

Summer School Jakarta – Constitutional Law

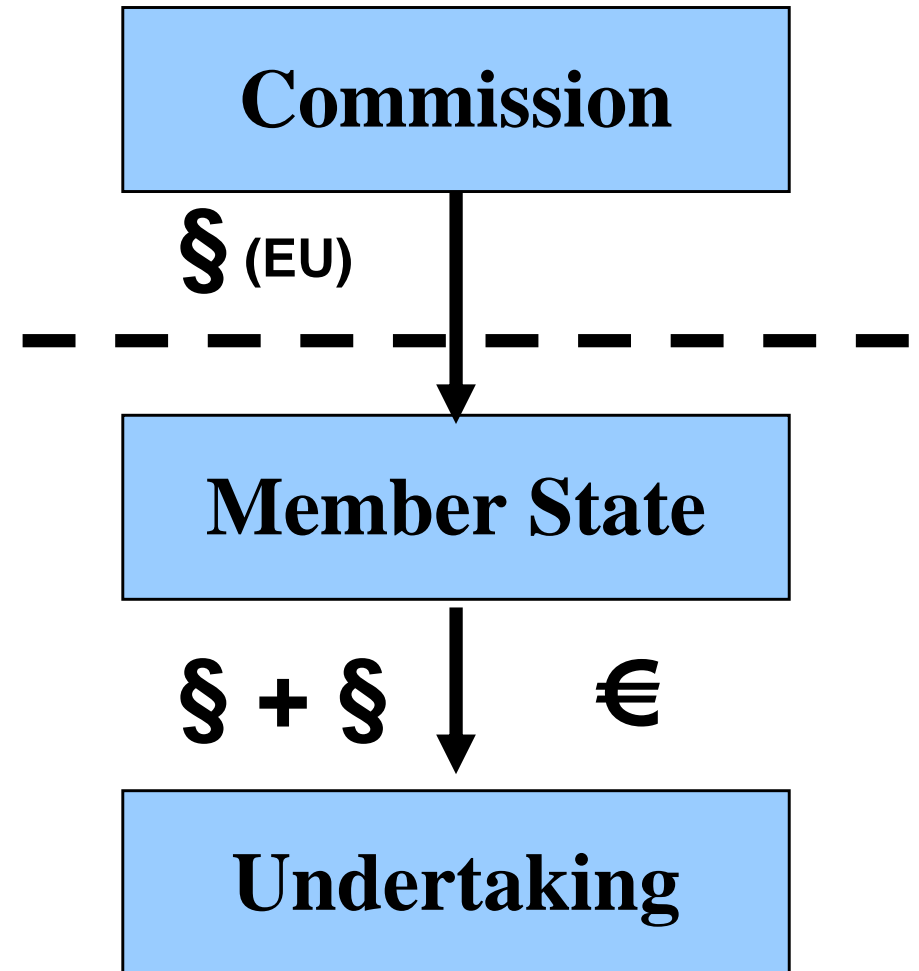
Basic Principles of European State Aid Law

- 1. Introduction, Background**
- 2. Substantive Law**
- 3. Procedure**

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Legal and Economic Situation

- Member States grant the aid
- aid has to be in conformity with European (and national) law
- Commission must approve



Economic Background



- State aid and competition:
 - also the state can distort competition
 - “two sides of one coin”- part of EU competition law
 - equal chances
- Legitimate interests to support:
 - “SMEs”
 - “startups”
 - underdeveloped regions
 - R&D
 - ...

Substantive Law – Art. 87 (1)

“Save as otherwise provided in this Treaty, 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, in so far as it affects trade between Member States, be incompatible with the common market”

Defining State Aid (1)

Transfer of State Resources

- “state resources”
 - aid has to be financed *out of* state resources
 - “state” to be understood in the broadest possible sense
 - includes central government and all levels or regional or local government
- “in any form whatsoever”
 - form and objectives of the aid are irrelevant
 - the effect matters, may it be direct or indirect

Defining State Aid (2)

“Economic Advantage”

- advantage that the undertaking would not have received in the normal course of business

“Undertaking” as Beneficiary

- includes production, services or distribution
- commercial, cultural or activities of other kind
- public enterprises and other public activities included

Defining State Aid (3)

Selectivity

- “*favouring*” certain goods or undertakings
- Affecting the balance between certain firms and their competitors
- to be distinguished from “general measures”
- aid for certain regions are also selective

Potential Effect on Competition and Trade

- “de-minimis-rules”

Forms of State Aid

Types of Aid

- subsidies
- interest-free loans; low-interest loans; interest rate subsidies
- guarantees on preferential terms
- relief from taxes
- capital injections on preferential terms

Benchmark

- reasonable investor, market price

Categoryisation

Particular Sectors (“sectoral rules”)

- shipbuilding, coal and steel, synthetic fibres, motor vehicles, agriculture (incl. fishing)...

Horizontal Objectives

- R&D, environment, SMEs, trade, energy saving, rescue and restructuring, employment, training...
- also regional aid for underdeveloped regions

→ distinction is practically very important

Specifying the State Aid Rules

Problem: need for concrete rules

- Art. 87 contains general clauses and discretionary powers – have to be specified

Commission's Approach: "Publicity"

- "decision practice", publishing of "letters", "notices", "guidelines" and also regulations

Influence of ECJ-judgments

- interventions and corrections → dynamic, continuously changing legal situation

Exemptions – Art. 87 (2)

Para (2): “The following *shall be* compatible with the common market:

(a) aid having a social character, granted to individual consumers, provided that...

(b) aid to make good the damage caused by natural disasters or exceptional occurrence

(c) aid granted to the economy of certain areas... affected by the division of Germany...

Exemptions - Art. 87 (3)

Para (3): The following *may be considered* to be compatible with the common market:

(a) promotion of the economic development of areas with abnormally low living standards

(b) important projects of common European interest; serious economic disturbances

(c) development of certain economic activities or areas, where such aid does not strongly affects trading conditions contrary to common interests

(d) culture and heritage conservation

Difference between Art. 87 (2) and (3)

Art. 87 (2)

- Commission has no own discretion
- general clauses (“social character”, “discrimination” etc.) → practical “discretion”
- however it is the ECJ having the last word

Art. 87 (3)

- Commission has got discretionary power
- practically very important (esp. regional aids)

Procedure - Art. 88

Para (1): constant review of all systems of aid *existing* in the Member States

Para (2): Commission can decide that certain (existing) aids are incompatible with the common market and have to be abolished or altered

Para (3): The Commission has to be *notified in advance* of any plans to grant or alter aid. Until a final decision the Member State *may not put into effect* its proposed measures

Existing Systems of State Aid

Object

- rules introduced before the treaty entered into force (important for EU-enlargement)
- covers also previously notified and approved measures

Constant Review

- of all existing state aid rules and practices; Commission is “free to chose” any scheme and request information
- system of retrospective
- Member States have to deliver *annual reports* on existing aid schemes

Prior Notification for new State Aids

Art. 88 (3): Principle of advance vetting

- necessity of *prior* notification
- Commission decides (controlled by the ECJ)
- until then plan *may not be put into effect*, otherwise the aid has to be repaid immediately
- duty of notification has *direct effect*

Different: Group Exemptions under Reg. 994/98

- designed for certain groups of horizontal aids
- allows Commission to concentrate on important cases
- ex-post supervision
- has got direct effect

Procedure – Reg. 695/1999

General aspects

- modernises the current procedural rules
- better legal clarity, transparency, efficiency
- legal binding, not “just” a Commission’s opinion
- concretises Art. 88

Content

- rules on the notification of state aid (Art. 2-9)
 - deadlines, communication, documents

Procedure – Reg. 695/1999 – continued

Content...

- unlawful state aids (Art. 10-15)
 - examination; request for information
 - injunctions to suspend or recover aids
- existing state aid systems (Art. 17-19)
 - obtaining necessary information from Member States
 - annual reports; on-site monitoring
- rights of interested parties (Art. 20)