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Recent EU case-law


Distortion of competition and effect on trade

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# Criteria for State aid – Article 107(1) TFUE

- **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 distorting of competition and affecting trade between Member States**
    - *"distorts or threatens to distort competition" and "insofar as it affects trade between Member States"*

# Milestones from the EU case-law since the 70s

- 17.9.1980, 730/79 *Philip Morris*, para 11
  - Measure "*strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid*". Aid has "*reduced the cost of converting the production facilities and has thereby given the applicant a competitive advantage over manufacturers who have completed or intend to complete at their own expense a similar increase in the production capacity of their plant.*"
- Conditions easily met – nearly presumed provided duly reasoned and market liberalized
  - no economic analysis, No need to define the market or to investigate in detail the actual impact of the measure, no concrete effects needed (C-494/06 P *Commission v Italy and Wam*; C-560/12 P *Wam v Commission*)
- Two distinct elements
  - but often treated jointly - inextricably linked (T-288/97, *Friuli Venezia Giulia*, point 41)
- Distortion of competition
  - not jurisdictional criteria as in 101-102 TFEU; no need to define the “relevant market” but minimum standard of reasoning;
  - market power is less relevant for State aid cases: effect of aid measure on competitors, ultimately, on the productive and dynamic efficiency of markets and the location of economic activity (“supply side” oriented concern)
- Affect trade between Member States
  - even if recipient undertaking does not itself participate in cross-border activities, incl. export only to third countries
  - no threshold or percentage below which trade is not affected (but *de minimis* Regulation)
  - no effect on trade only for very local activities

See Derenne and Verouden, *Distortion of Competition and Effect on Trade Between Member States*, in: *EU State Aid Control: Law and Economics*, Chapter 5, Wolters Kluwer, 2017 (Ph. Werner, V. Verouden (eds.)) – new edition in 2023

# Some statements

- *“it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States” (C-280/00 Altmark)*
- *“there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected” (C-280/00 Altmark)*
- *“since it is not inconceivable (...) that medical practitioners specialising in dentistry, such as Mr. Heiser, might be in competition with their colleagues established in another Member State, [(...) an effect on trade (...)] must be considered to be fulfilled” (C-172/03 Heiser)*

# Broad concepts

## ■ Distortion

- Aid is an *external* intervention in the normal operation of the markets (unlike agreements between firms and concentrations)
  - Spaak report: the level playing field for firms should not be distorted by “artificial advantages”
- Economists may rightfully argue that
  - subsidies correct a market failure (not a distortion but rather correction of a distortion); market intervention may be good for market efficiency; yes, but this is better assessed at compatibility stage
  - small subsidies unlikely to distort much; yes, but should we see these subsidies in isolation?
- Two different perspectives of negative effects
  - **individual subsidy** (and its effect) in isolation
  - **equilibrium effect**
    - cumulative effect of similar measures
    - reactions by other MS (*competition between Member States...*)

## ■ Affect trade

- Not necessary to establish *actual* effect on trade, only whether aid *liable* to affect such trade
- Where State aid strengthens the position of a company as compared with others in intra-EU trade, the latter is typically regarded as being affected by the aid (*Philip Morris*)

# Evolution over the years

- **Commission's change in emphasis** (cases in April 2015, September 2016; 2016 Notice)
  - limits to the scope of the “effect on trade” ; specific circumstances, purely local impact
    - goods or services to a limited area, unlikely to attract international customers;
    - at most, “marginal effect” on cross-border investments or establishment
- **T-728/17, *Marinvest* (14 May 2019): *no aid* decision confirmed**
  - local port services, not likely to attract international consumers
  - offer primarily intended for local residents
  - marginally for non-residents, predominantly Slovenians
  - Komunala Izola's activities negligible on the marinas market on the Adriatic
  - activities not liable to hinder cross-border investments in Slovenia; marginal
  - Komunala Izola will not seek to penetrate foreign markets
  - even if a marginal distortion of competition locally not excluded.

- Para 109 of *Marinvest* v para 192 of NoA Notice (free translation from French)

*“While the terms of paragraph 192 of the Notice on the concept of State aid, which is devoted to the question of aid to beneficiaries with a local dimension (...), do not rule out the possibility of an effect on trade between Member States in the event that the recipient firm is relatively small, **such a situation is not automatic and must be demonstrated on a case-by-case basis.** (...)*

*the Commission's analysis has made it possible to rule out the existence of such an effect on trade or, at the very least, to conclude that the **foreseeable effects** of the measures complained of were **marginal in view of the local dimension** (...).*

*(...) the low turnover achieved by Komunala Izola (...) support this analysis, in particular in that the low turnover is an indication of a very low level of economic activity, in line with the final considerations in paragraph 192 of the State Aid Notice.”*

# Recent Commission's no aid decisions

- 28.04.2020, *Italy - Maritim Group*, SA.48582, points 72 to 99
  - See *Siremar* case below.
- 13.07.2018, *The Netherlands, Groningen Province*, SA.48582, points 68 to 78
  - non-profit real estate foundation for buildings of a specific Dutch area
  - geographically area limited to the activity; population density low and declining;
  - no foreign investor or competitor disadvantaged; in the last 5 years, no other persons/undertakings from other Member States purchased/were interested in purchasing house in the geographical area;
  - sale price not a parameter which would attract foreign customers
  - low amount of public funding of the foundation
- 17.05.2017, *Spain – Basque language*, SA.47448, points 25 to 35
  - Spanish promotion of Basque language in the media
  - product limited to local or regional market (Basque language)
  - limited to costs directly associated with Basque language content; unlikely to attract users outside of the Basque language sphere of influence
  - at most, “negligible impact on trade-flows between Member States”; very small increase of beneficiaries’ operations
- Contra: 04.05.2018, *The Netherlands, Jachthaven Scharendijke*, SA.34815, points 40 to 54
  - marina with a limited geographical reach but attracting foreign boat owners
  - “*The alleged beneficiary's reach is not restrained to the local level (...) an effect on trade can therefore not be clearly excluded on the basis of the available information.*” (54)
  - See *Marinvest* case

# Recent cases rejecting no aid arguments (broad concept)

- T-209/15, *Gmina Kosakowo*, 21.12.2021
  - recap of case-law: only potential effects, not necessarily active cross-border; distortion also includes relief from costs other undertakings have to bear
  - airport competes with other airports in the same “attraction zone”, even if small
  - airport used by international airlines, trade affected (low-cost-sector)
- T-263/15, *Gmina Miasto Gdynia*, 21.12.2021 (under appeal: C-163/22 P)
  - trade must not have been affected on the very day of the decision (no actual effects)
  - small size of aid/beneficiary does not preclude affectation of trade
- T-363/19 & T-456/19, *UK v. Commission*, 8.6.2022
  - tax rulings: no need for the Commission to show actual relocations of multinationals for effect on trade
- C-179/20, *Fondul Proprietatea*, 26.10.22
  - electricity production open for competition and traded cross-border
  - distortion of competition, even if beneficiary not active abroad because competitors are deterred from market entry



## Rejection of no aid arguments but useful indications

- Privatisation of maritime Tirrenia companies - Sale of Siremar to SNS (Cdl not selected) – tax exemption and rescue aid
- Rejection of no aid arguments against Commission decision (recovery order)
  - beneficiary was not allegedly participating in trade exchanges because under extraordinary administration
  - effect on trade
    - objective factors are assessed at the date of decision
    - not necessary to establish actual impact but only whether aid is liable to affect trade and distort competition
    - not necessary for the beneficiary to participate in trade between Member States: domestic activity may be maintained or increased as a result of aid, leading to reduced opportunities for undertakings from other Member States to penetrate the market of that Member State
    - whatever local or regional nature of the services provided or the importance of the area of activity concerned
  - distort or threaten to distort competition
    - not necessary to establish actual distortion but only whether aid is likely to distort competition
    - relief of the costs normally borne distorts, in principle, competition
    - *Philip Morris* sentence (but not referred to; only more recent case)
    - any tax exemption is necessarily liable to distort competition

# No aid: T-582/20, *Ingolstadt congress center*, 19.10.22 <sup>(1)</sup>

- Construction of congress centre (and hotel) on two separate plots of land
- Commission decision SA.48582: no aid (no advantage capable of distorting competition or affecting trade between Member States)
- Doubts on the absence of trade affectation (no formal procedure)?
- Erroneous premise (alleged lack of impact on trade)?
  - only local and regional in scope; effect on cross-border investment and establishment of undertakings only marginal; not capable of affecting trade between Member States
  - the Commission did not dismiss any effect only on the sole ground of local scope - previous decisional practice not binding - individual assessment in each case
  - no argument or "slightest element capable of giving rise to a presumption" that presence of other hotels in Ingolstadt should have led to doubts
  - congress and conference market:
    - no element that Budget, Mercure or NH also developed such activities or were likely to do so
    - even supposing that this is not 'purely' hypothetical, no evidence of doubts through a "body of corroborating evidence capable of demonstrating the existence of difficulties which the Commission was not able to overcome during its examination"

# T-582/20, *Ingolstadt congress center*, 19.10.22 <sup>(2)</sup>

## ■ Size of the congress centre

- why the surface area could not usefully be taken into account and the nature of the events likely to take place more appropriate?
- number of rooms available, their respective sizes and the total capacity taken into account; size considered relating to the catchment area

## ■ Catchment area of the congress centre

- the mere fact that Ingolstadt is well served by road network does not in itself imply that measures are likely to affect trade
- size of the city and international attractiveness? Location of Audi in Ingolstadt? Not relevant
- No evidence of local nature of events in contradiction with feasibility study? Purely general claims
- 80% of clientele are local and regional users: remaining 20% are cross-borders? Not the slightest indication that this proportion reveals doubts
- the nature of the events not the only relevant criterion nor, a fortiori, the fact that only Germans were interested by the tender

# T-582/20, *Ingolstadt congress center*, 19.10.22 <sup>(3)</sup>

- International attractiveness of the congress centre
  - the Commission did not take into account only the nationality of the undertakings which had expressed an interest in the tender
  - the Commission pointed out that the congress centre had not been advertised on websites targeting foreign tourists or international tourism fair
  - no future events scheduled at the centre had been promoted on the international conference and congress market
  - the applicants do not explain why it would have been inappropriate to take account of the lack of interest shown by non-German applicants in the tender
  - no evidence that the nature of the events is the only relevant indicator
  - no evidence that the future activities of the centre were essentially international
  - Commission not bound by its previous practice
- Comparative situation of the congress centre on the national market
  - project was under construction when decision was adopted
  - that cannot indicate doubts (the tender indicated that centre was for local events)

# Conclusion

- *Philip Morris* still valid
- Isolated cases *contra*, justified by special circumstances
  - attempts by the Commission (no aid decisions)
  - isolated General Court's judgments
- No appeals against no aid judgment to CJEU yet
  - Let's be prudent...



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