



State aid in the context of European Territorial Cooperation programmes

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*The views expressed are purely those of the speaker and may not in any circumstances
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Presentation structure



- I. The notion of State aid
- II. State aid and ETC programmes
- III. Steps and procedures
- IV. Relevant State aid framework
 - *De minimis* regulation
 - General block exemption regulation

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I. The notion of State aid



- Art. 87(1) EC Treaty:
 - Granted by a MS or through State resources
 - Advantage: 'favouring'
 - Selectivity: 'certain undertakings or the production of certain goods'
 - Effect on trade between MS
 - Distortion or risk of distortion

- All criteria have to be met for a measure to constitute State aid

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I. The notion of State aid

1. State resources



- SF EU contribution = State resources
 - SF national allocation is transferred to 'body designated by MS' (Art. 76(2) general SF regulation)
 - Payment to final beneficiary is made through at national level (not EC budget)

- Grant decision (selectivity) is imputable to public authorities:
 - MA is responsible for selecting beneficiaries and projects (Art. 60(a) general SF regulation)

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I. The notion of State aid



2. Advantage

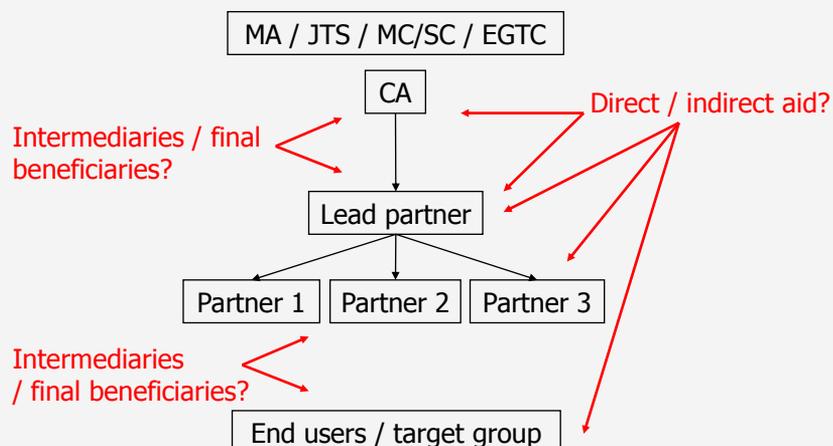
- Transfer of resources or relief from charges which an undertaking normally has to bear
- ECJ, joined cases C-180/98 to C-184/98 *Pavlov*:
 - 'the concept of an undertaking, in the context of competition law, covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. Any activity consisting in offering goods and services on a given market is an economic activity.'
- Therefore:
 - Undertaking = public authority, public enterprise, private enterprise, NGO, non-profit organisations, individuals, etc.
 - Non-economic activity ≠ non-commercial activity
- Advantage can occur at several levels (cf. next slide)

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III. Steps and procedures



2. Advantage (2) – level of aid



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3. Selectivity



- Material (sectoral) selectivity / geographical selectivity
- Important feature: discretionary power
- Call for proposals:
 - are by nature selective
 - can provide indications on distortions of competition though
- Need to consider:
 - whether the advantage is selective (i.e. favours certain undertakings or the production of certain goods)
 - selectivity also in the possible use made of the project results by undertakings (end users / target group)

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4/5. Trade and competition (1)



- Aid must have a potential effect on competition and trade between MS:
 - Sufficient if beneficiary is involved in an economic activity and operates in a market where there is trade between MS
 - Nature of recipient is not relevant in this context
 - Distortion does not need to be substantial or significant
 - Small size of beneficiary, small amount of aid or small market share does not exclude distortion
 - In practice, small amounts of aid (*de minimis*) are considered not to affect competition and trade though

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4/5. Trade and competition (2)



- Purely local economic activities (e.g. ski lifts, although cross-border)
- Trade between MS can also be affected by aid granted by MS outside the EU (operations in third countries)
- Extraterritoriality (20%): Extension to non-EU countries should in principle not affect State aid considerations
- Check however that:
 - Measure does not affect trade between MS (e.g. favouring certain EU undertakings in third countries to the detriment of other EU undertakings)
 - (indirect) export aid linked to quantities exported, distributions networks, is not present

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Criteria in ETC programmes



State resources / imputability	Yes, always
Advantage	Maybe sometimes → need to assess
Selectivity	Yes, always
Effect on trade and competition between MS	Maybe sometimes → need to assess

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I. The notion of State aid

Types of project (1)



Output / activity:	No State aid if:
Infrastructure / facilities, equipment	<ul style="list-style-type: none">■ General infrastructure (open to all potential beneficiaries on an equal and non-discriminatory basis)■ Linked to activities of a purely local nature
R&D&I (studies, models, etc.)	<ul style="list-style-type: none">■ Public financing of non-economic R&D&I activities by research organisations■ Public funding of economic activities: no aid at level of intermediary if all aid passed on to final beneficiary (incl. reasonable margin)■ R&D commissioned by public authorities according to market conditions (e.g. open tender procedure)

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II. State aid and ECT programmes

State aid and ETC programmes



State aid has to be lawful:

- Either approved by the Commission following a notification pursuant to Art. 88(3) of the EC Treaty
 - MS have to submit plans to grant aid to Commission (notification requirement, Art. 88(3) EC)
 - Declaration of compatibility of aid: normally exclusive responsibility of Commission (Art. 88 EC)
- Or exempted from the notification requirement of Art. 88(3) EC on the basis of a block exemption regulation adopted pursuant to Art. 89 EC
- Or constitute existing aid (e.g. approved measures or aid present prior to EU accession)

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SA control in SF implementation



- Responsibility of the MS; Commission will become active if:
 - the MS fails to set up and ensure the proper functioning of the management/control system for SA aspects, in particular where the compliance assessment report raises reservations
 - the MA fails to ensure compliance with SA rules, in particular where the Certifying Authority refuses to certify compliance with Community policies
 - the Auditing Authority raises doubts as to the effectiveness of the management and control system, or as to the legality of operations
 - in case of complaints by third parties

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State aid and the ETC objective



- General ban on State aid (Art. 87 EC)
- Obligation to comply with State aid rules:
 - EC Treaty
 - Regulation (EC) No 1083/2006: Arts. 9(5), 60(a)
 - All operations financed by SF must respect competition rules
 - Managing/certifying authorities responsible for ensuring compliance with Community policies
- Standard clause in OPs and Commission decisions:
 - 'Any public support under this programme must comply with the procedural and material State aid rules applicable at the point of time when the public support is granted.'

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State aid in the ETC context



- State aid uncommon under ETC projects:
 - Most projects involve non-economic activities (e.g. strategic development, networking, models, policy tools, etc.)
 - Even for economic activities (e.g. targeted business support, software, training, promotion, etc.): probably under *de minimis* in most cases
- Therefore:
 - Need to be realistic about extent of State aid
 - Commission seeks to focus on (really) distortive aid
 - Balance legal risk (e.g. complaint from potential competitors), amounts involved (e.g. versus *de minimis* or versus market price) and required 'bureaucracy'

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Assessment steps (1)

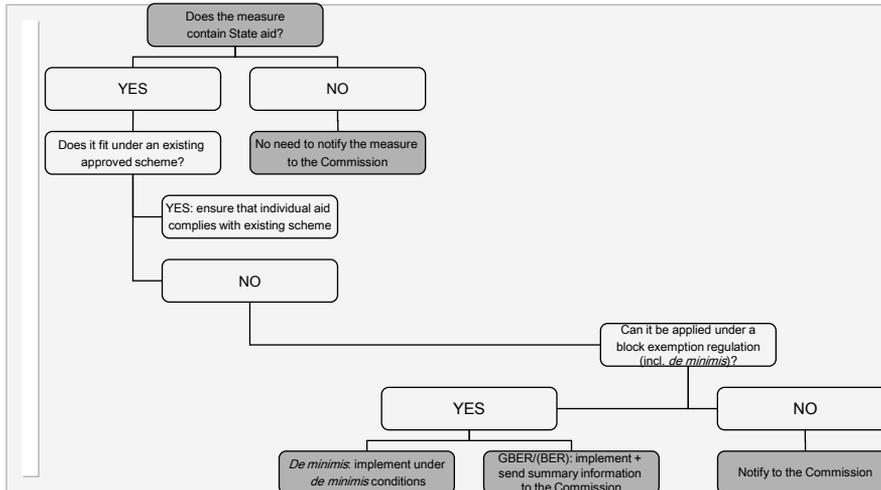


- Existence of State aid (aid / no aid?)
 - If so, aid at what level (intermediary / final recipient)?
- Aid covered under existing/approved scheme?
- If not, aid covered under *de minimis* regulation?
- If not, aid applicable under BER/GBER regulation?
- If not, aid notifiable?
 - Possible basis for compatibility (SME, R&D&I, training, culture, environment, RAG, etc.)

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III. Steps and procedures

Assessment steps (2)



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III. Steps and procedures

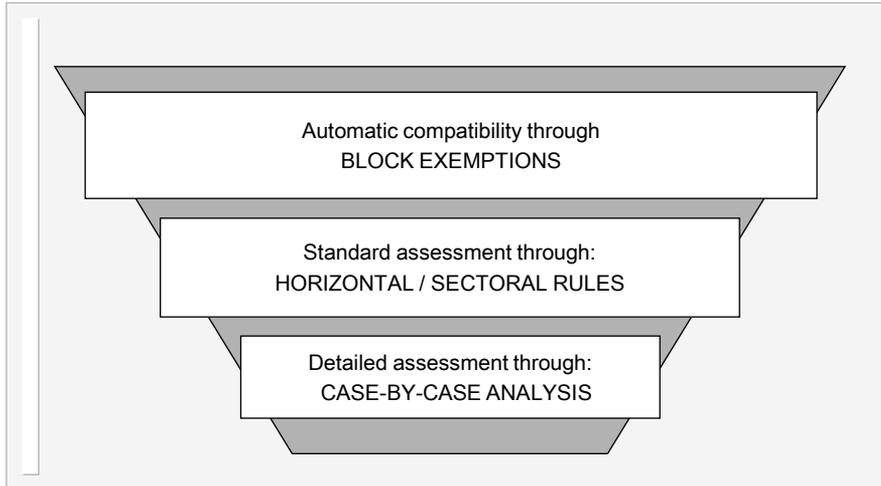
Notification procedure



- Granting authority prepares notification forms (support: EU funds authorities / competition authorities: key role in principle for MA)
- Central government sends notification electronically via the Permanent Representation in Brussels (SANI system)
 - Perm. Rep. = main contact point for the Commission
- Commission examines notification and has 2 months to reach formal decision:
 - No aid
 - No objections
 - Opening of formal investigation procedure
 - Negative decision (with or without recovery)
- Duration: in practice 4-6 months in average, due to need for additional info / questions
- Other possibilities:
 - Notification for legal certainty
 - Pre-notification

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Architecture of SA control



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De minimis – Concept and scope



- Regulation (EC) No 1998/2006 covers small amounts of State aid ('*de minimis* aid') which do not constitute State aid in the sense of Art. 87(1) EC → therefore not subject to the notification requirement
- The rule is based on the assumption that, in the vast majority of cases, small amounts of aid do not have an effect on trade and competition between MS
- Does not apply to undertakings active
 - Fisheries / aquaculture sectors
 - Coal sector
 - Primary production of agricultural products (cf. Annex I, EC Treaty)
 - Undertakings in difficulty
- Applies with additional conditions in processing or marketing of agricultural products

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De minimis – Criteria



- Ceiling for aid covered by the *de minimis* rule:
 - ≤ 200 k€ (cash grant equivalent) per undertaking per period of 3 fiscal years
 - 100 k€ in the road transport sector
- Applies to the total of all public assistance considered to be *de minimis* aid:
 - i.e. aid of all kinds, irrespective of form objective
 - export aid however excluded from *de minimis*
- Only applies to 'transparent' aid:
 - i.e. where it is possible to determine in advance the gross grant equivalent without needing to undertake a risk assessment

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De minimis – Cumulation



- Not possible to cumulate *de minimis* aid with compatible State aid in respect of the same eligible costs if cumulation would lead to aid intensities higher than under the GBER or approved State aid
- Thresholds are applied regardless of whether the aid is financed by resources of EC origin
- If the grant equivalent is above the threshold:
 - Whole of the measure falls outside *de minimis*
 - Not possible to benefit from *de minimis* just for the part below the ceiling

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IV. Relevant State aid framework

De minimis – Monitoring



- MS must check if new aid will not raise the total amount of *de minimis* aid received by an undertaking during the relevant 3 year period above the applicable ceiling
- MS is responsible for establishing instruments needed to ensure an effective control of the respect of the *de minimis* cumulation ceiling
- Effective control can be done in 2 ways:
 - MS sets up a central register of *de minimis* aid containing complete information on all *de minimis* aid granted by any authority within the MS
 - MS explicitly informs the enterprise about the *de minimis* character of the aid and obtains from it full information about other *de minimis* aid received during the 2 previous fiscal years and the current fiscal year
- Under all conditions, MS remains responsible for ensuring the respect of cumulation ceiling

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IV. Relevant State aid framework

General block exemption regulation



- Regulation (EC) No 800/2008
 - Covers schemes, individual aid + ad hoc aid
- Context:
 - State Aid Action Plan (2005)
 - Modernised state aid policy: Lisbon Strategy + Small Business Act (2008)
- SA reform package based on:
 - Less and better targeted state aid
 - A refined economic approach
 - More effective procedures, better enforcement, higher predictability and enhanced transparency
 - Coherent texts
 - A shared responsibility between the Commission and MS
- Existing block exemption regulations (SME, employment, training, regional): brought together in a single regulation

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Structure of the GBER



- Chapter I: Horizontal provisions
 - Standardised conditions and definitions
 - Harmonisation and simplification
- Chapter II: Different exempted aid measures
- Chapter III: Transitional provisions
- Annexes:
 - Definition of SME (cf. 2003 Commission recommendation)
 - Summary information sheets for R&D&I and large regional projects
 - Summary information sheets for all other types of aid

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GBER – Scope



- 26 measures in GBER as compared to 10 in 'old' BERs:
 - Regional aid:
 - Investment and employment
 - Newly created enterprises
 - SMEs:
 - Investment and employment
 - Consultancy and participation in fairs
 - Creation of enterprises by female entrepreneurs
 - Environmental protection
 - Risk capital
 - Research, development and innovation (R&D&I)
 - Training
 - Disadvantaged or disabled workers

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GBER – Conditions



- 'Self-standing' sectoral exclusions
- + exclusion of:
 - Export aid (WTO)
 - Ad hoc aid to large enterprises
 - Firms with outstanding recovery order (Deggendorf principle)
 - Undertakings in difficulty
- GBER only applies to 'transparent' aid (i.e. calculation ex ante without need to undertake a risk assessment)
- Calculation of aid intensities
 - Gross grant equivalent
 - Discounting when several installments
 - Evidence of eligible costs should be kept (monitoring exercises)

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GBER – Notification thresholds



- Prioritising control: leave to granting authorities the responsibility to self-control less distortive aid
- Thresholds largely raised and simplified (and coherent)
 - SME aid: $\pm 2 \text{ M€}$ ($25 \text{ M} * 50\% * 15\%$) $\rightarrow 7.5 \text{ M€}$
 - Social aid: $5 \text{ M€ / year} \rightarrow 10 \text{ M€ / year}$
 - Training aid: $1 \text{ M€ / project} \rightarrow 2 \text{ M€ / project}$
- Only applies to SME investment and employment aid, not to regional aid
- Certain aid has no ceiling: environmental tax reductions

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GBER – Cumulation



- 3 scenarios envisaged:
 - Cumulation SA + SA possible with ≠ clear eligible costs → Respective ceilings apply (Art. 7.2) [e.g. training aid and R&D aid]
 - Cumulation SA + SA or SA + DM on same clear eligible costs → possible up to highest applicable ceiling [e.g. regional investment aid (Art. 13) + SME investment aid (Art. 15): up to ceiling provided in Art. 13].
 - Cumulation of SA with clearly identifiable eligible costs + SA without clearly identifiable eligible costs (→ only risk capital and aid for YIE): specific rule of Art. 7.5
- Not supposed to apply to cumulation of SA not under GBER with SA under GBER (cf. Art. 7.3 and recital 27) → rules in other guidelines then apply

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GBER – Incentive effect



- Key feature of refined economic analysis
- Distinguish: underlying principles (recital 28) from practical conditions (Art. 8)
- Art 8.2 applies to all aid to SMEs → incentive presumed
- Art. 8.3 applies to all aid to large companies: 4 alternatives (not an 'in-depth' assessment but good governance)
- Art. 8.3 e): clarification of the condition with respect to regional aid
- Art. 8.4: special provisions for cases where incentive effect cannot be assessed ex ante:
 - Fiscal measures
 - Social aid
 - Environmental tax reductions
 - Risk capital

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GBER – Transparency



- If GBER conditions fulfilled, measure can be implemented directly (aid can be granted)
- MS submits summary information sheet to the Commission (within 20 working days)
- No formal Commission approval; for transparency / monitoring only
- Need for reference to GBER in national legal basis (e.g. implementing provisions, guidance for applicants, call for proposals, etc.)
 - Possible to combine several aid objectives in one measure (therefore one sheet)
- Obligation to maintain active web-link with legal text
- Special provisions for R&D aid (>3 M€) and large regional aid projects (Art. 2.12) → (Annex II GBER)

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GBER – Monitoring



- Commission monitors application GBER (Art. 10.1) → detailed records for 10 years
- Information may be asked when monitoring (Art. 10.2)
- Clarification with respect to possibility for the Commission to withdraw benefit of GBER: (recital 6, Art. 10.3)
 - Withdrawal only concerns the future
 - Withdrawal may concern only parts of the GBER (specific provisions of chapter II of GBER)
- Annual reporting for the Scoreboard

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IV. Relevant State aid framework

GBER – R&D&I aid (Arts. 30-37)



- Covers R&D aid schemes also for large undertakings
- Project aid and feasibility studies:
 - Fundamental research: 20 M€
 - Industrial research: 10 M€
 - Others: 7.5 M€ / undertaking / project
 - Otherwise: individual notification
- Innovation measures included (with minor limitations compared to R&D&I Framework):
 - Young innovative enterprises: aid ≤ 1 M€
 - Innovation advisory / support services : aid ≤ 200 k€ / undertaking / project
 - Loan of highly qualified personnel: 50% of eligible costs for 3 years / undertaking / person borrowed

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IV. Relevant State aid framework

GBER – Training aid (Arts. 28-39)



- Covers:
 - Fisheries, agriculture, coal (not excluded)
 - In-house training and external training
- Differences between:
 - **Specific training** (limited transferability to other sectors / fields of work) → 25% aid
 - **General training** (e.g. jointly organised with others, certified / validated tuition) → 60% aid
- Bonuses:
 - SE: +20 pp, ME: +10 pp
 - Disadvantaged / disabled workers: +10 pp
 - Maritime transport sector: 100%
- Extensive eligible costs:
 - (personnel costs, travel expenses, accommodation, materials + equipment, overheads, etc.: for trainers + trainees)
- Notification ceiling at 2 M€

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GBER – Transition (Art. 44)



- Existing aid measures implemented under 'old' BERs may continue to be implemented until 31.12.2008:
 - SME, training, employment BER
 - RAG BER (exempted schemes still valid after 31.12.2008 if no changes to them)
- As from 30.8.2008: GBER highly recommended
- As from 1.1.2009: only GBER!
- Implies adapting to new conditions : transparent aid, incentive effect, transparency provisions

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Further info



- State aid weekly e-news
- DG Competition website:
http://ec.europa.eu/comm/competition/state_aid/overview/sar.html
- DG COMP memo on de minimis (MEMO/06/482, 12.12.2006)
<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/482&format=HTML&aged=0&language=EN&guiLanguage=en>
- DG COMP memo on GBER (MEMO/08/482, 7.7.2008)
<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/482&format=HTML&aged=0&language=EN&guiLanguage=en>
- Vademecum on State aid rules:
http://ec.europa.eu/comm/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf
- European State aid network – State aid contact points

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