



State aid

Overview

State aid gives certain companies economic advantages and can therefore distort competition. This aid may be in the form of subsidies or other financial benefits such as subsidised loans, government guarantees, tax concessions, etc.

However, state aid may also be desirable if it is in the public interest – for example, to strengthen a structurally weak region as a business location or to promote environmentally friendly technologies.

At its core, EU law regarding state aid is about preventing undesirable distortions of competition and ensuring that all participants in the EU internal market operate on a level playing field. This is why the EU monitors state aid in its member states.

There is a fundamental ban on state aid in the EU, but with numerous exceptions. Moreover, state aid in the EU only has to be authorised by the European Commission above a certain threshold. Given that there are wide-ranging exemptions, the majority of state aid in the EU is permitted without the need for a case-by-case assessment. Furthermore, over 95% of the aid reported is authorised by the European Commission.

Up to now, Switzerland has only monitored state aid in air transport. The Competition Commission (COMCO) is responsible for this task; the state authorities which grant aid apply to COMCO for its opinion.

Key elements

For the EU, participation in its internal market is contingent on state aid monitoring. Switzerland will only adopt the rules in selected areas of internal market participation. Accordingly, the treaty obligation to monitor state aid was limited to the land transport, electricity and air transport agreements (the 1972 Free Trade Agreement and the Agreement on Government Procurement are not affected by the state aid provisions; neither of these agreements forms part of the package). The text expressly provides for exemptions for public services and minimum thresholds. The state aid provisions in the agreement on electricity contain further, sector-specific safeguards.

A two-pillar approach was secured: Switzerland's state aid will be monitored by a Swiss state aid supervisory authority and the competent Swiss courts. The proposed monitoring system is compatible with the Swiss constitutional order and respects the competences of the cantons, the Federal Assembly and the Federal Council.

Specifically, the Confederation, cantons and communes are required to notify the Swiss supervisory authority of any new state aid if it exceeds a certain threshold and is not exempt from notification. The supervisory authority then issues a non-binding opinion on the planned new state aid. However, if this opinion is disregarded, the supervisory authority could refer the case to a Swiss court for clarification.

A transitional period of five years has been agreed during which the Swiss monitoring system must be set up. At the end of this period, the supervisory authority has a further year to obtain an overview of the existing aid system. A consultation mechanism will be set up to allow Switzerland to put forward its view on developments that affect major Swiss interests and on EU industrial policy.

State aid for public services, which is also permitted in the EU, is retained. Also a range of exemptions and thresholds are in place. In addition, the air transport, land transport and electricity sectors are only affected in the areas regulated by the agreements. In Switzerland, for example, purely national public transport is not affected, as it is not covered by the Land Transport Agreement and will not be in the future.

Implementation in Switzerland

Switzerland will adopt the substantive provisions of EU state aid law limited to the areas covered by the air transport, land transport and electricity agreements, thereby complying with EU market rules. However, Swiss aid in these areas will be monitored under a separate, equivalent procedure. This will be set out in the new State Aid Monitoring Act and will respect Switzerland's constitutional order and the competences of the cantons, the Federal Assembly, the Federal Council and the Swiss courts.

Under this procedure, the aid provider may seek advice from the Swiss supervisory authority while planning the aid. The aid provider must give notification of the planned aid. The Swiss supervisory authority will carry out a simple review within two months to evaluate the aid for compatibility with international law. If any concerns are raised, the Swiss supervisory authority will open an in-depth review, which may take up to 12 months. The authority will conclude the review with a non-binding opinion. Before the aid is granted, the supervisory authority will be notified of the final legislative act. If the supervisory authority believes the aid to be inadmissible, it may lodge an appeal with the competent authority. Only a Swiss court can issue a binding decision that the aid is inadmissible and order repayment, if applicable. Competitors can also lodge an appeal. The key steps in the procedure are published in a database by the supervisory authority.

Due to the limited scope of the agreements and exemptions from reporting and notification duties, around five simple reviews and one in-depth review per year are expected in the long term.

Importance for Switzerland

As an open, medium-sized economy, Switzerland is dependent on the broadest possible market access. Undistorted, extensive participation in the EU internal market is central to this.

The Swiss economic system is based on the free market and competition. As such, Switzerland also has an interest in mutually fair competitive conditions. State aid monitoring that enables Swiss companies to participate in the EU internal market is therefore also in Switzerland's interests.

COMCO already monitors Swiss state aid in the air transport sector in accordance with EU law, even though there is currently no possibility of appeal. In electricity and land transport, state aid provisions will also be introduced for aid within the scope of the relevant agreements. In the electricity sector, the most significant existing Swiss state aid has been secured by agreement. In land transport, only cross-border services are affected, and Switzerland is not aware of any state aid that has been granted.

Specifically

- **Two-pillar model:** As an example: An electricity producer in Baden-Württemberg is angry that a producer in the Bernese Oberland is receiving subsidies from the Canton of Bern. Conversely, the producer in Bern is unhappy that its German competitor is receiving subsidies from the State of Baden-Württemberg. Both are convinced that these subsidies distort competition and violate the state aid provisions set out in the Electricity Agreement. The producer in Bern therefore appeals to the European Commission, and the German producer appeals to the Swiss supervisory authority. The two authorities establish that

proper notification of the subsidies was not given and now investigate them separately in equivalent procedures: the European Commission investigates the subsidies from Baden-Württemberg, while the Swiss supervisory authority investigates those from the Canton of Bern. If the supervisory authorities conclude that the subsidies violate the state aid provisions of the Electricity Agreement, they must be repaid. The equivalent procedures are as follows:

- In the EU, the European Commission will make the decision. If it concludes that the subsidies from Baden-Württemberg violate the state aid provisions in the Electricity Agreement, it will order Germany to recover the aid. If Germany does not accept this decision, it can bring an action before the General Court of the European Union (EGC). The European Court of Justice (ECJ) will decide in the last instance.
 - In Switzerland, the Swiss supervisory authority will issue an opinion on whether the subsidies granted by the Canton of Bern are permissible. If the authority concludes that they violate the state aid provisions in the Electricity Agreement, it will ask the Canton of Bern to recover the subsidies from the electricity producer in the Bernese Oberland. If the Canton of Bern does not follow the supervisory authority's opinion, the authority may lodge an appeal with the competent Swiss court. The Federal Supreme Court will make the final decision.
 - Equivalent state aid monitoring in Switzerland and the EU ensures that the two electricity producers in the Bernese Oberland and Baden-Württemberg operate on a level playing field in the single market (CH–EU internal market).
- **Public service:** A canton in eastern Switzerland wants to set up a new regional train service in the public interest. As is customary in regional transport, it would like to award the contract directly, without a tender procedure. The canton is not sure whether this is still possible under the new state aid provisions in the Land Transport Agreement and notifies the Swiss supervisory authority of the project. The supervisory authority carries out a simple review of the project. In its opinion, it declares that the state aid provisions do not apply in this case, as purely national transport is not covered by the Land Transport Agreement. The canton can therefore award the contract directly as planned.