

The Notion of “State Aid” in EU Law (Part 1)

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Abstract

The term “aid” has not been defined within the Treaty on the Functioning of the European Union (TFEU). Instead, the prohibition of aid is governed under Article 107 TFEU, stipulating that Member States may not grant any aid without prior notification to the European Commission. However, if a state measure qualifies as 'aid' within the meaning of Article 107 TFEU, a distinction must be made between existing aid and new aid. Depending on the type of aid, different procedural regulations of the TFEU must be adhered to. The prohibition of aid under Article 107 TFEU does not imply that no aids may be granted at all.

I. General Remarks

Article 107 TFEU is “neither absolute nor unconditional” (Court of Justice of the European Union [CJEU], 1977). Member States may grant aid, albeit in a very limited and controlled manner, following the liberal philosophy of the European Communities. Aids are deemed unauthorized if they meet the criteria of Article 107 TFEU, as it is assumed that they distort competition in such cases. The Commission decides on their compatibility or incompatibility with the internal market pursuant to Article 108 TFEU. The EU State Aid Control regime is also understood as part of the Community competition protection, essential for the integration of national markets into a “Single Market”.

Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) establishes a fundamental prohibition on aid, yet this prohibition is significantly limited by the statutory exceptions set forth in Article 107(2) and the discretionary exceptions of Article 107(3) TFEU. The doctrine supports this view by attributing a higher priority to the exceptions in Article 107 TFEU (paragraphs 2 and 3) 'over the demands for protection of competition from distortions contained in paragraph 1' (Groben, 1991; Caspar, Year of the symposium). Thus, the literature refers to the prohibition of aid as a “ban with a reservation for permission” (Sutter in Mayer, 2004). This “reservation for permission” is particularly helpful when competition fails in the Member States. In such cases, as Barth (1996) correctly recognized, the statutory and discretionary exceptions allow Member States to “intervene in market operations” by providing state funds. This regulatory objective is also used for the interpretation of aid provisions (Advocate General Tesauro, 1990).

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II. Definition of “Aid”

Pursuant to Article 107 of the Treaty on the Functioning of the European Union (TFEU), “aid” encompasses any measure that confers an advantage on a firm and threatens to distort competition. There is no explicit definition of “aid”; rather, the concept of aid must be deduced from the criteria listed in Article 107(1) TFEU (Heidenhain, 2003). The concept of aid is to be interpreted in a manner that ensures the competition and intra-Community trade are protected against distortion as effectively as possible. A key characteristic of the concept of aid is the 'provision of an advantage in the broadest sense,' meaning the concept encompasses both services from state resources and any reduction of burdens on the firm.

Contrary to the concept of 'aid' as defined in Community law, the Austrian concept of “subsidy” is to be interpreted more narrowly in one respect, because it includes only monetary or in-kind benefits (excluding the reduction of burdens, as with aid under Community law), and more broadly in another respect, since it also covers the provision of state funds to consumers. The term 'aid' within the meaning of EU law, however, refers to the provision of state funds subject to Articles 107-109 of the Treaty on the Functioning of the European Union (TFEU). If the provision does not have a competitive legal context, it is referred to as a “subsidy”. Aids may include, for instance, state participations, capital endowments (ECJ, C-40/85, *Belgium v Commission*, ECR 1986, p. 2321, para. 2323), participation in capital increases, exemption from taxes and duties, conversion of loans into equity capital (ECJ, C-261/89, *Italy v Commission*, ECR 1991, para. 2), capital grants for loss coverage, delivery of goods or services on preferential terms, etc. A very important characteristic of aid is the lack of a market-standard consideration from the recipient of the aid (ECJ, C-39/94, *SFEI*, ECR 1996, I-3547, para. 60).

III. The “Aid Recipient”

Article 107 prohibits the direct or indirect transfer of state resources to favored private and public enterprises or sectors of production (ECJ, C-78/76, ECR 1997, p. 595, para. 18). The European Court of Justice (ECJ) defines the term “enterprise” as a “collection of personal, material, and immaterial factors assigned to a legal entity, which pursues a specific economic objective on a lasting basis” (ECJ, C-19/61, *Mannesmann v High Authority*, ECR 1962, p.750). This jurisprudence thus aligns with the ECJ's interpretation of the concept of “enterprise” within the context of Articles 101 and 102 TFEU. Aid can be granted to enterprises either directly or indirectly, necessitating a distinction between bipartite (state-enterprise) and multipartite relationships. Bipartite relationships include public-law aids, encompassing all forms of tax exemptions, direct financial grants, investment allowances, various special depreciation

allowances, etc., or private-law aids, such as the sale of enterprises or a common waiver of claims by the state. The relationship may be “multipartite” as the beneficiary of the aid need not be its recipient. For the purposes of Article 107(1), it is the beneficiary, not the recipient, that is relevant. For instance, a consumer may be the recipient of the aid if it indirectly benefits an enterprise (Barth, 1996). Multipartite relationships include guarantees, credit orders, state guarantees, or the assumption of unlimited liability for an enterprise attributable to the public sector (European Commission, 1993).

The presence of a state guarantee or warranty need not necessarily be qualified as prohibited state aid under Community law: According to the Commission's notice on the application of Articles 107 and 108 TFEU, the following state guarantees or warranties are permitted if certain cumulative conditions are met (European Commission, 2000):

- “a. The borrower is not in financial distress;*
- b. The borrower would, in principle, be capable of raising funds on the financial markets under market conditions without state intervention;*
- c. The guarantee is tied to a specific financial transaction and limited to a fixed maximum amount, covering no more than 80 percent of the outstanding loan amount or other financial obligations (excluding bonds and similar instruments) and is of limited duration;*
- d. A market-standard premium for the guarantee is paid (taking into account, among other factors, the amount and term of the guarantee, collateral provided by the borrower, the borrower's financial situation, industry and outlook, default rates, and other economic conditions.”*

In the same notice, three additional, slightly modified conditions are introduced, under which a state guarantee scheme does not constitute state aid within the meaning of Article 107(1) TFEU. If these conditions are met, a state guarantee, guarantee scheme, or warranty is not considered state aid under EU law. However, if the aforementioned conditions (a-d) are not cumulatively present, it may still not constitute prohibited state aid within the meaning of Article 107 TFEU. In case of doubts, it is open to the Member State to notify the Commission of the aid in question.

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