

# European State Aid Law II

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## (2) Economic advantage

- T-157/01 *Danske Busvognmænd*:
  - lighten the burdens normally assumed in an undertaking's budget, economic advantage which the undertaking would not have received in normal market circumstances
- any advantage of monetary nature conferred by the state or its agents
  - Relief from economic burdens, mitigation of charges
  - Compensation for regulatory obligations
  - Own legal factual context with and without the measure
- anything that the state gives up without objective justifications
- Effects only? Only?

# *Market economy operator test*

- Private investor/vendor/creditor test
  - Has the state granted advantage to an UT by not acting as a market economy operator in a certain transaction
  - helps to ensure equal treatment between public-sector operators and private firms; equal treatment of the private and public sector
  - Cases: *Chronopost, Ufex, Bouygues, Valmont*
- Assessment: 2 methods
- I. *Ex ante* basis: any prudent MEO would do an *ex ante* assessment of strategy and financial prospects of project i.e. business plan
  - Empirical establishment on the basis of market data
    - *Pari passu* private and public entities carry out the transaction (exactly same terms, conditions, risks)
    - Transparent, non-discriminatory and unconditional tender (Public procurement Directives)

# *Market economy operator test cont'd*

- II. Benchmarking (comparable transaction, comparable private operators, comparable situations)
- Problems: no similar circumstances or comparable market conditions
- C-83/01 *Chronopost* paras 35-40:
  - La Poste entrusted with SGEI, which requires substantial infrastructure and resources
  - Creating and operating market network, which would not have been created by a private investor
- there is no obvious market benchmark against which to compare prices or interest rates
- Other assessment methods
  - Generally accepted standard assessment methodology

## C-280/00 Altmark: compensation for SGEI

- the grant of licences to a local bus company is challenged to the extent that that company needed public subsidies to discharge the public service obligations deriving from those licences
- Preliminary questions from the *Bundesverwaltungsgericht*:
  - “whether subsidies intended to compensate for the deficit in operating an urban, suburban or regional public transport service come under Article 87 (1) of the Treaty in all circumstances,
  - or whether, having regard to the local or regional character of the transport services provided and, if appropriate, to the significance of the field of activity concerned, such subsidies are not liable to affect trade between Member States”

# Compensation or economic advantage?

- what amounts to an economic advantage under Article 107(1)?
- state compensation for public service obligations (PSO)
- 4 cumulative criteria paras 89-93
  - definition of PSO
  - *ex ante* definition of parameters
  - compensation cannot exceed net additional costs plus a reasonable profit
  - benchmark of a typical well run company

# Article 106 (2)

- The rationale behind Article 106(2)
  - exception to all Treaty provisions
  - balancing between EU competition rules and general economic interests of Member States
  - *ultima ratio* provision
  - Member States have freedom to define what they regard as services of general economic interest
  - proportionality and necessity test
  - no efficiency test

# *Altmark* implications

- positive:
  - good governance in the operation of PSOs
  - transparency and legal certainty
  - preference for public procurement
  - efficiency should be part of the test
  
- problems:
  - benchmark of a typical well run company
  - what remains the role of Article 106 (2)?
  - what is reasonable profit?



# What remains the role of Article 106 (2)?

- Overlap between 1st and 3rd Altmark criteria and Art.106 (2)
  - Compensation and proportionality considered under Art.107 (1)
  - Incorporate derogation into the notion of advantage
  - If a measure fails the Altmark criteria then Art.106 (2) will not apply either
- 2nd and 4th Altmark criteria departure from Art.106 (2)
  - *Ex ante* transparency
  - Efficiency
- BUT application of Art.107 (1) should not be determined on the basis of leaving room for the application of Art.106 (2)
- Can Art.106(2) be applied after the application of the Altmark criteria?

# New package on SGEI

- Replaces "Monti-Kroes" Package of July 2005
  - Conditions under which State aid in the form of public service compensation can be considered compatible with the EU rules
- Commission Decision 2012/21/EU
- Communication on the application of the state aid rules to compensation granted for the provision of SGEI
  - Clarify key concepts on application of state aid rules to public service compensation (undertaking, economic activity, effect on trade, state resources, entrustment, compensation)
- Communication for state aid in the form of public service compensation
  - State aid public service compensation not covered by the decision

# Commission Decision 2012/21/EU

- Exempts Member States from the obligation to notify public service compensation for certain SGEI-categories to the Commission
  - Exemption is extended from hospitals and social housing to a much wider range of social services and a lower compensation threshold applies for triggering notifications for other SGEI activities
  - Notification threshold was lowered from €30 million to €15 million
- More precise methodology to determine the amount of compensation
- Introduce efficiency incentives in compensation mechanisms, comply with EU public procurement rules and equal treatment of providers of the same service for determining compensation

## (3) Selectivity

- general measure v. specific, selective measure
- condition of specificity: different treatment is not attributable to the logic of the system of charges in question
- affect the balance between certain firms and their competitors
- difficult when state confers discretionary power to another entity to authorize or grant aid: is there **administrative discretion** in its application?
- what is the extent of the state's influence on financial other institution that grants the aid?

# 3 step analysis

- 1. System of reference must be defined
  - Consistent set of rules that generally apply on the basis of objective criteria to all units falling under its scope as defined by its objective
- 2. Does a given measure constitute derogation from that system?
  - Differentiates between units in similar legal factual situation?
  - Special purpose levies (environment, health tax) integrate policy objectives
- 3. derogatory measure can be justified? By the nature of the general scheme of the reference system?
  - Proportionality and necessity test
  - Fight fraud, tax evasion, avoid double taxation
- In exceptional cases the reference system has to be analysed: has it been designed in a consistent, non-arbitrary manner etc.

## 3 step analysis cont'd

- C-106/09 P and C-107/09P *Gibraltar taks*
  - Founded on criteria of general nature
  - Discriminated between undertakings in similar situations
  - Selective advantaeg to offshore companies
- C-53/00 *Ferring*
  - Levy imposed on direct sale of medicinal products by pharm. Laboratories but not on wholesalers
- Taxation: particularly difficult
  - progressive rates of taxation, lower rates may treat certain undertakings more favourably
  - dividing line between general measure and general aid is obscure
  - aid = derogation by its nature from the general scheme where it is set
  - General measure applies without distinction across the board to all firms

## (4) Effect on trade

- Broad concept: standard of reference by which compatibility with common market is assessed
- Semantical reason: not part of the definition of aid
- Practical reason: Art.108 (1) (2) no requirement to demonstrate effect when reviewing existing aid
- “Foreseeable prospect” that the market share of recipient of aid increases, reduces chances of other undertakings from other M.Sts, less chance for import
- Overcapacity in particular sector usually qualifies

## (5) Distortion of competition

- Philip Morris applicant: definition of relevant market, small amount of aid
- Court: strengthens the position of an undertaking
- BUT Commission must set out reasons for its decision:
  - Leeuwarder Papierfabriek, Sardegna Lines para 66
  - Right of defence
- BUT no detailed competition analysis
- no quantitative test
- Formalistic approach: improves relative market position of recipient



# Effect on trade- distortion of competition

- Neither definition nor quantification when aid is capable of affecting trade and distorting competition
- Reasoning: reduces chances of undertakings from other Member States
- Not so much market shares count but whether it is foreseeable that recipient gains economic advantage *vis-à-vis* its rivals
- See Regulation 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid
- Commission Vademecum 2008:
  - potential effect on competition and trade between MSs
  - sufficient to show that the beneficiary is involved in an economic activity
  - he operates in a market in which there is trade between MSs
  - nature of the beneficiary is not relevant in this context (even a non-profit organization can engage in economic activities)

# Cases

- Effects based approach:
  - C-173/73 Italy v. Commission paras 17-19
  - C-75/97 Belgium v. Commission para 25
- BUT
  - C-72&73/91 Sloman Neptun para 21
- Distortion of competition
  - *Vlaamse Gewest* para 43 + para 46
- Effect on trade
  - Philip Morris para 11
- *Leeuwarder Papierwarenfabriek* paras 22-24, *Sardegna Lignes* para 66, *Le Levant* paras 111-125
  - State reasons on which Commission bases its decision

# Financial crisis – national rescue schemes- amendment of state aid rules

- Member States
  - Individual cases
  - Article 107 3 (c) + Guidelines on rescue and restructuring aid (2004)
- But crisis intensification, structural measures potentially going beyond 6 month rescue phase
- Individual interventions lead to subsidy races and proved to be ineffective
- New state intervention: general schemes
- Commission: guarantee level of playing field and well-targeted public support