

# **The Economic Dimension of State aid in the Light of European Union Law**

**Spiliopoulos Odysseas<sup>1</sup> and Apostolopoulou Christina<sup>1</sup>**

## **Abstract**

The protection of the European market and, by extension, of competition itself, as a prerequisite for ensuring the proper functioning of the open market economy, contribute to the reduction of the prices of products and services provided, to the widening of consumer choice and to the strengthening of technological innovation. All these harmonized aim at the sustainable development of Europe based on balanced growth and price stability, the social market economy with a high degree of competitiveness as provided for in Article 3(3) of the Treaty. The institution of State aid plays an extremely important role in the construction of Europe as it aims to strengthen the economic and social cohesion of the Union to promote a project of common interest or to contribute to the balanced development of a sector or a region within a Community framework (article 107 par. 3 par. a', b', c') while at the same time the existing legislative framework ensures the avoidance of state interventions that may distort competition.

**Keywords:** European Union Law, State Aid.

---

<sup>1</sup> University of Peloponnese, Greece.

## **1. Introduction**

To the extent that the State aid granted does not distort healthy competition in the internal market through it (i.e. State aid) the provision of incentives by the organized state to promote targeted state economic choices and models is served, while at the same time state aid contributes substantially to the mitigation of existing market dysfunctions by playing a balancing and at the same time protective role (with regard to specific weaker groups - categories). State aid regulations are included in the Union's economic constitution as it is of fundamental importance for the EU to consolidate the conditions of undistorted competition, but at the same time the absolute prohibition is bent so that the Member States, within the prescribed limits, serve with greater flexibility their intended economic policies.

In addition to undertakings operating in the European area which may distort competition, the Member States themselves, in the exercise of their public authority through specific decisions in the economic field, may affect competition by granting different, more favourable treatment to the benefit of certain undertakings to the detriment of other like undertakings operating in the same area. The most basic type of special treatment for certain enterprises is achieved through the institution of State aid provided for in Articles 107-109 of the Treaty (formerly Articles 87-89 of the EC Treaty). The above-mentioned provisions contain arrangements setting out the prerequisites for an aid to be compatible with the internal market and respectively in which cases the existence of certain conditions (cumulatively) make state aid incompatible and also confer on the European Commission the power to monitor the faithful implementation of the relevant legislation by the Member States. In order to determine whether specific national measures constitute State aid, it is necessary to examine whether the essential constituent elements of State aid are present in the present case, namely the granting of an economic advantage, the transfer of State resources, the selective preferential treatment of certain undertakings or economic sectors and the imputability of the measure to the State.

## **2. Providing an economic-competitive advantage**

The definition of the concept of advantage consists in obtaining from the benefit undertakings or exemption from charges which would normally be attributable to their budget. The ultimate objective (e.g. environmental protection, reduction of unemployment rates, etc.) that is attempted to be achieved is not an essential element for the classification of a State intervention in the normal turnover of enterprises as State aid. The repayment of amounts unduly paid in this case does not constitute a new allocation of State resources where the allocation of public resources is compensated by contributions from undertakings as it is not recommended to grant an advantage. Furthermore, the partial offer of consideration on the part of an enterprise does not negate the determination of a subsidy as State aid as the decisive element lies in whether the State, acting in the modern multifarious and with different aspects of the exchange rate of action of the enterprises, operated according to criteria that would operate, under similar

conditions and for the pursuit of the same purpose, a non-state-private investor (Karydis G.,2012).

Indicatively, the State or its public undertakings may sell goods or provide services but all such economic activities should be carried out on free market terms (at a price such as the market price) and there should be no economic behaviour different from another private undertaking operating in the same economic environment (Christianos and Rodopoulos, 2020).

In the context of art. 106(2) TFEU on aid for Services of General Economic Interest (SGEIs) the separation of amounts allocated in return to an undertaking providing public services as State aid or non-State aid becomes extremely difficult. jurisprudence has been ruled (Court of First Instance of the Court of First Instance of the European Parliament). In the case of the French Post Office, it has been held that the tax concessions granted which are intended to balance their public service are considered to be State aid falling under para. 2 of Article 106 and are therefore accepted within the framework of the European Community market). However, as a result of this treatment, the obligation arose to notify the Commission in advance of similar State interventions in order to determine whether Article 106(2) TFEU legitimises it in the context of the functioning of the single market (Christianos and Rodopoulos, 2020).

The European Court of Justice in the Ferring case accepts that France's tax exemption on pharmaceutical wholesalers from direct sales charges balanced the extra costs borne by wholesalers in refuelling pharmacies with medicines and constitute a state obligation. It was therefore accepted that more favourable treatment of wholesalers in medicinal products acts as compensation for the provision of a service of general economic interest and does not fall within the concept of State aid (in accordance with Article 107(1) TFEU) if it is a necessary measure to cover the additional costs incurred by wholesalers in operating a service of general interest (Spiliopoulos,2020).

In the same context and with the same reasoning, the European Court of Justice ruled in the most recent Altmark case while giving additional guidelines and the necessary prerequisites for a provision of an SGEI service not to be considered state aid (Article 107(1) TFEU) and therefore to be deducted from the mandatory prior notification to the Commission. Therefore, according to the European Court of Justice, the essential conditions that must be met cumulatively so that the coverage of the costs for the provision of an SGEI service is not treated as State aid are the following:

- a. The undertaking receiving the benefit is required to be legally entrusted with the fulfilment of an obligation of general economic interest.
- b. It is necessary to lay down in advance the conditions under which the consideration for the service offered is to be determined in an objective and fully transparent manner so as to avoid any scope for distortion of competition.
- c. The consideration must be at the level strictly necessary to balance the monetary costs of the undertaking in carrying out a compulsory service, taking into account the relevant income of the undertaking and a reasonable profit.

- d. Where the undertaking called upon to provide a service of general economic interest has not emerged from the selection of a tenderer in the context of drawing up public contracts.

In other words, there has been no prior voluntary participation in public procedures for the award of this service of general interest, knowing the terms and conditions and therefore there is no possibility of weighting the consideration, then the consideration must be determined on the basis of an analysis of the relevant costs which would be borne by a "well-managed local average enterprise" (Karydis 2004, Karydis 2012).

In case the above conditions are not met at the same time, then the judgment whether the aid in question is in accordance with the existing legislative framework of the European Union lies with the Commission following the obligation of its prior notification.

### **3. Granting of aid by States – imputation of the measure to the State**

A key element in the classification of aid as State aid is the finding that it is granted by the State or through State resources (to be developed in the next chapter). It is therefore clear that State aid also exists when the granting of the subsidised amounts is made directly by the State but also by public or private bodies set up by the State or entitled by it and by delegation of the State become responsible for the management of the aid granted. Under no circumstances should there be any misunderstanding that State aid may be aid financed from non-State resources because of the alternative wording of the article or that granted by the State or that granted through State resources even though it has been decided by State bodies. In other words, both criteria and conditions must be met cumulatively in order for an advantage granted to be considered as State aid as it has been judged in the case-law (Christianos and Rodopoulos 2020).

There is no doubt that State aid exists where the State directly grants the advantage to the recipient undertakings. That is, when it constitutes a clear state intervention directly or indirectly by an organization controlled by the state. The crucial element that is relevant to the classification of an advantage granted as State aid is that it takes place on the basis of a decision - an act connected with the exercise of public authority (Spiliopoulos 2020). A tax exemption resulting from a decision of the competent Minister of Finance constitutes aid because it was issued by the competent state authority of a Member State and is directly attributable to the State. In the case-law, state aid has been held to constitute state aid if it is decided by a public body and financed by it if state authorities ultimately approve its implementation. Further aid decided on by public undertakings may be regarded as State aid in conjunction with the specific elements of each case and taking into account the context in which the advantage was decided if the undertaking in question is organically linked to the State and in addition has to apply the instructions and recommendations emanating from the State. Additional elements

that support and impute a measure emanating from a public undertaking to the State are whether it is part of the structure of the public administration, its legal status regulating its operation (public law or common company law) as well as the extent of control and the degree of supervision that exists by the state authorities regarding the management of the enterprise and the management of its affairs (Christianos and Rodopoulos 2020).

#### **4. Transfer of State resources - burden of state imputation**

In addition to the origin of the measures from the State, as developed above, at the same time it is required that their financing has been made directly or indirectly from State resources or that the transfer of the amounts granted results in an additional financial burden for the State, in order to be imputable to the State. These State resources, which are under constant public control, continue to remain at the disposal of public authorities even if they are not constantly in the possession of the State. Since the aid involves the financial relief which would normally be borne by the budget of an undertaking and a simultaneous loss of resources for the State, it is not necessary to have a positive form of benefit with a transfer of money from the State to the undertaking in order to be considered as State aid under Article 107(1) of the Constitution as it is of the same nature or causes the same or similar effect as the positive benefit. More specifically, it has been held that the State guarantee, the sale of public lands at a more economical price than that of the market, the tax exemption from a corresponding obligation of an enterprise that entails a reduction of state resources are some of the indirect forms of granting with state amounts.

In order to be perceived as a grant that burdens the state budget, there must be either a direct relationship between the advantage and the consequent loss of public revenue or a sufficiently specific risk of burdening the state budget. When there is financing by the State in the form of a guarantee for the benefit of credit institutions under a contract between the State and banks and at the same time the transferred amounts transferred are charged to appropriations from the State budget, the prerequisite of granting by the State or through State resources of Art. 107 Cooperation and therefore constitutes State aid. However, if a financing of an undertaking is not made with public funds in a direct or indirect way, then there is no essential condition for the existence of State aid and therefore there is no need to examine compliance with the other criteria of Article 107 para. 1 Compact (Christianos and Rodopoulos 2020).

It goes without saying that a transfer of money by a body established by the state (public or private law) constitutes state aid as otherwise it could be abused, on the part of the state, by creating autonomous organizations that would grant aid and thus cause blatant circumvention of the relevant state aid as there could be no control and supervision of the management of public funds (Spiliopoulos 2020).

All the sums of money that the State actually allocates to support enterprises, which the State constantly controls and disposes of at will, constitute State resources so

that and if they are not included in the permanent property of the State or in the possession of the State Treasury or the Financial Services of the State. The revenues of public undertakings constitute State resources falling within the concept of State aid in Article 107 of the Constitution when they are transferred for financing by undertakings, since the decisive factor is whether the close State determines the allocation and management of these amounts, i.e. whether the State has a decisive influence and control over these public undertakings without affecting whether the resources are managed by independent bodies in relation to the State, as to their operation or whether the resources of such public undertakings come from private capital. Since what is at stake is to ensure that there is undistorted competition in the field of the internal market, the determination of whether or not State aid exists must not be confined to narrow considerations and, as mentioned above, the granting of money by the government or by the central administration does not exhaust the scope of existence of a State aid.

Even the establishment by the State of a body intended to manage private resources does not negate its affiliation to the public sector so that any transfer of money is imputable to the State. These funds come from private deposits and do not constitute non-contributory transfers as there is the possibility of withdrawal by private depositors. In other words, although the inflow and outflow of these amounts is free, as long as a certain minimum reserve of money remains and which the entity (controlled by the State) disposes of them on its own responsibility in a way that is appropriate as if it is a balance definitively at its disposal, then the allocation of these resources constitutes a State aid. In other words, the financed investment from the balance of this money at the disposal of the entity meets the criterion set out in Article 107 of the Constitution with the allocation "by the State or by State resources" and therefore may cause distortion of competition as if the investment has been made with income from taxation or payment of compulsory contributions. (Christianos and Rodopoulos 2020).

## **5. The effects on trade and competition**

In addition to the fact that an intervention to be considered as State aid presupposes that it has been granted by the State (by state act e.g. law, administrative acts, etc.) through State resources and constitutes favourable treatment in favour of one or more undertakings, in order to be classified as incompatible with the conditions of the internal market, it must also be capable of adversely affecting intra-Union trade and distorting healthy competition. These two terms affect trade and trade distortion are mentioned separately and separately in Article 107 para. 1 Co-operation, but because of their inextricable connection and interaction they are considered as a single treaty. Any subsidy to enterprises operating within the boundaries of the Union economic scope directly affects the conditions of Union competition and the general process of free market trade (Christianos and Rodopoulos 2020).

Furthermore, it is not necessary to prove the existence of a negative impact on intra-EU trade and the creation of phenomena – incidents of distortion of competition

when an economic advantage is given from State resources as it is sufficient to establish that state intervention is capable of affecting the transactions involved and distorting competition (Karydis 2012). Therefore, in order to make a firm judgment about the adverse effects, there is no need to carry out an economic analysis of the situation on the relevant markets, nor a review of the share held by the aided undertakings on the markets concerned, nor an analysis of the position of the other undertakings competing with them, nor of the trade flows between the Member States.

The possibility of affecting the transactions carried out and distorting competition may exist not only where the subsidised undertakings are active either within the Union or outside (Pliako 2018). This condition exists where the position of an undertaking is strengthened in comparison with other competing undertakings as a direct consequence of the economic advantage received from State bodies in the intra-Union area.

In addition, there is the possibility of affecting trade and distortion of competition also where the recipient undertaking is not involved in the internal trade of the association between the Member States under the following conditions:

1. Where the subsidy granted is likely to maintain or increase activity within the territory of that State.
2. When the recipient undertaking is given the opportunity, precisely because of the subsidy received, to penetrate the market of another State whereas before receiving the State advantage it could not participate (Spiliopoulos 2020).

According to the case-law of the Court of Justice, any effect on trade between States cannot be purely hypothetical or presumed but, on the contrary, it is necessary to ascertain the reasons why the measure under investigation may have an effect, as provided for in the trade in question. No threshold or percentage has been established which, when not respected, makes trade between States subject to consequences of the influence of such commercial transactions. The scope of the undertaking or branch of business and its market share does not constitute a priori a reason to draw a firm conclusion as to whether or not the market is affected by possible aid and a medium-sized undertaking or business sector may, by subsidising it, have a decisive effect on the internal market. Characteristically, it has been held in the case-law that the local or regional nature of transport services or the importance of the sector of activity does not necessarily mean that the influence of any aid on them is excluded or not.

The classification of the existence of distortions in the field of competition requires that the advantage granted is intended to relieve the undertaking of costs and expenses which would normally be borne by it. In this respect, financial support and assistance provided by artificial means distorts the conditions of competition. In the case-law, it is considered as an aid to the operation of the undertaking and is presumed to cause distortion or threat of distortion of competition without it being obligatory for the Commission to state the reasons for this negative development.

## **6. Conclusion**

The importance of the institution of state aid for the construction of the European Union is demonstrated by its reference to a text of primary law as it is of paramount importance to ensure the correct application of any state interventions in the internal market so as not to distort or threaten to distort competition. In the case-law, the Court has on several occasions pointed out the fundamental role played by the Treaty provisions on State aid, since the main objective of the Union is to create an internal economic environment in which the existence of a high degree of competitiveness and convergence of individual national economic indicators are the overriding objectives.

The definition of the concept of State aid is broad and therefore includes, in the context of its interpretation, all forms that may – in any way offer advantages directly or not to an undertaking which would not be treated in such a favourable manner under normal market conditions. In addition to direct and direct financial aid, State aid is also considered to be that which reduces the financial obligations charged to the company's budget and therefore, although it does not consist (the aid) in the provision of sums of money, they nevertheless take a similar form to the direct subsidy and have the same effects (e.g. tax and insurance reductions or reliefs); (guarantees, etc.).

## **References**

- [1] Christianos, V. and Rodopoulos, M. (2020). State Aid Law, *Nomiki Bibliothiki*, 2020, 46-100.
- [2] Karydis, G. (2004). *European Business and Competition Law*, 2004, 298-328.
- [3] Karydis, G. (2012). *European Law of exchange*, 2012, 403-462.
- [4] Pliako, Ast. (2018). *The European Union Law*, *Nomiki Bibliothiki*, 2018 (ingreek).
- [5] Spiliopoulos, O. (2020). *Economic Law of the European Union - The legal framework of economic integration*, 2020, 557-600.