

State Aid Law

Since 1957, aid given by individual EU Member States to business is prohibited, but the prohibition is not absolute.

Article 107 TFEU: “1. [...] [A]ny 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, in so far as it affects trade between Member States, be incompatible with the internal market.
2. The following shall be compatible with the internal market: [...]
3. The following may be considered to be compatible with the internal market: [...]”

The rationale of state aid rules has changed with time, passing from ensuring free competition in the internal market to boost economy and control Member States' public spending. It is an area of intense lobbying that lies within the exclusive competence of the Commission.



State Aid Law

Article 107(1) TFEU applies to: (1) aids involving State resources, (2) conferring a selective advantage on the recipient; (3) actually or potentially affecting trade between EU member States and (4) actually or potentially affecting competition.

The notion of aid has been interpreted broadly, to cover all types of transfers of State resources and other economic advantages, including tax exemptions.

A “mechanism [...] established and regulated by the Member States, for offsetting the additional costs arising from that obligation to purchase and through which the State offered those private operators the certain prospect that the additional costs would be covered in full” is state aid: *Association Vent De Colère! Fédération nationale and Others v. Ministre de l'Écologie*, C-262/12, [2013].

A similar, but privately financed, mechanism, does not “constitut[e] a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the state”: *PreussenElektra AG v. Schleswag AG*, C-379/98 [2001].

State Aid Law

Article 107(1) TFEU does not apply to aid not requiring States' expenditures.

The notion of aid not requiring States' expenditures covers a German law providing that national labor law protections were not applicable to ships registered in Germany but employing non-EU crew members (*Firma Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, C-72-3/91 [1992]), to a German law excluding small and medium-sized enterprises from national laws on unfair dismissal (*Kirsammer-Hack v. Nurhan Sidal*, C-189/91 [1993]) and to an Italian law exempting post offices from the statutory duty to grant its employees contracts of indefinite duration (*Epifanio Visico v. Ente Poste Italiane*, C-52-4/97 [1998]).

State aid is also that allocated by regional governments and state companies.

For state aid rules to apply to companies, the State should have a substantial control of the company's activity (*Spain v. Commission*, C-342/96 [1999]).

State Aid Law

State aid should confer a selective advantage on the recipient.

As to the advantage, a state aid confers an undue advantage to their beneficiaries, if, under normal market conditions, that undertaking would have not be able to secure a comparable advantage by a private investor.

A State's waiver of a tax claim in a state-owned company (*Commission v. EDF*, C-124/10 [2012]) and a region's offer to provide an airline company reduced landing charges in exchange for service in the region (*Ryanair Ltd v. Commission*, T-196/04 [2008]) are choices that no private investor would have made.

Technically, the private investor test only applies when the state is acting as an investor. It does not apply when the state acts as a public authority.

Subsidies conferred to a regional bus company to perform an anti-economic, but needed, public service are legitimate: *Altmark Trans v. Nahverkehrsgesellschaft Altmark GmbH*, C-280/00 [2003].

State Aid Law

State aid should not only conferring an advantage; it should also be selective. Selectivity might be established as to geographical or material selectivity.

A State's decision to set different taxes in one region or another is geographically selective. In *Portugal v. Commission*, C-38/03 [2006].

A State's decision to enact a measure benefitting only small or large undertakings (respectively *Spain v. Commission*, C-409/00 [2003] and *Ecotrade v. Altiforni e Ferriere di Servola*, C-200/97 [1998]), applying only to some manufacturers or public undertakings (*Germany v. Commission*, 248/84 [1987] and *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze*, C-222/04 [2006]), excluding from taxes offshores companies (*Commission and Spain v. Government of Gibraltar and United Kingdom*, C-308/01 [2004]), or granting tax rebates to goods providers to the exclusion of service providers (*Adria-Wien Pipeline GmbH v. Finanzlandesdirektion für Kärnten*, C-143/99 [2001]), is materially selective.

State Aid Law

The last two requirements for State aid rules to apply (actual or potential effect on internal trade and on competition) are interpreted broadly.

Austrian legislation providing for small compensatory payments for doctors under the VAT regime affects the internal market trade and competition, because “there is no threshold or percentage below which it may be considered that trade between Member States is not affected [...] it is not inconceivable [...] that medical practitioners specialising in dentistry, such as Mr Heiser, might be in competition with their colleagues established in another Member State”: *Wolfgang Heiser v. Finanzamt Innsbruck*, C-172/03 [2005], paras 32 and 41.

In recent years however the Commission has attempted to focus only on cases having a significant impact on trade in the EU.

To facilitate the application of state aid rules, the Commission has also adopted many horizontal and sectoral guidelines to clarify its practice and criteria.

State Aid Law

Not all state aid is prohibited. Two sets of exemptions (one automatic, one discretionary) are set out in Article 107 TFEU itself.

Article 107 TFEU: “2. The following shall be compatible with the internal market:

- (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;
- (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 [...].”

State Aid Law

Article 107 TFEU: “3. The following may be considered to be compatible with the internal market:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment [...], in view of their structural, economic and social situation;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) 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;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.”

State Aid Law

Yet, the most important exemptions from the application of Article 107(1) TFEU have been set out by the Commission itself, using Article 108(4) TFEU.

Article 108 TFEU: “4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.”

Article 3 of the Commission Regulation (EU) 1407/2013: “1. Aid measures shall be deemed not to meet all the criteria in Article 107(1) of the Treaty, and shall therefore be exempt from the notification requirement in Article 108(3) of the Treaty, if they fulfil the conditions laid down in this Regulation.

2. The total amount of de minimis aid granted per Member State to a single undertaking shall not exceed EUR 200 000 over any period of three fiscal years.”

State Aid Law

Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (so-called GBER)

The GBER covers 43 different categories of aid, some for small-and-medium enterprises only and some for all enterprises (with some exceptions):

- the GBER covers a number of specific SME aids (investment and employment aid, consultancy aid, aid for SME participation in fairs), aid in the form of risk capital and aid for promoting female entrepreneurship;
- the GBER also covers, in relation to all enterprises, covers aid for research & development, innovation, and broadband infrastructures, regional aid, environmental aid, training aid, and aid for disadvantaged and disabled workers.

State Aid Law

Article 3, Commission Regulation (EU) No 651/2014: “Aid schemes, individual aid granted under aid schemes and ad hoc aid shall be compatible with the internal market within the meaning of Article 107(2) or (3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty provided that such aid fulfils all the conditions laid down in Chapter I of this Regulation, as well as the specific conditions for the relevant category of aid laid down in Chapter III of this Regulation”.

The conditions for compatibility are that aid:

- (i) falls below given economic thresholds (Article 4),
- (ii) is given transparently (Article 5),
- (iii) with the aim of triggering an incentive effect on its beneficiaries (Article 6),
- (iv) and is duly published and communicated to the public by the concerned State (Article 9).

State Aid Law

State aid falling under the GBER needs not to be notified to the Commission. The Commission has however the power to monitor state aid practices under the GBER and to adopt sanctions.

Article 10, Commission Regulation (EU) No 651/2014: “Where a Member State grants aid allegedly exempted from the notification requirement under this Regulation without fulfilling the conditions set out in Chapters I to III, the Commission may, after having provided the Member State concerned with the possibility to make its views known, adopt a decision stating that all or some of the future aid measures adopted by the Member State concerned which would otherwise fulfil the requirements of this Regulation, are to be notified to the Commission in accordance with Article 108(3) of the Treaty. The measures to be notified may be limited to the measures granting certain types of aid or in favour of certain beneficiaries or aid measures adopted by certain authorities of the Member State concerned”.

State Aid Law

Any measure of state aid (except aid that is presumptively authorized under either the *De minimis* Regulation or the GBER) should be verified by the Commission. The Commission has exclusive competence in this regard.

Article 109 TFEU: “3. [...] On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances.”

The procedure for authorizing state aid is set forth by Article 108 TFEU, by Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the TFEU [2015], and by ECJ’s case-law.

State Aid Law

Article 108 TFEU: “3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.”

In 2 months, the Commission should decide whether to open an investigation procedure under Article 108(2) TFEU, which should then be closed in 18 months. The Commission can also start cases ex officio or following a complaint.

Article 108 TFEU: “2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State [...] is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.”

State Aid Law

The state aid procedure, the powers of the Commission and the guarantees for the concerned parties are set out by Council Regulation (EU) 2015/1589.

Article 6, Council Regulation (EU) 2015/1589: “1. The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the internal market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed 1 month. In duly justified cases, the Commission may extend the prescribed period.”

State Aid Law

Article 7, Council Regulation (EU) 2015/1589: “After the initiation of the formal investigation procedure provided for in Article 6, in particular as regards technically complex cases subject to substantive assessment, the Commission may, if the information provided by a Member State concerned during the course of the preliminary examination is not sufficient, request any other Member State, an undertaking or an association of undertakings to provide all market information necessary to enable the Commission to complete its assessment of the measure at stake taking due account of the principle of proportionality, in particular for small and medium-sized enterprises.”

Non compliance with a request of information is punished with fines:
Article 8, Council Regulation (EU) 2015/1589.

State Aid Law

Article 9, Council Regulation (EU) 2015/1589: “2. Where the Commission finds that, where appropriate following modification by the Member State concerned, the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission finds that, where appropriate following modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the internal market have been removed, it shall decide that the aid is compatible with the internal market (‘positive decision’). [...]

4. The Commission may attach to a positive decision conditions subject to which aid may be considered compatible with the internal market and may lay down obligations to enable compliance with the decision to be monitored (‘conditional decision’).

5. Where the Commission finds that the notified aid is not compatible with the internal market, it shall decide that the aid shall not be put into effect (‘negative decision’).”

State Aid Law

Following a negative decision, the Commission may order the State concerned to recover the unlawful aid.

Commission v. Germany,
70/72 [1973]

Article 16, Council Regulation (EU) 2015/1589: “1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (‘recovery decision’). [...]

3. Without prejudice to any order of the Court of Justice of the European Union pursuant to Article 278 TFEU, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission’s decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Union law”.

State Aid Law

Following a negative decision, States are therefore obliged to recover the unlawful aid granted throughout their own national procedures.

A diligent businessman should determine whether the state providing aid had followed the correct procedures to ensure that aid was lawful under EU law and therefore cannot claim that he had legitimate expectations about the right to retain such aid: *Commission v. Germany*, C-5/89 [1990].

National courts do not have the power to declare whether state aid is or not compatible with EU law. However, national courts are responsible for enforcing the standstill obligation and for implementing recovery decisions.

Commission Notice on the enforcement of State aid law by national courts [2009]

National courts are also the competent authorities where private parties harmed by state aid might bring their private actions. However, to date there is little private enforcement of state aid rules.