Chapter 15

Effects on Trade and EU State Aid Law: Reality or Chimera?

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1. Defining the framework and setting the question

In this contribution I will address - in a way that is not necessarily systematic and that does not at all maintain to be exhaustive - one of the apparently less relevant elements, in practice, of the 'notion' of State aid under Article 107 TFEU: the effect that the measure qualifying as aid must have on trade between Member States

In an earlier contribution that appeared in 2020 on this topic[1], I advocated a kind of a rule of reason approach, based on the need for the Commission, or any private enforcer, to show a sufficiently real threat to trade in the internal market trade, in order for art. 107 TFEU to apply. I argued there that a presumption of interstate effects might well be a workable shortcut to ensure the effectivity of EU State aid rules. However, such a presumption should only operate *in concreto*: i.e. where factual elements can be found in the case at hand, that justify to shift the normal operation of the burden of proof a public or private enforcer has to bear, and presume an internal market effect. I tentatively put forward some of such factual elements, by referring e.g. to the place of establishment of negatively affected competitor(s), to the fact that they are acting in an establishment regime - or indeed under the freedom to provide services within the Union - or when there's actual evidence that the beneficiary is directly or indirectly involved in interstate trade, as the relevant market extends over several member States, or when it enjoys a non-negligible market position in a single member State geographical market[2]. Otherwise, I argued, the result of a presumption universally applicable upon the sole recurrence of the other elements of the notion of aid would lead to a substantial disrespect of the principles of subsidiarity, proportionality and, ultimately, democracy.

Now I have been asked by some colleagues and friends, among them Jorge Piernas López, to contribute to a stimulating collective work with some further developments on that issue. No one will be taken by surprise, then, to read that my research question here is, essentially, to continue the line of analysis I started in my previous article.

To do this, I will first try to put the actual practice in perspective, by recalling the analysis of different periods of State aid enforcement at the Commission's level that Piernas López put at the basis of his work on the concept of State Aid[3]. In fact, I find that contribution extremely useful to understand the evolutionary dimension of the State Aid concept, and to place that evolution, which is the consequence of successive adjustments of the policies underlying the Commission's enforcement of EU State Aid law, in line with the overall evolution of the European integration process.

Still I will try to depart from the "purity" of such macroscopic lines of development, and investigate whether other less virtuous dimensions emerge, when scratching the surface of the system and… looking for the debris its evolutionary leaps produce.

[1] Bernardo Cortese, State Aid Law as a passepartout: Shouldn't We Stop Taking the Effect on Trade for Granted?, *Bratislava Law Review*, 2020, pp. , 4(1), 9-18.

[2] Ibidem, p. 16 f.

[3] Juan Jorge Piernas López, *The Concept of State Aid under EU Law: From Internal Market to Competition and Beyond*, Oxford University Press, 2015.

This is, I concede, a less systematic approach, but one that might help correct some imbalances or side effects that might otherwise render murky and, possibly, not healthy at all, the overall atmosphere in which the EU integration operates.

2. The evolutionary trends of the Commission's State Aid practice

According to the systematization accepted here, the practice of the Commission and the case law of the Court of Justice can be articulated into four periods of successive developments[4].

In a first period, lasting until the early '70s, the focus was on cases having a clear negative impact on external competitors, showing therefore a strong link between competition (including State Aid) policies and the need to ensure the establishment of a common/internal market.

In a second era, covering the period until the mid '80s, the Commission continued to pursue the fostering of the internal market, through a stricter approach especially on illegal aids and a focus on their recovery. At the same time, some "policies" appeared inside the Commission's practice, linked to old and new competences, thus defining an EC own industrial policy. In pursuing such a policy, the affirmation of the Market Economy Investor Principle, among other things, led to moving the focus of the State Aid enforcement towards fostering efficiency. The goal emerged of ensuring a level playing field *inside* Member States' economies, prohibiting the distortion of competition between public and private operators.

A third period, starting with the White Paper "Completing the Internal Market" of 1985 and extending into the mid '90s saw the reinforcement of a Commission's own industrial and overall economic policy, through the channelling of State Aid towards the creation of new jobs and the targeting of public distortions of competition, in parallel with the push towards privatization of public undertakings. The introduction of the subsidiarity principle in the Treaty framework indirectly, brought about by the Maastricht Treaty, induced a *de minimis* approach in this field, too. Although one could question whether such a reference wasn't just …ennobling a mere internal efficiency goal.

The fourth period is that starting in the late '90s, and leading us into the crisis (now, we can say; the *crises*). The features of this period can be summarized as encompassing, first of all, a refocussing of the State Aid policy on new priorities, including a stricter approach on direct business taxation, a focus on the SGEIs financing, a link to growth and horizontal priorities as defined by the European Council Lisbon Agenda and by the Commission's State Aid Action Plan, and an overall goal towards "less and better targeted aid".

Further, increased transparency and legal certainty are linked to the adoption of procedural rules and block exemptions, and a "partnership" with Member State's authorities is at the core of the so called "Modernization".

Finally, dealing with the crisis *inside* the State Aid regime is probably the last decisive mark of a period that sees the Commission in full command of a complex and "all-round" EU policy.

3. The Evolution of State Aid Law as Part of the Self-Constitution of the EU Legal System

This picture – which I find quite convincing – leads to the conclusion that the State Aid rules contained in the Treaty essentially evolved, through the evolution of the enforcement priorities set, and of the mechanisms applied, by the European Commission. Such evolution was endorsed by the case law of the Court of Justice.

[4] Juan Jorge Piernas López, *The Concept of State Aid under EU Law*, cit., p. 45 ff.

As such, the evolution of the EU State Aid concept is, I observe, one of the *substantive* law fields giving flesh to an approach I elsewhere proposed, to understand the nature of the EU integration process, namely one focussing on the 'self-constitution' of the EU legal system[5].

The self-constitution of the EU legal system is, however, first of all evident in the effective affirmation of *structural* legal principles addressing the relationship between EU law and national laws, and in the actual inclusion of national courts – and, to a lesser extent, of national administrations- in a (crypto-)federal structure of the Union[6].

Now, this structural dimension of self-constitution dynamics of EU law is quite evident in the field of EU State Aid law application, too. The very division (and integration) of the respective functions between the European Commission, on one side, and the national authorities and courts, on the other side, has changed its signification over time in this field, in a telling example of the growing federalization of the EU legal system.

For a long time that division, based on the exclusive competence of the Commission to apply art. 107(3) TFEU derogations, and on the (often disregarded) stand-still obligation enshrined in art. 108(3) TFEU, was simply a …front line between opposing legal worlds. It is by no chance that the first actual application by the Court of Justice of its revolutionary *Francovich*[7] approach to the judicial activity, involving the application of an interindividual, civil law liability of a Member State for a supreme court's "characterized" violation of EU law, came in a State Aid law issue in *Traghetti del Mediterraneo* in 2006[8], and that right before the hitherto unthinkable step over the *res judicata* principle in *Lucchini* in 2007[9], another (…belligerent) State Aid case.

This was the hard part of the taming exercise EU law had to perform on Member States' (admittedly: quite often, Italian) administrative and judicial institutions.

Then came the State Aid Modernisation, and EU State Aid law became a mainstream dimension of national legal life[10], with the GBER and, for some Member States, with the Common Understandings[11].

4. …And the Connected Responsibilities of EU Institutions

As I already stressed under a more general perspective, however, an evolutionary affirmation of the EU legal system by self-constitution, leading either to the actual extension of EU competences or in any case to the actual compression of Member States' ones, requires a responsible attitude of EU political institutions, namely one necessarily inspired by a strict proportionality and subsidiarity

[5] Bernardo Cortese, A la recherche d'un parcours d'autoconstitution de l'ordre juridique interindividuel européen: essai d'une lecture pluraliste 50 ans après Van Gend en Loos et Costa, 2 *Il Diritto dell'Unione Europea,* 2015, pp. 271-315; Id., *L'ordinamento dell'Unione europea, tra autocostituzione, collaborazione e autonomia*, Giappichelli, 2018, pp. 1-350, esp. pp. 3-6, 16-129.

[6] As to the national courts, cf. Bernardo Cortese, *L'ordinamento dell'Unione europea,* cit.*,* p. 91 ff.: as to the national administrations, Ibidem, p. 80 ff.

[7] Judgment of the Court of Justice of 19 November 1991, *Andrea Francovich and Danila Bonifaci and Others v Italian Republic* (C-6/90 and C-9/90, ECLI:EU:C:1991:428).

[8] Judgment of the Court of Justice (Grand Chamber) of 13 June 2006, *Traghetti del Mediterraneo SpA v Repubblica italiana* (C-173/03, ECLI:EU:C:2006:391).

[9] Judgment of the Court of Justice (Grand Chamber) of 18 July 2007, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* (C-119/05, ECLI:EU:C:2007:434).

[10] See on some issues related with this mainstreaming Carlo M. Colombo, State aid control in the modernisation era: Moving towards a differentiated administrative integration?, 3 *European Law Journal* 25, 2019, pp. 292-316.

[11] Cf. the Common Understanding on Strengthening the Institutional Setup for State Aid Control in Italy, published on line at https://www.politicheeuropee.gov.it/en/activity/state-aid/partnership-with-the-european-commission-common-understanding/.

approach. At the same time, the EU courts – the Court of Justice and the General Court as well – should reconsider their role and act not just as a loose controller of the political institutions' attitude, but rather as a true *cour d'arbitrage*[12].

This is particularly urgent in the realm of State Aid law, where the evolutionary approach followed by the Commission has given the latter a tool to participate in the shaping of member States' decisions in fields where harmonization powers either lack, or have yet to be fully exercised through the required legislative procedures.

Moreover, I add, when the EU legal system's evolution leads to the creation of an integrated system of enforcement and legal protection, as is now the case in the State Aid law field after the Modernisation shift, the political-executive and judicial masters of this process, namely the Commission and the Court of Justice, bear the responsibility to create the legal conditions for the proper functioning of such an integrated, crypto-federal framework.

They should contribute to the establishment of a workable system where individuals – but also national institutions – can rely on a stable and foreseeable legal framework. Legal certainty is indeed a necessary element of a Union based on the rule of law. And legal certainty must be ensured not only as to the content of substantive EU law rules applicable, but also as to their interaction with national law rules, and in the end as to the possibility (or not) to rely on rights conferred on individuals by national laws.

5. The Effect on Trade: Jurisdictional Criterion or Presumption?

My working hypothesis, here, is that EU State Aid law is failing such responsibility. And this happens mainly because of the inadequate operation of the criterion requiring an effect on trade between Member States. That criterion - which should operate as a jurisdictional diaphragm delimiting the scope of application of the Treaty's provisions 'designed to regulate competition', including State Aid rules[13] - is in fact applied in such a way that makes it almost impossible to for such a criterion to operate *ex ante*, i.e. without a prior decision of the Commission excluding the application of art. 107 TFEU in a given case.

It is true that the Commission is trying to adjust its practice in this field, and signalling some criteria that should let it go "big on big things and small on small things"[14], as announced in the Modernization Notice[15], as recalled in the relevant part of the 2016 Notice on the Notion of State Aid referring to the Commission's practice on measures having "purely local impact"[16], and as it became further noticeable in a number of cases following the launch of the Modernization process - of which the one regarding the *Marina of Izola/Isola* is the most apparent and significant example, having passed though the General Court control[17].

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[12] Bernardo Cortese, *L'ordinamento dell'Unione europea,* cit., p. 127 ff.

[13] As clearly and authoritatively expressed in Advocate General Tesauro's Opinion in *Kingdom of Belgium v Commission of the European Communities (Tubemeuse)* (C-147/89, ECLI:EU:C:1989:335), para. 28.

[14] Cf. the analysis developed by Sebastiaan Cnossen and Georges Dictus, Big on Big, Small on Small: A Never Ending Promise? A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion, 1 *European State Aid Law Quarterly* 20, 2021, pp. 30-40.

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 8 May 2012, EU State Aid Modernisation (SAM), COM(2012) 209 final

[16] *Commission Notice on the notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*, [2016] OJ C 262: see para. 196.

[17] Judgment of the General Court of 14 May 2019, *Marinvest d.o.o. and Porting d.o.o. v European Commission* (T-728/17, ECLI:EU:T:2019:325).Cf. Edwin Schotanus, Port of Izola: An Appreciable Twist in State Aid Law? 3 *European State Aid Law Quarterly* 18, 2019, p. 359.

The 'guidance' that can be inferred therefrom suggests that a State measure granting an advantage to an undertaking might not be capable of affecting trade between Member States when two criteria are met: first, "the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States; second, "it cannot be foreseen, with a sufficient degree of probability, that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment"[18].

Still, that welcome change of attitude is not decisive.

On one side, the above mentioned 'guidance' seems not to be so decidedly followed by the Commission itself[19].

On the other side, there's a deeper problem both in the 2016 Notice on the Notion of State Aid and in the approach of the Court of Justice to its case law, in this field.

What I assume here is, essentially, that the effect on trade criterion is in fact operating almost mechanically, in a way that clearly resembles to a presumption.

In fact, despite the fact that the Commission's Notice on the Notion of State Aid expressly declares that an effect on trade "cannot be merely hypothetical or presumed", but that it must rather be established, "based on the foreseeable effects of the measure"[20], a more attentive look at the Notice itself, and at the case law it refers to, proves in my view that the Notice, in excluding a presumption, is to a certain extent …photoshopping the reality.

First of all, the authority upon which that sentence of the Notice is built on is just an old judgment of the General Court (*AITEC*[21]), referring to a national measure dating back to the early '80s. What is more, that judgment did in fact annul a decision of the Commission, but *not* one declaring a measure an aid based on a mere presumption. To the contrary, the annulled decision had unlawfully avoided to considered the (quite evident) effects the national measure produced on the internal market! To express it in dogmatic terms borrowed from the common law tradition, that sentence in *AITEC* was merely a *dictum*, for sure not its *ratio decidendi*.

That part of the Notice, therefore, is *not* based on any relevant case law. It is, at the most, just a unilateral statement of the Commission's policy, capable of shielding its decisions not to open any formal procedure based on complaints not showing foreseeable negative effects of the national measure complained of.

What count, in my view, are the previous points of the Notice that deal with the effects on trade, all essentially referring to statements of principle adopted by the Court of Justice in the *Eventech* case[22].

And, one must say, *Eventech* is a judgment where the Court of Justice, in this area, simply… does not exclude anything.

More than that: in the relevant part of the judgment, dealing with the third question put to it by the English Court of Appeal, the Court of Justice simply forgot what its role should be: not that of giving abstract opinions on questions of law, but that of helping the referring court to decide the case pending before it.

[18] *Notice on the Notion of State Aid,* cit., para. 196; Decision C(2017) 5049 final of 20 July 2017, case SA.45220 (2016/FC) Alleged aid - Komunala Izola Marina, para. 37.

[19] Sebastiaan Cnossen and Georges Dictus, Big on Big, Small on Small, cit., p. 37.

[20] *Notice on the Notion of State Aid,* cit., para. 195

[21] Judgment of the General Court of 6 July 1995, *AITEC and others v Commission* (T-447/93, T-448/93 and T-449/93, ECLI:EU:T:1995:130), point 141.

[22] Judgment of the Court of Justice of 14 January 2015, *Eventech Ltd v The Parking Adjudicator*, (C-518/13, ECLI:EU:C:2015:9).

Now, in addressing the previous questions referred to it by the Court of Appeal, the Court of Justice had clearly suggested the referring court that the measure at hand applied to "factual and legal situations which are sufficiently distinct to permit the view that they are not comparable", with the consequence that the bus lanes policy at stake did "not confer a selective economic advantage on Black Cabs" as compared to Eventech minicabs.

With such an outcome already there, why bother with what had become, at that point, a merely hypothetical question? After all, the Court had so clear that its answer on the non-comparability issue would be decisive in the case at hand, that it decided not to answer the question on the proportionality of the measure at stake[23].

Still, the Court of Justice felt it necessary to answer the third question, and to recall that

1. the effect does not need to be actual nor real[24],
2. the beneficiary does not need to be directly involved in intra-Community trade, as it's enough for the beneficiary to have its 'internal activity … maintained or increased', thus diminishing the opportunities for external actors to 'penetrate the market' [25], and
3. no threshold exists, under the Treaty, below which an aid would be uncapable of affecting trade between Member States[26].

Further, despite having previously found that there is no possibility to characterize the relevant measure as giving a selective economic advantage to the Black Cabs, the Court of Justice still meant – in a passage so baffling that it is worth reporting it literally - that

> "it is conceivable that the effect of the bus lanes policy is to render less attractive the provision of minicab services in London, with the result that the opportunities for undertakings established in other Member States to penetrate that market are thereby reduced" [27].

Now, the first three statements are emphasized as such by the Commission's Notice on the Notion of State Aid, with direct reference to *Eventech*.

The last statement relied upon by the Court of Justice in its answer to the third question in *Eventech* is categorized in the Notice with reference to other authorities, and is generalized by stating that

4. "it is not necessary to define the market or to investigate in detail the impact of the measure on the competitive position of the beneficiary and its competitors"[28].

If the above-mentioned four statements are true, however, their cumulative effect is easily understood.

Once the measure is attributable to the State, and where it gives rise to a selective advantage - even a limited one benefitting an undertaking not directly active in the intra-community trade - this can be said to help that undertaking maintain its position on the national market where it operates. As a consequence, the decision to enter that market by any potential competitor coming from any other Member State is rendered 'less attractive'. And, as it is not necessary for the authority or party relying on that conclusion to define the relevant market, nor the position of the beneficiary or of its (potential, thus undefined) competitors, it is difficult to deny that the effect on trade is in fact there, unless the Commission *decides* it otherwise.

[23] Judgment of the Court of Justice, *Eventech*, point 62.
[24] Judgment of the Court of Justice, *Eventech*, point 65.
[25] Judgment of the Court of Justice, *Eventech*, point 67.
[26] Judgment of the Court of Justice, *Eventech*, point 68.
[27] Judgment of the Court of Justice, *Eventech*, point 70.
[28] *Notice on the notion of State Aid,* cit., para. 194.

So, we can safely assume that, based on the cumulative effect of the four general statements present in the case law of the Court of Justice and summarized above, the effect on trade of a measure that satisfies the other element of the State Aid notion can indeed be presumed[29].

6. Macro v Micro

If observed from a perspective based on a 'macro' analysis, namely one that links it with the main developments of the State Aid enforcement policy pursued by the European Commission in its practice, such a presumption appears to be functional to consolidate specific enforcement goals which, in turn and in their essence, *actually* foster the effective establishment and correct functioning of the internal market.

This is the case for the introduction of financial transparency requirements, and of the MEIP criterion. The same applies to the goal of preventing distortions of competition in newly privatized/liberalized markets, and to the focus put on SGEI financing in order to ensure competition *for* the markets. Equally, an enforcement policy targeting disruptions caused by direct business taxation measures that are directly or indirectly discriminating against newcomers appears to be worth renouncing an accurate demonstration of possible effects on the interstate trade.

In such cases, the application to a negative decision of legal principles easing the duty of the Commission to give grounds, as to the effects on the trade between Member States, is warranted by the overall framework defined by the relevant enforcement goal, which already takes into consideration the negative effect of that kind of aid for the functioning of the internal market[30].

So far so good.

What however if we move to a 'micro' perspective, involving the appraisal of that presumption's effects on individual cases? Is the operation of the effects on trade presumption always warranted?

Some elements of the practice, emerging from a non-systematic research considering only recent cases, give us reasons for concern.

7. a) Trivialising the Effect on Trade in State Aid Schemes Assessment

One delicate field to start with is the failure of the Commission to make express reservations, in its decisions declaring the inadmissibility of an aid scheme, capable of excluding the necessity of a recovery, or suppression, as the case might be, in any individual cases where the national measure at stake is not an aid, in particular for the lack of effects on trade and on competition.

This kind of problems arise, when having a look at the recent practice, in the *Union des ports de France-UPF* judgment rendered by the General Court in 2019[31].

As is well known, the case law excludes that the Commission has an obligation to directly assess, in its negative decision concerning an aid scheme, the individual situation of all beneficiaries. That case

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[29] While he does not reach the same bold conclusion overtly, what I propose here is not far from the position already expressed by Cees Dekker, The 'Effect on Trade between the Member States' Criterion, 2 *European State Aid Law Quarterly* 16, 2017, pp. 154-163, at p. 157, speaking of a "digital" application.

[30] Cf. Juan Jorge Piernas López, *The Concept of State Aid under EU Law*, cit., p. 212 ff., for the operation of connecting the case law of the Court of Justice to the policy developments in the enforcement of State Aid law by the European Commission.

[31] Judgment of the General Court of 30 April 2019, *Union des Ports de France - UPF v Commission* (T-747/17, ECLI:EU:T:2019:271).

law authorizes in fact the Commission to "confine itself to examining the general characteristics of the scheme in question"[32].

I have already stressed the unsatisfactory elements of inconsistency that such a case law presents, if considered together with the recent *Geargsmarienhütte* Grand Chamber case law, which considers the most appropriate forum to discuss State Aid law to be the EU General Court, and not the national courts, because of the complexity of the assessments required[33].

Here, however, I will just stress the …mockery element inherent in the reasoning with which the Commission, later backed by the General Court, dismissed the defence based on the lack of effects on interstate trade for the measure at stake - a tax advantage consisting in a corporate tax exemption in favour of French ports - when applied to island and overseas ports.

The attacked decision pointed to the fact that

> "in so far as other solutions exist[ed] or could exist to transport freight in the overseas regions, the measure c[ould], even for these ports located far from metropolitan France or other European ports, lead to a distortion of competition and have an impact on trade between Member States."[34]

Now, it's true that, according to the Commission's Notice, neither a definition of the relevant market nor a detailed assessment of the impact of the measure on the competitive position of the beneficiary and its competitors are required, but still a plausible case for a distortion of internal market competition should exist.

In the *UPF* case, according to the synthesis made by the Commission itself in the attacked decision, the data shown by the interested insular and overseas ports *did* show that no competition was there between freight by sea and freight by air[35].

Still, the task of differentiating between the situation of such ports and the others was left to the national authorities, in a situation where – according to the operative part of the Decision - any national measure giving execution to the Commission's decision should have first of all vacated the existing legal regime, *in toto*[36], and only then could France start discussing with the Commission the application of a new special regime, applying to island and overseas ports.

8. b) Taking Effect on Trade for Granted in Individual Complaints Procedures

A second field where the quasi-automatic approach to the effects on trade shows its limits is that of non-objection decisions in individual complaints procedures.

As is exemplified by the *Vereniging Gelijkberechtiging Grondbezitters (VGG)* case - which in 2020 was the object of a judgment on *pourvoi* by Court of Justice[37], confirming the annulment of the

[32] Cf. judgment of the Court of Justice of 9 June 2011, *Comitato 'Venezia vuole vivere'* (C-71/09 P, C-73/09 P and C-76/09 P, ECLI:EU:C:2011:368), point 130 and case law referred to. It is recalled at point 60 of the Judgment of the Court of Justice, *UPF*.

[33] Judgment of the Court of Justice (Grand Chamber) of 25 July 2018, *Georgsmarienhütte GmbH and Others v Bundesrepublik Deutschland* (C-135/16, ECLI:EU:C:2018:582), point 19: see my criticism in B. Cortese, Rinvio pregiudiziale e ricorso di annullamento: parallelismi, intersezioni e differenze, in F. Ferraro, C. Iannone, *Il rinvio pregiudiziale*, Turin, Giappichelli, 2020, pp. 241-270, p. 258 ff., and much more shortly in B. Cortese, State Aid Law as a passepartout, cit., p. 14.

[34] Commission Decision on the Taxation of ports in France, cit., para. 84 of the statement of grounds.

[35] Commission Decision on the Taxation of ports in France, cit., para. 38 of the statement of grounds.

[36] Cf. arts. 1 and 2.1 of the Commission Decision on the Taxation of ports in France, cit.

[37] Judgment of the Court of Justice of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others v European Commission* (C-817/18 P, ECLI:EU:C:2020:637).

Commission's decision previously ruled by a General Court judgment[38] - the abstract assessment approach carried by the Commission, instead of simplifying its administrative activity, only generates useless litigation and risks confirming a highly problematic use by private actors of EU State Aid law as a *general* antidiscrimination tool applicable to purely internal situations.

In that case, the Dutch "Association for Equal Rights for Landowners" (*Vereniging Gelijkberechtiging Grondbezitters*), representing landowners operating protected areas in the Netherlands, was denouncing a Dutch measure before the European Commission, and was especially objecting that the selective application of that national measure in favour of certain other landowners entrusted by the Dutch authorities with a public service obligation, with the aim of setting up a Natura 2000 Network for the protection of biodiversity, through the funding of nature land acquisition[39], was an unjustified discrimination of the complainants *and thus* a violation of arts. 107 and 108 TFEU.

In its *VGG* Decision, the Commission rejected the complaint without opening a formal investigation. It qualified the measure at issue as one falling under the State Aid notion enshrined in art. 107 TFEU, and as an illegal one, but maintained at the same time that it was an aid compatible with the internal market pursuant to Article 106(2) TFEU, thus confirming the approach previously taken in decision dealing with a not so dissimilar German measure[40].

The Dutch authorities had contested, among other things, that the measure at stake was not likely to affect trade between Member States[41], nor imperil competition, as the beneficiaries did not operate economic activities except on a limited scale, strictly functional to the funding of the loss-making nature conservation activity. On that point, the Commission acknowledged that the secondary economic activities affected by the measure (issuance of hunting and fishing permits, revenues from visitors' entrances, sale of wood resulting from nature conservation thinning) were 'likely to be limited in scope, both geographically and in terms of value'[42]. Nonetheless it observed, in purely abstract terms, that wood derived from thinning activities (!) can be sold and thus exported to other EU Member States, and that 'it cannot be ruled out' that visitors come from other Member States to visit the protected areas[43].

The Commission's decision was attacked by VGG, and annulled by the General Court because of a violation of the procedural rights of the complainants as "parties concerned" according to art. 108(2) TFEU.

Accordingly, in the General Court's judgment, the question of effects on trade is only addressed in an indirect way, when it comes to the definition of a party 'concerned' as one that might be actually affected in its economic activity by the aid granted[44]. In that framework, however, the General Court rebukes the Commission's defence by recalling the *Philip Morris dictum* that when aid 'strengthens the position of an undertaking compared with other undertakings competing in intra-community trade

[38] Judgment of the General Court of 15 October 2018, *Vereniging Gelijkberechtiging Grondbezitters and Others v European Commission* (T-79/16, ECLI:EU:T:2018:680).The annulled act was the Commission's Decision C(2015) 5929 final of 2 September 2015 on State Aid case SA.27301 (2015/NN) - Alleged illegal state aid in connection with the subsidized acquisition or free granting of land for nature conservation in the Netherlands (from now on: the VGG Decision).

[39] *VGG* Decision, cit., para. 11.

[40] Commission's Decision of 2 July 2009, C(2009) 5080 final on State Aid case SA.22741 (NN 8/2009), Germany - Transfer of natural protection areas to new owners and measures for biodiversity.

[41] *VGG* Decision, cit., para. 39.

[42] *VGG* Decision, cit., para. 62.

[43] *VGG* Decision, cit., para. 63, using an approach similar to that already followed in the German case SA.22741, cit., at para. 52.

[44] Judgment of the General Court *Vereniging Gelijkberechtiging Grondbezitters*, points 68-73.

the latter must be regarded as affected by that aid'[45], and by stressing that the Commission's decision was itself based on the direct assumption that some of the secondary economic activities were open to interstate commerce[46].

Now, it is easy to observe, on one side, that the *Philip Morris dictum* has come such a long way, from applying to a measure heavily favouring the industrial expansion of a giant, export-oriented cigarettes producer, to covering the sale of hunting permissions and thinned wood by nature conservation non-profits operating on a purely local dimension.

On the other side, such an evolution of the State Aid nation has remarkably become part of the …everyday life, so much so that it is proudly resorted to by DG COMP when raising no objections to national measures trying to make nature conservation less costly for the taxpayer, it is acquiesced to by national administrations entrusted with the conservation of natural habitats, and has become a sword to use in purely internal disputes among environmental charities.

9. c) Foregoing the Jurisdictional Diaphragm: The… Dark Side of SAM

A third field where the presumption-like approach to the effect on trade shows its puzzling normalcy, but also its resistible character, is that of the references for preliminary rulings having the effect on trade as their object.

I will refer here to two examples taken from the recent practice, namely a reference submitted by the German *Bundesfinanzhof* in 2019[47] (although later retracted), and another submitted in 2021 by the Italian *Tribunale Regionale di Giustizia Amministrativa* of Bolzano-Bozen[48].

The German C-797/19 case is about the applicability of art. 107 TFEU to a complex tax law scheme, concerning the tax law consequences of 'losses incurred (on a permanent basis) by an incorporated company as a result of an economic activity carried out without remuneration that is sufficient to covers costs', as applicable to incorporated companies controlled by legal persons governed by public law, if they carry out the activities concerned 'for reasons of transport, environmental, social, cultural, educational or health policy'.

To put it simply, the national scheme makes it possible, under certain conditions, to aggregate profit- and loss-making operations in the framework of activities carried out by municipalities, because the activities all serve the unitary purpose of providing the population with public services.

In the case at hand, a municipality of the Land Mecklenburg-Vorpommern, through its fully owned municipal company, provides access to the public to a communal swimming pool without a remuneration sufficient to cover the related costs. The same municipal company provides the public, moreover, with energy, water and telecommunications services.

The referring court observes that the possibility to offset the swimming pool losses against the revenues of other activities carried out by the same municipal company, ends up reducing its profits and thus its tax burden. This constitutes in principles, according to the referring court, State Aid according to art. 107 TFEU. However, it requires confirmation to the Court of Justice, through its single question.

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[45] Judgment of the Court of Justice of 17 September 1980, *Philip Morris Holland BV v Commission of the European Communities* (730/79, ECLI:EU:C:1980:209), point 11, referred in case T-79/16, cit., at point 68.

[46] Judgment of the General Court *Vereniging Gelijkberechtiging Grondbezitters*, point 71.

[47] Request for a preliminary ruling from the *Bundesfinanzhof* (Germany), lodged on 24 October 2019 — *B-GmbH v D Tax Office*, case C-797/19.

[48] Request for a preliminary ruling from the *Tribunale Regionale di Giustizia Amministrativa*, Autonomous Section for the Province of Bolzano-Bozen (Italy) lodged on 18 February 2021 – *SG v Autonomous Province of Bolzano-Bozen*

What matters, here, is that the German *Bundesfinanzhof* takes for granted, on the basis of the relevant *dicta* of the case law of the Court of Justice, namely *Cassa di Risparmio di Firenze*[49], that this is a case where 'aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade', thus affecting trade between Member States.

This case is telling of how a legal principle expressed in general terms by the Court of Justice in a previous judgment can substantially change its meaning, if one does not characterize it by having regard to the specificities of the subject matter.

A principle that was developed to qualify as State Aid a 50% reduction of the tax debt of the controlling entity of a bank, because of its national law characterization as a foundation, thus putting that controlling entity in a clearly favoured situation as compared with the controlling entities of other banks not having the same legal status, is applied to the offsetting of the losses deriving from the operation of a communal swimming pool at 'social' prices against the revenues of rentable services offered to the public by the same municipal entity.

Just to imagine that this kind of managerial choice is one 'strengthening the position' of that municipal entity compared with its competitors in the rentable sectors seems to me estranged from reality and common sense.

The situation at hand is, as a matter of fact, one that sees the municipality choose to operate the swimming pool at loss for social considerations. It could decide to do so by managing the swimming pool directly, and thus financing it directly through its fiscal revenues. It could decide to do so by charging a separate municipal corporate entity with that task, and have to refinance it through its fiscal revenues at the end of the year. In both cases, the situation would reasonably amount to the provision to the public of a service of general interest of a non-economic nature, thus excluded from the application of the Treaty rules. Or it could decide to limit the amount the taxpayer should pay for sustaining such a social choice taken by the municipality, and entrust a 100% controlled profit-making corporate entity active in other fields, as is the case here, while taking advantage of the possibility to offset losses against revenues for tax law purposes.

What lacks, in that case, is any possibility of a real competitive advantage in the choice taken by the municipality. The corporate municipal entity is only permitted to partially reduce the *burden* it faces because of the social choices of the municipality, a burden that none of its competitors in the revenue generating fields has to face.

Not to consider that, means giving the *Cassa di Risparmio di Firenze* legal principle a completely different meaning than that it had when it was affirmed by the Court of Justice. It means, even beyond my working hypothesis spelled out at the beginning of this essay, applying an abstract presumption of interstate trade effect *together* with an abstract presumption of advantage and competitive distortion.

The second reference for a preliminary ruling mentioned above shows the extension of such an unwarranted approach to national legislative/executive organs. The object in this case is linked to a measure set up by the Autonomous Province of Bolzano-Bozen, a self-governing entity of the Italian Republic enjoying some constitutionally protected competences in legislative and administrative areas. A law adopted in 2010 by the Province in the field of energy savings, renewable energy and climate protection, granted inter alia subventions to cover 80% of the costs of constructing mini-hydroelectric power plants for the generation of electrical energy for the benefit of mountain huts for

[49] Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8), point 141.

which connection to the electricity grid is not available, nor feasible "without disproportionate effort in technical and financial terms".

The Autonomous Province notified to the Commission the overall scheme foreseen by that law, and got it approved in 2012 by State Aid decision SA.32113[50].

The relevant part of the Autonomous Province measure applies, as said, to mountain huts which are not connected to the grid, and will remain disconnected even after the construction of the mini power plant, meaning that the subsidized plants will be used for auto-production only. The relevant Commission's decision does not expressly rule out such measures from its scope of application, but it defines the aid measure to which it applies by referring to other beneficiaries, i.e. non including the mountain huts not connected to the grid[51].

However, subsidies granted in 2018 to mountain huts non connected to the grid, were retroactively revoked in 2020 by the Autonomous Province. The Autonomous Province based its decision on the assumption that the relevant authorization decision would have expired in 2016.

Now, the beneficiaries of eight of such retroactively revoked grants attack the relevant provincial decision before the competent administrative tribunal. They maintain in particular that the revoked grant was intended to subsidize a production facility intended solely for the mountain hut's self-supply, and therefore does not constitute State Aid under Art. 107 TFEU, as it could neither distort competition within the European Union, nor affect trade between Member States[52].

In terms of the criterion of effect on trade between Member States, the situation in the Bolzano-Bozen case is paradoxical.

First, the electricity produced by the micro power stations intended to serve the self-production of isolated mountain huts, not connected to the electricity grid, is quite clearly not intended … to enter the grid! And second, without the micro power plant, there is no question of connection to the grid (not even through other subsidy measures provided for in the overall aid scheme). From the point of view of electricity supply, therefore, there is no current or expected impact on trade between Member States.

In addition, it does not seem reasonable to consider that the offer of those isolated alpine huts and refuges is in reasonably direct competition with that of other huts and refuges in other Member States. Again, it is the characteristic of their isolation in a mountains area not reached by the electricity network (and therefore, by definition, not even by the road network) that makes it hard to imagine that hikers, who will visit those huts and refuges, can choose whether to direct their trek to those huts or refuges, or instead to other huts and refuges located in another Member State. Once they are in the alpine valley where the hut or alpine shelter is located, the relevant market for them will necessarily be limited to huts and shelters within walking distance in that valley... And, to be frank, one would have to have a lot of imagination to think that they could choose whether to direct their mountain walk to one or another hut or shelter, on the basis of whether the self-generated electricity from those facilities is produced by a diesel generator or a micro hydroelectric power station.

So, what's going on here? This example, together with the previous one, suggests that a huge State Aid Modernization failure is hiding below the European Commission's radar.

10. Conclusions

[50] SA.32113 (2010/N) Aid schemes for energy savings, teleriscaldamento and electrification in Alto Adige/Südtirol – Italy.
[51] Decision SA.32113, cit., para. 25.
[52] Case C-103/21, summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, p. 4., section Facts and Procedure, para. 9.

The analysis carried out before shows that the effect on trade criterion is not taken seriously enough in the current step of the evolutionary development of EU State Aid law. The guidance provided by the case law of the Court of Justice and by the Commission's soft law and practice leads to a quasi-automatic application of EU State Aid law, based on a *de facto* presumption of effect on trade. More than that: the effect on trade criterion fades away also in the practice of national judicial and administrative authorities, contributing to a radical transformation of EU State Aid law, and of the balance of power between national authorities and the EU executive in many fields.

Whether this evolution is welcome or not is an open question, at the very least.

Further, it is a bit disturbing to see that an automatic application of case law formulae, totally segregated from any appraisal of their significance in relation with the relevant facts of the case(s) where they were originally affirmed, has somehow become the working day normalcy of national jurisdictions applying art. 107 TFEU.

Such an approach risks, on one side, essentially transforming State Aid control at the national level into a generalized application of a hard-line equal treatment clause, if not a tool to pursue given socio-economic agenda. On the other side, it involves a passive acceptance of the stretching the European Commission's competence well *inside* the realm of socio-political choices that should be left to Member States' democratically accountable institutions.

As already suggested, a minimum step to make the current situation evolve into a clearer and more balanced path would require that the Commission formalise its guidance on local services into a clearly structured communication on the effects on trade[53].

As I tried to show, however, the main issue at stake here is the way in which the *dicta* inserted in the case law of the Court of Justice are managed, at all levels.

To be provocative, such *dicta* tend to operate as if a system of Artificial Intelligence, instead of human judgement, would be in place: in subsequent cases, such *dicta* are referred to in their abstract meaning, without adequate consideration of the factual elements involved in the cases where they were first affirmed, and in the subsequent ones where they find, thus, a new signification.

It should therefore be first and foremost the Court of Justice and the General Court to take a more careful route in their case law. It should however also be the Commission to embrace its responsibility of not inducing such a 'functional' reading of the case law, through 'customized' readings in its communications. And it should also be the national authorities - courts and administrations - to become fully aware of the importance of reading the effect on trade clause as a jurisdictional clause, thus avoiding to destroy the delicate balance between national competences and the limits set by EU law.

Finally, a *Keck* moment[54] in the case law concerning State Aid law could represent a fresh new start, now that the long road towards a full recognition of the importance of State Aid law has been completed, and that the Commission is, indeed, in full command of a complex and "all-round" EU policy in this field.

Not only subsidiarity and democratic accountability would gain, from such an evolution, but also the overall acceptance of the EU in all Member States.

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[53] Bernadette Zelger, The 'Effect on Trade' Criterion in European Union State Aid Law: A Critical Approach, 1 *European State Aid Law Quarterly* 17, 2018, pp. 28-42, at p. 41.

[54] Reference is made here to the judgment of the Court of 24 November 1993, *Criminal proceedings against Bernard Keck and Daniel Mithouard* (C-267/91 and C-268/91, ECLI:EU:C:1993:905).