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State Aid Assessment: Principles of Compatibility

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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

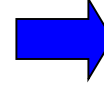
- aid to individuals
- natural disasters; exceptional occurrences
- division of Germany

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**

Options for public authorities & type of assessment

Option	Action	Assessment
No aid in meaning of Art. 107(1)	No notification	No assessment
De minimis [Reg 1407/2013] Agriculture [Reg 1408/2013] Fisheries [Reg 717/2014] SGEI [Reg 360/2012]	No notification	No assessment
GBER [<u>below</u> thresholds] ABER [Reg 702/2014] SGEI [Dec 2012/21] Transport [Reg 1370/2007]	No notification [but reporting]	No assessment
GBER [<u>above</u> thresholds] & Guidelines	Notification	Detailed assessment
On basis of Treaty [e.g. Art 107(3)(c)]	Notification	Detailed assessment

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

Cont.

- Incentive effect
 - Beneficiaries must change behaviour, do something extra
 - Project not possible without aid
- Proportionality of aid
 - Aid kept to minimum necessary

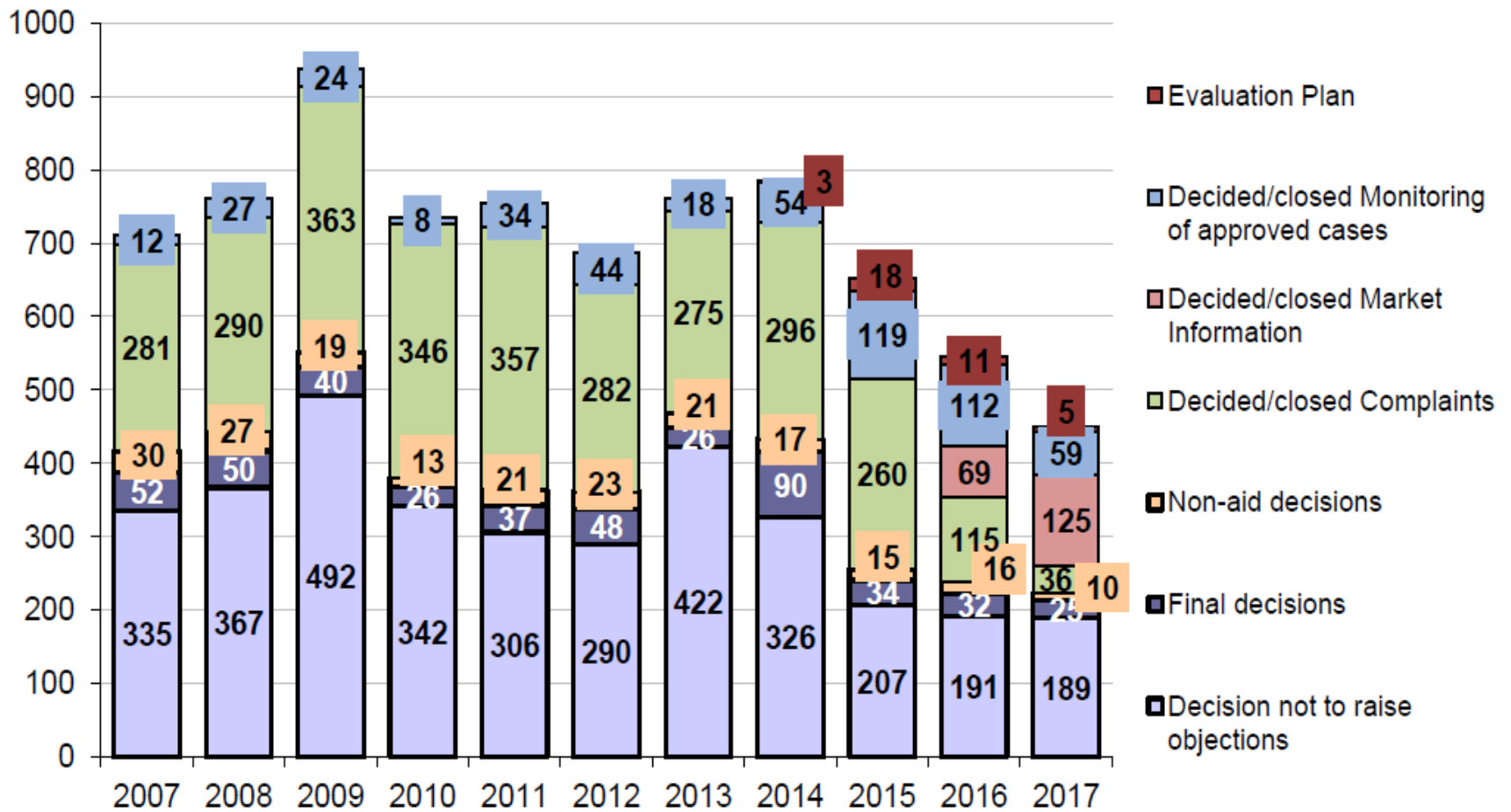
Cont.

- 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)]

Commission decisions



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]

[Sources: ECA, 2011 & 2016; EStAL, 4/2018; presentation 3/2019]