Current Issues in the law of State Aid
ICEL Competition Conference

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All views expressed are personal
Criteria for State Aid

The intent behind the measure is irrelevant – the notion of aid is objective. For a measure to be State aid, there must be:

- State resources

- In a State measure or measure imputable to the State

  - Conferring an advantage

  - In a selective fashion

  - On undertaking(s)/economic activity

  - Having an effect on competition

  - And an effect on inter-State trade
State Resources

Contrast the situations when

• the State transfers resources it owns or creates a sufficiently concrete risk of losing resources it owns or foregoes obtaining resources to which it is entitled

with

• State-mandated transfers from private persons to beneficiary with no transit through an intermediary (public or private) designated by the State to look after the transfer process
  – Case C-656/15 P Commission v TV2/Danmark EU:C:2017:836, §§ 50-53 and 63
  – Case C-329/15 ENEA EU:C:2017:671, §§ 30, 31 and 35 (confusion between State resources and imputability?)
Imputability

Where the transfer or forbearance is not that of the State itself (e.g., a measure taken by a State-owned bank), then State aid is present only where the decision can be attributed to the State

– Case 482/99 Stardust Marine
– Case C-242/13 Commerz Nederland
– Case C-472/15 P SACE and Sace BT EU:C:2017:885, §§ 26, 29 and 39-44.
"Favouring certain"

• Opinion of AG Wahl, Case C-15/14 P
  Commission v MOL EU:C:2015:32, §§ 47 and 48:

That requirement as to selectivity or — to use another term frequently employed — ‘specificity’ of the measure must be clearly distinguished from the detection of an economic advantage. In other words, once an advantage, understood in a broad sense, has been identified as arising directly or indirectly from a particular measure, it is then for the Commission to establish that that advantage is specifically directed at one or more undertakings. It falls to the Commission to show that the measure, in particular, creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. […]

That said, the selectivity requirement cannot, none the less, in my view, be completely disconnected from the concomitant, albeit separate, identification of an economic advantage.
Selectivity – Individual aids

Case C-270/15 P *Belgium v Commission (TSE)*
EU:C:2016:489, § 49:

In the [case of individual aid], the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective.
Selectivity – Individual aids

• Case C-211/15 P Orange v Commission (FT pensions) EU:C:2016:798, §§ 53 and 54

[T]he 1996 Law affected only France Télécom and, as a result, it was selective. No need to compare with other operators.

End of the “Chrissie Hynde” thesis
Material selectivity – general schemes

Case C-15/14 P Commission v MOL EU:C:2015:362, §§ 59 and 60

It falls to the Commission to show that the measure, in particular, creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. It is necessary therefore that the advantage be granted selectively and that it be liable to place certain undertakings in a more favourable situation than that of others.

[...] [W]hen examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity.
Material Selectivity – A defined category of beneficiaries?

• C-20/15 P Commission v World Duty Free Group EU:C:2016:981, § 71

The analytical method applicable to selectivity in tax matters that may be deduced from the Court’s settled case-law essentially involves ascertaining whether the exclusion of certain operators from the benefit of a tax advantage that arises from a measure derogating from an ordinary tax system constitutes discrimination with respect to those operators.

It does NOT require the identification of a particular category of undertakings, who are exclusively favoured by the measure concerned and who can be distinguished by reason of specific properties, common to them and characteristic of them.
Material selectivity – role of competitive dynamics

Case C-270/15 P Belgium v Commission EU:C:2016:489, §§ 53 and 54

[T]he situation of operators in the bovine sector was implicitly but necessarily compared to that of all the undertakings which, like them, are subject to inspections which they are required to perform before placing their products on the market.

Although [...] Belgium maintains that those different sectors are not in a comparable situation since the tests intended to control the quality of products, even food products, vary from one sector to another […], such an argument is ineffective in the context of the categorisation of State aid, which relates not to the tests themselves but to their financing by State resources having the effect of alleviating the burden of costs on its beneficiaries. It is undisputed that […], that the operators in the bovine sector benefited, by the financing of the screening tests, from an advantage which was not available to undertakings in other sectors.
Material selectivity – justification – not limited to fiscal measures

Case C-518/13 Eventech EU:C:2015:9, §§ 56 to 61

[T]he referring court asks the Court […] to assess, in order to determine whether there is any selectivity in the advantage granted, whether the measure at issue introduces distinctions between operators who are, in the light of the objective pursued, in a comparable factual and legal situation.

[...]

In that regard, it must be stated, first, that the identification of the factual and legal situation of Black Cabs and minicabs cannot be confined to that prevailing in the market sector in which those two categories of conveyors of passengers are in direct competition, namely the pre-booking sector. It cannot seriously be doubted that all the journeys made by Black Cabs and minicabs are liable to affect the safety and efficiency of the transport system on all the road traffic routes in London.

Secondly, it must be taken into consideration that, by virtue of their legal status, only Black Cabs can ply for hire; they are subject to the rule of ‘compellability’; they must be recognisable and capable of conveying persons in wheelchairs, and their drivers must set the fares for their services by means of a taxi meter and have a particularly thorough knowledge of the city of London.

It follows that Black Cabs and minicabs are in factual and legal situations which are sufficiently distinct to permit the view that they are not comparable and that the bus lane policy therefore does not confer a selective economic advantage on Black Cabs.
Material selectivity – general schemes – justification - coherence


A national measure may be justified by the nature or general scheme of the tax system at issue only if, first, it is consistent not only with the characteristics forming an essential part of the tax system at issue but also with the implementation of that system and, secondly, it is consistent with the principle of proportionality and does not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures. […]

[T]he measure at issue is not consistent with the objective pursued. [It] applies only to undertakings in difficulty. In those circumstances, it is not clear why the principle of taxation according to the ability to pay requires that a company in difficulty should be able to benefit from loss carry-forward, where that carry-forward is denied to a healthy company that has incurred losses and meets the other requirements of the restructuring provision. […]

[T]he argument relating to the lack of control over the use of losses is not consistent. Other companies which do not fulfil the requirements of the restructuring clause may also encounter economic difficulties and be unable to exert control over how losses are used, while being excluded from the application of the restructuring clause.
Material Selectivity - Reasons

• Case C-70/16 P ‘Retegal’ v Commission EU:C:2017:1002, §§ 60 to 62

The statement of reasons in the decision at issue [...] contains no indication of the reasons why undertakings active in the broadcasting sector should be regarded as being in a factual and legal situation comparable to that of undertakings active in other sectors or why undertakings using terrestrial technology should be regarded as being in a factual and legal situation comparable to that of undertakings using other technologies.
Selective *Advantage*

Payments, investments, loans, guarantees, sales, purchases and any other measures of an economic nature taken by a Member State create **NO ADVANTAGE** if they are in line with the behaviour of a comparably situated private market operator.

When the Commission is faced with a measure of that nature, it must therefore examine if the State’s conduct is in line with that of a market economy operator (*the MEO principle*).

– Case C-124/10 *EdF*

– Joined Cases C-214/12 P, C-215/12 P and C-223/12 P *Land Burgenland and others*
MEO – intensity of review and a State aid "history"

– Case C-579/16 P Commission v FIH Holding EU:C:2018:159

– Case C-300/16 P Commission v Frucona Košice EU:C:2017:706
Subsidies for services may not confer an advantage

Case C-280/00 Altmark Trans GmbH
Article 107(1) TFEU does not catch subsidies provided as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For no advantage to be present, four conditions must be satisfied.

There is an advantage in offsetting a structural disadvantage if the Altmark criteria are not met (‘Combus is dead’):

Case C-211/15 P Orange v Commission (FT pensions) EU:C:2016:798, §§ 44 and 45
“Non-undertakings I”

An entity will not be considered an undertaking where its activities are linked to the exercise of the public remit (‘State prerogatives’)


– Appeal C-687/17 P
“Non-undertakings II”

An entity will also be excluded from the category of "undertaking" if the entity engages in an activity on the basis of solidarity.

Where the activity has mixed characteristics, what test is to be applied, and is there one factor more important than any others?

– Case T-216/15 Dôvera zdravotná poist’ovňa v Commission ('Slovak health insurance) EU:T:2018:64, §§ 58, 63, 64, 67 and 68.
– Appeal
Ancillarity?

• Contrast footnote 305 of the 2016 NoA with

• Case C-74/16 Congregación de Escuelas Pías Provincia Betania EU:C:2017:496, §§ 60 to 62
Effect on trade between Member States and distortion of competition

The two conditions are very closely linked

The Union Courts: in principle enough that the product or service is subject to trade between Member States (in a liberalised market)

No distortion of competition possible for services that are subject to a legal monopoly in line with EU law (under very strict conditions)

Recent Commission decisional practice is that small local services do not affect trade, if:
• unlikely to attract customers from other Member States and
• not foreseeable that there will be more than a marginal effect on the conditions of cross-border investments or establishment

Case T-813/16 Abes v Commission (Santa Casa de Misericordia de Tomar (SCMT)) EU:T:2018:189
Case T-728/17 Marininvest v Commission, pending