



State aid and Public Procurement: *Spotted at the Same Party!*

Lustrum NVvA
19 November 2015

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A day at the races...





Outline

What is the party about? Making sure consumers and taxpayers get the best deal.

1. Intro – State aid control in the European Commission
2. State aid – describing the elephant
3. Relationship with/to public procurement?
4. Specific 'touching points': no aid, compatibility, other

The 'Agency'





State aid modernisation – Objectives

- Foster growth in a strengthened, dynamic and competitive internal market
 - Encourage “good aid”
 - Discourage useless or counter-productive aid
- Focus enforcement on cases with the biggest impact on internal market
 - Less ex-ante control by Commission
 - Better focus on ex-post monitoring, evaluation and transparency
- Streamline rules and faster decisions
 - Simplification and harmonisation of rules
 - Improvement of procedures

SAM - a paradigm shift

- Shift of responsibility to MS through enlarged GBER
- Therefore less ex-ante control by Commission, but certain level of ex-post control (monitoring)
- SAM contributing to economic recovery and growth
- Enhanced partnership with Member States

Make SAM work



Small % of aid under the control of the Commission with stricter conditions

Large proportion of aid under the control and responsibility of the Member States (enlarged and simplified GBER)



Avoid shipwrecks
Legal certainty concerns

Assistance to MS
Training actions
FAQ

Monitoring
Evaluation
Transparency

Partnership with MS



The notion of State aid

Article 107(1) TFEU defines State aid as:

'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 [...], in so far as it affects trade between Member States'



The basics: when is aid 'State aid'

Art. 107(1) TFEU:

- State resources
- **Advantage for an undertaking: “favouring”**
- Selectivity/discriminatory : “certain undertakings or the production of certain goods”
- Distortion or risk of distortion of competition
- **Effect on trade between Member States**

But: aid can be declared compatible, by the European Commission (Note: wet Markt en Overheid)



Effect on trade?

The Danish Shellfish Centre

What?

"...the construction of a museum facility annexed to the Danish Shellfish Centre that can host a permanent exhibition showing autochthonous shellfish and shellfish production within the Limfjorden region, with special focus on oysters and mussels species."

Effect on trade?? You bet!

"It cannot be excluded that the aid may indirectly contribute to the promotion in the region of certain economic activities linked to the activity of the Danish Shellfish Centre (e.g. promotion of agriculture, fishery, agro-alimentary industry), which are, at least potentially, subject to intra-Union trade. Thus, the economic effects of the measure, if minimal and indirect, cannot be disregarded."

SA.30649 (11.5.2011)



Although? The 2015 No Aid Package

Seven decisions from different sectors:

- Healthcare services (3)
- Sports and leisure (2)
- Other services (1)
- Infrastructure investments (1)

See Press release IP/15/4889

The notion of Aid: 'Advantage'?

- Part of the 'Notion of Aid' Communication (*Altmark* criteria): tender resulting in 'least cost to the Community'. (Compare to MEAT criterion)
- Similar notion as in Public Procurement? No: PP wider notion of advantage (e.g. information)
- Does a PP process exclude SA? Not necessarily (see GBER): consider discretion of beneficiary
- Note: special regime for SGEI and 'open tender' preference (para 66).



So: is an advantage excluded by a competitive selection process?

- Yes, in principle, if there is an open, transparent and non-discriminatory process
- If Altmark criteria are followed
- But in SA: if beneficiary has discretion to monetise aid (e.g. Broadband network), assessment is part of 'compatibility criteria'.



Compatibility criteria in SA:

- (1) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?
- (2) Is the aid well designed to deliver the objective of common interest? In particular:
 - (a) Is the aid measure an appropriate instrument?
 - (b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - (c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?

Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

Other 'touching points'

- The notion of 'undertaking' and 'economic operator' (Art. 37 PP Directive)
- In-house procurement/exposure to State aid
- Recovery and public procurement: liquidation processes in case recovery is not possible. How to avoid new State aid (Nürburgring)

Some conclusions:

- Violation of the PP Directive: not necessarily a problem for SA
- Good PP process can eliminate or minimise aid
- SA has own 'open selection process' criteria, though closely connected to PP

State aid and Public Procurement: complementary members of the same family





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Thank you for your attention!