

Brussels **State** Aid Regime

Must or Choice for **Regions**?



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1 Introduction

Brussels State Aid Regime. Is it a must or a choice for Regions? This essay will answer that question, focusing on the impact for regional governments. The consequences for local government and cities therefore will not be described.

A considerable amount of energy is spend on debating, arguing and analyzing Brussels state aid policy. However, often this is concentrating on the impact on a national level and not on regional level. The objective of this paper is to focus on the implications for Dutch regional governments. A secondary reason for studying the subject on a regional level is given by the fact that the state aid policies became part of the Treaty. Immediately after the Treaty came into force regional authorities were expected to adhere to and to apply the state aid policies without knowing the details sufficiently. State aid rules were accompanied by a poor level of marketing. As a result decentralized governments just were not aware of the existence of European state aid policies.

The aim of this essay is to give a good insight into the implications of European legislation with respect to the subsidy policies of Dutch regional governments. To achieve this aim, first I will describe the reasons why the European Union exists, second I will describe the current State Aid Regime. Third I will describe the impact of the State Aid Regime on Dutch regional governments. In the fourth and last place I will answer the main question of this paper: Brussels State Aid Regime; Must or Choice for Regions.

This paper is based on the current European state aid legislation and the explanation that can be found in case-law of the European Court of Justice. In addition to this a literature research has been conducted.

2 A short introduction to the European Union

2.1 European Union

After the second world war the states agreed to never have war again! Six states decided to start cooperating on the trading of raw materials needed for the production of weapons: coal and steel. That decision was the actual birth of the European Coal and Steel Community. After the Treaty that established the European Coal and Steel Community a lot has changed. Nowadays the most important collaboration in Europe is the European Union (EU). This institution is a coordinating establishment of a couple of European organizations. The participating member states have delegated some substantial national competences towards the EU. The four main institutions of the EU are the Council of Ministers, the European Parliament, the European Court of Justice and the European Commission. Other European institutions like the Economic and Social Committee and the Committee of the Regions play a particular role in the decision making process.

2.2 The European Commission

The European Commission is the executive committee of the European Union. The European Commission consists of 27 commissioners. The number is related to the total number of member states, but the commissioners are expected not to act as a representative of the member state they are from. The position of the commissioner is absolutely independent. It is not allowed to follow any instruction of the national government. The independency of the European Commission manifests itself in the nomination procedure. Each five years a new Commission will be nominated.¹ The governments of the member states agree on the nomination of the president of the Commission. The president will then nominate the commissioners, in close cooperation with the member states governments. The role of the European Parliament is extremely powerful in the nomination process, because of the required approval about the new Commission.

The European Commission executes a set of four main tasks, being the power:

1. to propose Community legislation on several policies;
2. to enforce the European legislation;
3. to manage the budget;
4. to give advise and recommendations.²

The European Commission is the most important institution in the field of state aid policy. The European Commission executes the legal provisions about state aid.

3 The regional government in the European Union

Many citizens within the European Union, nowadays experience a very large gap between their local personal life and needs on one side and the European Union on the other side. As a result the current political trend is decentralization. The outcome is a local or regional level of governmental control and interaction, which helps the citizens in being accepted in a better way and in return creates a solid basis of recognition. Local governments are familiar towards local and regional culture, language and governmental practices.

The ultimate desire to close the gap between European citizens and the European Union is not the only reason for the increasing role of regional governments. It has appeared that till a couple of years ago the adaptation of local Dutch government and regional Dutch government towards the European Union was minimal. Especially the smaller communities were struggling with the European integration³. An explanation for this phenomenon that has been given is that opportunities were simply overlooked by local governmental representatives such as aldermen, majors and civil servants.

Wolters⁴ has described the following three possible solutions to solve this problem and enhance the European involvement of local communities and regional government:

- the establishment of the Committee of the Regions
- increasing the level of subsidy for regional government
- enhancing the relevance of European law.

3.1 Committee of the Regions

As part of the Maastricht Treaty in 1994, the Committee of the Regions has been established. This has appeared to be a tremendously powerful tool to strengthen the position of regional government.

The Committee of the Regions is nowadays a strong linking pin and communication channel between regions and European Union. It is seen as the voice of Europe's regions and cities. A striking example is the fact that the Council of Ministers and the European Commission are obliged to consult the Committee of the Regions with respect to subjects that directly belong to the responsibilities of regional governments, such as education and culture. In addition to this the Committee of the Regions is empowered to come up with recommendations and advice towards the Council of Ministers, the European Commission or the European Parliament.

The main objective of the Committee of the Regions is to involve regions and cities more and more in European law, which is quite logic as soon as it is understood that 75% of all European laws are implemented by regional and local governments. The second objective is to bring Brussels nearer to the citizens through local and regional governments. All members of the Committee of the Regions have a local or regional background and therefore are best equipped for a successful operation.

3.2 Regional Policy

The objective of the regional policy of the European Union traditionally is to give financial support to the less prosperous European regions or are struggling with more structural difficulties. The support given to these regions is coordinated through the so-called Structure Funds. The goal of these funds is to provide financial support to the realization of the political objectives of the European Union. By means of these funds, local and regional governments are supported to achieve their local and regional goals.

From Jan 1st, 2007, onwards a new financial program is running within the European Union. The core message of the program for the period 2007-2013 is called: "More growth and jobs in all regions and cities of the European Union".

As part of this program the following priorities have been set:

- strategically focusing on economic growth, employment and sustainable development.
- concentrating on less favored regions.
- more decentral, simpler and goal directed execution.

The idea is that these priorities will result in an increased competitive position, economic growth, innovation and sustainable development with a strong focus on regions and cities.

The financial support for this program is managed by three different funds: The Cohesion Fund, The European Fund for Regional Development (EFRD) and the European Social Fund (ESF).

3.3 Regional Cooperation on sides of the border

Within the European Union nowadays more support is given for cooperation between regional governments close to a common border. This is an excellent opportunity for regional governments to work together on activities with a common interest and to start influencing European policies.

The best know example of cross-border cooperation between regional governments and the European Union are the Euregions. A Euregion is a permanent cooperation between local and

regional governments on both sides of a border⁵. An additional impulse to the Euregions has been given by the suppression of borders as part of the economical and monetary union.

4 The current European state aid legislation

4.1 Why a state aid regime?

In the vision of the European Community, a healthy state aid policy was an absolute need. It was the so-called finishing touch of the internal common market. The aim of the state aid rules is to prevent trading between member states from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favoring certain undertakings or the production of certain goods.⁶

4.2 Context of state aid regime

A first important notification is that the current state aid regime is situated in the Treaty of the establishing the European Coal and Steel Community. As stated in Article 2, the background of the Treaty was to contribute, through the common market for coal and steel, to the economic expansion, growth of employment and a rising standard of living. The current article 2 of the Treaty establishing the European Community still executes her tasks by establishing a common market and an economic and monetary union.

The state aid regime is settled in title IV chapter 1. Chapter 1 regulates the competition between Member States. Given the fact that already in the first chapter the competition has been regulated it might be concluded that the European Community has considered this to be of utmost importance. The goal of this regulation has been specified in the following case law.

4.3 Article 87 of the Treaty

"Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."

Carefully reading the article it can be concluded we have to deal with five requirements, which will be explained in more detail below.

1. Any aid granted by a Member State

In the whole Treaty no explanation has been given about the meaning of this requirement. In a judgment of the European Court of Justice however the following explanation can be found:

"any aid granted by a Member State". *"This provision thus refers to the decisions of Member States by which the latter, in pursuit of their own economic and social objectives, give, by unilateral and autonomous decisions, undertakings or other persons, recourses or procure for them advantages."*⁷

This explanation appears to be so generic that it can be concluded that most of the state aids given will meet this requirement.

2. or through State resources in any form

This requirement is a widening of the previous one. The previous condition contained only the decisions of Member States. This condition contains an extension. Not just the decisions of Member States may result in aid incompatibility with the common market, decisions of State resources in any form also. Because *"Advantages which are granted directly by the State and those granted by a public or private body designated or established by the State"*.⁸

3. certain

This requirement is also known as the "requirement of selectivity". The intention is that state aid must be delivered to a limited number of organizations in a member state. A state aid by which all organizations in a nation are favored can not be seen as state aid⁹.

The consequence of this all is that support given to any organization, by regional or local government never can be seen as state aid as mend above, due to the fact that it will be limited to its regional or local borders. It is quite obvious that a regional government will not support organizations that reside in other regions or even act on a national level.

4. undertakings

In relation to the subject discussed the following has been stated about the term undertakings:

"every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".¹⁰

By doing so, the European Court of Justice has given a generic definition which organizations have to be considered to an undertaking. This is even becoming more apparent in a judgment describing the term economic activity:

"and that any activity consisting in offering goods and services on a given market is an economic activity".¹¹

The conclusion that can be drawn is that the term "undertaking" is not limited to commercial organizations. Non-profit organizations are obviously included¹².

5. affects trade between Member States

This requirement clearly shows that is absolutely irrelevant for what reasons the state aid is being provided. What counts is the possible impact on the trade between member states¹³. This also implies the existence of a relevant market to support the trading process. What counts is a possible impact on the competition even before that competition is actually taking place.

In case a specific state aid meets the five above requirements according to the more detailed explanation that has been given above, the state aid must be notified to the European Commission, unless it is covered by one of the following exceptions¹⁴.

4.4 Exceptions

1. The minimum regulation.

The essence of this regulation is that no notification, according to article 87 is required if the total amount of subsidy granted to one organization is not exceeding the limit of € 200.000,-- during a period of three years. This exception can only be used for transparent types of state aid, for which it is upfront crystal clear what the exact amount of state aid will be.

2. Regional Aid.

There are some specific regions where the standard of living is abnormally low or where there is serious underemployment. Aid for the benefit of those regions is excepted for the notification obligation.

4.5 Notification Procedure

In all cases that a state aid policy applies to the five requirements of article 87 of the European Treaty and the mentioned exceptions are not valid, the state aid policy must be notified to the European Community. This notification should already be done when the policy is under development¹⁵. Notification must be done by completing a standard form, which is an appendix to regulation 794/2004, dated 21st April, 2004. Regional governments have to send the notification to the "Coordination Point State Aid Regional Governments". In the Netherlands, this office is part of the Dutch Ministry of Home Affairs. The office guarantees that the European Commission can make proper decisions with respect to the planned aid policy of regional or local governments¹⁶.

As soon as the notification has been filled in completely the European Commission will make a final decision within a time frame of usually 2 till 6 months, resulting in an arrangement that:

1. The nominated aid policy is not covered by article 87 of the European Treaty.
2. The nominated aid policy is compatible with the European common market.

3. The formal investigation procedure will be started, which means that the European Commission is not convinced the nominated aid policy is fully compatible.

During the decision making process of the European Union, which may take up to six months, the nominated aid policy can not be executed. This is also known as the standstill obligation.

4.6 Easing measures for Culture

Article 87, 3, d. Provides that:

"aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest, may be considered to be compatible with the common market".

Although this provision has been formulated in a very generic way, the European Commission is applying it in a restrictive manner. A typical example is an arrangement of the European Commission to the German government. Near Bremen is the so-called Space Park Bremen located, facilitating among others a amusement park, a couple of restaurants, a cinema centre and a hotel. German government has provided for the construction of the park an interest-free loan, however the European Commission has decided that this aid policy is not compatible with the European market and does not contribute to the promotion of culture or the maintenance of cultural heritage¹⁷.

The conclusion that can be drawn is that the European Commission is applying the mentioned article 87 in a very strict way.

This can also be concluded from an arrangement with the Dutch Government. The foundation National Aviation Theme Park Aviodrome (Aviodrome) is offering a mix of cultural activities, such as an exhibition hall, a museum, airplanes and flight simulators and commercial activities, such as a restaurant, a congress hall and a couple of shops.

Dutch Government has provided state aid for the cultural activities, partly funded by the EFRD and partly by the region Flevoland. Despite the fact that a clear distinction has been made between the cultural and the commercial activities the European Commission is not convinced that there will be no spill-over from the cultural towards the commercial events. Nevertheless the European Commission has concluded the planned state aid is compatible with the European trade market because of the local character of the commercial activities and the minimum possible impact on inter-state-trade.

The conclusion that can be drawn from this case is that the European Commission is applying article 87 in a very strict way.

It should also be mentioned that even if a planned state aid policy is having a 100% cultural focus, the policy has to be nominated to the European Commission.

Additional exceptions that have been created to this are the following regulations.

4.7 Services of general economic interest

According to article 16 of the Treaty, the Community shall take care that services of general economic interest operate on the basis of principles and conditions which enable them to fulfill their missions without prejudice to Articles 73, 86 and 87. Such services operate to fulfill a legal duty. That requires sometimes aid granted by a government. That is why article 87 (the state aid article) is out of rule. In the Altmark judgement the Court decided that compensation for the services provided by the recipient undertakings in order to discharge public service obligations is no state aid when:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations¹⁸.

4.8 Illegally provided state aid

The European Commission is not only checking nominated state aid policies in a preventive manner. In case the European Commission is informed about state aid policies that may be in conflict with article 87, as discussed a couple of times in this paper, investigation will be initiated. In all cases related organizations have to fully cooperate. Illegal state aid may be granted in one the following situations:

- The state aid policy has not been nominated.
- The state aid policy has been nominated but execution started already before the final decision has been made.

- The state aid policy is executed despite a negative arrangement.
- The state aid policy is executed in contradiction to or in conflict with (one of) the preconditions made.

After it has become clear that the provided state aid has been illegal, the European Union will start the procedure of chapter III of regulation 659/1999.

The European Commission will start an investigation. The related member state must always cooperate by providing all required information. The European Commission has the right to order full cooperation. Based upon the outcome of the investigations the related member state has the right to react on the preliminary results.

Finally the European Commission will make final decision and if required order the following:

- To suspend the state aid, until a decision can be made about the compatibility with the European common market.
- To reclaim the state aid given, until a decision can be made about the compatibility with the European common market in case:
 - There are no doubts about the state aid character of the provision.
 - Forced action is required.
 - There is serious danger irreparable damage will incur to the competition.

In case a member state is not adhering to the decisions made by the European Commission, the European Court of Justice will be asked to determine that the member state is acting in conflict with the European Treaty.

In all situations that the European Commission has determined that a specific state aid policy is not compatible with the European common market, the European Commission is obliged to reclaim the provided state aid.

4.9 Law Supervision European Subsidies

An arrangement for reclamation of subsidies is always directed to a member state. In case a region illegally has granted financial aid, the European Commission always will order the national government for a reclaim. The member state is the official contact point for the European Commission with respect to the execution of the reclaim. The national government in return will transfer the reclaim towards the regional government. According to article 14 of regulation 659/1999 the reclaim should be conducted immediately and in line with the national legal procedures of the member state involved.

Within the Netherlands the Law Supervision European Subsidies is applicable. This law authorizes the Dutch minister to transfer any reclaim of the European Commission with respect to an illegally provided subsidy towards the regional government involved.

However, it has appeared that the State Aid Regime is also applicable for non EU-subsidies¹⁹. For that reason a bill for adaptation of the Civil Code and the General Act on Administrative Law is currently being developed, creating the legal basis by which the national government is empowered to execute in case earlier provided subsidy has to be reclaimed²⁰.

5 Conclusions

Brussels state aid regime: is it a must or a choice?

To be able to answer that main question in this paper two questions have investigated in more detail:

1. What is the role of the regional government within the European Union?
2. What is the current European state aid regime and what is the impact for regional governments?

By first answering these two questions the main question can answered as well.

1. What is the role of the regional government within the European Union?

In order to close the gap between European citizens and the European Union three measures have been taken:

- the establishment of the Committee of the Regions
- increasing the level of subsidy for regional government
- enhancing the relevance of European law.

One of the responsibilities of regional governments is to bring the European Union nearer to the European citizen. Second, the European Union is becoming more and more important for the regional governments, for example because of the structure funds. Third we have to conclude that a lot of European laws are directly applicable to regional governments.

2. What is the current European state aid regime and what is the impact for regional governments?

Aid from regional governments may be incompatible with the European common market if the earlier described conditions are valid. Case law research has shown that very soon this is the situation. Some of the presented exceptions may be applicable for regional governments. The long period of uncertainty due to the standstill obligation makes it difficult for regional governments to notify all planned state aid in a decent manner. The current lead time of the investigation period is around six months. This is experienced as being very long. It also appears that in many situations finally the European Commission will conclude the planned state aid is compatible with the European common market. Therefore the final conclusion must be that it often is much better to take the risk of being confronted with a reclaim in certain state aid projects instead of delaying all projects with a standstill period of six months at an average.

So the ultimate answer to the leading question of this paper is:

Brussels State Aid is a Choice for Regional Governments.

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