
THE NOTION OF “STATE AID”: A GUIDE TO APPLICABILITY AND COMPLIANCE IN THE PRIVATE AND PUBLIC SECTOR

Marta Vejseli

International Balkan University, Skopje, North Macedonia, martavejseli@gmail.com

Abstract: In the complex landscape of European Union law, the concept of "State aid" occupies an important role, delineated by both legislation and European Court of Justice (ECJ) case law. This paper embarks on an analysis and a guidance at the same time, aiming to shed light on the nuanced criteria that define governmental financial support as "State aid" under EU regulations. The diversity of governmental support mechanisms presents a challenge; not all support measures qualify as State aid, a distinction that lies at the heart of EU State aid law.

This analysis elaborates the factors that influence whether governmental support crosses the threshold into State aid territory. Through a detailed examination, the paper reveals that the demarcation is far from straightforward, governed by a complex interplay of legal principles and precedents. The aim is to provide a comprehensive overview, making this paper at the same time a guide for those navigating the intricacies of governmental support within the EU framework. Particularly, the paper addresses governmental officials and entities in the private sector, offering clarity on when and how EU State aid rules apply to governmental support measures. This guidance is crucial for ensuring that such measures are designed and implemented within the legal bounds set by EU law, avoiding the pitfalls of non-compliance. The relevance of this paper extends beyond the EU's borders, echoing in the halls of non-EU member states that have sought to align their State aid regulations with those of the EU.

Through the process of harmonization, some non-EU states have adopted the *acquis communautaire* and core principles of EU State aid law, making the insights provided in this paper pertinent to a wider audience. This global relevance underscores the importance of understanding EU State aid law, not only for compliance within the EU but also for adhering to the harmonized standards adopted by these non-EU member states.

The paper presents a thorough dissection of the qualification of governmental financial support as State aid, according to EU law. It articulates the legal nuances and case law that shape this area of law, providing a clear roadmap for governmental and private sector actors involved in the design and receipt of governmental financial support. Its comprehensive analysis is dedicated to demystifying the criteria for State aid, making it an indispensable guide for all stakeholders in the realm of governmental financial support.

Keywords: State aid, TFEU, Article 107 TFEU, State Aid Control, European Commission

1. INTRODUCTION

Within the framework of the Treaty on the Functioning of the European Union (TFEU), "aid" is a term left undefined, shifting the focus instead to the governance of such aid under Article 107 of the TFEU. It's crucial, to determine whether a particular state intervention qualifies as "aid" under the criteria set by Article 107 TFEU as this article clearly outlines that Member States cannot offer any form of aid without first notifying the European Commission. This involves differentiating between "existing aid" and "new aid", each subject to its own set of procedural rules within the TFEU. It's important to note that Article 107 TFEU doesn't outright ban the provision of aid. Instead, it sets up a framework to ensure that any aid given is done so in a way that maintains fair competition and integrity in the market. 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 considered incompatible with the internal market and may be deemed illegal under Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) if they fulfill certain criteria, notably if they distort or threaten to distort competition and affect trade between Member States. However, Article 107 TFEU also outlines exceptions where aid may be considered compatible with the internal market under specific conditions detailed in its subsequent paragraphs. 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). 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). To qualify an aid as State aid under Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), all of the following criteria must be cumulatively met: (i) State resources: the aid must be granted through State resources or resources of State origin. This encompasses not only direct state funding, but also public bodies and entities designated or established by the state; (ii) to an undertaking: the aid must be granted to an undertaking, which is any entity engaged in an economic activity; (iii) advantage: there must be a benefit conferred on the recipient that it would not have received under normal market conditions. This advantage can take various forms, such as grants, tax breaks, loans at preferential rates, or guarantees on favorable terms; (iv) selectivity: the aid must be selective, benefiting certain companies or industries over others. This criterion distinguishes State aid from general economic policy measures applicable across all sectors, and (v) impact on trade and competition: the aid must have the potential to affect trade between Member States and to distort competition. The impact does not have to be actual or significant; it suffices that the aid could potentially alter competitive conditions.

When these five criteria are met, a measure constitutes State aid within the meaning of Article 107(1) TFEU and must be notified to the European Commission for assessment and approval before implementation, except if it falls under an exemption or is covered by the General Block Exemption Regulation.

2. THE 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 EU law, some legislations (such as the Austrian one) interpret “*subsidy*” more narrowly in one respect, because it includes only monetary or in-kind benefits (excluding the reduction of burdens, as with aid under EU 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) which are granted only to enterprises. 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).

The presence of a state guarantee or warranty need not necessarily be qualified as prohibited state aid under EU law: According to the Commission's notice on the application of Articles 107 and 108 TFEU, the state guarantees or warranties are permitted if certain conditions are met (European Commission. (2016). Commission Notice on the Notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union. Official Journal of the European Union, C 262/01).

In the same Commission's Notice, conditions are introduced, under which also other governmental financial supports do not constitute state aid within the meaning of Article 107(1) TFEU. If these conditions are met, a state financial support is not considered as state aid under EU law. In case of doubts, however, it is open to the Member State to notify the Commission of the aid in question.

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). To grasp the contemporary interpretation of the prohibition against the indirect or direct allocation of state resources to selected public or private enterprises and production sectors within the framework of EU law, the legal proceedings involving Fiat in Luxembourg stand as a significant example. In a notable decision from November 2022, the Court of Justice of the European Union (CJEU) overturned a previous judgment by the EU General Court and nullified the decision made by the European Commission in 2015 regarding the tax arrangements of Fiat in Luxembourg (*Court of Justice of the European Union. (2022). Fiat Chrysler Finance Europe and Ireland v European Commission (Joined Cases C-885/19 P and C-*

898/19 P). ECLI:EU:C:2022:859). The CJEU provided critical clarification on the methodology for reviewing State aid, specifically within the ambit of tax rulings related to transfer pricing. It highlighted the necessity for the European Commission to base its assessment on the specific national regulations of a Member State rather than relying on a broad interpretation of the goals aimed at by the general system of corporate income taxation. This ruling is pivotal for understanding the current stance of the judiciary on State aid and tax rulings across the European Union. 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). 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). The concept of an “*indirect beneficiary*” within the context of EU State aid law pertains to entities that, while not directly receiving aid, nonetheless gain a financial or economic advantage because of the aid provided to another entity. This concept is critical in assessing the full impact and scope of State aid measures, ensuring a comprehensive evaluation beyond the immediate recipients of the aid. In the Ryanair judgment (ECLI:EU:T:2023:831), the General Court of the European Union elucidates this concept by examining the circumstances under which a company can be considered to benefit indirectly from State aid granted to another entity. This is particularly relevant in complex corporate structures or industries where financial support to one entity may affect the market position or financial health of others within the same ecosystem or value chain. The judgment underscores the importance of a nuanced analysis to determine the existence of indirect benefits, which can include enhanced competitive positioning, financial stability, or access to resources facilitated by the aid. The assessment hinges on the interconnectedness of entities and the economic realities of their operations (General Court of the European Union. (2023). Ryanair v European Commission (ECLI:EU:T:2023:831).

3. THE CONCEPTS OF "AID GRANTOR" AND THE "PRIVATE INVESTOR TEST"

Pursuant to Article 107 of the Treaty on the Functioning of the European Union (TFEU), all forms of aid granted by a Member State fall under scrutiny (Heidenhein, 2023, § 3, para. 10). This scrutiny is not limited to the direct disbursement of state funds to beneficiaries: it suffices that such funds are expended to the detriment of the sovereign entities of the Member State involved (Barth, 2022, p. 53). Public enterprises are also considered to be part of the Member States for these purposes. The provision of state funds to a company can be classified as aid within the meaning of Article 107 TFEU if “*the beneficiary company receives an economic advantage that it would not have obtained under normal market conditions*” (Court of Justice of the European Union [CJEU], 1996, Case C-39/95, SFEI, ECR 1996 I-3547, para. 60; CJEU, 1999, Case C-256/97, DMT, ECR 1999 I-3913, para. 22). This principle is known as the market economy operator principle (see Heidenhein in Heidenhein, op. cit., §4, para. 2; CJEU, 1996, Case C-39/94, ECR 1996 I-3547, para. 60). In the provision of state funds, the focus is on whether the State acts as a private market participant (“*market economy investor*”). The assessment thus hinges on whether the State would grant the same measure to a company in a comparable situation as a private investor would. Should this not be the case, the measure is classified as aid and thus falls under the prohibition of aid as stipulated by Article 107 TFEU.

THE CONCEPT OF “ADVANTAGE”

This term refers to the various forms of aid or support that a state or public body provides to certain enterprises or sectors, which could potentially distort competition and trade. Benefits in this context could include direct financial support (such as grants, loans at preferential rates), tax advantages, guarantees, provision of goods or services on favorable terms, or any other type of economic advantage provided on selective terms to companies or industries. However, delineating between “*benefits*” and “*aid*” presents a nuanced challenge, as not all benefits conferred under EU law necessarily qualify as aid in the sense of State aid law. Within the ambit of State aid legislation, benefits may encompass the provision of advantages or the reduction of burdens (Heidenhein, 2023, § 4, para. 1). Aid may manifest in the form of a benefit when (i) a specific enterprise receives a (financial) advantage, (ii) a particular sector of an enterprise is favored, or (iii) an enterprise is exempted from a financial burden. This framework underscores the importance of assessing whether the measure confers a selective advantage that could potentially

distort competition and affect trade between Member States, thereby qualifying as State aid under EU law. The European Court of Justice (hereinafter “the Court”) has offered insights on the procedural aspects of evaluating whether a given measure can be considered as “aid” as per the criteria set out in Article 107(1) of the Treaty on the Functioning of the European Union (TFEU). Specifically, the Court emphasized the necessity of conducting this assessment from a prospective standpoint, prior to the aid's implementation, to ascertain if it confers an economic benefit. Furthermore, the Court underscored the importance of identifying and applying an appropriate benchmark or frame of reference for this evaluation, ensuring that the analysis is grounded in the correct legal and economic context for State aid evaluation. This approach ensures a standardized methodology for determining the presence of an “advantage” that could influence competition and trade within the EU, adhering closely to the foundational principles of State aid law. In the most recent ECJ judgement *Fútbol Club Barcelona* is provided guidance on assessing the existence of an “advantage” under Article 107(1) TFEU, clarifying that State aid advantages must be assessed ex-ante and focusing on the correct reference framework for evaluating State aid (see Court of Justice of the European Union. (2021). *Valencia Football Club*, ECLI:EU:C:2021:169).

THE CONCEPT OF “SELECTIVITY”

Selectivity is a crucial requirement for a measure to be considered as aid under the concept of State aid law. This criterion hinges on the specificity of the group benefiting from the state measure (Sutter, 2004, Art. 87, para. 38). A state measure is deemed selective if it is granted exclusively to a specific industry or sector of an enterprise. An example of such a selective measure could be the provision of tax advantages to a particular industry sector. The most recent ECJ judgement on this topic involved the compatibility of tax rulings issued by Luxembourg with EU State aid rules, focusing on the selectivity of measures and the concept of “abuse of law” in State aid challenges of tax rulings. The Court clarified the standards for establishing a selective advantage and the reference framework for State aid assessment (see Court of Justice of the European Union. (2023). *Engie* (Joined Cases C-451/21P and C-454/21P). ECLI:EU:C:2023:948).

DISTORTION OF COMPETITION

For a measure to fall under the prohibition of aid as outlined in Article 107 TFEU, the state action in question must also distort or threaten to distort competition (Court of Justice of the European Union [CJEU], 2006a, paras. 33–36; CJEU, 2001, para. 78). The concept of distortion of competition is defined in Article 101 TFEU. In the jurisprudential landscape of the European Union, the Court rigorously assesses State interventions to prevent distortions within the internal market, ensuring adherence to the Treaty on the Functioning of the European Union, specifically Articles 107 to 109 TFEU. The landmark *Altmark* judgment (Case C-280/00, ECLI:EU:C:2003:415) highlights criteria under which state compensation for public services is not deemed State aid, thereby safeguarding the equilibrium between Member States' prerogative to underpin essential services and the imperative of maintaining an undistorted competitive environment.

Except in cases of cross-border trade effects, the geographical boundaries of the market to be examined for competition distortion remain contentious. This is because Article 107 TFEU does not specify whether the distortion of competition refers to a national or EU-wide context (Sutter, 2004, Art. 87 EEC, para. 44).

The concept of market distortion in State aid law, particularly concerning non-EU companies, is addressed in a recent judgment (Case C-320/21 P), whereby the Court examined the criteria and conditions under which State aid measures can be deemed compatible with the internal market, emphasizing the principles of proportionality and non-discrimination. This case reflects the nuanced approach of EU law in balancing the need for State aid with the prevention of market distortion, including impacts on companies from non-EU countries (Court of Justice of the European Union. (2023). *Ryanair DAC v European Commission* (Case C-320/21 P). ECLI:EU:C:2023:712).

4. THE INTRACOMMUNITY TRADE IMPACT (SO-CALLED “INTERSTATE CLAUSE”)

The so-called “Interstate Clause” determines the incompatibility of state aid with European law. State aid is prohibited under Article 107(1) TFEU to the extent that it affects trade between Member States, leaving national courts with jurisdiction (Sutter, 2004, Art. 87, para. 5 ff.). Even if state aid does not lead to distortion of competition on the national market but affects or could affect the cross-border market, the European State aid regulations apply. The criterion of the “*Interstate Clause*” is met when trade between Member States is affected. Thus, the “*Interstate Clause*” delineates “*the scope of Community law against the national law of the Member States*” (Heidenhein, 2023, § 4, para. 67 ff.). According to consistent jurisprudence of the CJEU, it suffices for the Commission to demonstrate the capability for “*trade impact*” (General Court, Case T-288/97, *Friuli Venezia Giulia v Commission*, ECR 2001 II-1169, para. 47 ff.). This is the case, for example, when the Commission believes that the financial power of the beneficiary company has become strong enough through the aid granted to distort competition (Commission, Official Journal 1989, No. L 106, p. 34). Objective circumstances must exist that make trade impact likely (see Barth, 2022, p. 60; also Groeben, 2004, Art. 92, para. 24 ff.). According to CJEU jurisprudence, the amount of the

aid plays a subordinate role in assessing the existence of a cross-border impact. In this regard, the CJEU held in Case C-303/88 on 21 March 1991: "*Moreover, even relatively minor aid can affect trade between Member States if there is intense competition in the sector concerned*" (CJEU C-303/88, ECR 1991 I-1433, Italy v Commission, Headnote p. 3). The "*trade impact*" of the aid plays a crucial role in the Commission's main proceedings or in determining the compatibility or incompatibility of the aid with the Common Market: The focus is solely on the effect of the aid on the Common Market for assessing its legality or illegality (see Sutter, 2004, Art. 87, para. 49).

5. FORMS OF AID: DISTINGUISHING BETWEEN EXISTING AND NEW AID THE CONCEPT OF "EXISTING AID"

Contrary to Article 107(1) TFEU, which outlines the prohibition of aid and its exceptions, the procedure for EU State aid control is governed by Article 108 TFEU (Article 108 TFEU has remained unchanged since the entry into force of the EC Treaty). This procedure differentiates between existing and new aid, as different review processes apply to each type of aid. The term "existing aid" is used as an umbrella term for the forms of aid listed in Regulation (EU) 2015/1589 of the Council of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (Regulation (EU) 2015/1589). According to Article 1(b) of Regulation (EU) 2015/1589 (hereinafter referred to as R(EU) 2015/1589), "*existing aid*" encompasses both "*aid existing prior to the Treaty*" and "*aid already approved*". "*Aid existing prior to the Treaty*" refers to aid (schemes) that were granted in the Member States before the EC Treaty came into force. "*Approved aid*" refers to aid approved by the Commission or the Council under Article 1(ii) of R(EU) 2015/1589, considered approved under Article 4(6) of the Regulation. The latter's approval by the Commission is implicit through silence during a two-month period following notification (Article 4(6) R(EU) 2015/1589). Furthermore, Article 1(v) of R(EU) 2015/1589 mentions aid that, at the time of introduction, was not considered aid but became aid due to developments in the Common Market, without any modifications by the Member State (See Article 1(v) R(EU) 2015/1589). Conversely, this implies that if "*existing aid*" is modified over time, such as in duration or scope, it becomes "*new*" aid. However, if these "*modifications*" can be separated from the aid, they themselves constitute the aid (See Cases T-195/01 and T-207/01 (2002), Gibraltar v Commission). "*Modifications*" also apply to aid schemes. An "*aid scheme*" is defined according to Article 1(d) R(EU) 2015/1589 as: "*any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount*". The ongoing review by the Commission is to be classified as a repressive supervisory procedure, meaning "*existing aid*" is reviewed by the Commission until a decision of incompatibility is made regarding such aid. Within the repressive supervisory procedure, the Commission's control indeed only applies to aid schemes as these can lead to modifications or impairments of the common market.

THE CONCEPT OF "NEW AID"

New aid refers to aid that must be notified. It is subject to a more rigorous examination process (*a preventive supervisory procedure*) and is negatively defined in Article 1(1)(c) of Regulation (EU) 2015/1589 (similar to Sinnavee in Heidenhain, Handbook of European State Aid Law, §32, para. 22). Until approved by the Commission, they are subject to a standstill obligation based on Article 108(3) TFEU: "*The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid*" (Article 108(3) TFEU). If it considers that such a plan is not compatible with the internal market under Article 107 TFEU, it shall without delay initiate the procedure provided for in paragraph 2. The concerned Member State may not implement the planned measure until the Commission has made a final decision. The standstill obligation only ceases after the aid has been approved (see Article 11 of Regulation (EU) 2015/1589, which prescribes a suspension prohibition, even though the standstill obligation exists regardless). Thus, the standstill obligation ensures the notification duty, which, according to Article 2 of Regulation (EU) 2015/1589, explicitly refers to "*plans to grant new aid*". This encompasses aid that fulfills the criteria of Article 107(1) TFEU, including the effect on trade between Member States and the potential to distort competition (Opinion of Advocate General Flynn, Case 76/85, ECR 1988 p.219-240 - van der Kooy v Commission).

6. CONCLUSION

The intricate landscape of State aid within the European Union, characterized by its comprehensive regulatory framework, not only seeks to safeguard competition and foster equitable development across Member States but also extends its principles beyond its borders. The EU's stringent criteria for defining, detecting, and managing State aid, including the delineation between existing and new aid, underscore a steadfast commitment to preserving market integrity. This commitment is mirrored in the adoption and harmonization of similar principles by non-EU Member

States, reflecting the global influence of EU State aid law. Such countries, in striving for economic association or partnership with the EU, have aligned their national legislations with EU standards, thereby extending the ethos of fair competition and market integrity beyond the EU's geographical confines. The preventive supervisory procedures for new aid, coupled with the standstill obligation, exemplify the meticulous approach towards preventing competitive distortions, ensuring that both EU and aligned non-EU Member States adhere to a unified standard that champions fair competition and market openness. As the European Commission vigilantly oversees these procedures, the application and evolution of State aid law serve as a cornerstone for not only fortifying the internal market but also for setting a benchmark for international economic cooperation and development. This ongoing dialogue between the EU and non-EU Member States enriches the global economic landscape, highlighting the pivotal role of State aid law in fostering a competitive, equitable, and dynamic international market environment.

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