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STATE AID GIVEN BY THE LOCAL GOVERNMENT

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Abstract
One of the main principles of the local government is the principle of subsidiary, i.e. effective governance nearer the people. The local authorities governed by this principle may give aid to some enterprises that are in difficulty by giving them subsidies, because it deems these enterprises important for the development of the region, or because they may concern a R&D project. The local authorities may finance an enterprise or undertaking that is engaged in cultural activities, or in the conservation of regional or national heritage. There are also special situations like for example the cases of a natural disaster or of an exceptional occurrence that may entice the local authority to intervene, for example: in the case of droughts in the region the local government may give to the damaged farmers subsidies, or may exclude these farmers from certain categories of taxes. On the other hand the aid given by the local government may distort competition between undertakings and businesses, by favoring a selected undertaking or business in comparison to others. The aid given by the local authorities may affect also trade by increasing the production of certain products, namely those produced by the undertaking recipient of the aid, to the detriment of others. Local government intervention may influence the way in which markets operate, which would mine the free trade principle by being the local government who is "picking the winners". The aim of this paper is to show out some general guidelines to find equilibrium between the local government intervention in the businesses of the region it operates and state aid rules.
Keywords: Incompatible state aid, subsidies, tax exemptions, local government

Introduction

One of the main principles of the local government is the principle of subsidiary, i.e. effective governance nearer the people. The local authorities governed by this principle may give aid to some enterprises that are in difficulty by giving them subsidies, because it deems these enterprises important for the development of the region, or because they may concern a R&D project. The local authorities may finance an enterprise or undertaking that is engaged in cultural activities, or in the conservation of regional or national heritage. There are also special situations like for example the cases of a natural disaster or of an exceptional occurrence that may entice the local authority to intervene, for example: in the case of droughts in the region the local government may give to the damaged farmers subsidies, or may exclude these farmers from certain categories of taxes.

On the other hand the aid given by the local government may distort competition between undertakings and businesses, by favouring a selected undertaking or business in comparison to others. The aid given by the local authorities may affect also trade by increasing the production of certain products, namely those produced by the undertaking recipient of the aid, to the detriment of others. Local government intervention may influence the way in which markets operate, which would mine the free trade principle by being the local government who is "picking the winners". The aim of this paper is to show out some general guidelines to find equilibrium between the local government intervention in the businesses of the region it operates and state aid rules.

1. The Albanian legal framework on the financial autonomy of the local government and state aid

1.1 The Albanian legal framework on the financial autonomy of the local government

The Albanian Constitution in November 1998 has provided a special chapter on local government and important principles on its functions, powers and its relationships with other institutions, mainly the public administration. Article 108 of the Albanian Constitution defines provides that the Local government in the Republic of Albania ismbased on the principles of the decentralization of power and of autonomy. Article 108/3 defines communes and municipalities as basic units of local government.

In January 2000, the government approved the *National* Decentralization Strategy. The objective of this strategy is to take full advantage of the opportunity provided by the new Constitution to create, promote and implement a new vision of local government. Some of the main objective areas covered by this Strategy were the Framework of local government organization,the central-local government fiscal relations, the operation of local public property and enterprises etc. In the same year the Law On the organization and Functioning of Local Government, No. 8652, dated July 31, 2000, was enacted. Its objective is to create a functional system by determining clearly four components of local government: the functions and responsibilities, the finances, the properties and the organizational structures. This law has important provisions on the Principles governing local governments (municipalities/communes and regions), explains the typology of the local government functions (exclusive, shared, delegated), has articles on the financial authority of the local governments (i.e., budgeting and fiscal), Internal organization and allocation of authority, territorial reorganization of the local governments, and concludes with a timetable for implementation of this law. Article 8 of the Law No.8652, provides the exclusive rights of the local government, where it can be easily discern that most of them are of financial natyre. Thus, the local government have:

1. **Property rights**. Here, there are included the right to exercise property rights, the right to purchase, sell or rent its movable and immovable property or use its property, as well as to exercise other rights in the manner as set forth in the law. The property rights are exercised by the respective council, and they may not be
delegated to anybody else.

2. Right to fiscal autonomy. Local governments may obtain revenues and make expenditures related to the execution of their functions. Local government units have the right to set taxes and fees in compliance with the legislation in force and the interest of the community. Local

governments have the right to adopt and execute their budget.

3. Economic development rights. Local governments have the right to undertake any initiative for economic development in the interest of their residents, provided that these activities do not contradict the fundamental direction of economic policies of the State.

The major part of revenues from economic activities of local governments shall be

used to support the execution of public functions. The economic activity of the local government units is regulated by legislation on economic activities.

Article 10 foresee the exclusive rights of the local government. In point II of this Article we can distinguish the rights of financial nature, under the label " Local Economic development" rights. Here there are included the preparation of programs for local economic development; the setting [regulation] and functioning of public market places and trade network; the small business development as well as the carrying out of promotional activities, as fairs and advertisement in public places; performance of services in support of the local economic development, as information, necessary structures and infrastructure; veterinary service; and the protection and development of local forests, pastures and natural resources of local character. Chapter V, including article 15 to 22, is dedicated to the local government finance. Article 15, beyond sanctioning the principle of the fiscal self-sufficiency of the local government guranted by the National fiscal policy shall provides the technical measure for the achievement of this important principle, which are developed further in other articles of this Chapter. Thus, it provides that the local governments would have the right to adopt, carry and administerd annually, but in compliance with the Law No. 8379, dated 29.7.1998 " On the drafting and execution of the State Budget of the Republic of Albania. The local government units are financed with the revenues from locally derived taxes and fees, funds transferred from the central government and funds derived from shared national taxes, which are provided by law, meanwhile, to meet the requirements for the provision of shared and delegated functions, the central government is obliged to provide local governments with funds that are sufficient for the achievement of these functions.

Then in Article 16, 17 and 18 are provided three main important means of financing the local government, respectively by revenues derived from the municipalities and communes, revenues derived from national sources and revenues derived from the regions. Two main revenues derived from the municipalities and communes are **local taxes**- such as local taxes and levies on the movable and immovable property, as well as on the transactions conducted on them, local taxes and levies on the economic activity of small businesses and on hotel residency, restaurants, bars and other services, local taxes and levies on the personal income derived from donations, inheritances,testaments, and from local lotteries,- and **local fees**, i.e. the fees for the public services offered by them; the fees for the right to use local public property; or fees for the the issuing of licenses, permits, authorizations and issuance of other documentation, at the discretion of local government.[1] The Law on Local government, has given a wide discretion and autonomy to the communes and municipalities to set the level of the local fees, determine the manner of collection of local tariffs and their administration in compliance with policies and general principles defined in the normative acts of central government.[2]

Lastly, it is important to mention that the financial autonomy of the Local Government in Albania is supported by a wide range of other laws, such as Law no. 8435 dated 28.12.1998 On the Tax System in the Republic of Albania.Law no. 8334 dated 13.05.1998 On some amendments of the Law no. 7805, Law no. 8713 dated 15.12.2000 Amendments of the law 8435 dated 28.12.1998, Law no. 8560 dated 22.12.1999 On Income Tax Procedures in the Republic of Albania, Law no. 8511 dated 15.07.1999 Amendments on the law 7805 dated 16.3.1994, Law no. 7805 dated 16.03.1994 On the Property Tax in the Republic of Albania, Law no. 7930 dated 11.05.1995 Amendments on the law 7805 dated 16.3.1994 *et.al.*

We may conclude by saying that the financial autonomy of the local government is well sanctioned and guaranteed, by an accurate and broad legal framework, which enable the local governments to self-finance and having an independant budget to achieve its legal duties and objectives. Anyhow, experts evidence difficulties in the good implementation of the legal framework, linking this with the low capacities of government at the local level, with the lack of sufficient resources in most communes, particularly in the mountainous rural areas, with the tendency of wealth to concentrate in a few, large urban areas, with weak citizen participation in community affairs, with the strong dominance of political interests over the community interest and with a strong tradition of a centralized stat[3]e. Still there is much progress to be done, and raising of capacities of the local government is an important objective in order to attain the standard of decentralization of an european democratic state.

1.2. The Albanian legal framework on state aid

Albania has contracted international obligation regarding the granting of state aid in the country, its monitoring as well as the international reporting. The international agreements, so far, that serve as a legal basis for Albania in administering the state aid are the EU-Albania Stabilisation and Association Agreement[4], the November

1 The Law on Local Government, cit.above, Article 15/2, 15/3

2 The Law on Local Government, cit.above, Article 15/4

3 "Local Government Budgeting: Albania" Alma Gu rraj, Artan Hoxha, Auron Pasha, Genc Ruli, Qamil Talka, Irma Tanku, Tirane, pg.146

4 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, signed on 12 June 2006 and entered into force in 1 April 2009. Interim Agreement on Trade and trade-related matters between the European Community, of the one part, and the Republic of Albania, of the other part, OJ L 239 of 1 September 2006, has been into force from 2006 till the entering into force of the SAA.

2007 European Partnership Decision[5], the WTO Subsidies and Countervailing Measures Agreement[6] and the CEFTA (2006) Agreement[7]. Being a state with a fragile market economy, the implementation of the state aid measures is important to be in compliance with the best international trade practises and principles, and particularly with the rules of the European Union, the market of which we aim at being integrated in the near future.

Article 71 of the SAA "Competition and other economic provisions" deals with the full application of EC Treaty rules on state aid in Albania. In essence, it requires Albania (after a specified transitional period) to apply in full EU rules and regulations in the area of state aid. The main provisions of Article 71 of the SAA pertaining to state aid can be summarised as follows:

1. Any state aid which distorts or threatens to distort competition by favouring certain undertakings or certain products is incompatible with the SAA in so far as such state aid *may affect trade* between the EU and Albania;
2. Any state aid contrary to Article 71 shall be assessed on the basis of criteria arising from the application of Article 87 of the EC Treaty and the interpretative instruments adopted by the EU institutions for the application of Article 87 of the EC Treaty; [8] In compliance with the international obligations contracted, Albania has enacted a full legal framework regarding the State Aid. Law No. 9374, of 21 April 2005 "On State Aid" (hereinafter referred as the Law on State Aid), amended in 2009, and three implementing regulations[9], approved by Council of Ministers decisions since January 2006 regulate the subject concerned. The Law "On State Aid", provides for the establishment of responsible structures for controlling state aid in Albania - the State Aid Department (SAD in the Ministry for Economy, Trade and Energy and the State Aid Commission (SAC). The legal tasks of the State Aid Department and the State Aid Commission's competences, together with their operational reporting responsibilities, constitute an approach that ensures the operational independence required by Article 71, point 4 of the Stabilisation and Association Agreement during the transition stage (Article 37, point 4, of the Interim Agreement)[10]. The State Aid Commission was formally established by Council of Ministers Decision no.182 of 21 March 2006. The State Aid Commission, composed of five members and chaired by the minister in charge of economic affairs is the decision-making body for state aid. The Commission is responsible for assessing and authorizing state-aid schemes and individual aid, on the basis of proposals of the State Aid Department of the METE. Providers must notify the State Aid Department any plan to grant state aid; the State Aid Commission must give its approval before any aid can be granted. The Commission's decisions must be taken within 60 calendar days following the receipt of a complete notification. If the Commission finds aid to be unlawful, it can issue an injunction to suspend the aid and order the recovery of the any disbursement made from the beneficiary. The recovered amount, together with interest, is added to the budget of the aid provider. Furthermore, the Law On State Aid obliges all aid providers to report to the Department all existing aid schemes within six months of their entry into force. The authorities indicated that these schemes are notified, listed, and assessed by the State Aid Commission, which takes a decision in each case with respect to compatibility with the Law. The overall report on the inventory of state-aid schemes was approved by Council of Ministers Decision No. 45 of 16 January 2008.

The State Aid Department was established by Prime Minister's Order No. 79, of 26 March 2004. The general tasks of the Department include drafting the legal framework (including any future amendments, new regulations, guidelines, etc); identifying and analysing the economic and legal aspects of state aid schemes and individual aids, as well as preparing all investigative reports for particular cases and providing input in the decision-making of the SAC by means of policy analyses on the compilation and development of regional and sectoral policies.[11] For the further approximation of the Albanian legislation with the acquis, some changes were made to the Law No.9374, date 21.04.2005. The law no. 10 183, date29.10.2009 "On some changes and ammendments to the law 9374, dated on 21.04.2005 "On State Aid" (hereinafter referred to as the "New law on State aid"), reflect some of the developments in the EU policy on State Aid during the period 2005-2009, and namely consist in the changes of the intensity of state aid regarding the trainings, theworkers in difficulty or with dissabilities by applying the same values foreseen in the Regulation no. 800/2008 EC.

Since the legal framework on state aid is obligatory not only for the central government and its entities, but also for the local government, and due to the fact that this legal framework is drafted and should be implemented in accordance wiht the European Union framework on state aid and its practice, knowledges of the last are deemed necessary. This is the reason why the second part of this paper will be an overviwe of th EU legal framework on state aid, suplemented by practical cases when the state aid is granted by the local authority.

2. The EU legal framework and practise on state aid granted by local authority.

5 EU Council Decision on the principles, priorities and conditions contained in the European Partnership with Albania and repealing Decision 2006/54/EC, COM(2007) 656 final of 6 November 2007.
6 Subsidies and Countervailing Measures Agreement, 1994: GATT Secretariat (1994): The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts, Geneva, "Subsidies and Countervailing Measures Agreement", pp. 264-314.
7 Central and Eastern Europe Free Trade Agreement (2006) - Agreement on Amendment of and Accession to the Central European Free Trade Agreement (CEFTA 2006) at http://www.stabilitypact.org/wt2/TradeCEFTA2006.asp.
8 Decision of the Council of Ministers, No.630, date 11/06/2009 "On Approval of State Aid Annual Report 2008", pg 12
9 The Regulation on procedures and notification forms, the Regulation on regional aid and the Regulation on rescue and restructuring aid
10 Decision of the Council of Ministers of Albania, Nr. 1023 , date 09.07.2008 "On Approval of State Aid Annual Report 2007", pg 14-15
11 Decision of the CoM, no 1023, cit. supra, pg 15. In 2008, SAC approved the guideline "On state aid in the form of public service compensation" and "On the methodology used for analysing standard costs in granting state aid, specifically for short term export credit insurance" for a better application of its competences provided in the Law on State Aid.

2.1. The notion of state aid: The test of five indicators

The main provision in the EC Treaty dealing with state aid control is Article 87. Article 87

EC specifies a two stage approach. First, with a view to establish *jurisdiction*, it is assessed whether a specific state measure constitutes "state aid" within the meaning of Article 87(1). Only state measures which constitute "state aid" within the meaning of Article 87(1) are subject to EU state aid control. Second, there is the assessment of *compatibility*, to assess whether the aid measure can be allowed under the provisions of the EC Treaty. [12]Article 87(1) of the Treaty reads: "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market". Academics, based on the ECJ jurisprudence have articulated 5 criteria to identify if a state aid is within the ambit of Article 87 (1) EC Treaty[13]: (i) Aid must be granted by the state or though state resources (ii) This aid must confer an advantage to the recipients (iii) The advantage must favour certain (selected) undertakings or economic activities (iv) Aid must affect trade between Member States and, (iv) Aid must distort competition in the common market. The general assessment is that these criteria have a cumulative nature, which means that they should exist altogether in order to qualify a state aid incompatible with the Treaty.

2.1.1. Aid must be granted by state or through state resources

The concept of "Member State" in Article 87(1) EC has been broadly interpreted. The ECJ in *Case 248/84, Germany v Commission*, held that even aid granted by regional and local bodies of the Member States, whatever their status and their description are considered state aid for the application of the EC Treaty.[14] This interpretation stems from the fact that the community law is unconcerned regarding the internal organization of a Member State and the distribution of power therein; despite it is a federal State or a unitary state, the Member State has the obligation to secure the application of the Community provisions in its territory and to respect and follow the Community objectives. The same *ratio* applies regarding the relation between the community law and the Member States' regulations on state aid. The application of Article 87EC could be hampered if the respect of this provision would rely only to the central administration. If the regional and local bodies would grant aids irrespectively to the proviso of Article 87, the application of Community law on state aids would never be uniform within the European Community.[15]

The Court went further in its judgment C-*78/76, Steinike and Weinlig*, where it held that it was not necessary to distinguish between aid that was granted directly by the State or indirectly by public or private bodies established or appointed by the State to administer the aid.[16] This means that Article 87(1) applies to aid that is granted on the discretion of the state and covers transfer of resources without being necessary to make a distinction whether the aid is granted by the agents of the state or enterprises controlled by the state, or the state itself.[17] The term "aid granted by the State" is very broad and it covers public or private bodies, that are connected directly or indirectly with the State, because the latter is present in their governing boards, or because the State possesses its own shares therein, or because the state has a power of surveillance over them, and the aid must still be 'imputable' to the State. This 'set of indicators', supplemented by criteria such as the undertaking's integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the intensity of the supervision of the public authorities over the management of the undertaking, 'or any other indicator showing, in a particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved.' [18] are mentioned by the ECJ as elements that determine that the aid is imputable to the state.

On the other hand, in order to have a transfer of public resources the measure should have an impact on the budget of the public authority, or it should affect assets or liabilities of a public authority. In other words aid must have budgetary consequences for the government. [19] The advantage conferred by the state in order to be counted as aid must be supported by state resources not only in terms of actual but also of potential financial liabilities. This means that not only the reduced budget of the State should be taken into account to determine that there has been a transfer from state resources, but also its potential reduced budget; for example, a loss in tax revenue is synonymous with public spending in the form of tax expenditures.[20] Somewhat contrary to the precise wording of the Treaty, the ECJ jurisprudence have made it clear[21] that "aid

12 Hans W. Friederiszick, Lars-Hendrik Röller, Vincent Verouden, European State Aid Control: an economic framework", MIIT Press, 28th September 2006, pg3

13 Phedon Niolaides, Mihalis Kekelekis, Maria Kleis, "State Aid policy in the European Community", Principle and Practices, Second edition, "International, 2008, pg 10 ;P.Graig, cited in note 7; Giuseppe Tessauro, Diritto Communitario, CEDAM, 3za Edizione, 2003, pg 747

14 Case 248/84, Federal Republic of Germany v. Commission, 1987, ECR 4013, para.17

15 Even in the 1st Report on Competition Policy in 1971, the Commission has stressed that "the local authorities can often grant such aid, which is also State aid within the meaning of Article 92 of the EEC Treaty".

16 Case 78/76 Firma Steinike und Weinlig v Federal Republic of Germany [1977] ECR 595, para. 21

17 Case C-290/83, Commission v. French Republic, 1985 ECR 439, at para 14

18Wolf Sauter & Harm Schepel, "State' and 'market' in the competition and free movement case law of the EU courts", Tilburg university, 2007, pg 176

19 P. Nicolaides et al., " State Aid Policy in the European Community", ibid., pg 12.

20 See Commission notice on the application of State Aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, parag.10

21 For the matter of fact the ECJ case law on this issue has been controversial. First in Van Tiggele case the ECJ required the existence of a financial burden on the public budget in order to consist in a breach of Article 87(1). Then in case 290/83 Commission v. French Republic, Case

granted by the state **and** through transfer of state resources" are cumulative and not alternative requirements.[22] As it results from the case law these are two separate and cumulative conditions: *the measure must be imputable to the State[23], and it must entail a transfer of State resources.* If only one of these conditions is met, the measure will not be considered state aid.

2.1.2. Aid must confer an advantage to the recipient

Regarding the notion of "advantage", the ECJ ruled that the concept of aid covers a wide range of measures, such as subsidies, grants, loans or guarantees given by the state. Thus, in general terms, aid constitutes an advantage conferred on an undertaking by the public authorities without payment or against a payment which corresponds only to a minimal extent to the figure at which the advantage can be valued (*positive intervention*). A definition of this kind covers the allocation of resources and the grant of relief on charges that the firm would otherwise have to bear, enabling it to make a saving (see Commission v. France Case C-290/83 above). Furthermore, even those measures that mitigate the charges an undertaking would normally bear, such as the supply of goods or services at a preferential rate on loans and dividends on invested public capital, a reduction in social security contribution, tax exemptions, as well as anything the state gives up without objective reason such as products and services it sells at excessively low prices and anything the state gives away without objective reason such as products and services it purchases at excessively high prices, would be considered state aid under Article 87(1) (the so-called *negative intervention*)[24]. Furthermore in *Danske Busvognmaend v. Commission*[25] *the ECJ* ruled: "Article 87(1) EC is aimed merely at prohibiting advantages for certain undertakings and the concept of aid covers only measures which lighten the burdens normally assumed in an undertaking's budget and which are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions".

As in other areas of Community law, the European Court has taken an effects-based approach. A measure would be deemed to be an "advantage" pursuant this Article when it improve the position of the undertaking in comparison with its competitors, or when lightens it burdens budget which the undertaking would be obliged to bear in normal market conditions. Moreover, the Court found that if the *effect* of a particular measure was to benefit a particular undertaking or category of goods, then it should be regarded as an aid, even if a benefit was *not* the primary intention of the measure.[26]

2.1.3 The advantage must favour certain (selected) undertakings or economic activities

Aid is selective if it applies to a particular type of activity, a sector of the economy, a particular geographical area or to firms with the same characteristics (such as small and medium-sized enterprises). [27] M. Aldestam labels the selective criterion as material selectivity, geographical or other criteria of selectivity. Material selectivity is considered to be an aid addressed to certain sectors, or aid with the effect of benefiting certain sectors, specific undertakings, or undertakings in a certain industry. The Court[28] and the Commission [29]have made it clear that, even an aid programme which covers the whole sector of economy of a Member State can fall within the ambit of Article 87 (1); Geographical selectivity is considered an aid addressed to certain undertakings in a specific region or in a selective are; Other selectivity criteria, i.e. aid granted to a group of undertakings receiving aid may have features in common other than belonging to the same sector or being situated in the same region.

2.1.4. Aid must affect trade between Member States

According to the case-law of the Court, when State financial aid 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[30]. The affect of Community intra-trade, could be defined as an artificial decrease of the importation, or an artificial increase of the exportation, or vice-versa, as a decrease of the exportation and an increase of the importation of the undertaking that receives the state aid in comparison with its competitors. Thus, it concerns a situation in which the competitive position and the intra-trade exchange of goods and services for the undertaking

C- 57/86 Hellenic Republic v. Commission, and in case C-387/92 Banka di Credito Industrial the Court took the opposite view and held that a measure may constitute aid in the meaning of Article 87 (1) although it did not involve a transfer of State resources. Further, starting from Sloman Neptun, following with Kirsammer- Hack, Viscido, Ecotrade and Piaggio, and especially PreussenElektra case, the Court affirmed that the criteria of aid " granted by the State" goes together with the "through state resources" criteria. For further see Fjoralba Caka " The State aid and Competition: An analysis of the Albanian legislation and practise on state aid in the light of article 87 of the treaty of European Union", Master Thesis, January 2011.

22 Fiona Wishlade and Rona Michie, " Pandora's box and the Delphic oracles: EU cohesion policy and state aid compliance, European Policy Research Paper, 2009, pg 5

23 Formally, the Community resources are not State resources; however the legal service of the Commission have confirmed that once the Structural Funds come under the control of Member State, they become state resources and the decision on how they are expended are attributable to the State.See Fiona Wishlade ibid, note 43

24 See P. Nicolaides et al., " State Aid Policy in the European Community", ibid. pg 21, 22 and P.Craig& G.de Burca, op.cit., pg 1087, G. Tessauro, op.cit pg 747

25 Case T-157/01 Danske Busvognmaend v. Commission, 2004 ECR II-917, para 57

26 Fiona Wishlade " When are state tax advantage state aid and when are they general measures", Regional and Industrial Policy Research Paper, Number 20, Published by: European Policies Research Centre University of Strathclyde, Glasgow, United Kingdom, June 1997, pg. 7

27 Fiona Wishlade, Fiona Wishlade " When are state tax advantage state aid and when are they general measures", Regional and Industrial Policy Research Paper, Number 20, Published by: European Policies Research Centre University of Strathclyde, Glasgow, United Kingdom, June 1997, pg. 10

28 Case 248/84 Federal Republic of Germany v Commission [1987] ECR 4013, para. 18; Case C-143/99 Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zement- werke GmbH v Finanzlandesdirektion für Kärnten [2001] ECR I-8365.

29 Commission Decision concerning Case E/1/98 of 18 December 1998 regarding a proposal for appropriate measures under Article 93(1) of the EC Treaty concerning the International Financial Service Centre and Shannon customs-free airport zone, OJ C 395, 18.12.1998, pp. 14–18.

30 Case 730/79 Philip Morris v Commission [1980] ECR 2671, paragraph 11

which receives the state aid is increased and decrease for the other competitors that do not receive this state aid.[31]
However, as in other discipline of law, also in the ambit of state aid is made available the principle of law "*de minimis non curat lex*". For this reason the Commission is engaged in drafting guidelines on the thresholds and other conditions an aid is deemed to be *"de minimis*" and as such be excluded from the application of Article 87(1).[32]
2.1.5 Aid must distort competition in the common market.
The Court, in Belgium v. Commission, has stated that the "competition is distorted, if the aid in question strengthen the competitive position of the recipient...in relation to its rivals"[33]. It means that the court will consider the position of the relevant company prior to the receipt of the aid, and if this has been improved, then Article 87 will have been met.[34] It is irrelevant that the aid recipient may have suffered from other disadvantages and that the aid merely sought to alleviate those advantages.[35] Thus, the distortive effects are assessed, even in cases when the aid does not improve in absolute terms the position of the undertaking with respect to its competitive, but rather bring the beneficiary undertaking in an equal position with the other undertakings which operate in other Member States of the Union.[36] Furthermore, the article catches even those measures that "threaten to distort competition", so every state measure that actually or potentially distorts competition in trade between State Members will be contrary to the Treaty.[37] The provision, by considering as incompatible with the Treaty also those measures that threat to distort competition, prohibits all those measures that even though by their own characteristics did not altered the normal competition are able to alter it. This does not mean that there is any general assumption in basis of which any measure is automatically incompatible with the Treaty, so far as it grants and advantage to the undertaking, but rather it should be examined its effect on competition, whether it has altered or may alter the normal conditions of the competition between undertakings. The Court of Justice has clearly stated that the Commission has the obligation to prove, case by case, that the public intervention in favour of an undertaking has in fact or may have genuinely distorted the competition.

31 See C. Baudenbacher, op.cit, ibid
32 See: Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid" (Official Journal No L 379, 28.12.2006
33 Case 234/84, Belgium v.commission, 1986 ECR 2263, para 22
34 See P.Craig& G.de Burca, op.cit., pg 1092.
35 See, P. Nicolaides et al., "State Aid Policy in the European Community", ibid., pg 40, para 4.
36 In the case 173/73, cit.supra, the Court assessed as incompatible an aid designated to reduce the social charges of the employer in the sector of textile industry, even though the State alleged that in this way the undertaking was brought in the same position with its competitors, which were not subject of this social burden. The AG Warner, in its conclusion stated that is sufficient that the reduction of the costs due to the reduction of social charges has improved the competitiveness of the undertaking and distorted competition.
37 In the Case C 148/04 Unicredito Italiano v. Agencie delle Entrate, 2005, ECR, para 54 the Court has stated: " Article 87 (1) EC provides that the threat of distortion of competition is sufficient. It is not therefore necessary 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 the aid is liable to affect such trade and competition".

2.2. Cases when the state aid is granted by local authorities

2.2.1. State aid and tax reduction

Article 87(1) EC prohibits State aid 'favouring certain undertakings or the production of certain goods' in comparison with others which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question, that is to say, selective aid. In the *Azores*[38] case, the legislative body of the Azores Region enacted a regional legislative decree[39] for adapting the national tax system to the region's specific characteristics. The Decree No 33/99/A included, in particular, a section concerning reductions in the rates of income and corporation tax. Those reductions were applied automatically to all economic operators and they were intended, inter alia, to allow undertakings in the Azores to overcome the structural handicaps resulting from their location in an insular region on the periphery of the Community. For that purpose, all persons subject to income or corporation tax in the Azores Region enjoyed a reduction in the rate of personal income tax of 20% (15% for 1999) and a reduction in the rate of corporation tax of 30%. [40]The question posed here is whether the aid given by the State, in this case the local government, is selective in character and as such contrary to Article 87(1) EC provision. The Court held the determination whether a constituted selective aid required an examination of whether that measure constituted an advantage for certain undertakings in comparison with others which were in a comparable legal and factual situation. In this concern the Court stated: "Thus, in order to determine the selectivity of a measure adopted by an infra-State body which seeks to establish in one part only of the territory of a Member State a tax rate which is lower than the rate in force in the rest of that State it is appropriate to examine whether that measure was adopted by that body in the exercise of powers sufficiently autonomous vis-à-vis the central power and, if appropriate, to examine whether that measure indeed applies to all the undertakings established in or all production of goods on the territory coming within the competence of that body"[41] To reach a conclusion on the autonomous powers of an infra-State body tp reduce taxes in a certain territory, the Court based on the reasoning of Advocate General stipulated three criteria:

1. The decision must, first of all, have been taken by a regional or local authority which has, from a constitutional point of view, a political and administrative status separate from that of the central government.
2. Next, it must have been adopted without the central government being able to directly intervene as regards its content.

38 Case C-88/03, Portuguese Republic v Commission of the European Communities, 26 September 2006, ECR I-07115
39 Regional Legislative Decree No 2/99/A of 20 January 1999, as amended by Regional Legislative Decree No 33/99/A of 30 December 1999, hereinafter referred as 'Decree No 2/99/A'
40 Case C-88/03, Portuguese Republic v Commission of the European Communities, cit.supra, para.13-14
41 Case C-88/03, Portuguese Republic v. Commission of the European Communities, cit.supra, para 62

3. Finally, the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government.[42]

The Court ruled that, although the Constitution of Portugese Republic guaranteed to the autonomous region of the Azores its own political and administrative status and its own self-government institutions which have the power to exercise their own fiscal competence and adapt national fiscal provisions to regional specificities[43], the two other conditions cited above were not fulfilled. The Court assessed that the decision to reduce the regional tax burden by exercising its power to reduce tax rates on revenue and the fulfilment of its task of correcting inequalities deriving from insularity, are inextricably linked and depend, from the financial point of view, on budgetary transfers managed by central government[44], and thus affirmed that the reductions in the tax rates at issue were selective.[45]

3.2.2 State aid and sale of land

During its investigation on state aid, on a number of occasions in recent years the Commission has deat with sales of publicly owned land and buildings in order to establish whether there was an element of State aid in favour of the buyers. In order to to make its general approach with regard to the problem of State aid through sales of land and buildings by public authorities transparent and to reduce the number of cases it has to examine, in 1997 the Commission adopted a Communication on state aid elements in sales of land and buildings by public authorities. [46] This Communication specifies conditions under which the sale of land and buildings by public bodies does not involve state aid: this is the case when the transaction is at a price that conforms to the market value, calculated on the basis of normal economic activity.[47] The Communication sanctions four main principles on this regard: principles for sales through an unconditional bidding procedure, sales without an unconditional bidding procedure, the principle of notification and at last a principle on the review of the complaints regarding the sale of land and state aid.

The Communication distinguishes between two basic principles: sale via an 'unconditional bidding procedure' (an *open, non-discriminatory and unconditional contracting procedure*) and sale without this unconditional bidding procedure. Under the first principle, the bidding procedure ensures that the sale takes place at the market price; under the second, valuation is required in order to arrive at a market price.[48] Thus, a sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid.[49] If public authorities intend not to use this procedure, an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.[50] Furthermore, for sales without an unconditional bidding procedure the Communication have foreseen a margin of appreciation and special obligations and the possible costs of the state authorities. [51]

Regarding to the application of this Communication for the local authourity we can refer to Dr. Ir. D.A. Groetelaers et.al. : "It may therefore be concluded that the European regulations on competition and state aid apply if a municipality fails to employ market prices for land it buys, sells, leases or rents out. The Communication appears to be directed principally towards the sale of government property, and not the issue of land on which to build. According to the Communication, then, there are only two methods by which a market price for a land supply can be determined: an unconditional bidding procedure, or a valuation"[52]

A recent landmark case that interpreted this Communication has been Case C-*239/09 Seydaland Vereinigte Agrarbetriebe v BVVG*. *Seydaland* (the applicant) was a company operating in the agro-industrial sector. By contract dated 18 December 2007, BVVG[53] sold land for agricultural use to Seydaland. The total selling price was EUR 245 907.91, of which agricultural land accounted for EUR 210 810.18. As it considered that the price it paid was excessive, Seydaland sought reimbursement of part of the selling price of the land,

[42] Case C-88/03, Portuguese Repulbic v. Commission of the European Union, cit.supra, para.66-67

43 Case C-88/03, Portugese Republic v.Commission of the European Union, cit.supra, para.70

44 Case C-88/03, Portugese Republic v.Commission of the European Union, cit.supra, para.77

45 See also the Gibraltar case C-211/04 and Joined cases C-428/06, C-434/06, UGT- Rioja et. al.

46 Commission Communication on State aid elements in sales of land and buildings by public authorities (97/C 209/03), Published in the Official Journal OJ C 209, 10.07.1997

47 Dr. Ir. D.A. Groetelaers, Dr. M.E.A. Haffner, Drs. H.M.H. van der Heijden, Prof. Dr. W.K. Korthals Altes, Dr. T. Tasan-Kok " Providing cheap land for social housing: Violation of state aid rule of Single European Market ?" , OTB Research Institute for Housing, Urban and Mobility Studies of the Delft University of Technology, The Netherlands, pg. 3

48 Ibid,pg 3

49 Commission Communication on State aid elements in sales of land and buildings by public authorities (97/C 209/03), Published in the Official Journal OJ C 209, 10.07.1997, pg.2

50 Commission Communication on State aid elements in sales of land and buildings by public authorities (97/C 209/03), Published in the Official Journal OJ C 209, 10.07.1997, pg.3

51 Thus for example the Communication foresee that if, after a reasonable effort to sell the land and buildings at the market value, it is clear that the value set by the valuer cannot be obtained, a divergence of up to 5 % from that value can be deemed to be in line with market conditions. If, after a further reasonable time, it is clear that the land and buildings cannot be sold at the value set by the valuer less this 5 % Margin, a new valuation may be carried out. For costs and other obligations see further Commission Communication on State aid elements in sales of land and buildings by public authorities, cit.above, pg 4 and 5

52 Dr. Ir. D.A. Groetelaers, et.al, cit.above, pg. 4

[53] BVVG is a wholly-owned subsidiary of the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (the federal body responsible for special tasks connected with German reunification), responsible for the privatisation of agricultural and forestry land.

claiming that, calculated on the basis of the regional reference valuations, that selling price was only EUR 146 850.24. After the refusal of the request by the BVVG, Seydaland brought an action before the Landgericht Berlin (Berlin Regional Court) seeking reimbursement. According to Seydaland, BVVG ought to have calculated the selling price of the land at issue on the basis of the regional reference valuations, or to have referred to the valuation committee pursuant to Paragraph 5(1) of the FlErwV[54]. The main question raised before the the Landgericht Berlin, which was refered to the European Court of Justice by a preliminary ruling, was whether Article 87 EC must be interpreted as precluding national legislation laying down calculation methods for determining the value of agricultural and forestry land, being offered for sale by public authorities in the context of a privatisation programme, such as those laid in the German national law.

First, the Court acknowledged that, in relation to the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity, such as agriculture or forestry, there might be elements of State aid, in particular where it is not made at market value, that is to say, where it is not sold at the price which a private investor, operating in normal competitive conditions, would have been able to fix [55]

Furthermore, it stated that, where the national law establishes rules for calculating the market value of land for their sale by public authorities, the application of those rules must, in order to comply with Article 87 EC, lead in all cases to a price as close as possible to the market value. As that market value is theoretical, except in the case of sales accepting the highest bid, a margin for variation on the price obtained as compared with the theoretical price must be tolerated, as the Commission correctly states in Title II, point 2(b), of the Communication. Next, it stressed that only a sale accepting the best bid, or the determination of the price by an expert, are suitable for establishing the market value of a piece of land.[56]

The Court, based on the Advocate's General Opinion, expressed in paragraph 47, ruled that the answer to the question referred is that Article 87 EC must be interpreted as not precluding a provision of national law laying down calculation methods for determining the value of agricultural and forestry land, offered for sale by public authorities in the context of a privatisation plan, to the extent that those methods provide for the updating of the prices, where prices for such land are rising sharply, so that the price actually paid by the purchaser reflects, in so far as is possible, the market value of that land.[57]

Although at last the Court, acknowledged that it is a competence of the national courts to examine the methods and procedure of prices evaluation, set in the national law, and to find whether it is consistent with Article 87 EC, it stressed that it cannot be ruled out that, in certain instances, the method laid down in that provision of national law may lead to a result far removed from market value [58]

It is clear that the principles set out in the Seydayland case, regarding the methods and procedure of price evalutation in cases of sales of public property, apply also when the sale is made by local authorities. A recent case where a local authority, i.e. the City of Orleans, was engaged in sales of public property, is Case 290/07 Commission v. Scott SAECJ judgment of 2 September 2010 in *Commission v Scott SA (C-290/07 P)* considered a long-running state aid dispute arising out of a public land sale to Scott in France. Land sales by public authorities can include state aid, if the purchase price is lower than the market price and therefore confers an advantage to the buyer. The Commission found that the sale of the land had occurred at a preferential purchase price and therefore included unlawful state aid. This was declared incompatible with the common market. The CFI annulled the Commission's decision, holding that the Commission had breached its duty to exercise due diligence by first, relying on a cost-based method and applying this method to the facts of the case, and secondly, not taking into account additional information provided by Scott during the administrative proceedings.

On appeal, the ECJ annulled the CFI's judgment and referred the case back to the CFI. The ECJ emphasised the Commission's broad discretion when performing complex economic assessments and the limits of judicial review in these assessments. Judicial review of the Commission's complex economic assessments is limited to verifying whether first, the rules on procedure and on the statement of reasons have been complied with, second, whether the facts have been accurately stated and last, if here has been any manifest error of assessment or misuse of powers

54 Case 239/09, Seydaland....cit. above, para 20-21
55 Para.34
56 See para 35-38
57 Para 54
58 Para. 52-53