

The application of EU State Aid Law in the Member States

A Practitioner's Perspective on the Role of National Courts

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What roles may the national courts play in state aid law?

- ❖ Recovery after negative decision of the European Commission
- ❖ Review of decisions of state bodies implying aid (e.g. subsidies)
- ❖ Contract law disputes



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- ❑ Not: is the aid compatible or not

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- Commission Notice on the Notion of State Aid?
 - Status?
 - Be critical

The Role of the Courts and European Commission

“[...] State aid [...] is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article [107](1) of the Treaty.”

CoJ 16 May 2000, C-83/98P, France and Ladbroke Racing v Commission

Is the EC a reliable amicus curiae?

State aid for FC Barcelona:

GC 26-02-2019 (T-865/16): no advantage

State aid for Italian bank:

GC 19-03-2019 (T-98/16, T-196/16 en T-198/16): no state resources

State aid for FC Hercules

GC 20-03-2019 (T-766/16): advantage (lack of reasoning)

In 2018: 8 annulments of Commission decisions

EC as amicus curiae

- ❖ Certainly huge expertise
- ❖ Good source of information
- ❖ However: administrative body with its own interpretation of concept of aid
- ❖ In the end: Court of Justice determines the ambit of the concept of State aid
- ❖ Stay critical

Knowledge of how to deal with GBER (if GBER is invoked)

- Difficult concepts
 - Transparency
 - Incentive effect
 - Eligible costs
 - Etc.
- e.g. incentive effect

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



Knowledge of how to deal with GBER (if GBER is invoked)

Eesti Pagar

- Agreement to acquire from Kauko-Telko Oy a tin loaf and sandwich loaf bread production line for the price of € 2 770 000
- Buyer: Eesti Pagar, supplier Kauko-Telko Oy
- September 2008: leasing contract between Eesti Pagar and AS Nordea Finance Estonia
- 13 October 2008: tripartite sale contract, whereby Kauko-Telko undertook to sell the bread production line to Nordea Finance Estonia, which undertook to lease the line to Eesti Pagar. That contract took effect upon signature.
- 24 October 2008: application for aid with respect to the acquisition and installation of that bread production line.

Knowledge of how to deal with GBER (if GBER is invoked)

Court of Justice:

In those circumstances, it must be held that Regulation No 800/2008 confers on the national authorities not the task of verifying whether or not the aid at issue has a genuine incentive effect, but the task of verifying whether or not the applications for aid that are submitted to them satisfy the conditions, laid down in Article 8 of that regulation, that govern whether aid can be considered to act as an incentive.

Readiness for economic thinking rather than applying legal concepts

- Undertaking
- Advantage: Market economy operator principle

However:

- State resources or attribution of an advantage to the state
- Distortion of competition
- Effect on interstate trade
- Qualification of aid as *de minimis* (€ 200.000/3 yrs)

Economic Thinking?

CoJ 14 January 2015, C-518/13, Eventech

- In particular, when aid granted by a Member State 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
- In that regard, it is not necessary that the beneficiary undertakings are themselves involved in intra-Community trade. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced

Readiness for counterintuitive thinking

Background of State Aid Law

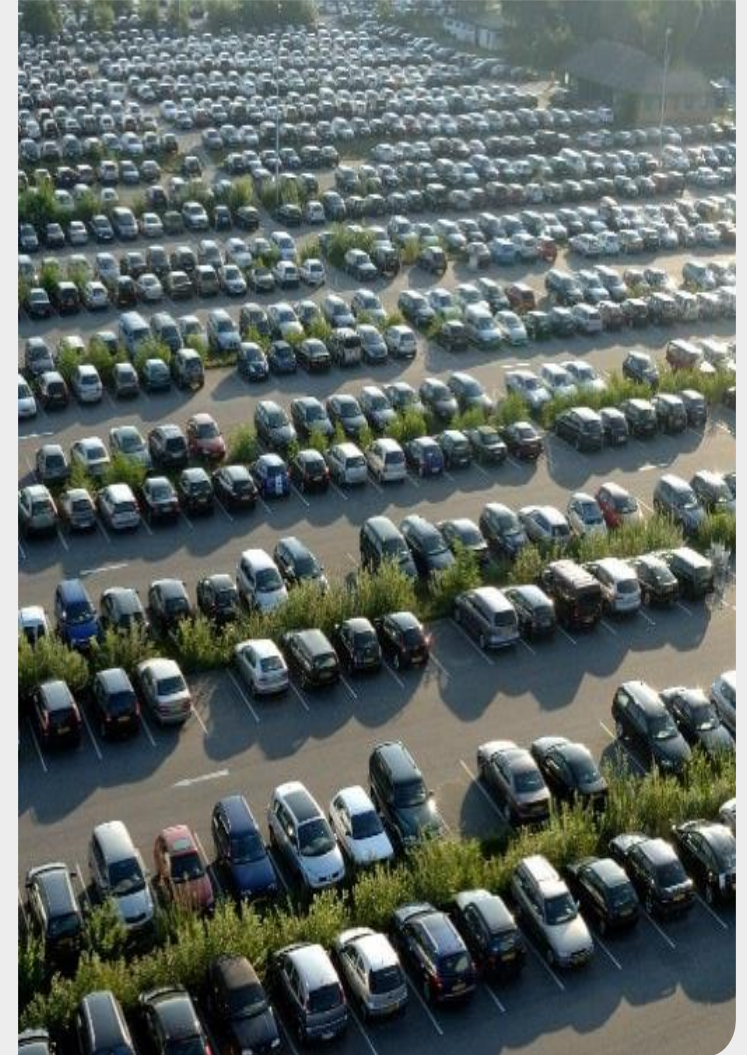
- ❖ Part of competition law
 - ❖ Prevent member states from distorting of competition in internal market
- ❖ Protection of level playing field
- **Not only the interests of beneficiary and Member State are involved**
 - Interest of 'the market' (competitors)

Couterintuitive thinking - example

A private company and a public body have negotiated a contract for 3 years. The result: a contract according to which the undertaking operates a certain infrastructure for 30 years against a rent of € 100.000/yr. No indexation. No termination option. After 10 years the public body wants to end the contract considering that they became aware of the fact that in other cases in comparable circumstances rents of € 180.000/yr are paid. The undertaking claims that, give its proceeds and its costs the rent of € 10.000 is the maximum he is able to pay.

The public body starts proceedings. Claim:

- Termination of the agreement
- Recovery of the aid given in the past 10 years



Counterintuitive thinking - example

- What about: pacta sunt servanda?
- Not only the agreement between undertaking and public body is relevant
- Not only the costs of this undertaking are relevant
 - Abstract from the specific undertaking
 - Assess maximum rent on the base of an efficient undertaking
- **Be aware that you should compare with an 'abstract' efficient undertaking**
- **Compare with what possible yield could be obtained and what room would be left for the rent, given an efficient operator**

Counterintuitive thinking

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)

Counterintuitive thinking - example

EU law precludes, in circumstances such as those at issue in the main proceedings, the application of a rule of national law enshrining the principle of res judicata from preventing a national court which has held that contracts forming the subject-matter of the dispute before it constitute State aid, within the meaning of Article 107(1) TFEU, implemented in breach of the third sentence of Article 108(3) TFEU, from drawing all the consequences of that breach because of a national judicial decision which has become definitive, which court, without examining whether those contracts constitute State aid, has held that the contracts remain in force.

CoJ 11-11-2015, Klausner Holz (C-505/14)

Role of the National Courts

- ❖ As with all EU-Law: domestic courts play an important law in the proper application of EU-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

THANK YOU FOR YOUR ATTENTION

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