EU – US Seminar

Orientation to EU state aid rules

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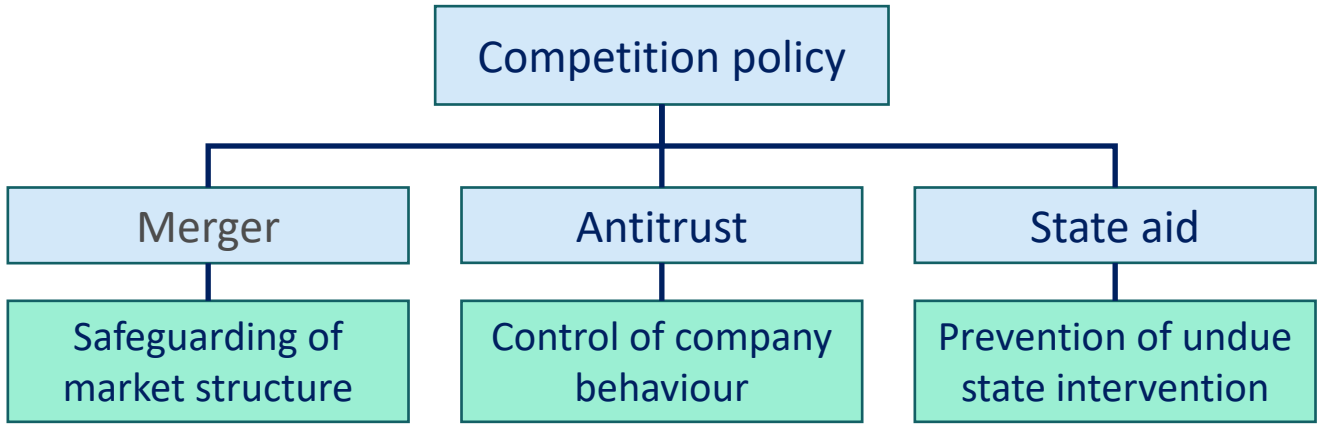

- Common aim is to protect the internal market against distortions created by Member States
- Establish level playing field
- Avoid subsidy races
- Competitive European industry
- Element of cohesion

Outline

Seminar 1: Introduction to State aid

- Part A: What is State aid & case study
- Part B: The State aid authorisation framework

Seminar 2: Regional aid

- Regional aid maps
- Scaling down
- Compatibility

Seminar 3: Procedure and application of EU Rules to US

- PART A: Overview of procedures
- PART B: Lessons learned for the US

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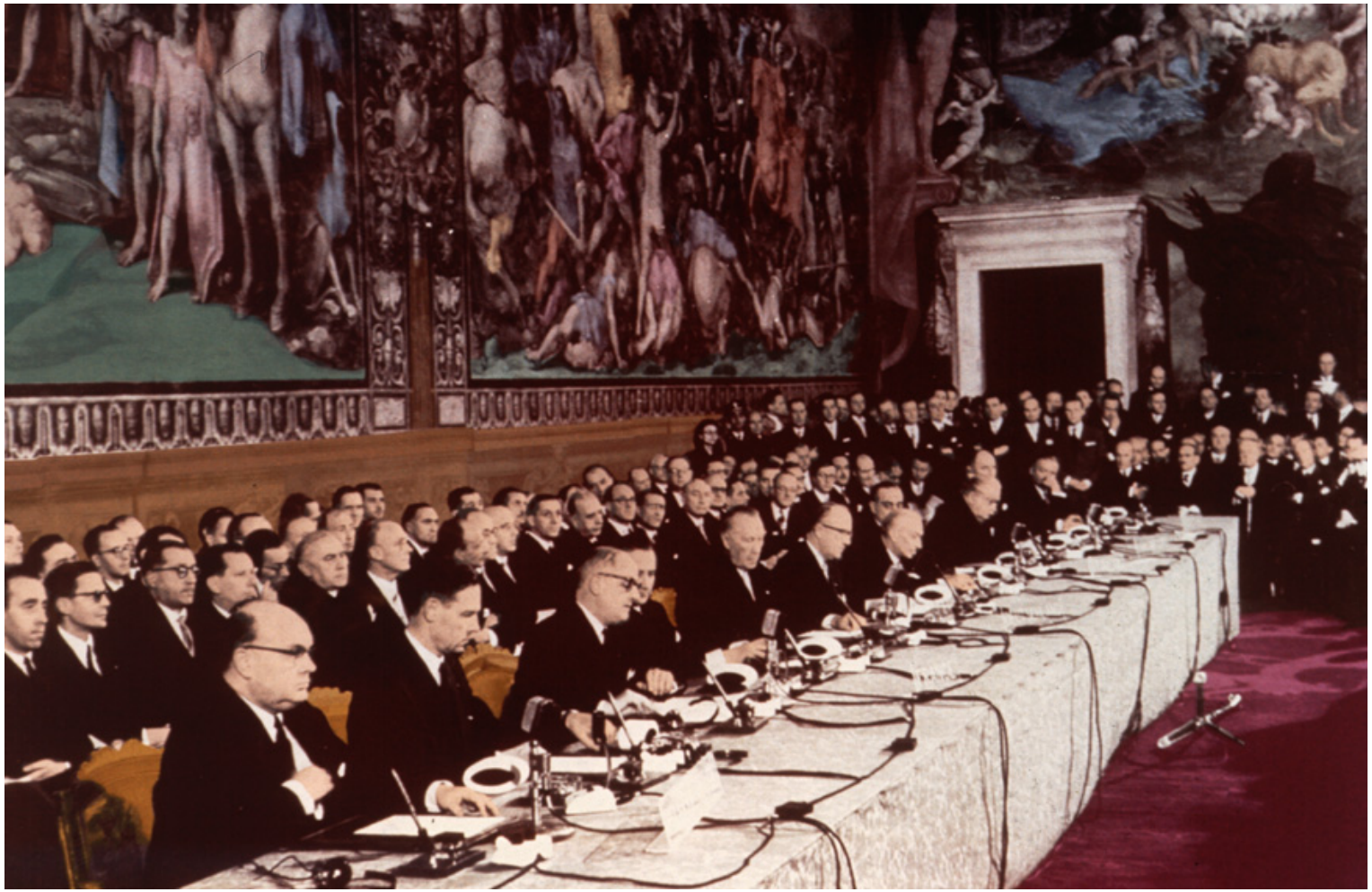
Seminar 1: Introduction to State aid

Part A: What is state aid

One of the original pillars



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Notion of aid and general prohibition

Art. 107(1) TFEU: notion of aid and general prohibition of State aid

> **"… 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, insofar as it affects trade between Member States, be incompatible with the internal market."**

- State aid control is not about prohibiting public support, but about promoting good use of it
- State aid control is exclusive Commission competence
- The granting of incompatible state aid results in prohibition of measure and recovery of the aid to restore the competitive situation. Recovery is not a fine.

Art. 107(1) TFEU – the elements

1. State aid in « any form whatsoever»:
   - Tax breaks /relief from mandatory contributions
   - Sale of assets or public land on favorable terms
   - Grant of use to infrastructure, energy on preferential terms
   - In case of public undertakings Any action that does not correspond to that which a private investor would have adopted
2. «State resource »:
   - Resources/services from State
   - Regional/local entities

Art. 107(1) TFEU – the elements

3. « Favouring a certain industry or undertaking »
   - Selectivity = « specificity » of measures
   - General measures are not State aid
4. Affecting trade between Member States
   - Effect on trade presumed for liberalised markets
5. « Distorts/threatens to distort competition»
   - Potential distortion is sufficient
   - De minimis aid (no aid if amount below $240.000 over three years)

Case study

- Tesla is looking to open a new important production site for electric vehicles in Eastern Europe. Several countries/regions (Eastern Germany, Slovakia, Poland) are interested in attracting Tesla and propose tax and other incentives.
- Germany's economy minister has told Tesla CEO Elon Musk that he'll have "every assistance" in building a new Gigafactory on the outskirts of Berlin. And indeed, Germany grants generous subsidies to incentivize Tesla's production unit in Eastern Germany.
- What are the State aid implications, both procedurally and substantively?

… to be continued …

Exceptions from the prohibition of State aid

1. The **prohibition** of State aid
   - Follows directly from EU law (Article 107(1) TFEU), enforceable before a national court
2. **Exceptions**: State aid can be allowed when compatible
   - Exceptions are defined in the EU Treaty.
   - In most cases the treaty defines a common objective. It is in the discretion of the Commission, whether the objective is met. In principle, positive effects must outweigh the negative effects.
   - Commission has reduced its discretion in guidelines.
   - In general State aid should have incentive effect to achieve EU objectives ➔
3. **Transparency** on the exceptions
   - Aid awards above EUR 500.000 must be published
   - Commission must publish the decisions

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Q&A 1 (Procedure)

- What does Germany and/or Tesla need to be aware of in terms of procedural obligations before building the new production site?
- Procedurally: who should notify what when and to whom?
- What would happen if the project is not notified beforehand or Tesla notifies but starts constructing without waiting for final authorisation?

… to be continued …

Part B: Authorisation framework & Application of general case study

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Part B: The State aid authorisation framework

- **State aid can exceptionally be allowed**. State aid control is not aimed at eliminating all or any State aid. It is rather intended to ensure that aid is allowed only in certain instances and implemented in the most competitive way
- Normally, ex ante check by the European Commission through a **notification**
- Member States can notify **individual aid or aid programmes** (technical term = schemes) on the basis of which individual aid can be granted later.
- Exceptions from the notification obligation exist

Guidance

Guidance for the exceptions is based on the EU Treaty (Article 107 (2) and (3) TFEU)

- 107 (3) a) : “aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment”.

The Commission has adopted a large set of guidance to explain the exceptions

- **Transparent and publicly available** framework explaining how subsidies can be used in an acceptable manner (e.g. guidelines)
- Has been **refined over time** based on case experience
- **Flexible**, also allowing response to financial and COVID crisis,
- The procedure has proven effective in reducing State aid expenditure and directing it towards horizontal objectives (e.g. environment, R&D)

Example: Regional Aid Guidelines

- The applicable EU Regional Aid Guidelines for 2014-2020 **allow the granting of aid for investment projects in less developed regions**
- When approving an aid measure under the Guidelines, the following need to be fulfilled:
  - The aid must have a real "**incentive effect**", i.e., it must effectively encourage the beneficiary to invest in a specific region
  - be kept to the **minimum necessary to attract the investment** to disadvantaged regions
  - **not have undue negative effects**, such as the creation of excess capacity in a declining market
  - **not exceed the regional aid ceiling** applicable to the region in question

… to be continued in Seminar 2 …

Aid that does not need to be notified

Case without real competition concerns must not be notified:

- Commission has developed rules in its General Block Exemption Regulation
    - Outlining under which conditions aid may be granted without notification
    - **Member State checks itself the compatibility** with the rules and proceeds with the granting of the aid without notification (obligation to inform the Commission)

Example:

- Aid for small and medium-sized enterprises (SME)
- R&D aid, training aid, risk finance aid,
- Aid for broadband infrastructures, aid to regional airports, aid to ports,
- energy and environmental aid, regional development aid, aid for natural disasters

Allows Commission to concentrate ***big on big, small on small***

Monitoring and Evaluation

Monitoring

- **Certain block-exempted and approved schemes** by the EU Commission are monitored by the Commission.
- **Member States are required to keep files demonstrating** compliance with State aid rules, in view of the transparency principle.
- If irregularities found, **corrective action** required from Member States.

Evaluation

- The overall objective of State aid evaluation is to assess the positive and negative effects of a program, i.e. the public objective of the aid relative to its impact on competition.
- State aid evaluation can explain whether and to what extent the original objectives of an aid program have been fulfilled, and if and how the programs should be modified.

Q&A 2 (Substance)

- Is this project likely to be approved or prohibited?
- What are the relevant considerations for the approval or prohibition?
- Is it relevant for the approval decision that Tesla would otherwise build its production plant in Turkey and receive generous subsidies from the Turkish government?