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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 constitute State aid
- Objective, legal concept developed by EU jurisprudence



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Potential effect is enough



- 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 (730/79. *Philip Morris Holland BV*)
- No need to establish that the aid has a real effect on trade 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 / capability to use the advantage in other product or geographical markets (T-297/02. *ACEA*)

“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



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The Commission's new approach



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- **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



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Only one case tested at Court so far



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- 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



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Marinvest - Factual background



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- More than 90% of berths in the harbour are reserved for local permanent residents
- The majority of the remaining is also assigned to Slovenians
- 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 marginal distortion of local competition cannot be completely excluded, the alleged measures are not liable to affect trade between Member States



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



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- 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



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Is Marininvest helpful?



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- 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 does not provide legal certainty...
- What is marginal?
- Only notified measures are 100% safe (C-654/17 P BMW)



