

# The application of EU State Aid Law in an actual case

## the Role of National Courts

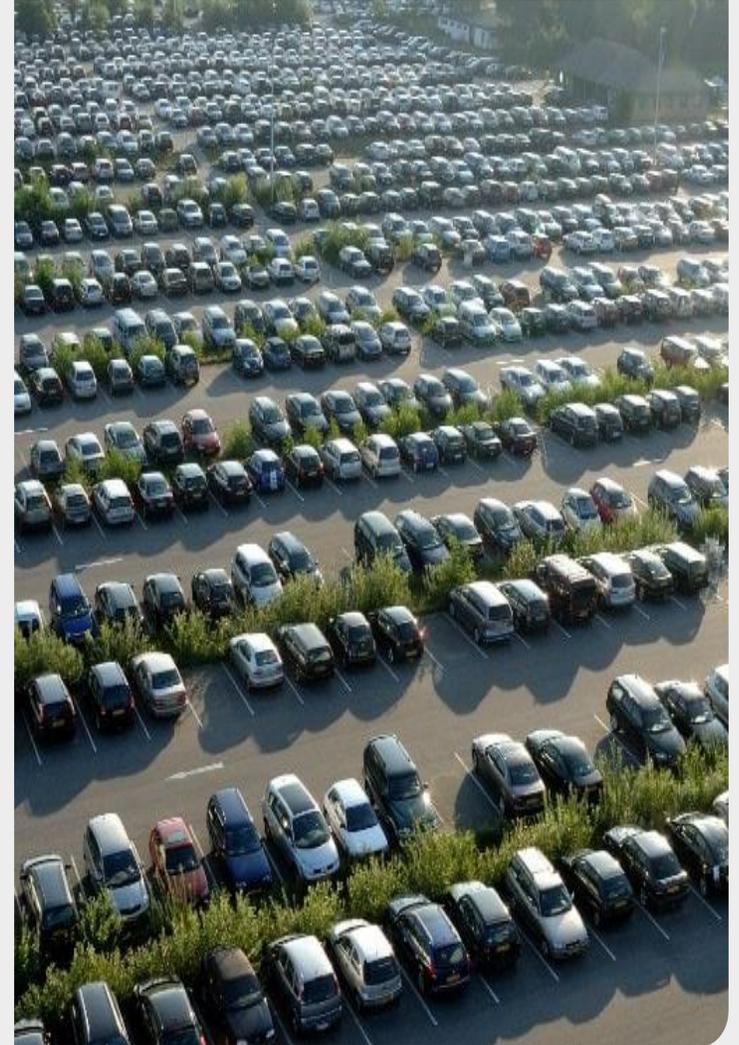
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# Recap from May

- ❖ As with all EU-Law: domestic courts play an important law in the proper application of State aid law
- ❖ Readiness for economic thinking rather than applying legal concepts
- ❖ Readiness for counterintuitive thinking
  - ❖ Way of thinking may differ from legal thinking in 'other' cases

# Case

- ❖ Agreement between Private company **P** and public body Municipality **M**
- ❖ Rent and operation of parking terrain and garage for island visitors
- ❖ Natural monopoly
- ❖ Granted without tender
- ❖ Agreement for 25 years. Option for P to prolong for 25 years
- ❖ No prior valuation of the contract
- ❖ Rent partly indexed



# Case

First questions:

Without a negative decision of the Commission:

- Can M rely on State aid in order to end the contract?
- Can M rely on state aid in order to recover aid given in the past?
- Would M have any choice to whether or not recover and end the the granting of aid?

# Recap May

CoJ 05-03-2019, Eesti Pagar, C-349/17



88 In that regard, the Court has stated that the prohibition on implementation of planned aid laid down in the last sentence of Article 108(3) TFEU has direct effect and that the immediate enforceability of the prohibition on implementation referred to in that provision extends to all aid which has been implemented without being notified.

92 It follows that, where a national authority finds that aid which it has granted pursuant to Regulation No 800/2008 does not satisfy the conditions laid down to qualify for the exemption provided for by that regulation, it is the duty of that authority, *mutatis mutandis*, to comply with the same obligations as those referred to in paragraph 89 of the present judgment, including that of recovering on its own initiative the aid that was unlawfully granted.

# Case

Next questions:

- ❖ What should M prove?
- ❖ If M proves that the agreement entails state aid, what should be the consequences?

# What should M prove?

- ❖ State resources involved?
- ❖ Beneficiary is an undertaking?
- ❖ (selective) Advantage?
- ❖ Distortion of competition?
- ❖ Effect on interstate trade?

# Effect on interstate trade?

P argues:

- P is a very small company, only active in M. It does not undertake any activities that compete with companies established abroad. If these companies already know at all who P is, they will not see her as a threat because of her size.
- Furthermore, the alleged advantage that P would have had would not enable her to influence inter-state trade. The return that P achieves on its activities is by no means sufficient for this. Furthermore, the number of parking spaces that P operates only represents a very small, even negligible, part of the total number of parking spaces in the Netherlands. On that basis, it is not expected that there will be any effect on inter-state trade.



## Effect on interstate trade

- P is based in M. Its geographical scope is limited to M. It does not operate activities outside of M. M is situated far from any member-state's border. There is no question of any competition with parking facilities established abroad. On that basis too, an effect on interstate trade will not be plausible.
- No foreign operator of parking facilities was interested in operating these facilities in M.
- Finally, the alleged support will not make P more attractive for visits by foreign tourists. The parking facilities that P operates are focused on parking for the port terminal and the crossing to the Island. Tourists make a deliberate choice to visit the Island. Only then do they look at what the parking options are.

# Effect on interstate trade

M argues:

- Q-Park, Interparking and Apcoa, among others, are active in several EU member states and are also active in The Netherlands
- Support to a local company can make it more difficult for operators from other Member States to enter the market because the local supply is maintained.
- In addition to the fact that foreign companies are active in the Dutch market for parking, the value of the exploitation also indicates that there is a possible interstate effect. That investing could have been attractive appears from the potential revenue from the operation. The total value of the concession – the total turnover of the concession during the term of the contract – would be many tens of millions if it relates to a duration of 25 or 50 years, given that the revenue in 2018 amounts to EUR 2,639,697.

# Distortion of competition

- P is the only operator of parking facilities in M
- M is the only place from which ferries depart to the island

➤ **So: no competition at all?**

# Advantage

How should we deal with the MEOP?

Who has to prove what?

# Counterintuitive thinking – recap from May

## Burden of proof

- ❖ Rule: the one that claims must give evidence of the facts on which its claims are based
- ❖ If Member State claims the grant of an advantage (no compliance with the MEOP)?

# Counterintuitive thinking

CoJ 20-09-2017, Frucona Kosice, C-300/16P



24. As a result, where it appears that the private creditor test might be applicable, it is for the Commission to ask the Member State concerned to provide it with all the relevant information enabling it to determine whether the conditions for applying that test are satisfied

# Counterintuitive thinking

## Burden of proof re MEOP

- ❖ evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability (GC Frucona Kosice)

# MEOP - Burden of proof

GC 22 May 2019, T-791/16, Real Madrid

45 [...] the Commission found that, considering the legal uncertainties in 2011 surrounding the question whether Madrid City Council was liable to compensate the applicant for that city council's failure to transfer plot B-32, a market economy operator in the same situation as that city council would have sought legal advice before entering into the 2011 settlement agreement, and it pointed out that Madrid City Council did not do so. The Commission added [...], that it had asked the Kingdom of Spain to provide it with 'any legal advice [...] sought before entering into [that settlement agreement]'.

51 However, as the Commission in essence observes, the applicability of the private investor criterion requires that it be established, unequivocally and on the basis of objective and verifiable evidence, that there was an evaluation comparable to one to which a private operator would have had access prior to or at the point of adoption of the measure at issue

52 In order to reply to the Commission's request, the Kingdom of Spain could have relied on any legal analysis which Madrid City Council would have had drawn up in the circumstances given in paragraph 51 above.

# Case - Advantage

- ❖ M had an expert report drafted in 2016 from which it appears that the rental price P pays is below market price. A market price would have been € 900.000 per year (€ 675.000 for the terrain, € 225.000 for the garage)
- ❖ M had a second expert report drafted on the market conformity of the rental price in 2008-2018.

## Argument P:

- when renting commercial property, the revenue to be generated is not the starting point for determining a market-based rental price. This is because the starting point is the invested capital, the desired return and the available area to be rented out. It is precisely in parking facilities that the area to be used is decisive, since the area determines how many cars can use the parking facility.

# Case - Advantage

- Several comments on the expert reports
  - P claims:
    - reports take as basis that garage could be managed from a distance whereas P employs 2 fte for managing the garage
    - P employs 4 fte for the terrain whereas the reports only count with 1 fte
      - Reports are based on experience of the experts with other operators of parking facilities
- P: This means that the municipality cannot prove, that there is a an advantage for P.
- What about this burden of proof?

## Advantage - questions

- ❖ What should be the point in time for assessing whether or not the agreement was in conformity with the market? 1990?
- ❖ What about the fact that the expert reports only go back to 2009?
- ❖ What arguments could be given for the claim that the agreement did not reflect market value in 1990?



## Advantage - questions

- ❖ Could the length of the contract in itself be an advantage?
- ❖ Question is: would a private owner of the terrain and garage enter into this agreement under these conditions?

# State aid - consequences

- ❖ Could P invoke the GBER?
- ❖ Or claim that M (the Member state) should notify the agreement under the GBER?
- ❖ Is the agreement null and void?
- ❖ What remedies should the national court use?

# THANK YOU FOR YOUR ATTENTION

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