

When is it considered to be State aid?

- Article 107(1) TFEU as the basis for assessing State aid:
 - *“Save as otherwise provided in the Treaties, 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, in so far as it affects trade between Member States, be incompatible with the internal market.”*

CRITERIA:

- *State aid must involve State resources and be imputable to the State (e.g. public company resources, “state” defined broadly)*
- *Selectivity, i.e. selective advantage favouring certain undertakings (note! Also selective aid when the aid concerns an entire economic field, see C-672/13 OTP Bank, paragraph 49).*
- *Distortion of competition*
- *Effect on trade between Member States*
 - *All criteria must be met (see e.g. C-142/87 Belgium vs Commission (1990) ECR I-959, Section 25) and effect on the market is essential.*

SOTE 2021: So-called transfer loans and State aid

- Government proposal 241/2020 (p. 287):

“As a result of property arrangements, the State’s guarantee responsibilities would be increasing. A State guarantee would be issued for transitional period debts of municipal federations being transferred to welfare areas and their relevant commitments.

According to the financial statements of 2019, this would involve liabilities of worth approximately 2.8 billion euros. Considering the ongoing and planned investment project, which would mainly be funded with loans, the amount of transfer loans at the beginning of 2023 would, according to preliminary estimates, be approximately 4.2 billion euros. ”

“SOTE” = Legislative Reform of the Social and Health Care Sector in Finland

SOTE 2021: So-called transfer loans and State aid

- **Problem:** The municipal risk in loan arrangements becomes a State risk and at the same time State aid changes. Expressly, the practical reality is that the State is a stronger guarantor than the municipal sector, so the so-called risk premium will change but, at the same time, nothing seems to be done to the loans' interest rates. The incurred interest benefit is notifiable State aid. Notification is also necessary because the arrangement is so-called new aid (new legal person: welfare area)
- In the same way as in other transactions, loans and guarantees issued by public companies include State aid if they do not meet market terms.

The interpretation of Article 107(1) TFEU is not sufficient in case of transfer loans

- Article 108(3) TFEU and Article 3 of the procedural regulation concerning the notification procedure 2015/1589 require aid to not be issued until the Commission has assessed the compatibility of the aid for the internal market.
- NOTE! The Commission has the authority to decide whether the State aid is compatible with the internal market!
- On the other hand, Article 213 Section 3 of the Capital Requirements Regulation (EU) 575/2013 states the following:
"An institution shall fulfil any contractual and statutory requirements in respect of, and take all steps necessary to ensure, the enforceability of its unfunded credit protection under the law applicable to its interest in the credit protection. An institution shall have conducted sufficient legal review confirming the enforceability of the unfunded credit protection in all relevant jurisdictions. It shall repeat such review as necessary to ensure continuing enforceability."

About the Capital Requirements Regulation (EU) 575/2013

- According to the Capital Requirements Regulation (EU) 575/2013, a risk weight of 0% could be assigned to State-guaranteed loans, if the State guarantees meet the terms set out in Articles 213 and 215 of the Capital Requirements Act. The essential one of these is the requirement set out in Article 213 1 d), according to which

'the credit protection contract is legally effective and enforceable in all jurisdictions which are relevant at the time of the conclusion of the credit agreement.'

- Legal literature and practice has considered that borrowers should confirm the competence of the guarantee by clarifying whether notification had been done or even request the Member State to notify a guarantee system.
- *Prudent trader* – protection of legitimate expectations

(e.g. 78/77 Lühns (1978) ECR 169 and further *Raitio, Juha: The Principle of Legal Certainty in EC Law*, Dordrecht: Kluwer Academic Publishers, 2003, p. 203 and 218-220.)

So what does “sufficient legal review” in the Capital Requirements Regulation refer to?

- The aid recipient or guarantor must ensure that the aid has been issued in an appropriate procedure referred to in Article 108(3) TFEU, i.e. has been notified to the Commission.
- This is an essential point in terms of the legal certainty involved in the guarantee operations. In principle, successful claims cannot be made on the protection of legitimate expectations when claiming on the protection of legitimate expectation in case of an illegal matter.
- NOTE! State aid jurisprudence is not “a game, where the ball is only in the possession of the Commission and Member States”. It is competition law in which the market powers are a third force, i.e. in other words, companies can submit complaints to the Commission about forbidden State aid.

Application: must have Commission's decision!

- “Sufficient legal review”: In practice, this means that to verify the matter, Finland should be able to provide the lender (e.g. Municipal Finance Plc) a case number issued for the Commission's individual aid or aid programme as well as a possible public copy of the Commission's decision, and details about which European Union Official Journal the decision has been published in. See. OJ, N:o L 248, 24/9/2015, p. 9. (See Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ, No. C 155, 20/6/2008, p. 10-22, particularly pages 13 and 14.)
- Such statements that State aid matters have been negotiated with the Commission in the government proposal, which are vague, are not sufficient (see, e.g. C-261/01 van Calster (2003) ECR I-12249, Sections 62-64 and compare Government proposal 241/2020, p. 22.)

Should this be taken seriously?

- C-672/13 OTP Bank Nyrt, ECLI:EU:C:2015:185, Section 76:

“However, even if the Commission were to declare, in a future final decision, that the State guarantee is compatible with the internal market, the national court is still required to order the recovery of that State aid, in accordance with its national law. If the direct effect of the last sentence of Article 108(3) TFEU is not to be compromised or the interests of individuals, which are to be protected by national courts, are not to be disregarded, the Commission's final decision does not have the effect of regularising ex post facto the implementing measures which were unlawful by reason of their having been adopted in continuation of the prohibition laid down by that article. Any other interpretation would encourage the Member States to disregard the prohibition laid down in the last sentence of Article 108(3) TFEU and would deprive it of its effectiveness (see, to the effect, judgements in Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon, C-354/90, [EU:C:1991:440](#), paragraph 16, and SFEI and Others, C-39/94, [EU:C:1996:285](#), paragraphs 67 to 69).”

It must be taken seriously because:

- 1. The Court of Justice of the European Union outlines in the previously mentioned Section 76 that the incompatibility of State aid that has not been notified shall not be rectified retrospectively, even if the Commission states that the aid is compatible with the internal market.
- 2. This interpretation, which has been adopted from the OTP Bank case, is not an individual case, but instead it represents an established interpretation in the line of cases (see previously mentioned cases C-354/90 Fédération nationale and C-39/94 SFEI)

It must be taken seriously because:

- 3. The Commission is currently preparing a notice on the enforcement of State aid law by national courts, and its Section 47 states the following:
”A final Commission decision recognising the compatibility of unlawful aid after it has been granted does not have the effect of regularising ex post facto the measures implementing the aid, which had been adopted in breach of the standstill obligation provided for by the TFEU”.
- THEREFORE THE COMMISSION IS IN LINE WITH THE COURT OF JUSTICE OF THE EUROPEAN UNION!
- See the draft notice online:
<https://ec.europa.eu/competition/consultations/open.html>

A prudent trader takes the matter seriously

- C-672/13 OTP Bank Nyrt, ECLI:EU:C:2015:185, Section 77, which states the following concerning *prudent trader* know-how:

”Finally, and as regards in particular the beneficiaries of the State guarantee, it must be stated that, taking account of the mandatory nature of the review of State aid by the Commission pursuant to Article 108 TFEU, first, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article and, second, a diligent economic operator should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, so that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful.”

- THEREFORE: UNNOTIFIED STATE AID ARRANGEMENTS ARE NOT SUBJECT TO THE PROTECTION OF LEGITIMATE EXPECTATIONS!

Difference between principles and rules

- Legal facts on the relation to norm premises in individual cases:

	Facts	/ Norm (formulations)
• Non-linguistic interpretation	↑	
• Principles	general observations / considerations	guide solution[1]
•	A	B
• Rule	observation of fact	direct answer from norm
•	yes/no	
•	C	D
• Linguistic interpretation	↓	

[1] See Dworkin, Taking Rights Seriously, 1978, p. 26. A principle directs the solution, it does not provide a directly applicable solution. Interpretation in relation to other principles.