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Insolvency, restructuring and competition law

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One of the singularities of the law on companies in difficulty is its determination not only to regulate, but also to combat economic realities.[2] This also explains the instability of this law, which is constantly seeking to improve its effectiveness. What is most interesting is its capacity to interact with other legal disciplines. In this sense, while the link with the law of securities, the law of obligations or company law may seem obvious, the interaction between insolvency law and competition law cannot be taken for granted.

However, competition law (in particular State aid and merger control) can constitute a tiny blip in the well-oiled machine of insolvency and restructuring. Indeed, there are risks of infringements of competition law which would be opposed on the one hand to companies and on the other hand to Member States and which could slow down the smooth running of a collective procedure.

At the outset, it is necessary to recall the EU legal framework applicable in this case. The competition rules in question are contained in the Treaty on the Functioning of the European Union ("**TFEU**"), its EU case-law and the decisional practice of the European Commission (the "**Commission**"), notably in State aid law and EU merger control, while Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (cross-border insolvency proceedings) and Directive 2019/1023 of 20 June 2019 on restructuring and insolvency and its transposition provide for a minimum harmonisation of insolvency law across national legal orders.

Directive 2019/1023 was implemented into Belgian law by the law of 7 June 2023[3], which is the main subject-matter of this present publication. That law entered into force on 1st September 2023 and is consolidated into the new "Book XX on the insolvency of companies" in the Belgian Code of Economic Law.

Under EU competition law, both rules addressed to Member States (State aid rules), but having a direct impact on companies, called in EU jargon "undertakings" (section I), and rules addressed to undertakings (section II) are relevant for insolvency issues.

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2 V. C. SAINT-ALARY-HOUIN, *De la faillite au droit des entreprises en difficulté, Regards sur les évolutions du dernier quart de siècle,* in Regards critiques sur quelques évolutions récentes du droit, Travaux de l'IFR, Mutations des normes juridiques, 2005, PU Toulouse I, p. 299.

3 Loi transposant la directive (UE) 2019/1023 du Parlement européen et du Conseil du 20 juin 2019 relative aux cadres de restructuration préventive, à la remise de dettes et aux déchéances, et aux mesures à prendre pour augmenter l'efficacité des procédures en matière de restructuration, d'insolvabilité et de remise de dettes, et modifiant la directive (UE) 2017/1132 et portant des dispositions diverses en matière d'insolvabilité, Moniteur belge – Belgisch Staatsblad, 7 July 2023, pp. 59113 – 59159.

I. The rules applicable to Member States: State aid rules ("rescue and restructuring aid")

Under EU competition law, State aid is not prohibited in absolute terms. Indeed, if State aid is prohibited in principle (because, to simplify, it interferes with normal market conditions), it can be exempted from this prohibition ("*declared compatible with the internal market*") by the European Commission (the "*Commission*") (following prior notification by the Member States and compliance with the standstill obligation) or, as a result of the application of the General Block Exemption Regulation ("GBER"[4]), which nowadays covers 95% of the cases, but less than 50% of the State aid expenditure.

Since the purpose of this article is not to discuss the notion of State aid, it can be referred to the entry we wrote on the relevant criteria of this notion for the *Dictionnaire de droit de la concurrence* (www.concurrences.com) – see the annex below.

Undertaking in difficulty

EU State law defines the "undertaking in difficulty" as "*an undertaking in respect of which at least one of the following circumstances occurs:*

(a) In the case of a limited liability company (other than an SME that has been in existence for less than 3 years or, for the purposes of eligibility for risk finance aid, an SME that fulfils the condition in Article 21(3), point (b), and qualifies for risk finance investments following due diligence by the selected financial intermediary), where more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital. For the purposes of this provision, 'limited liability company' refers in particular to the types of company mentioned in Annex I to Directive 2013/34/EU of the European Parliament and of the Council (7) and 'share capital' includes, where relevant, any share premium.

(b) In the case of a company where at least some of its members have unlimited liability for the debt of the company (other than an SME that has been in existence for less than 3 years or, for the purposes of eligibility for risk finance aid, an SME that fulfils the condition in Article 21(3), point (b), and qualifies for risk finance investments following due diligence by the selected financial intermediary), where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses. For the purposes of this provision, 'a company where at least some of its members have unlimited liability for the debt of the company' refers in particular to the types of company mentioned in Annex II to Directive 2013/34/EU.

(c) Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.

(d) Where the undertaking has received rescue aid and has not yet reimbursed the loan or terminated the guarantee, or has received restructuring aid and is still subject to a restructuring plan.

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4 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, pp. 1–78.

(e) In the case of an undertaking that is not an SME, where, for the past two years:

(1) the undertaking's book debt to equity ratio has been greater than 7,5 and

(2) the undertaking's EBITDA interest coverage ratio has been below 1,0."[5]

Compatibility assessment of aid to undertakings in difficulty

State aid granted to undertakings in difficulty is regarded as the most distortive aid. Indeed, the basic premise is that such aid confers undue advantages on the most fragile (and sometimes poorly managed) companies and prevent market forces from adapting to future challenges or at least delays this process. Conversely, EU competition principles consider that the exit of less efficient companies from the market allows their more efficient competitors to grow and returns assets to the market, where they can be used for more productive purposes. By interfering with this natural process, rescue and restructuring aid may lead to a significant slowdown in economic growth in the sectors concerned. This is why EU State aid law shows a particular reservation with respect to aid to undertakings in difficulty. Such aid is therefore strictly controlled. The Member States, their judges in particular (regarded as part of the "State" for EU law purposes) and the beneficiaries should therefore be particularly cautious vis-à-vis these forms of aid.

The imperatives of general economic interest that drive the law of companies in difficulty have led it to impose its rules and solutions on other branches of law. This is the case with regard to private law but also public law. Nevertheless, the objectives of insolvency law and State aid law are not as heterogeneous as they seem. Competition policy has a social dimension that is too often ignored.[6] More broadly, EU law does not conceive competition as an objective in itself but as a means to a highly competitive social market economy, which strives for full employment and social progress, and a high level of protection and improvement of the quality of the environment, in the words of Article 3 TFEU. Indeed, public support to companies in difficulty is authorised when it is "*indispensable to achieve a well-defined objective of common interest*", i.e. "*when the failure of the beneficiary would be likely to lead to serious social difficulties or a significant market failure"*.[7]

To clarify the principles of its compatibility assessment, the Commission has set out the conditions under which aid to firms in difficulty may be declared compatible with the internal market. This doctrine has taken the form of of "guidelines" which bind the Commission's discretionary power vis-à-vis the Member States (who can always try to argue directly under the Treaty rules should they have good reasons to amend this policy). The current guidelines applicable to the rescue and restructuring aid ("R&R aid") are those enacted in 2014.[8] They establish the general regime for State aid to firms in difficulty, which must be complied with by aid schemes established by Member States or individual aid granted by them or by any subordinate public entity. It applies, in principle, to all sectors of activity, without prejudice

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5 Article 2(18) of the GBER, cited above. This definition codifies and supplements the pre-existing definition of the 2008 and then 2014 "Rescue and Restructuring Guidelines" (see Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.7.2014, pp. 1–28, point 20). These guidelines consider that an undertaking is in difficulty "*when it is virtually certain that, in the absence of State intervention, it will be forced to give up its activity in the short or medium term*" (*ibidem*).

6 See A. Schaub, La politique européenne de concurrence : objectifs et règles : Les petites affiches, 5 nov. 2001, n° 220, p. 11.

7 Commission's guidelines on State aid for rescuing and restructuring firms in difficulty other than financial institutions ("R&R guidelines"), OJ C 249, 31.7.2014, pp. 1-28, points 8 and 44.

8 See R&R guidelines cited above.

to special rules in the fisheries, agriculture and rail freight sectors and with the exception of the coal and steel sectors. They mainly concern large and medium-sized enterprises insofar as aid to SMEs in difficulty may be subject to a special and more flexible framework. Similarly, the 2014 R&R aid guidelines provide for greater flexibility for certain activities, such as enterprises providing a service of general interest, or by other texts, as is the case for credit institutions whose difficulties may entail systemic risks for the economy. A few key concepts of these guidelines are briefly described below.

Rescue aid is intended to keep the company in difficulty afloat during the period necessary to draw up a restructuring plan or, failing that, a liquidation plan.[9] It can therefore only be non-structural and reversible support, lasting a maximum of six months and taking the form of liquidity aid consisting of advances or credit guarantees.[10]

Temporary restructuring support is intermediate in nature compared to the two forms of intervention, rescue or restructuring. It is similar to rescue aid in that it is liquidity support in the form of advances or loan guarantees but, like restructuring aid, its purpose is to support the restructuring of a firm by giving the beneficiary the opportunity to devise and implement the measures needed to restore its long-term viability.[11] This explains why this support can be granted for up to 18 months and must be part of a simplified restructuring plan. This support can only be granted to SMEs in difficulty or facing pressing liquidity needs due to exceptional and unforeseen circumstances. It is therefore a measure to combat difficulties in access to credit for SMEs.

Restructuring aid aims at restoring the long-term viability of the beneficiary on the basis of a realistic, coherent and far-reaching restructuring plan. It usually comes after the granting of rescue aid for transitional purposes and has a longer duration, determined by the restructuring plan adopted under the supervision of the Commission. In substance, restructuring aid can be declared compatible, provided that three conditions are fulfilled:

- the submission of a restructuring plan which "*must restore the long-term viability of the beneficiary within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions that should exclude any further State aid not covered by the restructuring plan*" (point 47 of the R&R guidelines);
- compliance with the principle of proportionality in that "*the amount and intensity of restructuring aid must be limited to the strict minimum necessary to enable restructuring to be undertaken, in the light of the existing financial resources of the beneficiary, its shareholders or the business group to which it belongs. In particular, a sufficient level of own contribution to the costs of the restructuring and burden sharing must be ensured*" (point 61); own contribution means a significant contribution to the restructuring costs from the own resources of the aid beneficiary, its shareholders or creditors or the business group to which it belongs, or from new investors; burden sharing means that incumbent shareholders and, subordinated creditors must absorb losses in full so that State intervention only takes place after losses have been fully accounted for and attributed to the existing shareholders and subordinated debt holders;

9 R&R guidelines, point 26.
10 *Ibidem,* point 55.
11 *Ibidem,* point 29.

- measures must be taken to *limit distortions of competition* and minimise any adverse effects on trading conditions, the positive effects of the aid outweighing any adverse ones; these measures to limit distortions of competition take the form of structural measures (divestments and reduction of business activities) and, where appropriate, behavioural measures (to be refrained from making any acquisition during the restructuring period, except where indispensable to ensure the long-term viability; use the aid to restore viability and not to fund investments or to expand the beneficiary's presence in existing or new markets; to be required to refrain from publicising State support; to be refrained from engaging in commercial behaviour aimed at a rapid expansion of the market share relating to specific products or geographic markets).

Finally, restructuring aid can only be granted once every ten years under the principle of the "*one time, last time*" (if less than 10 years have elapsed since the aid was granted, since the restructuring period has ended or since the implementation of the restructuring plan has ceased, the Commission cannot, in principle, authorise further aid). The Commission should also require that account be taken of previous unlawful aid payments to the firm in difficulty.

Aid recovery and undertakings in difficulty

The obligation to recover unlawful and incompatible aid is implemented by the Member State concerned under the control of the Commission in order to restore the initial undistorted competition situation. However, the enforcement of this obligation can be particularly complicated when the debtor company is in difficulty and is subject to insolvency proceedings. In such cases, the rules of insolvency law should appropriately interact with EU law requirements.

In a nutshell, the principles, as synthesised in the Recovery Notice[12], can be described as follows:

- an aid beneficiary unable to reimburse an unlawful aid must, to restore an undistorted competition situation, exit the internal market;
- the aid recovery must be extended to any legal and economic successor of the original aid beneficiary, even if the latter exits the market;
- to recover the aid from an insolvent beneficiary, the Member State can only proceed to seize the assets of the aid beneficiary and to cause its liquidation if the latter is unable to reimburse the aid, or take any measure enabling the aid to be recovered, as provided for under its national law[13]; winding up the aid beneficiary to recover aid is not disproportionate[14];
- the Member State concerned must bring those proceedings in its capacity as a creditor or shareholder, where it has this latter position;[15]
- in the context of insolvency proceedings, the Member State must, to restore the previous situation of undistorted competition register its claim relating to the aid to be recovered in the schedule of liabilities within the recovery deadline (together with recovery interest accrued until full repayment or until an earlier date if under national

12 Communication from the Commission – Commission Notice on the recovery of unlawful and incompatible State aid, OJ C 247, 23.7.2019, p. 1–23 ("*Recovery Notice*"), points 127-135.

13 Judgment of 17 January 2018, *Commission v Greece* ('United Textiles'), C-363/16, EU:C:2018:12, paragraph 36.

14 Judgment of 21 March 1990, *Belgium v Commission* ('Tubemeuse'), C-142/87, EU:C:1990:125, paragraphs 65-66.

15 Judgment *Commission v Greece* ('United Textiles'), C-363/16, cited above, paragraph 38.

law interest stops accruing for all creditors on that earlier date);[16] that registration of the claim must be followed by (i) recovery of the full recovery amount, or, if that cannot be achieved, (ii) the winding-up of the undertaking and the definitive cessation of its activities;[17]

- national law still governs the ranking of the State aid claim in the schedule of liabilities, as long as the ranking complies with the principle of effectiveness and the principle of equivalence; the State aid claim cannot be ranked lower than ordinary unsecured claims;
- Member States cannot provide for the temporary continuation of some or all of the activities of insolvent undertakings subject to unlawful aid recovery: the winding up and cessation of activities of the aid beneficiary should occur in the absence of timely and effective aid recovery;[18] where a plan providing for the continuation of the activity of the aid beneficiary is proposed to the creditors' committee, the Member State concerned can support that plan only if it ensures recovery of the full recovery amount within the recovery deadline: a Member State cannot waive part of its recovery claim if the aid beneficiary continues its activity after the recovery deadline.

A recent illustration of a discussion of these issues occurred in the *ASIT Biotech* case before a Belgian court of appeal, currently before the Belgian supreme court.[19]

ASIT Biotech is a pharmaceutical company that received two R&D grants from the Walloon Region in the form of repayable advances for clinical development. Judicial reorganisation proceedings were initiated. Ordinary surviving creditors had the choice of reducing 80% of their claims or converting their claims into ASIT Biotech shares. The collective agreement for the reduction of claims was approved by the enterprise court, although the Walloon Region objected on the grounds that it had breached State aid rules (because the 80% reduction of the regional claim constituted aid that should have been notified to the Commission).

The Liège Court of Appeal relied on the case-law of the supreme court relating to the loss of social security contributions for the State following the application of a statutory deferment of payment rule, in which the Court of Cassation ruled that such a loss was inherent in any legal regime organising relations between an insolvent company and its creditors, without it being possible to automatically deduce the existence of an extra-financial burden borne directly or indirectly by the public authorities and intended to grant the companies concerned a specific advantage. According to the EU case-law, debts relating to social security contributions are no different from other debts owed by the debtor to specific creditors. According to the Liège Court of Appeal, the approval of the plan complied with these

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16 Member States must register the aid principal amount and recovery interest with the same ranking.

17 Judgment of 11 December 2012, *Commission v Spain* ('Magefesa II'), C-610/10, EU:C:2012:781, paragraphs 72 and 104.

18 Judgment of 21 October 2014, Italy v Commission, T-268/13, EU:T:2014:900, paragraphs 62-64.

19 Liège, 14 September 2021, 2021/RG/201, Région wallonne v. ASIT Biotech & Diagnostic Medical Systems (waivers of claims approved by the enterprise court of Liège of 9 February 2021, including research aid from the Walloon Region to ASIT Biotech in the context of judicial reorganisation proceedings against the wishes of the public creditor; on appeal, the Walloon Region argues the special nature of its claims and the infringement of the judicial reorganisation plan filed by ASIT Biotech, particularly with regard to State aid; the Liège Court of Appeal rejected the argument (judgment under appeal by the Walloon Region, pending); see Annabelle Lepièce and Marguerite Soete, ASIT Biotech : les abattements de créances publiques dans le cadre d'une procédure en réorganisation judiciaire au regard de la règlementation européenne en matière d'aides d'Etat, Competitio 2021(4) pp. 424 ; note, pp. 428-433.

principles, as the deduction of the Walloon Region's claim was no different from that of the debtor's claims against its other creditors who had approved the plan. The Court of Appeal therefore ruled that the allowance at issue does not constitute unlawful State aid.

The Court of Appeal also considered that the Walloon Region had not established that the measure at issue was imputable to the State within the meaning of this criterion under Article 107(1) TFEU: the rebate was imposed on the Region by the effect of the majority vote of the creditors and Article XX.79 of the Code of Economic Law. The Court of Appeal added that it had no discretion and could only approve the plan or reject it if it was contrary to law or public policy. The Court of Appeal also rejected the reference to the Court of Justice for a preliminary ruling requested by the Walloon Region.

The issues raised by this judgment are as follows from a State aid perspective:

- the special nature of recoverable advances for research as aid (the waiver of the claim modified the recoverable advance granted in accordance with the relevant rules on State aid);
- the notion of imputability (the reduction voted on must be approved, which constitutes a decision by a judge, part of the State within the meaning of Article 107(1) TFEU, which gives rise to the right in question);
- the public policy nature State aid rules (Articles 107(1) and 108(3) TFEU have direct effect and take precedence over any conflicting national law, which must be left unapplied, if necessary, by a national court).

Finally, the Recovery Notice[20] restates the following principles with respect to the obligations of the organs of the Member State in insolvency proceedings and to the market exit of undertaking not recovering unlawful aid:

- all the organs of the Member State concerned, including its courts, must leave unapplied all national provisions (insolvency rules, rules governing voluntary liquidation) "*which, by keeping the aid to be recovered at the disposal of the beneficiary, do not ensure immediate and effective execution of a Commission recovery decision*". The Member State must challenge any decision adopted by its national courts in breach of EU law;
- "*For the purpose of the fulfilment of the recovery obligation, an aid beneficiary is liquidated when its activities cease and its assets and interests are sold under market conditions. While national rules apply, the sale must be carried out through an open, transparent and non-discriminatory procedure. The evaluation of the assets should be carried out by an independent expert*" (these requirements are generally met in the case of bankruptcy proceedings under the surveillance of a court).

The Member State must ensure that there is no economic continuity in order to prevent the buyer of assets from being liable of aid recovery obligation (see following section).

Acquisition of undertakings in difficulty and *sui generis* decision by the Commission to assist national courts in their handling of these takeovers under insolvency proceedings

Often, within the framework of insolvency proceedings (for instance under Belgian law, a judicial reorganisation procedure by amicable agreement, by collective agreement or by transfer under court authority), a national court may be conducted to save all or part of an

20 Paragraphs 134-135.

undertaking, when its financial difficulties are not too serious. In this context, third parties could bid for the acquisition of that undertaking or for part thereof.

It is in this specific case that State aid law could be an obstacle to these third acquirers who could be discouraged by the risk of aid recovery when the undertaking in difficulty in question is the beneficiary of an unlawful aid (and incompatible aid, if a negative decision of the Commission was adopted) which has not yet been recovered. The third parties do not want to take the risk of this aid recovery when acquiring that undertaking.

State aid law was construed so as to remedy this obstacle which it "created": this is the purpose of the sui generis (because not provided by the Treaty nor by any Regulation) decisions that the Commission has adopted in a few cases in order to create the legal certainty which this takeover situation before a national court should deserve in these circumstances (where the life of an activity and employment are at stake).

The EU case-law[21] has established the principle, confirming a decisional practice of the Commission, that the Member State should ensure that the recovery obligation is not circumvented, in particular when the original beneficiary of the unlawful is transferred to another undertaking. In principle, the Member State should extend recovery to the undertaking that effectively enjoys the advantage following the transfer of activities. However, when it is possible to conclude that the principle of economic continuity does not apply to this transfer, the aid recovery obligation will not be transferred to the acquirer of the original beneficiary.

In this case, a set of various indicators (a body of evidence) applies to determine whether the proposed acquirer of the undertaking in difficulty and beneficiary of previous unlawful (and incompatible) aid should be declared liable of that aid recovery obligation or not:[22]

- the purpose of the transfer (assets and liabilities, continuity of the workforce, bundled assets);
- the transfer price (market price or not);
- the identity of the shareholders or owners of the acquiring undertaking and of the original undertaking;
- the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision: is the purpose of the transaction to avoid aid recovery only?);
- the economic logic of the transaction.

If the proposed acquirer does not seek to continue exactly the same scope of business and business plan (not the same workforce, not the same assets, etc.), pays the market price, has a different identify than the shareholders or owners of the original aid beneficiary, carries this transaction at a moment non suspicious in relation to this aid recovery obligation and purses an economic rationale through this transaction, then it is possible to conclude that this

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21 Judgment of 8 May 2003, *Italian Republic and SIM 2 Multimedia SpA v Commission* (Seleco), C-328/99 and C-399/00, EU:C:2003:252; judgment of 29 April 2004, *Germany v Commission* ('SMI'), C-277/00, EU:C:2004:238, paragraph 75.

22 See in particular the following case-law: *Mory o.a. v Commission*, C-33/14 P; Italy and SIM 2 *Multimedia Spa v Commission*, C-328/99 & C-399/00; *Germany v Commission*, C-277/00 *Greece v Commission*, T-415/05, T-416/05 & T-423/05 *Commission v France*, C-214/07 *Fortischem v. Commission*, T-121/15 (C-890/19 P) *SNCF Mobilités v. Commission*, C-127/16 P.

proposed acquirer will not be liable to reimburse the unlawful aid of the original aid beneficiary.

The Commission can adopt this kind of *sui generis* decision to bring about legal certainty to this question of the determination of the entity liable for the aid recovery. In the context of takeover of an undertaking in difficulty (having received unlawful aid to be recovered), this clarification is crucial to ensure a smooth takeover of that undertaking before the national court handling such situation of insolvency proceedings.

There are a number of these *sui generis* decisions[23] which can be requested from the Commission by the Member State concerned (the Member State itself, or one of its local or regional governments) may be involved in an pre-bankruptcy settlement before a national court discussing the takeover of the undertaking in difficulty). This is the situation where this kind of *sui generis* decision can clarify the matter for the national court to decide on the takeover bids and to provide assurances to the bidders for the takeover. The EU case-law has ruled that "*a decision on economic continuity must be regarded as a decision which is 'related and complementary' to the final decision preceding it on the aid concerned in so far as it defines the scope thereof as regards the status of beneficiary of that aid and, therefore, as regards that of the party obliged to repay that aid, following the occurrence of an event after the adoption of that decision, such as the acquisition by a third party of the assets of the initial beneficiary of that aid*".[24]

National courts should be encouraged by the acquirer's counsel in these cases to ask the national authorities to refer the matter to the Commission in order to achieve this legal certainty, ensuring the takeover of these undertakings which may deserve to be recovered by these acquirers.[25]

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23 See, for example, 2 June 1999, *Seleco SpA*, OJ L 227 of 02.06.1999; 1 October 2014, SA.31550, *Nürburgring*, OJ L 34 of 10.2.2016; 4 April 2012, SA.34547, *Sernam* (*sui generis* decision on economic continuity); 31 July 2014, SA.34791, *Val Saint- Lambert*, OJ L 269 of 15.10.2015 (corrigendum 19 March 2015); 31 July 2014, SA.38810, *Val Saint-Lambert* (*sui generis* decision on economic continuity).

24 Judgment of 19 June 2019, *NeXovation, Inc. v Commission*, T-353/15, EU:T:2019:434, paragraph 43 (partially annulled on appeal, not on this point: judgment of 2 September 2021, *NeXovation, Inc. v Commission*, C-665/19 P, EU:C:2021:667). In this case, the Commission took a "Decision 1" declaring unlawful and incompatible some of the support measures in favour of the sellers (Rhineland-Palatinate) of the circuit of the Nürburgring, while deciding that Capricorn (buyer) was not concerned by any recovery of aid to the sellers; it also took a "Decision 2" declaring that the sale of the Nürburgring to Capricorn did not constitute State aid; decision 1 was challenged before the General Court who declared the action inadmissible and it was upheld on appeal; decision 2 was also challenged before the General Court, the rejection of which on the merits was annulled by the Court of Justice on appeal - the Commission had to resume the proceedings: Cases 647/19 P and C-665/19 P.

25 The national court itself could also contact directly the Commission under Article 29 of the State aid Regulation (Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ L 248, 24.9.2015, p. 9–29), which sets out the cooperation mechanism between the Commission and national courts. This could not in principle give rise to the same *sui generis* decision (which is addressed to the Member State, not to a national court), but this may lead the Commission to adopt an non-binding opinion addressed to the national court, which could help the latter in this context. Until now, from the information published by the Commission on these cooperation tools with national courts, it seems that the Commission has not yet provided an opinion on the economic continuity to national courts, but only *sui generis* decisions to the Member State at its request (and therefore notification).

II. The rules applicable to undertakings

Companies that are subject to insolvency proceedings remain subject to competition rules addressed to undertakings, i.e. the prohibition of anti-competitive practices (application of Articles 101 and 102 TFEU) and the control of concentrations (the EU merger regulation) and their national equivalents.

Determining the fine

Insolvency proceedings can have an impact on the determination of the debtor and the amount of the fine when a competition authority decides to sanction an undertaking. The determination of the debtor of the fine depends essentially on whether the legal personality of the offender remains or disappears. If the legal person remains, the undertaking that committed the infringement is still liable for the fine. The opening of safeguard or receivership proceedings and the adoption of a safeguard or continuation plan with a partial transfer of activity are irrelevant and do not affect the classification of offences. Similarly, in the event of judicial liquidation, which entails the dissolution of the company, the perpetrator of the offending practices, whose legal personality remains for the purposes of the liquidation, is liable for the offences committed on its assets. However, as a general rule, the competition authorities consider that it is not appropriate to impose a financial penalty on a company placed in judicial liquidation.[26]

If the legal person disappears, the determination of the debtor of the fine is based on the principle of the economic and functional continuity of the undertaking. The competition authority looks for the person who acquired the material and human elements that contributed to the infringement. This criterion should normally be applied in the event of judicial liquidation in the event of a total or partial transfer of the undertaking, or even a transfer of assets. The infringement should then be imputed to the legal transferee who would be required to pay the fine.

Under certain conditions, the opening of insolvency proceedings may lead to a reduction of the financial penalty imposed. The provisions of national and EU competition law on the calculation of fines take into account the financial situation of the sanctioned undertaking. Indeed, the financial penalties imposed by the a competition authority are proportionate to the situation of the undertaking, i.e. in particular to its financial situation. Similarly, the Guidelines on the method of setting fines imposed by the Commission provide for the possibility to take into account the ability of undertakings to pay and mitigating circumstances, including their economic and financial difficulties.[27] However, the Commission has never been obliged to take account of the financial difficulties of undertakings, or even their insolvency, as an attenuating circumstance when determining the amount of the fine.[28]

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26 See France, Cons. conc. decision n° 02-D-42, 28 June 2002; IDOT L., La prise en compte du droit des procédures collectives par le droit de la concurrence? L'articulation des procédures, Concurrence et consommation 2005, n° 143, p. 17.

27 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, pp. 2–5 (point 35 : in exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context).

28 Judgment of 29 April 2004, *Tokai Carbon Co. Ltd and Others v Commission*, T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, EU:T:2004:118, paragraph 371: under the previous guidelines, the EU court ruled that "*that ability applies only in a 'specific social context' consisting of the consequences which payment of the fine would have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking*

Moreover, the ability of undertakings to pay is strictly assessed, the Commission making the reduction of the fine conditional on proof that it would irretrievably jeopardise the economic viability of the undertaking concerned and would lead to its assets being deprived of any value.

The financial difficulties of the companies are also taken into account at the stage of the execution of the sanction. The insolvent company can ask for the terms of payment of the fine to be adjusted and pay the fine by instalments. The Commission can also agree to defer recovery measures until a final judgment is handed down, provided that a bank guarantee is lodged. The insolvent company can then apply for a stay of execution of the Commission's or the competition authority's sanction decisions, which are enforceable, alongside an action for annulment on the merits before the relevant court.

Merger control in insolvency situations

The adaptation of merger control to insolvency situations is reflected in the reception and application of the failing firm by the domestic and European competition authorities.

The "failing firm defence" allows, under certain conditions, to authorise an anti-competitive merger if the acquired company is in difficulty and means that there is no causal link between the acquisition of the failing firm and the deterioration of competition resulting from the consequent disappearance of a competitor on the market. In other words, the failing firm exception amounts to demonstrating the neutrality of the merger on competition after a competitive assessment.

The failing firm exception was first used in EU competition law in the "*Kali und Salz*" case. The Commission declared the takeover of a potash company by its sole competitor on the German market compatible with the common market, subject to certain commitments. The Commission found, on the basis of the failing firm exception, that the merger was not the cause of the strengthening of the acquiring firm's dominant position because the disappearance of the acquired firm was inevitable. Its financial situation was irremediably compromised, the company surviving only thanks to public aid. The Court of Justice, hearing an action for annulment of the Commission's decision, accepted the failing company's plea by agreeing to verify the absence of a causal link between the takeover and the deterioration of competition.[29] To this end, the Court examined whether the purchased company would have disappeared anyway, whether the harm to competition would have occurred even in the absence of the takeover of the failing company, and whether there was no alternative that was less harmful to competition.

The Commission has been prepared to accept this argument on several occasions. In *Nynas/Shell/Harburg refinery*,[30] although it did not characterise this case as a failing company (or division), it consistently applied the three conditions, concluding that they had been met and that the relevant counterfactual was one where Shell would have closed a refinery in Harburg in the absence of its acquisition by Nynas. Similarly, in *T-Mobile NL/Tele2 NL*,[31] the Commission unconditionally approved a transaction on the grounds that Tele2 NL was already stagnant before the merger, suffering from both limited growth and a decline in network quality, and was expected to deteriorate further in the absence of the transaction. In

concerned. In that regard, the applicants have adduced no evidence capable of determining the 'specific social context'".

29 Judgment of 31 March 1998, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission*, C-68/94 and C-30/95, EU:C:1998:148.

30 Decision of 2 September 2013, COMP/M.6360 - *Nynas, Shell/Harburg refinery*.

31 Decision of 27 November 2018, COMP/M.8792 - *T-Mobile NL/Tele2 NL*.

NewsCorp/Telepiù,[32] the Commission attached importance to evidence that the targets in question were "in difficulty" in order to conditionally approve the transactions. The Commission's assessment of *ArcelorMittal/Ilva*[33] was also influenced by similar considerations. In this case, the Commission rejected the defence of the defaulting company. However, as Ilva had been forced by environmental restrictions to operate below its optimum capacity, the Commission accepted in what it termed a "prudent approach" that it would not return to full capacity in the absence of the transaction.

Unlike the Court of Justice, the Commission considered that the neutrality of the merger on competition should be deduced from the fact that the purchaser takes over all the market shares of the failing firm, even if there is no takeover. This condition, known as the absorption of market shares, was easily applicable in the case of a duopoly, but not very well suited to oligopolistic or atomistic markets. By setting aside this particularly restrictive condition, the Court has broadened the scope of the failing firm exception. However, this relaxation of the conditions of application of the failing firm exception raises doubts about the strict neutrality of the merger on competition. The exception of the failing company, widely understood, could even lead to the merger control being transformed into an auxiliary of insolvency law.

The *SEB / Moulinex* case is a remarkable illustration of this. Referred to by the Commission, the Minister of the Economy authorised SEB's takeover of Moulinex's activities in the French small electrical appliance market, which had been placed in compulsory liquidation. The Minister, invoking the failing company exception, considered that the disappearance of Moulinex would have created a sort of bottleneck leading to higher consumer prices.[34] However, the French Conseil d'État annulled the authorisation decision, which was vitiated by a manifest error of assessment, on the grounds that the Minister had not demonstrated that competitors were not in a position to supply rapidly the quantities necessary to compensate for the disappearance of Moulinex products, nor had he examined precisely the possibility offered to a foreign competitor, by acquiring Moulinex's brands without taking over the industrial assets, to penetrate the French market[35] . In addition, the Conseil d'État criticised the Minister for failing to take into account the negative consequences that this merger could have on consumers. Thus, it is clear that the interest of the consumer even when it comes to insolvency or restructuring proceedings takes precedence over other interests. It is certainly the only interest that greatly stitches the two sides of the law together and justifies their interaction.

Olympic/Aegean Airlines remains the paramount case where the parties raised the failing firm defence in the wake of a global economic crisis, specifically the Greek sovereign debt crisis that followed the financial crisis of 2007–08.[36] In 2011, the Commission rejected the parties failing firm defence arguments and prohibited the transaction.

However, two years later, in October 2013, a similar transaction between the two airlines was unconditionally approved (*Aegean/Olympic II*).[37] This was the first (and remains the only)

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32 Decision of 6 August 2010, COMP/M.2876 – *Newscorp/Telepiu*.
33 Decision of 7 May 2018, COMP/M.8444 – *ArcelorMittal/Ilva*.
34 Cons. conc. opinion n°. 02-A-07, 15 May 2002, on the acquisition of part of the assets of the Moulinex group by the SEB group.
35 Conseil d'État, France, 6 Feb. 2004.
36 Decision of 26 January 2011, COMP/M.5830 - *Olympic/Aegean Airlines*.
37 Decision of 9 October 2013, COMP/M.6796 - *Aegean/Olympic II*.

time the Commission cleared a merger after it has previously prohibited it. By then, the sovereign debt crisis had fully devastated the Greek economy.

The Commission analysed the renewed failing firm defence arguments in this changed economic context and came to the view that, because of "*both the on-going economic crisis in Greece and Olympic's very difficult financial situation*", "*Olympic would be forced to leave the market soon, with or without the merger*". If not acquired by Aegean, Olympic would "*simply shut down*" —a conclusion "*in part*" reached "*due to the economic situation in Greece*".[38]

Olympic's situation in 2013 was dramatic. The company had been lossmaking since the start of its operations in 2009[39] and had been regularly receiving financial support from its parent company. Olympic withdrew from several routes and underwent a drastic downsizing.

The situation in *Aegean/Olympic II* was exacerbated by the fact that the failing firm's parent company was also in financial distress and arguably no longer willing to financially support (or even capable of supporting) its subsidiary. This was a key consideration in swaying the Commission into accepting the failing firm defence. Finally, the Commission"s "*market investigation has also shown that there* [was] *no other credible purchaser interested in acquiring Olympic. There has also been no expression of any credible interest in the acquisition of Olympic's very few assets. This extends to the brand, which is owned by the Greek State*".[40]

Based on these facts, the Commission announced that its in-depth investigation had shown that the merger had "*no additional negative effect on competition*"[41] and that there was "*no doubt that the failing firm defence scenario can apply and should apply to this case".*

CONCLUSION

Pursuing apparently contradictory goals, competition law and insolvency law have long coexisted in relative indifference.

The parallel development of both areas of law gives rise to legal issues which insolvency lawyers or judges may not be sufficiently equipped to deal with. They are however crucial for the smooth and efficient management of some insolvency proceedings. First, those where the Member State is heavily involved either as a previous grantor of aid to that undertaking (potentially unlawful aid to be recovered) or one of the number of creditors who cannot settle anything in view of its EU law obligations. A *sui generis* decision by the Commission on the economic continuity of the undertaking being taken over is likely to facilitate this process in reassuring the bidders to the takeover. Second, the failing firm defence in merger control is central to those transactions raising competition issues, even where the Member State is not involved.

This variety of interactions of insolvency law with EU competition law is particularly interesting to consider from a strategic point of view in the understanding of the restructuring procedure as a whole. Competition law can influence the course of insolvency proceedings.

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38 Commission approves acquisition of Greek airline Olympic Air by Aegean Airlines: Statement by Joaquín Almunia, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_13_927.

39 Olympic Air was formed when the former Greek national carrier Olympic Airlines was privatised in 2009.

40 Statement by Joaquín Almunia mentioned above.

41 *Ibidem*.

ANNEX

JACQUES DERENNE, AIDE D'ETAT (NOTION), DICTIONNAIRE DE DROIT DE LA CONCURRENCE, CONCURRENCES, ART. N° 86434

DÉFINITION AUTEUR

PREMIER APERÇU

Définir les contours de la notion d'aide d'État requerrait un traité en soi de plusieurs centaines de pages. Ce qui suit ne peut donc qu'être très largement simplifié et le résultat d'une sélection des questions pertinentes.

Le contrôle des « aides d'État » fait partie « *des règles de concurrence [qui sont] nécessaires au fonctionnement du marché intérieur* » (art. 3 TFUE). La seconde section du chapitre « Les règles de concurrence » du TFUE est intitulée « Les aides accordées par les États ». Ce sont donc les États qui sont destinataires de ces règles. Mais, les entreprises bénéficiaires sont directement concernées (p. ex., obligation de remboursement des aides « illégales et incompatibles », réparation des dommages causés aux tiers affectés) et devraient en fait en être les premiers juges étant donné les risques juridiques et économiques qu'elles prennent en recevant des aides d'État. Le contrôle des aides d'État est la clé de voûte du marché intérieur sans quoi celui-ci serait vain puisque les États membres pourraient avantager indûment leurs entreprises. C'est la Commission qui s'est vue investie du pouvoir exclusif du contrôle de fond des aides d'État (leur « compatibilité avec le marché intérieur », qui ne sera pas abordée ici).

Le traité ne donne pas de définition « fermée » de la notion d'aide d'État. En suivant le rapport Spaak de 1956, les auteurs du traité n'ont pas voulu s'enfermer dans une définition qui aurait été vite dépassée par l'inventivité infinie des États membres, sans cesse enclins à succomber à leur mal naturel de protectionnisme nationaliste. En ce sens, la définition des contours de l'« aide d'État » est le siège d'une lutte stratégique entre la Commission (qui souhaite élargir au maximum la notion pour protéger sa compétence exclusive de contrôle de compatibilité) et les États membres (qui visent le résultat inverse).

Dans ce contexte, bien identifié par les auteurs du traité, qui ont eu la sagesse de se méfier d'eux-mêmes (les États membres), l'article 107, paragraphe 1, TFUE ne donne qu'une liste de critères cumulatifs développés par la jurisprudence européenne : « *Sauf dérogations prévues par les traités, sont incompatibles avec le marché intérieur, dans la mesure où elles affectent les échanges entre États membres, les aides accordées par les États ou au moyen de ressources d'État sous quelque forme que ce soit qui faussent ou qui menacent de fausser la concurrence en favorisant certaines entreprises ou certaines productions.* »

Il s'agit là d'une notion « juridique objective » qui échappe à toute marge discrétionnaire que pourrait avoir la Commission européenne dans son application. Son contrôle juridictionnel est plein et entier (CJCE, 22 décembre 2008, *British Aggregates c/ Commission*, aff. C 487/06 P, pts 111 et 112), sauf lorsque la question implique une « *appréciation économique complexe* », auquel cas le contrôle de l'appréciation de la Commission demeure mais devient plus marginal

(CJUE, 2 septembre 2010, *Commission c/ Scott*, aff. C 290/07 P, pt 64). L'analyse requise est toutefois plus financière qu'économique. Lorsque l'application de la notion suppose des analyses financières fines (notamment s'agissant des « conditions normales de marché »), il serait vain pour un économiste de chercher à disqualifier une mesure définie juridiquement comme une aide au moyen d'une quelconque théorie économique portant notamment sur les effets concrets de la mesure, hormis les analyses financières liées à l'identification de « l'opérateur en économie de marché ». Si l'article 107, paragraphe 1, TFUE ne distingue pas selon les causes ou les objectifs des interventions visées, mais les définit en fonction de leurs effets (CJCE, 2 juillet 1974, *Italie c/ Commission*, aff. 173/73, pt 27), ceux-ci peuvent n'être que potentiels, théoriques, mais non hypothétiques.

Le juge national dispose de compétences concurrentes à la Commission pour la définition de la notion d'aide d'État vu son caractère objectif (sauf à la suite d'une décision d'ouverture de la procédure formelle d'examen qui se prononce sur cette notion : CJUE, 21 novembre 2013, *Deutsche Lufthansa AG c/ Flughafen Frankfurt-Hahn GmbH*, aff. C 284/12, pt 45).

Après presque cinquante années de jurisprudence, la Commission a tenté de synthétiser celle-ci dans une communication interprétative qui se veut objective mais contient néanmoins quelques prises de position illustrant également sa pratique décisionnelle, parfois remise en cause par la jurisprudence depuis (v. communication de la Commission relative à la notion d'« aide d'État »).

En substance, l'aide d'État correspond à toute mesure qui remplit *cumulativement* les critères suivants, qu'on peut identifier à partir des mots du texte même de l'article 107, paragraphe 1, TFUE :

(i) avantage (« *en favorisant* », « *sous quelque forme que ce soit* ») ;

(ii) sélectif (« *certaines entreprises ou certaines productions* ») ;

(iii) à une « entreprise » ou à une catégorie « d'entreprises » ;

(iv) imputable à l'État et engageant les ressources d'État (« *accordées par les États ou au moyen de ressources d'État* »), ayant pour effet

(v) une (potentielle) distorsion de concurrence (« *qui faussent ou qui menacent de fausser la concurrence* ») et

(vi) une (potentielle) affectation des échanges entre États membres (« *dans la mesure où elles affectent les échanges entre États membres* »).

POUR ALLER PLUS LOIN

L'absence de l'un quelconque de ces critères est suffisante pour le rejet de la qualification comme « aide d'État ». Leur analyse ci-après suivra un ordre logique pour cette qualification (la Cour de justice commence souvent son énoncé des critères par l'origine étatique et donne

l'impression de télescoper les critères d'avantage et de sélectivité en employant l'expression d'« avantage sélectif »).

« *Entreprise* »

Le prérequis pour constituer une aide est que la mesure vise comme bénéficiaire une « entreprise », c'est-à-dire toute entité exerçant une activité économique (offre de biens et services sur un marché donné), indépendamment de son statut juridique et de son mode de financement (CJCE, 12 septembre 2000, *Pavlov e.a.*, aff. jtes C 180/98 à C 184/98, pts 74 et 75), même si l'activité est sans but lucratif (CJCE, 1er juillet 2008, *MOTOE*, aff. C 49/07, pts 27 et 28). En principe, si des mécanismes de marché n'existent pas (comme pour la gestion immobilière de prisons dans certains États membres, par exemple), les activités qui font intrinsèquement partie des prérogatives de puissance publique ne constituent pas des activités économiques (notamment, l'armée ou la police, la sécurité et le contrôle de la navigation aérienne, le contrôle et la sécurité du trafic maritime, la surveillance antipollution, l'organisation, le financement et l'exécution des peines d'emprisonnement, la valorisation et la revitalisation de terrains publics par des autorités publiques – v. communication de la Commission préc., pt 17). Des activités comme la sécurité sociale ou la santé relèvent de l'activité économique selon qu'elles sont fondées sur le principe de solidarité ou sur des régimes économiques (v. *ibid.*, pts 19 à 27). Les mesures étatiques visant à développer de grands projets d'infrastructure (aéroports, routes, chemins de fer, stades, etc.) peuvent également relever des aides d'État selon la position des différents acteurs concernés (développeur/propriétaire, opérateur/exploitant, utilisateurs finals – v. *ibid.*, pts 199 à 228 – cette dernière catégorie concerne également les conditions décrites ci-après).

« *Favorisant* », « *sous quelque forme que ce soit* »

La mesure doit procurer un « avantage » économique qu'une entreprise n'aurait pas pu obtenir dans les conditions normales du marché, c'est-à-dire en l'absence d'intervention de l'État (CJCE, 11 juillet 1996, *SFEI e.a. c/ La Poste e.a.*, aff. C 39/94, pt 60). La notion d'aide est « *plus générale que la notion de subvention parce qu'elle comprend non seulement des prestations positives telles que les subventions elles-mêmes, mais également des interventions qui, sous des formes diverses, allègent les charges qui normalement grèvent le budget d'une entreprise et qui, par-là, sans être des subventions au sens strict du mot, sont d'une même nature et ont des effets identiques* » (CJCE, 23 février 1961, *De Gezamenlijke Steenkolenmijnen in Limburg c/ Haute Autorité de la CECA*, aff. 30-59, p. 39).

Ce critère fait souvent appel à des analyses financières dans le cadre de l'application de la notion « d'opérateur en économie de marché » pour déterminer si des interventions étatiques dans l'économie (lorsque l'État investit, octroie du crédit ou une garantie, achète ou vend des biens ou des services sur le marché, privatise, etc.) doivent être qualifiées d'aides d'État (v. not. communication de la Commission préc., pts 73 à 114). À cette fin, il y aura lieu d'apprécier si, *ex ante*, dans des circonstances similaires, un opérateur privé d'une taille comparable, opérant dans les conditions normales du marché, aurait pu être amené à réaliser les opérations en cause.

La conformité de ces opérations avec ces conditions normales de marché peut être établie directement sur la base des données du marché spécifiques à cette opération (opération effectuée *pari passu* par des entités publiques et des opérateurs privés ou appels d'offres concurrentiels, transparents, non discriminatoires et inconditionnels en cas de vente et d'achat). En l'absence de telles données, cette conformité est appréciée en fonction d'autres méthodes disponibles, en examinant les conditions dans lesquelles des opérations comparables réalisées par des opérateurs privés comparables se sont déroulées dans des situations comparables (analyse comparative) ou sur la base d'une méthode d'évaluation standard communément acceptée (en se fondant sur des données disponibles objectives, vérifiables et fiables, suffisamment détaillées pour refléter la situation économique au moment où l'opération a été décidée et en tenant compte du niveau de risque et des attentes pour l'avenir). On fera intervenir dans ce cas des outils financiers comme le taux de rendement interne, la valeur actuelle nette, le coût du capital, le « *capital asset pricing model* », l'expertise indépendante, etc. (Trib. UE, 25 janvier 2018, *Brussels South Charleroi Airport (BSCA) c/ Commission*, aff. T-818/14 ; Trib. UE, 3 juillet 2014, *Espagne, Ciudad de la Luz, e.a. c/ Commission*, aff. jtes T-319/12 et T-321/12). Ces analyses ne tiendront pas compte d'éléments non pertinents comme ceux liés aux revenus provenant de prérogatives de l'État (fiscalité, économies sur allocations de chômage), aux externalités positives (développement régional et industriel, politique de l'emploi) et aux considérations philanthropiques ou sociales.

Par exception à ce qui précède, une mesure étatique qui se borne à compenser une entreprise pour les coûts d'exécution d'une obligation de service public sans conférer un avantage réel au bénéficiaire ne constitue pas une aide d'État (CJUE, 24 juillet 2003, *Altmark*, aff. T-280/00). Quatre conditions cumulatives doivent être remplies pour qu'une telle mesure échappe à la qualification d'aide d'État : premièrement, le bénéficiaire doit effectivement être chargé, par un acte législatif ou règlementaire, de l'exécution d'obligations de service public qui doivent être clairement définies ; deuxièmement, les paramètres de calcul de la compensation doivent être établis à l'avance de manière objective et transparente ; troisièmement, la compensation ne doit pas dépasser ce qui est nécessaire pour couvrir tout ou partie des coûts en cause en tenant compte des recettes et d'un bénéfice raisonnable pour l'exécution de ces obligations ; quatrièmement, lorsque la sélection du bénéficiaire ne résulte pas d'un marché public, la compensation doit être déterminée sur la base d'une analyse des coûts qu'entraîne qu'une entreprise moyenne, bien gérée et suffisamment adéquatement équipée pour répondre aux exigences de service public nécessaires, aurait encouru pour s'acquitter de ces obligations.

« *Certaines* »

Seules peuvent constituer des aides les mesures sélectives, qui confèrent un avantage à certaines entreprises ou catégories d'entreprises ou à certains secteurs économiques.

La sélectivité peut être « matérielle » quand la mesure ne s'applique qu'à certaines entreprises (ou catégories d'entreprises) ou qu'à certains secteurs de l'économie dans un État membre donné. Ce caractère sélectif peut être établi *de jure* ou *de facto*. Les mesures fiscales présentent des difficultés particulières s'agissant du critère de sélectivité. Progressivement, la jurisprudence a développé un test en trois étapes à ce sujet : (i) la définition du cadre de référence pertinent (le système « normal » d'imposition), (ii) la dérogation (avantage non ouvert à toutes les entreprises se trouvant dans des situations comparables), et (iii) l'absence

de justification par la nature ou l'économie générale du régime en cause (CJUE, 21 décembre 2016, Commission c/ World Duty Free, aff. jtes C-20/15 P et C-21/15 P ; CJUE, 21 décembre 2016, *Commission c/ Lübeck*, aff. C-524/14 P).

La sélectivité peut également être « géographique » ou « régionale » (CJCE, 19 septembre 2000, *Allemagne c/ Commission*, aff. C-156/98, pt 23) selon le système de référence (des mesures qui ne s'appliquent qu'à certaines parties du territoire d'un État membre ne sont pas toutes automatiquement sélectives). Des mesures de portée régionale ou locale peuvent ne pas être considérées comme sélectives en cas d'autonomie institutionnelle, procédurale et financière de l'autorité régionale qui a décidé de la mesure (CJCE, 6 septembre 2006, *Portugal c/ Commission*, aff. C-88/03, pts 62 à 67).

« *Accordées par les États ou au moyen de ressources d'État* »

L'avantage doit impliquer des ressources d'État ou opérer un transfert de ces ressources, ou, lorsqu'un tel transfert n'est pas effectif (notamment en matière d'exemption fiscale, de garantie étatique), constituer une charge supplémentaire ou un risque suffisant d'une telle charge pour le budget de l'État au sens large (CJCE, 13 mars 2001, *PreussenElektra*, aff. C 379/98, pt 62 ; CJUE, 19 mars 2013, *Bouygues et Bouygues Télécom c/ Commission e.a.*, aff. jtes C 399/10 P et C 401/10 P, pts 137, 138 et 139), sans toutefois que cette charge ou ce risque doive être étroitement lié et corresponde à, ou ait pour contrepartie, un avantage spécifique (arrêt *Bouygues préc.*, pt 105). Le contrôle étatique doit être d'un degré suffisant, quelles que soient les circonstances (CJCE, 15 juillet 2004, Pearle, aff. C 345/02, pts 36 à 39 ; CJUE, 28 mars 2019, *Allemagne c/ Commission*, aff. C-405/16 P). En outre, contrairement au mot « ou » du texte du traité, la mesure doit également être « imputable » à l'État, ce qui suppose, lorsque l'avantage est octroyé par l'intermédiaire d'entreprises publiques ou même privées, que les autorités publiques aient été impliquées, d'une manière ou d'une autre, dans l'adoption de la mesure (CJCE, 16 mai 2002, *France c/ Commission (Stardust)*, aff. C 482/99, pts 52 à 57). L'octroi de l'avantage directement ou indirectement au moyen de ressources d'État et son imputabilité à l'État sont deux conditions distinctes et cumulatives mais souvent examinées conjointement, car elles sont toutes deux liées à l'origine de la mesure.

« *Faussent ou qui menacent de fausser la concurrence* » et « *dans la mesure où elles affectent les échanges entre États membres* »

L'avantage doit avoir pour effet, réel ou potentiel, de fausser la concurrence et doit affecter, réellement ou potentiellement, les échanges entre États membres. Ces deux critères, distincts et nécessaires, sont dans la pratique souvent traités conjointement, car ils sont généralement considérés comme indissociablement liés. Leur caractère potentiel, sans nécessité de démonstration d'effet réel et concret (et donc d'étude économique quelconque), doit être souligné. Il suffit de démontrer que la mesure est de nature à renforcer la position concurrentielle du bénéficiaire par rapport à d'autres entreprises concurrentes, il n'est pas requis que la distorsion de concurrence ou l'affectation des échanges entre États membres soit sensible ou substantielle, mais seulement potentielle, à condition de ne pas être hypothétique ou présumée (CJCE, 17 septembre 1980, *Philip Morris Holland c/ Commission*, aff. 730/79). Cette possibilité n'est pas pour autant automatiquement établie et elle doit donc être dûment motivée (TPICE, 6 septembre 2006, *Italie et Wam c/ Commission*, aff. jtes T 304/04 et T 316/04, pt 63, confirmé par CJCE, 30 avril 2009, *Commission c/ Italie et Wam*, aff. C-494/06

P). On notera une tendance récente du Tribunal, à la suite d'une série de décisions de la Commission, à réduire quelque peu l'étendue de la notion d'affectation potentielle des échanges entre États membres s'agissant d'aides à des bénéficiaires de dimension locale qui doivent faire l'objet d'une démonstration au cas par cas. Les effets prévisibles de certaines mesures peuvent en effet s'avérer marginaux compte tenu de la dimension locale de l'activité concernée ou de la faiblesse du chiffre d'affaires en cause, à titre d'indice d'activité économique très réduite (Trib. UE, 14 mai 2019, *Marinvest c/ Commission*, aff. T-728/17, pt 109 ; communication de la Commission préc., pt 192).

Par ailleurs, on notera que l'article 107, paragraphe 1, TFUE commence par les mots « *Sauf dérogations prévues par les traités, sont incompatibles avec le marché intérieur* » : l'interdiction des aides d'État n'est donc pas absolue (d'où l'emploi du mot « incompatibles », qui sous-entend que certaines aides peuvent être déclarées compatibles avec le marché intérieur). C'est l'objet des paragraphes 2 (aides compatibles de plein droit) et 3 (aides compatibles selon l'appréciation exclusive et discrétionnaire de la Commission) de l'article 107 TFUE.

(Jacques Derenne, *Aide d'État (notion)*, *in* « Dictionnaire de droit de la concurrence », Muriel Chagny, Emmanuel Combes (dir.), Concurrences, 1ère éd., 2023, pp. 837, pp. 81-87).