

Universität Zürich

European Economic Law

Lesson 13

The Role of the State/Subsidies

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European Economic Law

Overview of the course

- I. Principles of European Economic Law – The Economic Constitution of the European Union and the Foundations of the Internal Market
- II. Fundamental Freedoms
- III. EU Competition Law
- IV. The Role of the State/Subsidies**
- V. Community Policies

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The Role of the State/Subsidies

- 1. Application of Competition Law to State Action (Art. 106 TFEU)
 - a) The State as an Undertaking
 - b) Art. 106 (1) TFEU
 - c) Art. 106 (2) TFEU
 - d) State Monopolies
 - e) Procedural Particularities
- 2. State Aids (Art. 107 et seq. TFEU)
(*et seq.* = "et sequentes" = and the following ones)

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1. Art. 106 (2) TFEU

Art. 106 (2) TFEU

"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

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Art. 106 (2) TFEU

- Services of general economic interest ("public service"):
 - energy
 - telecommunication
 - postal services
 - transport
 - water
 - waste-disposal services
- Revenue-producing monopolies: no practical importance. According to the dominant opinion, it is not allowed to discriminate in order to generate public revenues.

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Art. 106 (2) TFEU

- Art. 106 (2) TFEU is interpreted narrowly: The competition rules only stand back if the application of the competition rules "obstruct" the performance of the public service task.
- Therefore it is not sufficient, that the public service task is complicated: Its performance has to be prevented.

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State Monopolies

- The existence of state monopolies itself has become under legal scrutiny.
- ECJ, 30 April 1974 – *Sacchi*:
 - ➔ State monopolies are admissible.
- ECJ, 19 March 1991 – *Telecommunications terminals equipment*
 - ➔ State monopolies may infringe the fundamental freedoms (or the competition rules). In absence of a justification, they have to be abolished.

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State Monopolies

- Some criticize the stringent requirements to the legality of state monopolies.
Craig/de Burca, p. 1079: "This comes perilously close to regarding the grant of exclusivity as abusive *per se*."
- On the other hand, EU law has helped to launch reforms which – on the level of Member States – apparently were difficult to achieve.

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2. State Aid

- Enterprises should compete on an equal footing.
- State aid may confer selective advantages to certain enterprises thus distorting competition and affecting trade between Member States.
 - ➔ Necessity of state aid control in the internal market.
- See Art. 107 – 109 TFEU

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2. State Aid

Art. 107 (1) TFEU

"Save as otherwise provided in the Treaties, 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 internal market."

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2. State Aid

1. "any aid ... in any form whatsoever": transfer of state resources or any other economic advantage
payment, tax exemption, interest rate rebate, loan guarantee, accelerated depreciation allowances, buying or renting state-owned land below market price, privileged access to infrastructure
Examples: EDF; public banks in Germany enjoyed an unlimited state guarantee.
2. "granted by a Member State or through State resources"
national, regional, local authorities; public banks; public foundations, etc.

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2. State Aid

3. "distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods"
selectivity as opposed to general measures (e.g. nation- and sector-wide fiscal measures)
4. "affects trade between Member States"
A potential effect is sufficient.

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State Aid and Public Enterprises

ECJ, C-280/00 – *Altmark Trans*, ECR 2003, I-7747:
No favourable competitive position of an enterprise, if four conditions are met:

1. First, the recipient undertaking must actually have public service obligations to discharge and the obligations must be clearly defined.
2. The parameters on the basis of which the compensation will be calculated must be established in advance in an objective and transparent manner.
3. The compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations.
4. If no public procurement procedure took place, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.

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Procedure

- **Art. 108 TFEU: Procedure**
 - The Commission is in charge
 - In "exceptional circumstances", the Council may grant an exceptional permission.
 - Art. 108 (3) TFEU: Member States have to inform the Commission **in advance**.
 - If not, the Commission may adopt an interim decision and fix a deadline.
 - After expiration, the aid may be assessed under the information available.
- Unlawful aid **has to be recovered** by the Member State in question. Only exception: recovery is "absolutely impossible".

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