State Aid Assessment: Principles of Compatibility

Prof P. Nicolaides
Exceptions

State aid in principle prohibited, unless it can be exempted

Options

Regulation on de minimis aid [+ SGEI, agric., fish.]
=> no aid in meaning of Art 107(1)

Article 107(2): compatible with IM
- aid to individuals
- natural disasters; exceptional occurrences
- division of Germany

Article 107(3): may be compatible with IM
- underdevelopment & Art 349 regions
- European projects; serious disturbance
- certain economic activities or areas
- culture & heritage
- other

Article 42: agriculture
Article 93: transport
Article 106(2): SGEI

Conditions

Guidelines: Horizontal
- regional development
- environment & energy
- R&D&I
- rescue & restructuring
- risk finance
- PSC framework
- guarantees, loans
- etc

Guidelines: Sectoral
- financial institutions
- agriculture
- transport
- airports & airlines
- broadcasting
- electricity
- broadband
- films

Regulations
- GBER
- ABER
- Transport
- Decision on PSC
<table>
<thead>
<tr>
<th>Option</th>
<th>Action</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>No aid in meaning of Art. 107(1)</td>
<td>No notification</td>
<td>No assessment</td>
</tr>
<tr>
<td>De minimis [Reg 1407/2013]</td>
<td>No notification</td>
<td>No assessment</td>
</tr>
<tr>
<td>Agriculture [Reg 1408/2013]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fisheries [Reg 717/2014]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SGEI [Reg 360/2012]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GBER [below thresholds]</td>
<td>No notification [but reporting]</td>
<td>No assessment</td>
</tr>
<tr>
<td>ABER [Reg 702/2014]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SGEI [Dec 2012/21]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transport [Reg 1370/2007]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GBER [above thresholds] &amp; Guidelines</td>
<td>Notification</td>
<td>Detailed assessment</td>
</tr>
<tr>
<td>On basis of Treaty [e.g. Art 107(3)(c)]</td>
<td>Notification</td>
<td>Detailed assessment</td>
</tr>
</tbody>
</table>
Assessment by Commission

- Only the Commission may assess compatibility of aid
- Commission has wide discretion
- Judicial review is confined to
  - rules of procedure
  - duty to give reasons
  - accuracy or error in assessment of facts
  - error of law
  - misuse of powers
- It is not for EU courts to substitute their economic assessment for that made by Commission

- Commission may limit approval to 4 years and request re-notification & ex post evaluation
Discretion of Commission

- T-162/13, Magic Mountain Kletterhallen v Commission
- GC: Compatibility criteria used by Commission may change
  - Commission not bound by past decisions
  - Case law neither requires, nor prohibits economic analysis

- Appellants must show, not that Commission could have decided differently, but that it could not have reached the particular conclusion on the basis of the criteria and facts

- There is no need for market failure; it is only one of several factors taken into account
General principles of exemption

- Compatible aid must fall within one of categories of exception allowed by Treaty

- Aid must be capable of achieving an objective defined by Treaty
  - Operating aid does not in principle fall within scope of Art 107(3). In principle it distorts competition without being capable of achieving any of objectives of derogations

- Aid must not infringe other Treaty provisions
“Common interest”

- T-356/15, Austria v Commission [Hinkley Point C]
- SA must be in common interest, necessary & proportional
- “Common interest” does not mean a policy shared by all MS
- Interests of other MS are safeguarded by preventing aid from affecting trade to undue extent
- Positive effects balanced against negative effects
- Market failure not necessary. But it must be shown that public policy objective cannot be achieved by market forces alone
Common assessment principles

- Contribution to a well-defined objective of common interest
  - MS must identify policy targets & relevant performance indicators

- Need for state intervention
  - MS must demonstrate existence of market gap/equity

- Appropriateness of state aid
  - No other less intrusive instrument
- Incentive effect
  - Beneficiaries must change behaviour, do something extra
  - Project not possible without aid

- Proportionality of aid
  - Aid kept to minimum necessary
Avoidance of undue negative effects
  • No crowding out
  • No strengthening of market power
  • No support of unviable firms in stagnant markets
  • No restricted procedures for selecting beneficiaries

Transparency of aid
Typical reasons for finding of incompatibility

- Aid not in common interest [e.g. duplicate infrastructure, no need for the product]

- Aid not appropriate instrument [e.g. regulation more effective]

- Aid not necessary [e.g. project already started, market provides product, operating aid, excess aid]

- Aid causes excessive distortion of competition [e.g. not available to all competing undertakings, favours certain technologies, no compensatory measures (in case of restructuring)]
Typical errors [audits & ex post monitoring]

- Absence of incentive effect
- Ineligible costs
- Aid intensity higher than max allowed
- Undetected/non-notified aid
- Non-compliance with formal requirements [e.g. cumulation, publication, reference to GBER]
- Non-exclusion of non-eligible firms [e.g. in difficulty, Deggendorf]