. In this context, the Commission, inter alia, stated that the measure could affect trade between EU Member States if there was competition between the Italian traders who receive support from the Piedmont region and methane (or other car fuel) traders from another EU Member State. However the Commission pointed out that the only EU Member State, which has a common border with region of Piedmont, is France. Border is for the most part made up of mountains, so that the crossing of a motor vehicle is possible only via the Alpine passes or toll tunnels. In addition, traders have to be connected to the existing gas pipelines within the regional borders. Unlike the facts of the case, which was the subject of decision 1999/705/EC, it was not - according to the Commission – conceivable that the driver of the motor vehicle would cross the border in order to buy methane as a fuel at a lower price. Range of motor vehicle, powered by methane, is lower than the range of the motor vehicle powered by petrol (300 km in comparison with at least 600 km), and filling of methane can occur only during the opening hours of gas stations. On the basis of the above mentioned, the Commission concluded that the measure did not constitute a state aid.

Commission decision 2005/401/ES France – Measures for the Bioscope theme park: In this case, the aid was granted to a private company S.M.V.P., which operated the Bioscope theme park. Bioscope was a theme park, which was at the same time of scientific, educational and entertaining nature and concentrated on the topics of health, life and the environment. The idea was, that the visitors can educate through enjoyment. In this context, France claimed that Bioscope is so specific that it does not substitute the offer of other amusement parks, especially the one, which was located in the area of potential customers (visitors). According to France the support to this project, therefore, cannot affect the attendance and therefore has no effect on trade between EU Member States. The Commission recognized that the activities that Bioscope offers are very different from those that offer other common amusement parks; so the visit of ordinary amusement park is no equivalent alternative to a visit to Bioscope and therefore there would not a significant reduction in the number of customers (visitors) in common amusement parks. However, the Commission had considered that this difference is not enough to completely

eliminate all forms of substitutability. If the people decide how to spend their leisure time, they do not always decide between activities of the same type. They may decide to visit the swimming pool rather than the zoo, though, when it comes to entertainment, is visiting the Zoological gardens, the content very different from staying in a swimming pool. Similarly, it is common that the parents decide that the whole family will go to the Museum. However, if the children decide for themselves, they would rather go on a pilgrimage. The Commission therefore came to the conclusion that a visit to Bioscope is an alternative to visiting the German amusement parks, even if only in a limited way. Due to the above reasons, the Commission concluded that, in this case, the measures may have an impact on trade between EU Member States and therefore meets the required criteria and should be considered state aid.

Commission decision N 497/2006 Czech Republic – The Municipal Hall in Přerov: In this case Přerov municipality granted subsidies to private company for the purpose of organizing cultural events in the Municipal Hall in Přerov, which the company operated. The Commission in this matter stated that, although it is obvious that the Municipal Hall in Přerov cannot offer its services (programme) elsewhere, trade between EU Member States might also be affected, if the demand (audience) comes from abroad. In this context, the Commission took note of the fact that Přerov is located at a distance of 60–70 km from the nearest border. The programme, which consists of concerts of different styles of music and theatre performances, including performances for children and schools, apparently does not attract foreign audience. Furthermore performances were in Czech language and the programme was clearly intended for the local Czech population. The Municipal Hall in Přerov offered cultural events and activities with limited regional relevance. The Commission also did not consider that it has a unique feature which would distinguish it from other cultural centres, so that it was not favoured over other cultural centres, which may be located in the wider area. The Commission therefore decided that the measures might not constitute state aid, due to the fact, that they probably do not have an effect on trade between EU Member States.

Commission decision NN 44/2007 (ex N 32/2006) Czech republic – Exemption from income taxes on prizes and donations in the field of culture: In this case it was made an exemption from income tax for donations to natural persons who provide public cultural services. The Commission, *inter alia*, stated that in many cases, the activities supported by the aid scheme would be of local character (e.g. making accessible the real estates listed in the cultural heritage, which are located in small municipalities and owned by private individuals or the public) and therefore the probability of affecting trade between EU Member States, in particular by attracting cross-border tourism, is really small. At the same time, however, it is possible that an exemption from income tax granted to individuals who operate cultural facilities (e.g. exhibition spaces, galleries, art workshops, concert halls and theatres, museums, etc.) might disrupt or distort the competition and affect trade between EU Member States, because of the competitive advantage over the other entities, either in the Czech Republic or abroad, which operate the same businesses.

3. The general prohibition of the provision of public support and specified exclusions

State aid is generally incompatible with the EU internal market and may be declared compatible only under the conditions mentioned below.

The incompatibility has to be understood in the sense that state aid fulfilling the characteristics (attributes) stated in Article 107 par. 1 TFEU is primarily prohibited. From this general prohibition, however, there are exceptions to the system, when it is possible to grant state aid.

Article 107 par. 2 TFEU states cases of state aid, which are compatible with the internal market, i.e. which are automatically exempted from the general prohibition referred above. These cases include a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; b) aid to make good the damage caused by natural disasters or exceptional occurrences; and c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

Article 107 par. 3 TFEU furthermore states cases of state aid, which may be considered by the Commission to be compatible with the internal market of the EU:

- aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349 TFEU, in view of their structural, economic and social situation;
- aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a EU Member State;
- aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the EU to an extent that is contrary to the common interest;
- such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Exception to this general prohibition of state aid may, however, be allowed only on the basis of the decision of the Commission, whose authority (competence) stems from the TFEU (the authority (competence) of the Commission in state aid decision-making process derives especially from Article 108 TFEU). In certain specific cases it is possible to grant state aid even without consent of the Commission; these are called “block exemption”, or “de minimis aid” (small state aid amounts).

4. Conclusion

The economic and financial crisis has threatened the integrity of the EU internal market and increased the potential for anticompetitive reactions; crisis has increased the demand for a greater role of the State to protect the most vulnerable members of society and promote economic recovery. Stronger and better targeted State aid control can encourage the design of more effective growth-enhancing policies and it can ensure that competition distortions remain limited so that the EU internal market remains open and contestable. It can also contribute to improving the quality of public finances (Communication from the Commission “EU Modernization of the State Aid Rules”, COM (2012) 209, issued on May 8th 2012, to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions).

In our view the modernisation of State aid rules is necessary. The Commission states the three main goals of the modernisation: a) the definition of common principles applicable to the compatibility assessment of Aid measures, b) focusing of the Commission on those measures with the largest impact on the EU internal market, and c) to speed up decision making by rationalizing the Commission’s investigations of measures. The main goal is to enable the growth of a stronger, more dynamic and competitive EU internal market.

Notion of state aid is an objective concept defined directly by the TFEU in Article 107 as any measure that results from an intervention by the State or through State resources, that is liable to affect trade between Member States, that confers an advantage on the recipient and distorts or threatens to distort competition. The Commission’s role in that respect is and will be limited to providing clarification as to how it understands and applies the relevant provisions of the TFEU, as also interpreted by the Court of Justice. Within those limits, the Commission should provide further clarification on the key concepts relating to the notion of state aid with a view to contributing to an easier implementation (Communication from the Commission “EU Modernization of the State Aid Rules”, COM (2012) 209, issued on May 8th 2012, to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions).

The intention of the Commission to clarify and better explain the notion of state aid is, in our opinion, appropriate and it would be really helpful, especially from the perspective of practice. Nowadays it is quite often that in case of doubt whether the measure represents the state aid or it does not, the Member state notifies the measure to the Commission just for reasons of legal certainty, since that is the only way to avoid the risk that the measure would be considered as the incompatible state aid, and on the basis of non-notification would be considered as unlawful state aid.

As already mentioned above the State aid law framework is formed at the level of primary law by Article 107 to 109 TFEU. Notion of state aid is defined by the legal definition contained in article 107 par. 1 TFEU, which is however very general. This very vague legal framework resulted in an extensive degree of discretion by bureaucrats

(the Commission) and judges (Court of Justice), which can be illustrated by the numerous decisions; this causes, that the State aid rules are disorganized and might be confusing.

In our opinion, the Commission should provide clear and detailed written guidelines (soft law) for the assessment of what is considered to be a state aid according to the definition in the article 107 par. 1 TFEU and what is not, and furthermore set out detailed criteria for distinguishing between important and less important cases of state aid (in this respect we understand that the Commission has no power to change the basic meaning of state aid, which is derived from article 107 par. 1 TFEU).

It would be really welcomed if the State aid rules used for assessing aid are harmonized; this may be expected to lead to greater simplification and understanding of the state aid assessment process.

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