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Concept of State Aid: Review of Recent Developments

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Article 107(1)

“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”

Not all public funding is state aid: Six cumulative conditions

Public measure must ...

transfer state resources

to an undertaking

conferring a selective

advantage

that affects trade

and distorts competition

State aid

Precedents

- T-314/15, Greece v Commission [Piraeus terminal]
- GC: An argument based on the Commission's decision-making practice cannot succeed, since the concept of state aid is objective and depends on the facts of each case

Art 107(1) & taxes

- T-131/16, Belgium v Commission
- MS have autonomy in direct taxation
- But they must exercise autonomy in compliance with SA rules

Hypothecation of tax to SA measure

- C-449/14 P, DTS v European Commission
- Tax on broadcasters to fund RTVE
- A taxpayer has to pay tax even if those exempted from tax receive state aid
- A tax does not have to be paid only if it is hypothecated to an aid measure and only if aid is illegal or incompatible
- Hypothecation =
 - all tax revenue funds aid + all aid is funded by tax revenue
- In case of hypothecation, Commission assesses compatibility of both aid and tax

Cont.

- CJEU: Tax not hypothecated
 - SA for RTVE only up to amount needed to compensate for PSO
 - Any excess revenue from tax transferred to govt budget
 - Any shortfall for PSC made good by extra payment from govt budget

Economic activity & undertakings

Activities based on solidarity

- T-216/15, Dôvera zdravotná poisťovňa et al v Commission
- GC annulled Commission decision that found that providers of health insurance in Slovakia were not undertakings
- A non-profit entity can be undertaking
- Social aim of health insurance scheme is not in itself sufficient to exclude its classification as an economic activity
- Decisive elements: Extent of
 - Social solidarity
 - State supervision

Cont.

- Solidarity:
 - Obligation of health insurers to participate
 - Lack of direct link between contributions and benefits
 - Compulsory and identical benefits for all insured persons
 - Contributions proportional to income of insured persons

- State supervision:
 - Obligation of health insurers bodies to offer defined benefits
 - Impossibility for health insurers to determine nature and level of benefits set by law or amount of premium paid

Cont.

- GC found that Slovak system was indeed based on solidarity and was supervised by state
- However, insurance companies made profits and distributed part of them => their activities = economic
- While insurers could not set prices, they competed on supplementary services and quality => insured persons could choose & switch
- Even if an insurer does not seek profit, economic nature of an activity is determined by presence on that market of competitors seeking to make profit [= becoming undertaking by “contagion”]

Education

- T-220/13, Montessori v Commission
 - No property tax for “primarily” non-economic activities
 - Criteria used by GC:
 - No pursuit of profit
 - Not in competition with market operators pursuing profit
 - Based on principle of solidarity
 - Statutes prohibit distribution of profits
 - Profits reinvested in activities of social solidarity
 - In case of dissolution, assets transferred to another non-commercial entity
- C-622/16 P, Montessori v Commission
 - Nominal fee ≠ undertaking

Cont.

- C-74/16, Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe
 - Education fully funded by the state which does not engage in “gainful activity” is not economic in nature
 - Services provided for remuneration are economic, even if not paid by students themselves
 - Religious status of aid recipient not relevant
 - Not-for-profit status not relevant

- SA.43700: Fundació Privada Conservatori del Liceu
 - Predominantly financed by state => own revenue < costs

Boundary of economic & non-economic activities

- T-818/14, Brussels South Charleroi Airport v Commission
- GC: Control and policing of airspace are typical public tasks
- But guided approach to airport is economic activity
- GC also considered how to allocated costs between non-economic and economic functions within airport [e.g. customs v passenger lounge]

Local infrastructure

- Commission decision SA.41935: Village renewal and infrastructure projects in rural areas in Germany:
 - Included: i) small infrastructures within villages, ii) open spaces and squares, iii) public facilities for leisure and culture activities, iv) maintenance of historic buildings
 - Excluded: new housing, commercial or industrial areas
- No SA because:
 - Direct: Recipients = public authorities carrying out public tasks
 - Indirect: Infrastructure was
 - Open to all
 - Not intended to favour any particular undertaking
 - Not intended to be commercially exploited
 - Benefits to any economic activity were “incidental”

Cont.

- Commission decision SA.45645 on nature conservation in Saxony-Anhalt, DE
- Commission decision SA.46073 on aid to associations of natural parks, nature conservation associations and landscape maintenance associations, DE
- Non-economic because:
 - Sites accessible to everyone free of charge
 - Occasional fee covers only fraction of true costs \neq genuine remuneration
 - Clear account separation

Cont.

- SA.42545 on revitalisation of Hamburg Congress Centre
- Some cultural activities = non-economic

- Public funding of cultural activities may be organised in a “non-commercial way”
 - Accessible to general public free of charge, or
 - Visitors pay fee that covers only “fraction of true costs”

- Ticket prices covered only about 10-20% of costs

State resources

No transfer of state resources: Regulation

- T-57/15, Trajektna luka Split v Commission
- Port operator claims that regulation of port fees was SA to state-owned ferry operator
- GC: No transfer of state resources => no SA

Cont.

- Commission decision SA.48856 concerning Czech prohibition of billboard advertising along primary roads [except for billboards within 200 metres of the promoted establishment]
- Main supplier of billboard advertising claims measure constitutes state aid to those who supply those billboards – the state would lose revenue from billboards on public land
- Commission: This is regulatory measure, applying in a non-discriminatory manner.
- When MS act as regulators they do not have to maximise revenue
- “A negative indirect effect on state revenue stemming from regulatory measures does not constitute a transfer of state resources, where it is an inherent feature of the measure.”

No imputability => no transfer of state resources

- T-98/16: Italy v Commission [Banca Tercas]
- GC: Measure not imputable to state
- FITD [private banking consortium] had obligation to reimburse depositors in case of default
- Chose to inject capital because it was less costly
- GC: Capital injection not mandated by state

However, ...

- Decisions by national deposit guarantee funds and resolution funds are imputed to state [even if resources are contributed by banks]
- SA.46575: Polish resolution scheme for cooperative banks funded by Bank Guarantee & Resolution Fund
- SA.49275: Sale of Novo Banco [Banco Espirito Santo] by Portuguese Resolution Fund

Cont.

- C-329/15, ENEA v Prezes Urzędu Regulacji Energetyki
- Polish energy regulator fined ENEA for not buying green electricity
- ENEA argued that obligation to buy green electricity was SA

- ECJ: No transfer of state resources
 - No levy on consumers
 - No entity appointed by state to manage payments or system

- Complication: ENEA was state owned
 - ECJ: No evidence that decisions of ENEA could be attributed to the state

Cont.

- C-656/15 P, Commission v TV2/Danmark
- TV2/Danmark under PSO; partly financed by advertising revenue collected by TV2 Reklame and paid via TV2 Fund
- TV2 Reklame and TV2 Fund established by state to manage advertising revenue for TV2/Danmark
- ECJ: Finds that advertising revenue was under the control and “disposal” of the state

Advantage

Advantage v economic benefit

- C-164/15 P, Commission v Aer Lingus
- Issue: Size of advantage
- Aer Lingus & Ryanair claim they passed on to consumers an exemption from passenger tax
- ECJ: Advantage \neq economic benefit derived by recipient
- Recovered aid = aid granted, not value of economic benefit

Relief from legal obligations

- Commission decision 2017/1441 on a Polish scheme for milk producers
- Legal requirements = normal costs
- Relief from penalty for exceeding milk quota = advantage

Compensation for the extra costs imposed by law

- C-211/15 P, Orange v Commission
- CJEU: Confirms judgment of GC
- Pension arrangements for civil servants were distinct from pension arrangements for other categories of employees
- Compensation was advantage = SA
- Only instance of compensation not being SA is when a PSO is imposed
- Not necessary to compare Orange to other undertakings because measure was ad hoc and applied only to itself

Cumulative effect

- T-865/16, Fútbol Club Barcelona v Commission
- GC: Annuls Commission decision
- Although each tax has to be assessed on its own merits, cumulative effect of “inseparable” provisions has to be taken into account

Normal market conditions

- C-131/15 P, Club Hotel Loutraki and Others v European Commission
 - ECJ: Normal market conditions = conditions before intervention
- => Removal of disadvantage = advantage in meaning of Art 107(1)

Applicability v application of MEIP

- T-93/17, Duferco v Commission
- GC: Commission must consider applicability of MEIP even if MS does not request it
- But burden of proof for application of MEIP lies on MS
- Ex ante assessment not credible: Duferco's business plan was an internal table of one page, undated and not mentioning any hypothesis justifying the figures used
- Concomitance of public & private investment a necessary but not sufficient condition for *pari passu*. All other conditions must hold too

MEIP v state obligations

- C-579/16 P, Commission v FIH Holding
- CJEU: Sets aside judgment of GC
- State must ignore obligations that arise from past granting of state aid; may not act as MEI to reduce past state aid liability

MEIP: Appropriate benchmark

- T-747/15, EDF v Commission: Upholds Commission decision 2016/154 on EDF
- Use of CAPM
 - Likely return < 6.35% = yield on French government bonds
 - Likely return < 12% = needed return estimated by CAPM
- And extensive analysis of
 - Whether there was evidence that French state intended to act as investor
 - Whether other benefits could be obtained from investing in EDF [e.g. reduction of debt lowers costs of obtaining new finance => raises profitability]

Market economy vendor (seller)

- T-74/14, France v Commission and T-1/15, SNCM v Commission
- Three measures:
 - Negative sale
 - Payments to employees
 - Injection of capital
- FR: Acted as PI protecting its image and reducing labour unrest
- GC: France did not show that it was normal practice among private investors to grant additional redundancy payments to protect their image
- It did not quantify alleged social costs
- Holding company would not be so generous as to raise expectations of employees in its other subsidiaries

Cont.

- Payment to employees to leave is indirect SA to SNCM
- Cost of liquidation cannot include damages to dismissed employees because FR adduced no evidence that employees could successfully make that claim

Cont.

- FR also claimed that public investment was pari passu with private investment
- GC: Not pari passu in presence of side conditions
 - “Termination” & “repurchase” clauses in agreement with private investor = no-loss guarantee
- GC: Irrelevant that closure of SNCM could enable Corsica Ferries to increase its market power
 - Also no evidence of barriers to trade or absence of other competitors

Market economy operator

- T-375/15, German Wings v Commission [Zweibrücken]
- Commission: Agreement between Zweibrücken airport and German Wings contained incompatible state aid
- It failed Market Economy Operator Test
- MEOT: There is no aid to users of airport if
 - Incremental revenue $>$ incremental costs
 - Incremental revenue = charges + non-aeronautical revenue
 - Incremental costs = costs of services actually provided

Cont.

- SA = Additional aviation revenue of EUR 369,705 + additional non-aviation revenue of EUR 231,996 – additional costs of EUR 1,717,673 = Loss of EUR 1,115,971
- But GC noted that Commission took into account all costs of investment in terminal; not all were intended to accommodate or for benefit of German Wings
- No evidence that agreement “caused” investment in terminal

Pricing of infrastructure

- T-108/16, Naviera Armas v Commission
- NA appealed against Commission decision SA.36628 which concluded that exclusive use of port of Puerto de las Nieves by Fred Olsen, a competitor of NA, did not involve state aid
- NA claimed that FO benefited from state aid because it was not obliged to pay a fee corresponding to the real economic value of its right to use the port

Cont.

- GC annulled Commission decision because Commission failed to verify that port charges paid by FO covered costs incurred by port authority plus reasonable profit, taking into account market value of exclusive right
- GC also rejected Commission argument that FO paid all fees charged by port, which were similar to those of other ports [benchmarking is not enough]

Private creditor

- C-300/16 P, European Commission v Frucona Košice
- Tax authorities in SK forgave tax debt of Frucona
- CJEU: Private creditor takes into account length and complexity of liquidation and value of sold assets
 - Liquidation value of assets < market value
- Commission obliged to apply test objectively even if not claimed by MS
- Commission applied an arbitrary discount factor to calculate market value at forced sale

Concessions

- SA.44259: 14 Greek regional airports [Fraport]
- Phase I: Publication of invitation to submit expressions of interest
 - 11 expressions of interest; evaluated on objective criteria [technical and financial capacity and experience]
 - 7 invited to the 2nd phase
- Phase II: Request for proposal
 - Stage 1: evaluation of non-financial aspects; pass/fail basis
 - Stage 2: evaluation of financial aspects: upfront lump-sum payment and annual lump-sum and variable payments
- Plus: Airport charges were capped
 - And, claw-back mechanism => max return < 15%

Cont.

- Participation is open to any interested bidder
- Procedure is transparent: All bidders have equal and full info
- Sufficient time is given to bidders to prepare bids
- Award criteria are clear, objective, specified in advance and applied uniformly to all bidders
- Only credible and binding offers taken into account
- Tender is unconditional
 - with exception of requirements that expedite process ensure successful conclusion of process
- Price regulation is OK

Selectivity

The right comparator for determining selectivity

- C-76/15, Paul Vervloet
- Issue: Were deposit guarantees extended to shareholders of financial cooperatives selective?
- CJEU: Measure was selective in relation to companies with shareholders [because deposit guarantees protect depositors, not shareholders]

Whole sector or all firms?

- C-270/15 P, Belgium v Commission
 - Confirms T-538/11, Belgium v Commission
- Belgium appealed against Commission decision that found SA in free BSE tests which were compulsory
- BE: Tests not selective, applied to all bovine products [all undertakings in similar position]
- GC/CJEU: Free tests not available to all undertakings subject to compulsory tests

How much explanation of selectivity?

- C-70/16 P, Comunidad Autónoma de Galicia v Commission
- Commission found that support to rural broadcasters to convert from analogue to digital tv was selective advantage
- GC agreed
- CJEU annulled GC judgment and referred case back to GC because it was not shown whether rural broadcasters were in same situation as other undertakings
[is terrestrial technology factually and legally comparable to other technologies?]

Regional taxes for environmental protection

- C-233/16, Asociación Nacional de Grandes Empresas de Distribución v Generalitat de Catalunya
- C-234/16 & C-235/16, Asociación Nacional de Grandes Empresas de Distribución v Consejería de Economía y Hacienda del Principado de Asturias and Consejo de Gobierno del Principado de Asturias
- C-236/16 & C-237/16, Asociación Nacional de Grandes Empresas de Distribución v Diputación General de Aragón
- Regional taxes on large retailers: Exceptions:
 - No tax below a certain size [in m²] of business area
 - Certain retailers also exempted [garden centres, car dealerships, suppliers of construction materials]
- Objective: Discourage car trips [pollution & congestion]

Cont.

- Objective of tax was environmental protection
- Exemption of small retailers justified by logic of measure because they did not harm environment
- Exemption of certain retailers with large business areas also justified by logic of measure because the area size did not correspond to number of visitors

Recent high-profile tax cases [advance tax rulings]

- Decisions [amounts to be recovered]:
 - October 2015: Fiat, LU [EUR 23.1 mn]
 - October 2015: Starbucks, NL [EUR 25.7 mn]
 - January 2016: 35 MNCs, BE [EUR 900 mn]
 - [Annulled by GC in T-131/16, Belgium v Commission](#)
 - August 2016: Apple, IE [EUR 14.3 bn]
 - October 2017: Amazon, LU [EUR 282.7 mn]
 - June 2018: Engie, LU [EUR 120 mn]
 - September 2018: McDonald's, LU [No aid](#)
 - December 2018: MNCs, Gibraltar [EUR 100 mn]
 - April 2019: CFC, UK [??]

- On-going investigations:
 - Netherlands: IKEA
 - Netherlands: Nike
 - Luxembourg: Huhtamäki

... and many more

- Whole tax system: C-106/09 P, Commission v Gibraltar
- Taxes by regional authorities: C-88/03, Portugal v Commission
- Sectoral taxes: T-160/16, Groningen Seaports v Commission
- Turnover taxes: Commission decisions 2017/329 & 2018/160
- Environmental taxes: C-233/16, ANGED; C-487/06 P, British Aggregates v Commission
- Property taxes: C-374/17, Finanzamt v A-Brauerei
- Carry forward losses: C-203/16 P, Heitkamp BauHolding v Commission
- Acquisition of foreign companies: C-20/15 P, Commission v World Duty Free
- Financial leasing: C-128/16 P, Commission v Spain

Effect on trade

Effect on trade at 3 different levels

- Is aided product traded across border?
- Does aided undertaking have cross-border activities?
- Does aid induce customers/consumers/providers to move across border?

No effect on trade

1. Local medical and care centres:

- N 543/2001: Capital allowances for hospitals, IE
- SA.34576: Jean Piaget, PT
- SA.37432: Hradec Králové, CZ
- SA.37904: Durmersheim clinics, DE
- SA.38035: Bad Nenndorf clinics, DE
- SA.38920: Santa Casa da Misericórdia de Tomar, PT

Cont.

2. Local recreational facilities:

- N 258/2000: Leisure Pool Dorsten, DE
- 2004/114: Marinas, NL
- SA.32737: Parnassos ski resort, EL
- SA.33952: Climbing centres, DE
- SA.38208: Golf clubs, UK
- SA.43983: BLSV Sportcamp Nordbayern, DE

Cont.

3. Local cultural activities:

- N 630/2003: Museums Sardinia, IT
- N 458/2004: Editorial Andaluza, ES
- N 257/2007: Theatre productions in Basque country, ES
- SA.33243: Jornal da Madeira, PT
- SA.34466: Centre for Visual Arts & Research, CY
- SA.34891: Renovation of historic site of the "Przemyśl Stronghold", PL
- SA.36581: Archaeological Museum Messara Crete, EL
- SA.44942: Local media in the Basque language, ES
- SA.45512: Valencian language in the press, ES
- SA.47448: Promotion of Basque language in digital news media

Cont.

4. Local infrastructure:

- N 486/2002: Congress hall in Visby, SE
- SA.32737: Parnassos ski resort, EL
- SA.35909: Infrastructure for tourism, CZ
- SA.38441: Isles of Scilly Air links, UK
- SA.39403: Lauwersoog port, NL
- SA.42219: Refurbishment of the Schuhmacher-quay in the port of Maasholm, DE
- SA.44692: Port of Wyk on Föhr, DE

Cont.

5. Local services:

- SA.33149: Advisory services Kiel, DE
- SA.37963: Glenmore Lodge, UK

6. Closed sector:

- N 478/2004: Investment in rail infrastructure, IE
- SA.39177: Port of Baja (rail connections), HU

Closed sector

- T-68/15, HH Ferries et al v Commission [Oresund bridge]
 - Management of rail connections = closed sector
 - Companies not allowed to operate outside home countries

- T-631/15, Stena Line v European Commission
 - Funding of rail links different from funding rail/road project
 - Finding of SA for project, does not necessarily imply SA for rail links
 - No competition for or on market for rail network management
 - Construction & maintenance of parts of network through tendering does not mean sector is open to competition

Distortion of competition

Effects on competition

- T-818/14, Brussels South Charleroi Airport v Commission
- Commission not required to establish existence of causal link between the aid and actual effects of aid on traffic at Charleroi and Brussels
- Finding of selective economic advantage was sufficient for purposes of establishing risk of distortion of competition