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Effect on trade in the light of the Marinvest judgment

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Concept of State aid



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Cumulative criteria of Art. 107 (1)

- Economic activity
- Use of State resources & imputability
- Advantage
- Selectivity
- Potential effect on trade and
- Liability to distort competition
- If any of the above elements is missing, the measure does not consitute State aid
- Objective, legal concept developed by EU jurisprudence



Potential effect is enough



- When aid granted by a Member State <u>strengthens the position of an</u> <u>undertaking compared with other undertakings competing in intra-Community</u> <u>trade</u>, the latter must be regarded as affected by that aid (730/79. *Philip Morris Holland BV*)
- <u>No need to establish that the aid has a real effect on trade</u> between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (*Libert* and Others, C-197/11 and C-203/11)
- Direct and indirect effects are also relevant, effect on up or downstream markets / <u>capability to use the advantage in other product or geographical</u> <u>markets (T-297/02. ACEA</u>)

"the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced"



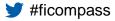


Further considerations



- The fact that the amount of aid is low or the beneficiary is a small undertaking is in itself not excluding effect on trade (T-55/99. CETM, T-214/95. Het Vlaamse Gewest ,C-113/00. Spain v. Commission)
- However simple reference is not enough, some reasoning has to be present (318/82 Leeuwarde Papierfabriek BV)
- More thorough analysis, if extra EU trade is involved, but effect on trade is not excluded as such (C-494/06 P. Italy vs. Commission, WAM)
- Even local taxi drives and dentist can have an effect on trade
 - C-518/13. Eventech
 - C-172/03, Heiser







The Commission's approach



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Some sectors over-represented where COM accepted no effect on trade, but no coherent picture,

- Museums and cultural infrastructure: SA.34891, SA.36581
- Sport and leisure facilities: N 258/00, SA.32737, SA.39403, SA.38208
- Hospitals: SA.37904, SA.38035, SA.37432, SA.34576
- Newspapers: SA. 35909
- (Tourism) infrastructure: SA. 35909, N 731/2007





The Commission's new approach



- 7 decisions adopted April 2015, followed by a second group in 2016
 - Common points
 - activities of "purely local" character
 - no / marginal (!) foreseeable cross-border effect
 - Customers, catchment area
 - Investors
 - hence no State aid







Only one case tested at Court so far



- The Komunala Izola case SA.45220
- Started with a complaint from an Italian undertaking Marinvest
- Port managing public company received different advantageous measures
 - Tax advantages (EUR 100 733 p.a.)
 - Concession free of charge (EUR 61 187 p.a)
 - Free of charge land, car parking and other facilities (EUR 98 552 p.a)
 - Harbour and Marina in the city







Marinvest - Factual background



- More than 90% of berths in the harbour are reserved for <u>local</u> permanent residents
- The majority of the remaining is also assigned to <u>Slovenians</u>
- The services offered are of lower quality, compared to the Marina
- Only smaller ships (up to 8 metres) can have access
- Very small % of the market (1.07% of Slovene mooring market and 0.05% of the Adriatic market of small ports/marinas)
- Limited income
- Not advertised internationally





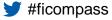
Commission Decision



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 Even if some <u>marginal</u> distortion of local competition cannot be completely excluded, the alleged measures are <u>not liable</u> to affect trade between Member States







The General Court's judgment - T-278/17



- Adopted 14 May 2019
- Accepts COM analysis, dismisses the action
- No automatic exclusion of effect on trade in case of local services
- But excludes, if there is only "purely local impact"
- Case by case assessment is needed







Is Marinvest helpful?



- Local services, catchment area
- Most likely in cases where the amount needed is > de minimis and the case does not fit one of the options provided by the GBER
- De minimis and GBER is always safer
- Prenotification, eWiki question and answer, comfort letter can be used for solving a case informally, but <u>does not provide legal</u> <u>certainty</u>...
- What is marginal?
- Only notified measures are 100% safe (C-654/17 P BMW)









