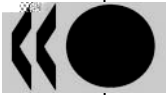


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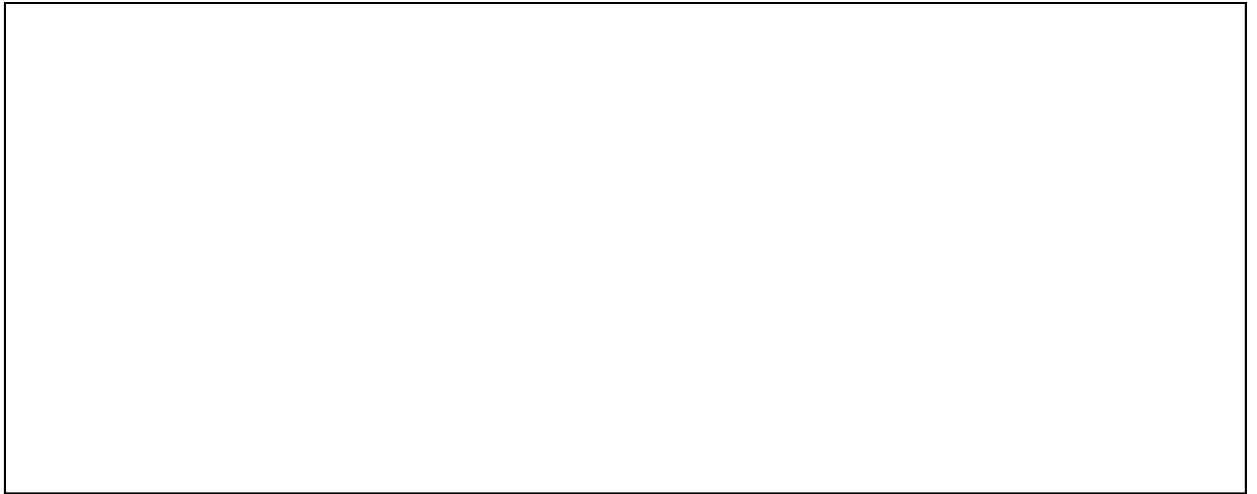
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STATE AIDS AND SUBSIDIES

-- U.S. Federal Trade Commission --

1. Introduction

1. The United States does not have a system for the direct regulation of government financial aid to firms. In some extraordinary instances, the U.S. Government has provided assistance to industries and firms to address specific exigencies, for example, to protect critical infrastructure, employment, national defence, and the integrity of the banking and financial system.¹ In its recent rescue measures, the U.S. Government has taken steps to limit the possible negative effects of such interventions by restricting the duration and depth of its intervention. U.S. states may provide certain assistance to firms but, under the “dormant Commerce Clause” of the U.S. Constitution, their actions may not discriminate against other states or hinder interstate commerce.

2. State and Local Level Aids and Subsidies

2. The United States does not have a regulatory regime governing state and local aids and subsidies. However, courts have found certain state assistance to violate the Commerce Clause of the U.S. Constitution.² The Supreme Court has held that there is a “dormant” or “negative” aspect of the Commerce Clause that implicitly limits the states’ right to tax or otherwise regulate interstate commerce:

It has been long accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce. ... This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competition.... Thus, State statutes that clearly discriminate against interstate commerce are routinely struck down, [...] unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism....³

3. Thus, measures that either discriminate against interstate commerce, because they favour in-state interests, or measures that burden interstate commerce, because (even if they are non-discriminatory) they

¹ This paper does not cover government measures that may indirectly benefit firms, such as those involving infrastructure, research and development, public services, and taxation.

² United States Constitution, Art. I, sec. 8, cl. 3. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981). In *Maryland v. Louisiana*, the Supreme Court held that a Louisiana statute imposing a first-use tax on natural gas extracted from the continental shelf in an amount equivalent to the severance tax imposed on natural gas extracted in Louisiana unquestionably discriminated against interstate commerce in favour of a local interest and violated the Commerce Clause. *See also, West Lynn Creamery v. Healy* (1.1 (h), 4)117692.8 (e)-18.6,2011

violation of the Commerce Clause, the Court heavily relied on the FTC's 2003 Wine Report.¹³ Citing the FTC report, the Court concluded that the regulations were not the least restrictive alternative for regulating interstate wine sales to minors and facilitating tax collection. The Court said the regulations were "the product of an ongoing, low-level trade war"¹⁴ among the states, and added that it was "evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive

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difficulty, and protect the taxpayer by ensuring that only financially viable firms receive assistance.”²⁵ The companies were required to make fundamental changes in their management and products as conditions for assistance.

14. In December 2008, Congress enacted the Automotive Industry Financing and Restructuring Act,
