
THE
EUROPEAN STATE AID LAW
INSTITUTE

Autumn Online Conference on EU State aid law 2020
Workshop - Day 1 – 23 November 2020

The Notion of Advantage to Undertakings

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Disclaimer

The views expressed in this presentation are the views of the speaker and do not necessarily reflect the views or policies of the European Commission.

Overview of Content

- Reminder of general criteria for State aid
- **Advantage**
 - Legislation – *ratio legis* - soft law
 - Case law
 - Case study 1
 - Case law
- Q&A
 - Case study 2
- **Undertaking – Economic activity**
- Q&A

EU System

- Supranational independent authority, to control State aid given by Member States
- *Ex ante* control
- State aid control is part of competition policy
 - State aid is about competition between Member States *and* competition between undertakings
 - Market integration objective

Article 107 TFEU: a two-step approach

- Article 107(1) TFEU: notion of State aid and general **prohibition**

“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, insofar as it affects trade between Member States, be incompatible with the internal market”.

- Articles 107(2) and 107(3), 106(2) TFEU: **derogations** (aid "compatible with the internal market")

Criteria for the notion of aid (Article 107(1) TFEU)

- Advantage ("*in any form whatsoever*" - "*favouring*")
- Granted to an "undertaking"
- Selective ("*certain*")
- Transfer of State resources and imputability to the State ("*granted by a Member State or through State resources*")



- Risk of distortion of competition
- (likely to) Affect trade between Member States

Cf. Commission Notice on the notion of aid (2016)

Criteria for the notion of aid (sources)

- Treaty
 - Article 107(1) TFEU
- Commission decisional practice
- EU case law
 - General Court (direct actions)
 - Court of Justice (appeals on points of law and preliminary rulings)
- National case law
- *Soft law* – Commission's Notice on NoA
 - Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, pp. 1–50
 - [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)&from=EN)

Advantage

Scope of notion (1)

"**favouring** *certain undertakings or the production of certain goods*"

(Article 107 (1) TFEU)

Various definitions, e.g.:

- A State measure is capable of favouring an undertaking if it produces an economic advantage that the company would not have obtained under **normal market conditions**.
- A transfer of resources to the company or **relief from charges which a company normally has to bear**, whereby the financial advantage is for free or without adequate remuneration.

Scope of notion (2)

- Not only subsidies but measures which, in various forms, mitigate the normal burdens on the budget of an undertaking
 - *30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority (ECSC)*
- Economic advantage which the beneficiary would not have obtained under normal market conditions
 - *C-39/94 SFEI, DHL, a.o. / La Poste, Chronopost*, paragraph 60
- Aid is determined by its effects
 - *C-480/98 Espagne c. Commission*, paragraph 16

Various forms (1)

- Subsidies
- Tax exemptions, tax credits, reduced tax rates, reduced taxable amount, accelerated depreciation...
- Sale of land, buildings, shares, assets:
 - open, transparent and unconditional tender procedure
 - expert report or other accurate methods (binding offer in a tender procedure more reliable than expert reports)
 - *T-268/08 and T-281/08 Land Burgenland and Austria*, paragraphs 69-73
- Guarantees are an advantage even if the guarantee is not called. It can be an aid to the borrower and aid to the lender
 - *C-275/10 Residex Capital IV*
 - *See Commission Notice (OJ C 155, 20.6.2008, p. 10)*

Various forms (2)

- Investments

- *Ex ante* assessment, based on the information available at the time of the decision
 - *C-124/10 P Commission v EDF*
 - *T-747/15 Électricité de France (EDF) v Commission*
- Consecutive measures may have to be assessed together
 - *Joined Cases C-399/10 P and C-401/10 P Bouygues SA et Bouygues Télécom*
- *Pari passu* investments and other methods of assessment
 - *T-296/97 Alitalia v Commission*

- Loans

- Reference rate: proxy for market rate and measure of grant equivalent, particularly for block exemptions and scheme
- Based on ratings and collateralisation
 - *See Commission communication (OJ C 14, 19.1.2008, p. 6)*
- *Pari passu*

Market economy operator test

- Market Economy Operator Principle (MEOP)
 - no advantage if State behaves like a "normal" player on market
- Reasoning
 - State has right to act on market like any other market player (principle of neutrality – Art. 345 TFEU)
 - if State behaved like a private player, alleged beneficiary did not obtain anything outside "normal market conditions"
- Key question
 - what would commercial operator do?

Market economy operator test (2)

- *"In order to determine whether such action is in the nature of State aid, it is necessary to assess whether, in similar circumstances, a private investor operating in normal conditions of a market economy ("private investor") (...) could have been prompted to make the capital contribution in question"*
 - *T-228/99 and T-233/99 WLB a.o. v Commission, paragraph 245*
- Test: further elaboration in Notice on the notion of State aid (2016)

Market economy operator test (3)

- Only for commercial activities of the State, not for public function
 - *C-278/92 to C-280/92 Spain v Commission (“Hytasa”)*, paragraph 22
 - But see *C-124/10 P Commission v EDF a.o*
- Public actor in different economic situations (MEOP test)
 - Investor
 - Creditor
 - Vendor
 - Buyer

Market economy operator test (4)

- Not whether the transaction at issue is reasonable for the State, but whether it is at normal market conditions
 - *T-228/99 and T-233/99 WLB a.o. v Commission*, paragraph 315
- Hence, not relevant:
 - revenues related to State prerogatives (tax revenues, savings on unemployment benefits)
 - positive externalities related to public policy remit (regional development, industrial / employment policy)
 - philanthropic, social considerations

Market economy operator test (5)

- Assessment methodologies
 - Direct
 - Competitive Tender
 - *Pari passu* situation
 - Indirect
 - Benchmarking
 - Other assessment methodologies
 - IRR (Internal Rate of Return)
 - ROE (Return on Equity)
 - ROCE (Return on Capital Employed)
 - NPV (Net Present Value)
 - CAPM (Capital Asset Pricing Model)
 - Expert valuation, ...
- See Notion of Aid Communication (2016)

C-124/10 P, EDF v Commission

- Recapitalisation of EDF by waiver of tax debts
- GC: private operator test is applicable. The form does not matter: the nature, purpose and objective pursued by the measures in question are decisive.
- CJEU: Confirmation (appeal dismissed)
 - The sole basis of the fiscal nature of the means employed does not rule out the applicability of the private investor test (paras 100 and 108).
 - Commission must verify the conditions for the application of the criterion.
 - According to available evidence and foreseeable developments at the time the decision to make the investment was taken (para. 105).

Credit granted by public authorities

Private creditor test

- C-256/97, DM Transport
- Reference for a preliminary ruling by the Brussels Commercial Court
- Payment facilities from social security administration to DMT
- Criterion: private creditor
 - the public authority acts like a private creditor seeking payment of sums owed to it by a debtor in financial difficulties
 - NB: the Belgian administration had discretionary powers to grant payment facilities

Case study 1 – private creditor principle: *Frucona Košice*

Frucona Košice: background

- Case involving the application of the private creditor principle (debt write-off by a tax authority)
- Frucona Košice: Slovak company producing spirits



Frucona Košice – timing

- Timing of the case:
 - 2004 (March) – Frucona Košice, unable to pay excise duties, files an application in a local court proposing to its creditors (incl. the tax authority) to pay 35% of each claim. Creditors accept
 - 2004 (October) – SK notifies measure (as R&R)
 - 2006 – Commission takes decision. Incompatible aid
 - 2010 – Decision upheld by the GC (after action by Frucona)
 - 2013 – Court of Justice sets aside ruling GC
 - 2014 – New Commission Decision. Incompatible aid
 - 2016 – GC annuls Commission Decision
 - 2017 – CJEU dismisses Commission’s appeal

Court judgments

- CJEU (2013) set aside GC's judgment (2010) which upheld a Commission decision finding that the Slovakian tax office had granted incompatible State aid to Frucona
 - Liquidation/bankruptcy procedure v tax execution procedure/write off of debt
 - Duration of the bankruptcy procedure: a factor that could have a significant influence - GC failed to establish whether the Commission had taken into account the duration of bankruptcy procedure in its assessment
- GC (2016) annuls 2013 Commission decision since the Commission failed:
 - to obtain information on the anticipated duration of a tax execution procedure
 - to take into account that it was likely to be interrupted by the initiation of the bankruptcy procedure
 - to obtain information concerning the costs that such a procedure might generate
- CJEU (2017) dismisses Commission's appeal

C-300/16 P *Frucona Košice* - Main lessons (1)

- When a private creditor test should apply, the Commission must ask the Member State concerned to provide it with all the relevant information enabling it to apply the test
 - irrespective of any request to that effect
 - the beneficiary may invoke the test
- All options of a private creditor should be examined, irrespective of the subjective mind, intentions and alternative courses of action that the Member State considered
- The Commission must have regard to all information liable to have a significant influence on the decision-making process of a "*normally prudent and diligent private creditor who is in a situation as close as possible to that of the public creditor and is seeking to recover sums due to it by a debtor experiencing difficulty in making the payments*" (para 60)

C-300/16 P *Frucona Košice* – Main lessons (2)

- The only relevant evidence is the information available and developments which were foreseeable at the time when the State measure was taken
 - "available": what is relevant to conduct the assessment and what could have been obtained, upon request by the Commission, from the Member State
- The Court must not substitute its own economic assessment for that of the Commission; but, the Court must verify that the evidence relied on is factually accurate, reliable and consistent and contains all the relevant information to be taken into account in order to assess a complex situation
- The Commission is not obliged to commission outside consultants

See also FIH Holding; Charleroi; EDF cases

C-300/16 P, Frucona Košice (see case study)

Obligations of the Commission

- To examine, even at the sole request of the beneficiary, all the elements that a Member State should have taken into consideration in order to assess, *ex ante*, the behaviour of a hypothetical private creditor in a similar situation
- Comparison not only with a hypothetical private creditor who would have all the advantages of the public authorities (comp. *EdF*) but also in a way that disregards any subjective element, even an express admission by the public authority to have intervened outside normal market conditions
- The Commission must free itself from all subjective considerations and seek, in particular at the request of the beneficiary, to surround itself with all objectively relevant elements for the qualification of the measure (in particular by obtaining them from the State) and to make an overall assessment thereof.

T-525/08, Poste Italiane, 13 Sep 2013

- Context

- Obligation for a bank to deposit funds in a Treasury account
- Complaint, interest rate higher than that observed on the market. Unlawful and incompatible State aid

- Annulment

- Need to take into account all relevant elements: remuneration in return for the impossibility to use the funds ("obligation to use")
- Constraints specific to the public operator
- Need for a comprehensive approach

Privatisation

XXXIII Competition Report, 1993

- Sale by stock exchange transaction: presumption of absence of aid (no notification)
- Other sales:
 - call for tenders to the highest bidder
 - time and information to bidders for an asset valuation
- Notification (presumption of aid) :
 - only one participant / selected participants
 - cancellation of debts prior to the transaction
 - conversion of debt into equity or capital increase
 - unusual conditions attached to the sale
 - then : notification and evaluation by an independent expert

Privatisation (2)

Commission working document (10 February 2012)

- Reminder of the principles
 - Absence of aid if compliance by seller of market economy principles
 - Contexts where conditions may be imposed
 - Avoid purely speculative offers
 - Exclusion of purchasers who would not obtain the authorisation of the competent authorities
 - Ensuring compliance with pre-existing legal obligations
 - Limit
 - Conditions that reduce the price and which would not be required of a private seller
 - e.g.: maintaining employment beyond legal requirements
 - Alternatives to a call for tenders, the State must demonstrate:
 - Profit maximisation
 - No advantage for the buyer
 - Absence of revenue forgone by the State

Privatisation (3)

Automobile Craiova-ex Daewoo (Commission, 27 February 2008, C 46/07)

- takeover of a previously loss-making activity
- minimum production guarantees that a certain level of economic activity will be maintained by the new owner
- other conditions (debt cancellation not offered to other interested parties)
- effect of relieving to a certain extent the competitive pressure on the acquired company.

Continuity of the activities or liquidation ? (1)

Buczek Automotive v. Commission, T-1/08, 17 May 2011

- Confirmed by C-405/11 P, 21 March 2013
- Advantage
 - No application for bankruptcy and undue continuation of activity
 - Not in line with normal market conditions
 - Placed in the same situation, would a private creditor have arbitrated in favour of bankruptcy proceedings or would he have continued the debt collection procedure?
 - Complex economic assessment - broad discretion but verification of methodology and validity of reasoning (*Scott*)
 - Significant deterioration in the financial situation: debt restructuring proposal

Continuity of the activities or liquidation ? (2)

Choice of creditor

- Proposed amount and amount that could be obtained by continuing the liquidation
- In order to avoid being classified as aid, the Member State must not be obliged to seek to recover public debts or to use all available methods of recovery, but obliged to behave like a private creditor under normal market conditions

Benefits of bankruptcy proceedings

- Affirmation by the Commission: potential repayment of debts by deferral would not have been greater than the secured repayment resulting from a possible liquidation of the company.

- Annulment

Continuity of the activities or liquidation ? (3)

- GC

- there is no material basis for this assertion:

- no comparative analysis of the foreseeable proceeds of the legal procedure for the recovery of public debts and the bankruptcy procedure, nor a comparison of the duration of the two procedures
- no evidence that a hypothetical private creditor would have opted for bankruptcy proceedings
 - securities owned by Polish public bodies
 - chances of recovery
 - possible benefit resulting from bankruptcy proceedings
 - other factors that may influence the choices of a private creditor

- CJEU confirmed

- the burden of proof that the conditions of the private creditor test are met lies with the Commission (*EDF*)

Sale of public land and real estate

- See 1997 Communication (OJ (1997) C 209/3) - repealed
- See Communication on State Guarantees
- See para 103 Notion of Aid Notice

- Call for tenders: sufficient publicity and unconditional offer
- Sale without tender procedure
 - Independent expertise
 - Market price to look for (minimum purchase price)
 - 5% tolerance

T-366/00, *Scott* (idem: T-369/00, *Loiret*)

- Transfer by a SEM (*société d'économie mixte*) of a plot of land to Scott at an allegedly preferential price
- Value of the aid = difference between the price paid and the price at the time under normal market conditions for an equivalent plot of land from a private seller
- **GC (T-366/00, 2007)**
 - decision annulled (preferential land price)
 - no direct and independent estimate of the market value of the disputed land in 1987
 - based on the cost of the land paid by the authorities in 1975, who ceded the land to the SEM
 - decision upheld (preferential rate of water treatment levy)
- **CJEU (appeal by the Commission, C-290/07P)**
 - judgment annulled
 - GC exceeded its jurisdictional competence in so far as it did not show that the Commission had committed a manifest error of assessment in determining the market value of the land (paragraphs 84-85)
 - GC erred in law by relying on conjecture rather than evidence to show that the Commission was wrong (paragraph 98)
- **T-244/08, *Konsum Nord v. Commission***
 - Annulment of the decision for not taking into account all the particular circumstances of the case in order to determine the cost of acquisition of the land
- **C-39/14, *BVVG*, 16 July 2015**
 - prohibition of sale to the highest bidder

Provision of services

- The State **provides services** (through resources intended for the public service) to a company, often a subsidiary, active in the competitive market
- **Available market price:** from the point of view of the purchaser of services
 - Sécuropost (1999, L 274/37): incl. rent, maintenance and repairs
 - UFEX (2000, T-613/97): market price for an operator without a reserved sector
 - SNCM (2002, L 50/66): market rent
- **No equivalent market price:** service provider (logistical and commercial assistance from La Poste to SFMI - Chronopost)
 - 1996 - SFEI (UFEX) C-39/94
 - aid if "remuneration is lower than that which would have been charged under normal market conditions".
 - 2001 - UFEX I T-613/97 (annulled by UFEX II)
 - 2003 - UFEX II, C-83/01P, C-93/01P & C-94/01P
 - § 40 : Coverage of variable costs incurred for the service
 - Adequate contribution to fixed costs
 - Adequate return on invested capital
 - No arbitrary allocation
 - 2006 - UFEX III T-613/97 RV
 - annulment of the decision applying the test of § 40 (annulled by UFEX IV)
 - 2008 - UFEX IV C-341/06 P and C-342/06 P (annuls UFEX III)
 - 2005 - La Banque Postale decision (21.12.05, N 531/2005 - T-98/06)

No aid qualification: C-280/00, Altmark

No aid if four (cumulative) conditions are met:

1. Undertaking entrusted by the State with the discharge of clearly defined public service obligations
2. Calculation of the compensation previously defined in an objective and transparent manner
3. No overcompensation, but a reasonable profit is taken into account
4. Compensation determined on the basis of a cost analysis taking as a reference "a medium-sized, well-managed and adequately equipped company"

N.B. condition 4 only if no condition 1

Case study 2 - equity injection: Ciudad le la Luz (2012)

Illustration: T-319/12 and T-321/12 - Ciudad de la Luz

Public funding to set up a film studio complex in Valencia (Spain)



T-319/12 and T-321/12 - *Ciudad de la Luz*

- Timing of the case:
 - 1999/2000 – feasibility studies and first business plan
 - 2000 – project launch, initial funding
 - 2002 – construction of the film studio complex with public funding
 - 2004 – new business plan, additional funding
 - 2005 – start of filming
 - 2007 – complaints from large film studio competitors
 - 2008 – formal investigation opened by EC - C8/2008
 - 2012 – negative decision Commission
 - 2014 – judgment Court (GC) in cases T-319/12 and T-321/12

The market context

Market for EU based big film studios capable to attract international productions

- Intense competition
 - 4-5 big studios in EU (internal docs)
- Excess capacity (also outside EU)
- Mobility of production



Customers - film production companies

- Fox, Universal, Time Warner, Sony (Columbia Tristar), Paramount, Disney

Ciudad le la Luz - financials

- Total funding amount: EUR 274 million, no private involvement (except for very beginning)
 - Assessment of expected return on investment (profitability)
 - Based on business plans (at face value)
 - Measure used: IRR (Internal Rate of Return): measures return over the lifetime of the investment
 - Expected IRR of project 8,84% (for 2000 business plan) and 5,74% (at face value, 2004)
- Enough for a private investor??
- Comparison required with the cost of capital
 - Opportunity cost of capital = the return that could be achieved by an investor on alternative investments with equivalent risk
- If $IRR > \text{cost of capital}$, a private investor would indeed go for the project

Opportunity cost of capital

- In this case: project fully equity financed
- Cost of equity estimated by the Commission on the basis of standard CAPM model (Capital Asset Pricing Model), i.e. as the sum of the “risk free rate” plus a premium reflecting the riskiness of the investment (proxied by the market risk premium x the “beta factor” for the investment)

$$K_e = R_f + \beta(R_m - R_f)$$

Opportunity cost of capital (cont'd)

- Quite some divergence in CAPM estimates ...

	Commission's estimate	Spain's estimate
Risk free rate (10 year gov. bonds in Spain, 2004)	4.1%	4.1%
Market risk premium	6.8%	4%
Beta	1.5-1.68 (based on investment reports on two direct competitors)	0.38 (based on data extractions financial database)
Cost of equity	≈ 14%	≈ 5%

Source: Commission Decision, cost of capital analysis for 2004 business plan. Commission estimate of cost of capital for 2000: 16,66%

Sensitivity analysis

- Commission checked cost of capital estimate with historic accounting returns (ROCE) for different peer groups in the period 2000-2007
- Historic accounting returns \neq forward looking cost of capital, but still a useful exercise
- Historic accounting returns found to be in the range of [10.1 - 12.26]%

General Court judgment

- Spain challenged the Commission's decision
- General Court rendered a judgment on 3 July 2014 upholding the Commission's decision
- On methodology:
 - average return of the sector: only one indication among many. One should go deeper into the context of the case
 - "CAPM approach" in principle valid: one has to compare investment return with opportunity cost of capital
 - Having consultant reports supporting the business case is not enough! A private investor would still critically review these reports
 - Sensitivity tests important
 - Important to check comparability of the benchmarks
 - Margin of appreciation (for the Spanish authorities): yes, but the margin is greater on the "return side" of the business plan than it is on the "cost of capital" side (as it is possible to make comparisons with alternative investments for this purpose)

General Court judgment (2)

- On the choice of parameters:
 - Commission was correct in its reading of the various sources (e.g. Fernandez, Damodaran) regarding the average market risk premium, in particular as it focused on the right time periods and the country in question (Spain)
 - Commission was correct in basing its estimate of beta on investment reports on two close competitors (Babelsberg, Carrere)
 - Spain's estimate of beta (0,38) cannot be correct. It signals a risk profile that is even lower than the market average
- On the business plan:
 - Commission took business plan of Ciudad de la Luz at face value (while questioning its assumptions) → conservative approach
 - Commission was wrong not to take into account the possible ancillary revenues from the hotel and services activity of Ciudad de la Luz . However, these extra profits would not have made a difference (cf. cost of capital)
 - Commission took a too rigid view of the EDF judgment in relation to one specific consultant report study that was prepared *ex post*.

Advantage

Recent examples (*)

* Slides of this section on recent examples adjusted, with his amicable authorisation, from a presentation of Jan Blockx (Researcher and Visiting Professor, University of Antwerp) at the ERA Annual Conference on European State Aid Law, 13 November 2020

Advantage may be indirect

C-212/19 Cie des pêches de Saint-Malo

- Reduction of social security contributions of fishermen (following Erika disaster)
- 2004 Commission's negative decision: recovery (C91/2001)
 - Saint-Malo did not challenge this decision
- During recovery proceedings
 - employers' contributions recovered
 - but, Saint-Malo argued that employees' contributions should not be recovered
 - national litigation and preliminary ruling
- CJEU
 - reference admissible
 - Saint-Malo could not be sure that it could have challenged assessment of employees contributions in the original decision
 - the Commission had only discussed direct advantages of the measures
 - decision declared invalid as far as employees' contributions are concerned (decision could not cover possible indirect advantages such as employees contributions)

MEOP not applicable

T-257/18 Iberpotash v Commission

- Permits for mining subject to a guarantee for environmental clean-up which was too low & State payment for covering of unused mine
- EU directive left MS to decide on calculation of guarantee
 - Commission could rely on local court's ruling that guarantee was too low
- Covering reduced risk of future environmental clean-up constituted an advantage, even if Iberpotash was under no obligation to cover mine
- Action dismissed, no appeal

MEOP not applicable – in part

T-607/17, T-716/17 and T-8/18 Volotea, Germanwings & easyJet v Commission

- MEIP not applicable to payments for opening of new routes
 - Italy had not argued in administrative procedure
 - Airports at issue were not publicly owned
- GC accepted (contrary to Commission) that Sardinian region could have wanted to acquire marketing services to promote tourism, but:
 - No public tender procedures were followed to select airlines
 - All airlines that applied seemed to have been accepted
 - Airlines only marketed their own flights
 - Airports only concluded contracts when they got State funding for this
- Action dismissed, Volotea (C-331/20 P) and easyJet (C-343/10 P) have appealed

MEOP not applicable – but *C-332/18 P Aluminium of Greece*

- National court order (interim relief) to prolong contract for preferential electricity tariffs granted by public power company (which the Commission qualified as State aid in 1992)
- 2010 Commission's decision: State aid and multiple actions
- MEOP could not be applied to judicial decisions
- Nevertheless argument by beneficiary that there were economic justifications for the preferential tariffs considered
 - GC: only economic justifications advanced by MS needed to be taken into account
 - CJEU: Commission must conduct diligent and impartial investigation, including arguments put forward by beneficiary (C-290/07 Commission v Scott)
 - But no annulment because economic justifications were submitted out of time
 - Other evidence showed no benefits for the public power company justifying the reduced tariff
- Appeal dismissed

MEOP – selling shareholder & creditor

C-148/19 P Duferco

- Last of several Duferco cases
- 3 aid measures in Commission decision 2016:
 - Sale of participation of Walloon financial vehicle in 2 subsidiaries of Duferco to the Duferco holding
 - Undervalued according to Commission
 - €100 m loan granted by Wallonia to Duferco
 - Not at market conditions according to Commission
- GC agreed
- Duferco's appeal on burden of proof for MEIP
- CJEU: burden of proof is on Commission but applicant has to show manifest error to contest this (margin of appreciation of Commission)
- Appeal dismissed

MEOP – shareholder guarantee

C-244/18 P Larko Mining

- Measures granted by Greece to Larko, of which it was a shareholder
- One measure was a guarantee for a loan
- Commission: Larko was a firm in difficulty at the time and Greece should have been aware of this
- GC confirmed
- CJEU: Commission and GC could not simply assume that Greece was aware of financial difficulties
 - Commission needs to conduct complete and reliable investigations into application of the MEIP
 - Member State merely bears burden to establish that MEIP is applicable; not whether it is fulfilled
- Judgment annulled and case referred back to GC

MEOP – non-shareholder guarantee

- *T-732/16 Valencia Club de Fútbol*
 - 2016 Commission decision: Valencia in financial difficulties and therefore a guarantee could not be provided at market conditions
 - However, Valencia had referred to similar loans and credits it obtained on the market during this period
 - GC: Commission bears the burden of establishing whether MEOP is fulfilled (contra: see *Larko*) - It cannot merely rely on a presumption that a firm in financial difficulties cannot obtain a guarantee at market conditions
 - Decision annulled and Commission has appealed on this point
- *T-901/16 Elche Club de Fútbol*
 - GC: Commission should also have considered situation of foundation that obtained the loan and the guarantee, and certain securities, including a pledge of the shares acquired
 - Decision annulled decision –no appeal

See also

T-679/16, Athletic Club

T-865/16 Fútbol Club Barcelona

T-766/16 Hércules Club de Fútbol

T-791/16 Real Madrid Club de Fútbol

Implicit State guarantee

T-479/11 and T-157/12 RENV IFP

- 2011 Commission decision: transformation of IFP into a public law entity constituted State aid
 - Public goods benefit from privilege from seizure
 - Equivalent to a State guarantee
 - similar position re La Poste in 2014 (CJEU), followed by the GC in relation to IFP in 2016
- CJEU
 - however, such a State guarantee can only be presumed to constitute an advantage for credit obtained with financial institutions
 - GC ruled that Commission had not established that IFP also benefited from this in relations with suppliers and customers
 - Partial annulment of decision

Undertaking

Definition

"...every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed." (C-41/90, Höfner)

- Test: is the activity "economic" or not?

Economic activity: offering goods and services in the market (C-180/98 to C-184/98, *Pavlov*)

Not an economic activity: regulatory tasks, supervisory tasks, activities based on solidarity, basic functions of the State (police, customs, air safety, treatment of prisoners ...)

Definition (2)

- Focus on nature of activity, not set-up of entity
 - Public undertakings, part of administration, not-for-profit organisation, charitable organisation
- Whether market exists depends on organisation by authority
 - Differences between Member States
 - Developments over time

Examples

- Exercise of public powers: non-economic
 - Activity essential functions of State or closely connected to those activities
 - Examples: army or police, air navigation safety and control, etc.
- Social security schemes
 - Criteria in earlier case law and Notice on the notion of aid (NoA)
 - Schemes based on solidarity vs. economic schemes
 - » Affiliation compulsory? Scheme is non-profit? Benefits independent of contributions? Etc.
- Debated in Slovak health insurer case
 - Commission: no aid (activity of compulsory health insurance, as organised and carried out in Slovakia, not an economic activity)
 - GC: annulment of decision (T-216/15)
 - CJEU: annulment of GC (C-262/18 P): should general economic activity principles be applied for social security schemes?

Dôvera zdravotná poisťovňa, C-262/18 P (11 June 2020)

- Concept of economic activity - compulsory health insurance schemes
- State measures in favour of a public, profit-making Slovak health insurance institution: capital increase, debt repayment, subsidies and risk equalisation scheme
- Commission 2014: no State aid (Dôvera complaint)
- GC 2018: annulment of the decision
- CJEU 2020: annulment of the judgment
 - "an overall assessment of the scheme at issue"
 - "the pursuit, by the scheme, of a social objective, its application of the principle of solidarity, whether the activity carried out is non-profit-making, and State supervision of that activity" (points 28-30)

Dôvera C-262/18 P (2)

- Distinction among social security schemes
 - principle of solidarity (compulsory membership, fixed contributions, identical compulsory benefits, equalisation of costs and risks)
 - the principle of capitalisation (optional nature of membership, variable contributions and benefits, extremely limited solidarity elements)
- The principle of capitalisation, and not the principle of solidarity, can be economic in nature
- Economic activity (profit-seeking and a certain degree of competition with regard to the quality and scope of services offered and in the area of procurement)
- Error of law by the GC in inferring an economic activity
 - the legal status of the bodies (public limited profit-making companies under private law), whereas the classification as an economic activity "depends, [...] not on the legal status of the entity concerned but on all of the elements characterising its activity"
 - the ability to seek to make a profit is strictly regulated by law and cannot be considered, [...], to be a factor liable to affect the social and solidarity character that arises from the actual nature of the activities concerned. " (paragraphs 39-40).
- Error in the assessment of the level of competition
 - the possibility of offering complementary services free of charge, encouraging operators to operate according to sound management principles, and the freedom of policyholders to choose their insurer and to change once a year
 - these elements could not call into question the social and solidarity-based nature of the scheme (points 41-47)
- Error in inferring from the case-law "that a body involved in the management of a scheme which has a social objective and applies the principle of solidarity under State supervision could be classified as an undertaking on the ground, [...], that other bodies operating in the context of the same scheme are actually seeking to make a profit" (paragraph 50) - Annulment and no referral back to the CG

Dôvera C-262/18 P (3)

- Dismissal of the action against the Commission's decision.
 - the Slovak public insurance body could not be considered an undertaking (points 59-61) :
 - the Slovak insurance body has all the characteristics of schemes applying the principle of solidarity, in accordance with case law
 - the scheme is subject to State supervision
 - the presence of competitive elements is not likely to change the nature of the scheme
 - the additional elements of the scheme (possibility to seek, use and distribute profits, requirement of the legal status of a profit-making public limited company under private law and freedom of choice for the insured) could not alter the conclusion that the scheme was not of an economic nature (paragraph 62).
- Disagreement between the GC and the CJEU (and the Commission) :
 - the assessment of the intensity of the degree of competition between the bodies in question.
 - GC: intense competition on the quality and supply of services
 - CJEU: that competition has, in relation to the social, solidarity-based and regulatory elements of the scheme at issue a secondary aspect, not capable of altering the nature of that scheme
 - the possibility for insurance bodies to compete with each other may not relate either to the amount of contributions or to the statutory compulsory benefits
 - those bodies may differentiate only, residually and incidentally in relation to the latter benefits, on the extent and quality of the provision (paragraph 61).
- State supervision of the scheme also seems to have played a key role:
 - “In addition and above all, it is apparent from recital 94 of the decision at issue that the ability of insurance bodies to seek, use and distribute profits is strictly framed by law, the purpose of those legal obligations being to preserve the viability and continuity of compulsory health insurance. In the same vein, the requirement that insurance bodies operating in the Slovak compulsory health insurance scheme must have the legal status of a for-profit joint stock company governed by private law and the opening up of that scheme to insurance bodies controlled by private entities is intended, according to the statements in recital 13 of that decision, to strengthen efficiency in the use of available resources and the quality of healthcare provision. It thus appears that those features, as well as the freedom of Slovak residents to choose their health insurer and to switch insurer once a year, were introduced in the interests of the proper functioning of that scheme and cannot, therefore, call into question the non-economic nature of the scheme”(paragraph 62).

Examples

- Education
 - Payments by parents/pupils only cover fraction of costs or all costs?
 - Competing private organisations?
- Healthcare
 - Public hospitals as integral part of solidarity-based national health system; directly funded from social security contributions / State; free of charge for affiliates
 - Hospitals providing services against remuneration (by patients or their insurance); certain degree of competition between hospitals

Culture and heritage conservation

- Vast array of purposes and activities – can fall both inside or outside of State aid control
- Financing:
 - Free of charge or entrance fee only covers fraction of the costs: non-economic
- VS**

 - Predominantly financed by fees or other commercial means: economic
- Effect on trade section: recognition of the special features of culture and the fact that most activities do not have an effect on trade between Member States
 - *"only funding granted to large and renowned cultural institutions and events in a Member State which are widely promoted outside their home region has the potential to affect trade between Member States"* (NoA Notice, para. 197)

Infrastructure

- Until **2000**: Construction and operation of infrastructure (e.g. airport) is general measure of public policy
- Judgement in *Aéroports de Paris* (**2000**): operation of an airport = economic activity
 - Financing granted before **2000**: not subject to State aid rules (legitimate expectations)
- *Leipzig/Halle* (**2011**): All public funding of infrastructure (including its construction) that is meant to be commercially exploited subject to State aid rules
- Created need for specific clarifications; requested by Member States and many stakeholders
 - Very high practical relevance
 - Legal uncertainty in the wake of *Leipzig/Halle*
 - Special chapter in the Notice on the notion of aid (NoA)

Infrastructure – economic activity

- Economic exploitation = economic activity (Leipzig/Halle)
- No economic exploitation = no economic activity
 - Exercise of public powers (public remit = police, military, customs,...)
 - Not used for offering goods/services on a market (roads for free public use)
- Mixed use:
 - General principle: separation of costs and revenues
 - Concept of **ancillarity** (up to 20% of overall capacity p.a.)
 - “Customary amenities” (restaurants/shops/...): normally no effect on trade between Member States

Infrastructure competition distortion & effect on trade

- Local cases: Commission's "no effect on trade" decision-making practice
- Conditions excluding any effect on trade/distortion of competition as regards construction of infrastructure (cumulative criteria):
 - Infrastructures do not face direct competition from other infrastructures (likely for comprehensive network infrastructures that are natural monopolies)
 - Private financing insignificant in sector concerned on Member State level
 - Not dedicated infrastructure



State aid control typically does not apply to the construction of infrastructures in the following sectors: railway, roads/bridges/tunnels, canals/inland waterways, water supply and wastewater Networks

Infrastructure – operators and users

- Three levels for infrastructures: owner – operator – users
- If operators or users of an infrastructure built with public financing pay a market price, they do not receive any 'indirect' State aid (no advantage passed on to them).
- In particular:
 - Competitive tender excludes aid to the operator
 - Incremental cost coverage (if no other methodologies are possible) excludes aid to users (approach from Aviation Guidelines)
- Approach can be debated: what if there had been no infrastructure in the first place? (counterfactual reasoning)

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Thank you for your attention