The introduction to Art. 107 TFEU

A. Main aspects

Art. 107 para. 1 introduces a general prohibition of State aid in EU law. Exemptions to this prohibition are provided by the TFEU Art. 107 para. 2 and 3. To be covered by the prohibitions, Art. 107 establishes four conditions to avoid being classified as State Aid under the EU law:

(a) there must be a financial intervention by State or State resources (e.g. grants, interest and tax relieves and provision of goods and services on preferential terms, etc.),
(b) this intervention must bring an advantage on the recipient,
(c) the intervention must distort or threaten to distort competition and
(d) the intervention must be able to affect trade between Member States (MS).

B. Structure of article 107 TFEU

The article is divided into three parts:

The first part, Art. 107 para. 1, sets out a general prohibition. It defines aid that is prima facie prohibited and unlawful, i.e. aid provided through state resources that distorts or threatens to distort, competition by favouring certain undertakings or the production of certain goods.

The second part, Art. 107 para. 2, lists the type of aid considered to be in line with the internal market, namely aids that have a social character granted to individual consumers, aids to make good the damage caused by national disasters or exceptional occurrences, and aids granted to certain areas of Germany affected by the division of that country.

The third part, Art. 107 para. 3, allows the Commission to permit a number of categories of aid for which any anticompetitive effects are outweighed by other benefits.

C. Historical background

The provisions of former Art. 87 EC-Treaty, now Art. 107 TFEU, have remained unchanged since the founding of the European Community, now referred to as European Union (EU) according to the Lisbon Treaty. The only exception is Art. 107 para. 2 d, which was later introduced by the Treaty of Maastricht, signed in the Netherlands in 1991. As the provisions of Art. 107 were drafted by the Member States of the former European Community and not by an institution of the EU, it is difficult to access the historical background that allows to justify the creation of such Article.

Nevertheless, it is possible to infer that the Treaty of Rome was founded following a liberal philosophy which pretended an efficient allocation of resources through an internal market, without any interference regarding the capacities of the different actors in the market (“level playing field”). The principle of free market, without competition distortions, was expected to allow a more efficient assignment of the EU’s resources and impulse investments, increase productivity and innovation. State intervention, in this context, only made sense as a way of correcting failures of the free market or with the purpose of social justice. It was following this philosophy that the creators of the Treaty of Rome included an article that would help control state intervention, this mechanism was stated in former Art. 87 para. 1 EC-Treaty, now Art. 107 para. 1 TFEU.

Procedural principles regarding state aid did not exist, therefore their formulation was left to the practice of the Commission and to the case law of the courts of European Union. Later on, on March 22, 1999 the Council published regulation No 659/1999 which intended to lay down detailed rules for the application of former Art. 93 of the EC Treaty, later Art. 88 EC Treaty, now Art. 108 TFEU, which contains the procedural rules and principles governing State aid control which was based on the Commission’s practice in procedural matters and on the case-law of the Court of Justice.

The Commission started publishing communications, guidelines and frameworks regarding sectoral, regional and horizontal aid just by the end of the 80’s, nevertheless they became the backbone when taking decisions regarding compatibility of aid under Art. 107 TFEU. Later on, in 2001 the Commission published the first block exemption regulations regarding Art. 107, supported by later Commission Regulations on block exemption and de minimis.
In March 2000, Member States gathered in Lisbon summit to decide on how to encourage growth and development within the EU. The result of this meeting was the “Lisbon Strategy” launched in 2005, which developed an agenda regarding growth and jobs in EU. The proposed implementation of State Aid reforms was outlined by the Commission in the “State Aid Action Plan” of 2005, which had the purpose of achieving less and better targeted State Aid and more refined economic approach, more effective and transparent procedures and shared responsibility between the Commission and the Member States. Most of the reforms proposed by the State Aid Plan have been implemented, with the most significant being the adoption of the new General Block Exception Regulation (GBER) of 2008, which covers both horizontal and regional aid.

D. Purpose of article 107 TFEU

There are strong reasons for state aid control in the European Union, nevertheless its use has to be limited to avoid its abuse and protect national players. The abuse of state aid can result in the bankruptcy of firms, distort competition and artificially help to maintain costly fragmented markets. On the other hand, a correct use of state aid policies help to embrace globalisation by targeting public funds towards economic growth and working positions in open and competitive markets – supporting economic reform to deliver long term competitiveness.

It is of fundamental importance that competitors operate on an equal basis to the benefit of European competitiveness and that companies do not accumulate market power which could lead to higher prices and lower quality. Faced with free trade between the EU and MS and the opening of public services to competition, national authorities sometimes want to use public resources to promote certain economic activities or to protect national industries. The granting of these resources is known as state aid.

State aid has the capacity to distort competition by interfering with the level playing field on which companies compete, with the potential consequence that less efficient companies can account for a larger share of output. Such distortions may be both intended and unintended.

Thus, the most important reason for imposing EU control over the State aid is to prevent countries from deliberately and/or unintentionally using State aid to benefit their own enterprises at the expense, among others, of rivals located in other MS.

However, a national measure falling under the ambit of Art. 107 para. 1, can still be approved if it satisfies the condition of Art. 107 para. 2 or 3. The purpose of the exemptions of Art. 107 para. 2 is to declare three specific categories of aid to be compatible with the internal market: social aids to individual consumers, disaster aid and aid compensating for cold war division of Germany.

While the purpose of Art. 107 para. 3 is that measures falling therein, should help to achieve an objective of common interest, always assessed by the Commission. Such assessment enables the Commission to shape the policy and direction of Stated Aid control within the EU.