Relationship between State and Public Undertakings and its Limits Arising from EC State Aid Law

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Table of Contents

Table of Cases

European Court of Justice and European Court of First Instance

Case 19/61 *Mannesmann*, judgment of 13 July 1962, Rec 675

Case 173/73 *Italy v Commission ('Steenkolenmijnen')* [1974] ECR 709

Case 703/79 *Philip Morris v Commission* [1980] ECR 2671

Case 84/82 *Germany v Commission* [1984] ECR 1451

Cases 296 & 318/82 *Netherlands and Leeuwarder Papierwarenfabriek v Commission* [1985] ECR 809

Case C 323/82 *Intermills v Commission* [1984] ECR 3809

Case 234/84 *Belgium v Commission ('Meura')* [1990] ECR I-2263

Case 40/85 *Belgium v Commission ('Boch II')* [1986] ECR 2321

Case C-118/85 *Commission v Italy* [1987] ECR 2599

Case C 102/87 *France v Commission* [1988] ECR 4067

Case C-142/87 *Belgium v Commission ('Tubemeuse')* [1990] ECR I-959

Case C-301/87 *France v Commission ('Boussac')* [1990] ECR I-307

Cases 188-90/88 *France, Italy and UK v Commission* [1982] ECR 2545

Case C-303/88 *Italy v Commission ('ENI-Lanerossi')* [1991] ECR I-1433

Case C-305/89 *Italy v Commission ('Alfa Romeo I')* [1991] ECR I-1603

Case C-42/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979

Case C-69/91 *Ministre Public v Decoster* [1993] ECR I-5335

Cases 72 and 73/91 *Sloman Neptun Schiffahrts AG* [1993] ECR I-887

Case C-278/92 *Spain v Commission ('Hytasa No 1')* [1994] ECR I-4103

Case C-364/92 SAT *Fluggesellschaft v Eurocontrol* [1994] ECR I-43

Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547

Case C-42/93 *Spain v Commission* [1994] ECR I-4175

Cases C-329/93, C-62/95, C-63/95 *Germany and Hanseatische Industrie Beteiligungen GmbH and Bremer Vulkan Verbund AG v Commission* [1996] ECR I-5151

Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547

Case T67/94 *Ladbroke Racing v Commission* [1998] ECR II-1

Case C-241/94 *France v Commission* [1996] ECR I-4551

Case T-358/94 *Air France v Commission* [1996] ECR II-2109

Cases T-129/95, T-2/96, T-97/96 *Neue Maxhütte Stahlwerke v Commission* [1999] ECR II-17

Case T-19/96 *Cityflyer Express Ltd v Commission* [1998] ECR II-757

Cases T-132 & 143/96 *Freistaat Sachsen v Commission* [1999] ECR II-3663

Case C-342/96 *Spain v Commission* [1999] ECR I-2459

Cases T-204/97, T-270/97 *EPAC v Commission* [2000] ECR II-2267

Case 256/97 *DMT* [1999] ECR I-3913

Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871

Cases C-15/98, C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855

Case C-156/98 *Germany v Commission ('new Länder')* [1999] ECR I-6857

Cases C-180-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451

Case C-379/98 *Preussen Elektra v Schleswag AG* [2001] ECR I-2099

Case T-55/99 *CETM v Commission* [2000] ECR II-3207

Cases T-228/99 T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II 435

Case C-334/99 *Germany v Commission* [2003] ECR I-1139

Case C-482/99 *France v Commission ('Stardust Marine')* [2002] ECR I-4397

Case C-53/00 *Ferring v ACOSS* [2001] ECR I-9067

Case T-98/00 *Linde v Commission* [2002] ECR II-3961

Case C-280/00 *Altmark Trans and Regierungspräsidum Magdeburg* [2003] ECR I-7747

Cases T-116/01, T-118/01 *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* [2003] ECR II-295

Case C-276/02 *Spain v Commission* [2004] ECR I-8091

C-442/03 *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* [2006] ECR I-4845

Case C-451/03 *Servizi Ausiliari Dottori Commercialisti v Calafiori* [2006] ECR I-2941

Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio di Genova* [2005] ECR I-11137

Case C-237/04 *Enirisorse v Sotocarbo* [2006] ECR I-2843

Case T-475/04 *Bouygues v Commission* [2007] ECR II-2097

Cases C-393/04, C-41/05 *Air Liquide Industries Belgium v Ville de Seraing* [2006] ECR I-5293, para 34

Case T-25/07 *Iride SpA v Commission* [2009] ECR II-nyr

A. Introduction

Through its public undertakings the State participates in the economy. This seems at least questionable, from various points of view. According to Article 3(1)(g) EC there should in the European Community be a true single market and system of undistorted intra-Community trade and competition. According to some scholars, public undertakings are no obstacle to achieving these aims, because, they argue, public undertakings are treated like private companies in nearly all respects, as they are members of the same compulsory regulatory bodies, with the same fiscal obligations, and they have to comply with the same anti-trust laws.[1] But this approach seems wrong. The special threat of competition arising from public undertakings cannot be denied, as it is explicitly mentioned twice in the EC Treaty, namely in Article 31 and Article 86. There are certain dangers arising from the participation of States in the market. Especially questionable is the complexity of the relations between the State and its public undertakings, in particular because with its participation in the economy, the state competes directly with its own citizens. And in this, the State has a number of advantages: the State has – theoretically – unlimited financial resources [2] and can,

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[1] H Schwintowski, 'The common good, public subsistence and the functions of public undertakings in the European internal market' (2003) 4 EBOR Law Review 373-74.

[2] K Hellingman, 'State Participation as State Aid under Article 92 of the EEC Treaty: The Commission's Guidelines' (1986) 23 CML Rev 111.

moreover, support its undertakings with its functions as a public authority. Looking at the economies of the Member States we can see that every Member State, to a varying degree, participates in the market through public undertakings.[3] Also, States tend to support their public undertakings. But this is not all plain sailing, because Article 87(1) EC prohibits 'any aid granted by a Member State or through State resources'. Therefore, we have to ask to what extent the participation and the financial and other relations between the State and its undertakings count as aid and are therefore prohibited according to Article 87(1) EC, and therefore restrict the State to this extent.

The main objective of State aid control is to ensure a 'level playing field' in the internal market for undertakings through the prior control of advantages that are granted by Member States to selected beneficiaries, to enhance both the efficiency of the economy as a whole and consumer welfare.[4] But con-

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[3] L Hancher, T Ottervanger, PJ Slot (eds), *EC State Aids* (3rd edn Sweet & Maxwell, London 2006) para 8-001; G Abbamonte, 'Market Economy Investor Principle: a Legal Analysis of an Economic Problem' (1996) 17 ECL Review 259.

[4] State Aid Action Plan – Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 – SEC(2005) 795, 7 June 2005, para 7; M Schütte, 'The Notion of State Aid' in MS Rydelski (ed), *The EC State Aid Regime – Distortive Effects of State Aid on Competition and Trade* (Cameron May, London 2006) 52; F Groeteke, K Heine, '"Institutional Rigidities" and European State Aid Control' (2004) 25 ECL Rev 322; A Biondi, 'Some Reflections on the Notion of "State Resources" in European Community State Aid Law' (2006-07) 19 Fordham International Law Journal 1428; F de Cecco, 'The Many Meanings of "Competition" in EC State Aid Law' (2006-07) Cambridge Yearbook of European Legal Studies 122; P Craig, 'The Evolution of the Single Market' in C Barnard, T Scott (eds), *The Law of the Single European Market – Unpacking the Promises* (Hart, Oxford 2002) 2; HW Friederiszick, LH

sidering the concerns described above about the States' market participation with public undertakings, and recognising that inefficient and anticompetitive results are primarily caused by state intervention, it is, nevertheless, of general importance to realise that, according to established case law, the active participation of the State in the market economy is in itself not automatically contrary to the rules on State aid.[5] One of the main responsibilities in searching for the limits arising from State aid law which apply to the relation between States and public undertakings is to assess when State measures would not be considered to amount to aid if checked against economic rationality: that is, they would have also have been undertaken by an investor operating under normal market conditions; or in other words, to assess when public undertakings operate on the 'level playing field' of competition.[6] This control was not rigorously applied to public undertak-

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Röller, V Verouden, 'EC State Aid Control: An Economic Perspective' in MS Rydelski (ed), *The EC State Aid Regime – Distortive Effects of State Aid on Competition and Trade* (Cameron May, London 2006) 145; M. Merola and others, 'The Most Appropriate Economic Tool for a Better Targeted State Aid Policy' in J Derenne, M Merola (eds), *Economic Analysis of State Aid Rules – Contributions and Limits* (Lexxion, Berlin 2007) 31; P Rey, 'On the Form of State Aid' in C Ehlermann, M Everson (eds), *European Competition Law Annual 1999: Selected Issues in the Field of State Aids* (Hart, Oxford 2001) 141.

5 L Hancher, T Ottervanger, and PJ Slot (eds), (n 3) para 3-066; H Lesguillons, 'The State as Shareholder and the Private Investor Principle' (2003) International Business Law Journal 363.

6 G Roberti, 'Public Guarnatees and Community Control of State Aids' in C Ehlermann, M Everson (eds), *European Competition Law Annual 1999: Selected Issues in the Field of State Aids* (Hart, Oxford 2001) 278; P Anestis, S Mavroghenis, 'The Market Investor Test' in MS Rydelski (ed), *The EC State Aid Regime – Distortive Effects of State Aid on Competition and Trade* (Cameron May, London 2006) 122.

ings before the 'public U-turn' in EU competition policy in the 1980s, as the Commission started enforcing competition rules against public undertakings too.[7]

To analyse the relationship between State and public undertakings, and its limits arising from EC State aid law, we first have to ask what public undertakings are. Further we have to look where their position in the Treaty is, and then, following the requirements of Article 87(1), consider in detail where the limits of State participation lie. We do this referring to certain typical situations in the 'life' of a public undertaking, and placing the main focus on the market economy investor principle, its requirements and its problems. Because it is not possible nowadays to write about competition law without looking at least briefly at the impact of the current financial crisis – which was initially triggered in mid 2007 by problems with sub-prime mortgage lending in the US that impacted heavily on other markets, leading to a loss of confidence between financial institutions and a systemic crisis for the entire banking sector[8] - we will mention this impact at several points.

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7 W Sauter, 'Competition Policy' in A El-Agraa (ed), *The European Union – Economics & Policies* (6th edn, Financial Times, Harlow 2001) 197; E Morgan, 'Competition Policy in the European Union' in N Healey, *The Economics of the New Europe* (Routledge, London 1995) 251-53; D Spector, 'The Economic Analysis of State Aid Control' in J Derenne, M Merola (eds), *Economic Analysis of State Aid Rules-Contributions and Limits* (Lexxion, Berlin 2007) 8.

8 C Quigley, *European State Aid Law and Policy* (2nd edn Hart, Oxford 2009) 336.

B. Public Undertakings

When writing about the relation between State and public undertakings, it is first of all necessary to consider which undertakings actually are 'public'. In the EC Treaty this concept is mentioned in Article 86(1) but not defined therein. According to the settled case law of the European Court of Justice (ECJ), however, determining the meaning of 'public undertaking' is a two-step procedure: first, the question must be asked whether a particular body is an undertaking; and, if it is, it should further be asked whether it is a public undertaking.[9]

1) The Concept of Undertaking in EC Law

Given the absence of a definition in the Treaty itself, the ECJ has developed this concept, holding that an 'undertaking' is any entity engaged in economic activity, regardless of its legal status, the way it is financed and without reference to any formal distinctions made as a matter of national law. 'Economic activity' is any activity consisting in offering goods and services in a given market.[10] This broad and functional interpretation serves

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[9] A Jones, B Sufrin, *EC Competition Law* (3rd edn OUP, Oxford 2008) 626.

[10] J Baquero Cruz, 'Beyond Competition: SGI and EC Law' in de Búrca (ed), *EU Law and the Welfare State* (OUP, Oxford 2005) 179; Holmes, 'Fixing the Limits of EC Competition Law: State Action and the Accommodation of the Public Services' (2004) Current Legal Problems 151; Case C-42/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, para 21; Cases C-180-

to guarantee the uniform application of Community law across all Member States.[11] *Per se* excluded is any activity within the essential prerogative of the State such as general and fiscal administration, justice, security and national defence and also certain aspects of the welfare state.[12]

2) Public Undertaking

The concept of a public undertaking covers a wide variety of situations, which naturally means that it has not been easy to define. As the concept of undertakings, it is a Community law concept, because to rely upon the widely varying classifications of undertakings as 'public' or 'private' in national legal system would deprive Community law in respect to public undertakings of its effect.[13] In 1962 the ECJ defined 'public undertaking' as any undertaking placed directly or indirectly under the dominant influence of the State.[14] In its Transparency Directive the Commission defined 'public

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184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paras 74-75.

[11] W Sauter, H Schepel, *State and Market in European Union Law – The Public and Private Spheres of the Internal Market before EU Courts* (CUP, Cambridge 2009) 77.

[12] G Monti, *EC Competition Law* (CUP, Cambridge 2007) 486-87; JM González-Orús, 'Beyond the Scope of Article 90 of the EC Treaty: Activities excluded from EC Competition Rules' (1999) 5 European Public Law 387; Opinion of AG Tesauro in Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43, para 9.

[13] A Arnull and others, *Wyatt and Dashwood's European Union Law* (5th edn Sweet & Maxwell, London 2006) 1120; H Schwintowski, (n 1) 369; Opinion of AG Reischl in Cases 188-90/88, *France, Italy and UK v Commission* [1982] ECR 2545, para 9.

[14] European Parliament n – Directorate General for Research, 'Public Undertakings and Public

undertaking' in Article 2(b) as:

> 'any undertaking over which the public authorities exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein or the rules which govern it. A dominant influence is to be presumed when the public authority holds the major part of the undertaking's subscribed capital, controls the majority of votes attached to the shares issued or can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.'[15]

The Court upheld this definition.[16] The key to this concept is therefore the dominant influence exercised by the State, regardless of whether it is as the result of ownership, financial participation, or the rules governing the undertaking,[17] and regardless of whether it has legal separation from the state or a distinct legal personality, and regardless of whether it is at national, regional, or local level.[18]

Service Activities in the European Union' (Working Document – Economic Affairs Series W-21, May 1996) 11; Case 19/61 Mannesmann, judgment of 13 July 1962, Rec 675.

15 Art 2(b) of Dir 80/723 on the transparency of financial relations between Member States and public undertakings, OJ 1980 L195/35, as amended by Dirs 85/413 (OJ 1985 L229/20), 93/84 (OJ 1993 L254/16), 2000/52 (OJ 2000 L193/75), 2005/81 (OJ 2005 L312/47); OJ 2006 L318/17.

16 Cases C-188-190/80 (n 13).

17 A Jones, B Sufrin, (n 9) 626.

18 Case C-118/85 *Commission v Italy* [1987] ECR 2599; Case C-69/91 *Ministre Public v Decoster* [1993] ECR I-5335; J Faull, A Nikpay, *The EC Law of Competition* (2nd edn OUP, Oxford 2007) para 6.26; H Schwintowski, (n 1) 368.

3) State and Public Undertakings in Europe

Public undertakings have been established in Europe since the eighteenth century, for a variety of different reasons. They experienced a period of popularity during the 1930s-1950s, as they played an important, role in certain sectors.[19] However, the situation changed fundamentally during the 1980s as public undertakings were widely privatised, because they were considered as inefficient, overly bureaucratic and as an obstacle to the development of markets and competition.[20] In just ten years – from 1978 to 1988 – the contingent of public undertakings in the UK, for example, was reduced from 17.0% to 5.5%.[21] Nevertheless, public undertakings remain important in European economics. After the wave of privatisation tied down, the average figure for the EU was still about 12%. In Italy and France, for example, public undertakings account for up to a fifth of the national economy whereas Ireland and Germany lie around the average and

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[19] M Shirley, P Walsh, 'Public versus Private Ownership' (2000) World Bank Policy Research Working Paper 2420, 3; European Parliament – Directorate General for Research, 'Public Undertakings and Public Service Activities in the European Union' (n 14) 8, 11.

[20] J Jakovides, 'Public Communications - Positionierung öffentlicher Unternehmen zwischen Markt und Mandat' in J Rieksmeier, *Politische Interessenvermittlung* (Springer, Berlin 2007) 62; Wissenschaftl. Beirat der Gesellschaft für öffentliche Wirtschaft: 'Wandel und Perspektiven der öffentlichen Wirtschaft' (Berlin 2003, available online: http://goew.de/pdf/c.1.2.goew.pdf) 1; JE Stiglitz, *Economics of the Public Sector* (3rd edn Norton, New York 2000), ch. 1.

[21] S Thornton, 'Reforming Public Enterprises – Case Studies: UK' (OECD 1998, available online: http://www.oecd.org/dataoecd/19/57/1901726.pdf) 1.

the UK and Luxemburg have only 4% or less.[22] But it might be helpful to look at one State in detail. In Germany, for example, lying around the EU average, there are more than 9,000 public undertakings with a business volume of € 150 billion and employing 7,4% of all employees. This clearly indicates that the volume of public undertakings is still considerable.[23]

Moreover, it is argued that the current financial crisis will lead to an increase in public undertakings some even write about a U-turn to the privatisation trend of the 1980s.[24] Beyond any doubt the current crisis is leading to an increase in the number and importance of public undertakings, especially if we think about the nationalisation of banks, for instance.

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[22] European Parliament – Directorate General for Research, 'Public Undertakings and Public Service Activities in the European Union' (n 14) 17–18.

[23] H Braun, W Leetz, 'Statistik der öffentlichen Unternehmen in Deutschland' (1998, available online: http://goew.de/pdf/c.3.4.1.goew.pdf) 2-4.

[24] L Rubini, *The Definition of Subsidy and State Aid – WTO and EC Law in a Comparative Perspective* (OUP, Oxford 2009) 209; RM D'Sa, '"Instant" State Aid Law in a Financial Crisis – A U-Turn?' (2009) 8 EStAL 144.

C. Importance of the EC (State Aid) Law for Public Undertakings

According to Article 86(1) EC, the EC Competition rules – including the EC State aid regime – are in principle also applicable to public undertakings.

1) Limitations Arising from the EC Economic Constitution

The founding Member States of the European Community held different views on the relations between State and market. In Germany the ordo-liberal view predominated, whereas in France and Italy public ownership and state planning were widely applied in a market framework.[25] However, today the free internal market is at the centre of the Treaty and one of the pillars of the Community, based on the rationale that a more integrated European market will, by increasing competition, promote lower prices, better products and more economic growth.[26] The idea of State aid rules is to protect this internal market from potential distortive State influence.[27]

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[25] W Sauter, 'The Economic Constitution of the European Union' (1998) 4 Columbia Journal of European Law 49; W Sauter, H Schepl, (n 11) 13-16.

[26] HW Friederiszick LH Röller, V Verouden, (n 4) 164; P Craig, (n 4) 1; I Ward, *A Critical Introduction to European Law* (3rd edn CUP, Cambridge 2009) 116; JM Buchanen, VJ Vanberg, 'The market as creative process' in DM Hausman (ed), *The Philosophy of Economics* (2nd edn Cambridge University Press, Cambridge 1994) 327.

[27] A Biondi, (n 4) 1426-27; L Rubini, (n 24) 40.

Therefore it could be argued that public undertakings should be treated strictly according to EC Law. But this approach would not cope with the Treaty as a whole. Indeed, European integration favours one form of economic organisation and policy over others – in particular favouring those associated with economic liberalism over those associated with public ownership and intervention; but nevertheless, the Treaty does not prohibit Member States from running a mixed economy.[28] Therefore it could not be argued that the State aid rules according to public undertakings should be interpreted more restrictive than in respect to private undertakings.

2) Limitations Arising to the Application of EC State Aid Law by Articles 86(2), 295 and 16 EC

The position of public undertakings in the structure of the EC Treaty is essentially determined by Articles 86(1), 295 and 16 EC.[29] This complex norm structure reflects a triple-pole network of interests. These three poles are the general aim of a common market, the interest on supporting services of general economic interest (SGEI) and the interest of Member States in their own freedom concerning economic participation in the market. We

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[28] W Sauter, (n 25) 67; J Baquero Cruz, *Between Competition and Free Movement –The Economic Constitutional Law of the European Community* (Hart, Oxford 2002) 77-79.

[29] F Montag, C Leibenath, 'Finanzierung öffentlicher Unternehmen und EG-Behilfenrecht' (2003) EWS 403; T Mann, 'Öffentliche Unternehmen im Spannungsfeld von öffentlichem Auftrag und Wettbewerb' (2002) JZ 820.

have to keep in mind this field of conflict by interpreting the State aid rules on public undertakings and discussing the various problems in detail. In general, Article 295 EC provides that the Treaty in no way prejudices the rules in the Member States governing the system of property ownership. It grants the Member States the right to run a mixed economy and to create and maintain public undertakings.[30] Thus Article 295 EC could be seen as the cornerstone of the Treaty's neutrality regarding the choices that a Member State may make between public and private ownership. At first sight, this seems to indicate that Member States have been granted great scope concerning their public undertakings.[31] But, nevertheless, Article 295 EC is not just the cornerstone for the Treaty's neutrality in relation to the mixed economies it is also, in relation with Article 86(1) EC, the legal basis for the principle of equal treatment of private and public undertakings. Therefore, it must be kept in mind that the States' behaviour as market participants is governed by the same rules as those applicable to private undertakings, except where the Treaty itself specifically permits some derogation.[32] Therefore, Article 295 EC should not be interpreted as implying that public ownership is unlimited and hence a public undertaking can not claim for an ex-

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[30] W Weiß, 'Öffentliche Unternehmen und EGV' (2003) 38 Europarecht 166; J Schwarze (ed), *EU Kommentar* (2nd edn Nomos, Baden-Baden 2009) Art. 295, no 1.

[31] K Adamantopoulos, 'State Aid and Public Undertakings with Specific Reference to the Airline Sector' in A Biondi, P Eeckhout, J Flynn (eds), *The Law of State Aid in the European Union* (OUP, Oxford 2004) 219.

[32] A Arnull and others, (n 13) 1117.

ception from competition rules, solely relying on the fact that it is a public undertaking.[33]

Moreover, Article 10 EC provides a fidelity or solidarity clause which obliges the Member States to cooperate in a positive way to facilitate the objectives of the EC Treaty, and, in a negative way, not to harm or hamper the attainment of the EC Treaty objectives.[34] Member States are therefore under a duty to observe the principle of co-operation. Thus they are obliged to ensure that their internal constituent entities comply with Article 87(1).[35] This is of particular importance in the context of public undertakings, because the most public undertakings in Germany, for example, operate on local level, owned by cities and regional local authorities.[36]

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[33] K Hellingman, (n 2) 115; T Lübbig, A Martín-Ehlers, *Beihilfenrecht der EU – Das Recht der Wettbewerbsaufsicht über staatliche Beihilfen in der Europäischen Union* (Beck, München 2003) 136.

[34] E Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Hart, Oxford 2007) 13.

[35] A Bartosch, C Koenig, 'EC State Aid Law Reviewing Equity Capital Injections and Loan Grants by the Public Sector: a Comparative Analysis' (2000) 21 ECL Rev 378.

[36] G Püttner, 'Neue Regelungen für öffentliche Unternehmen?' (2002) DÖV 731.

D. Participation of the State by its Public Undertakings and the Prohibition of State Aid Article 87(1) EC

The EC Treaty does not contain a definition of State aid. Instead, Article 87(1) EC sets out the characteristics of State aid. There are several cumulative conditions which a measure must satisfy in order to be classified as State aid: it must (1) confer an advantage; (2) be granted by a Member State or through State resources; (3) favour certain undertakings or the production of certain goods; (4) distort competition and affect intra-Community trade.[37] According to settled practice, the notion of aid within the meaning of Article 87(1) should be very broad and effect-based, as indicated by the wording 'in any form whatsoever', going beyond mere subsidy, and aid thus comprises any form of intervention or assistance which has the same effects as or effects similar to a subsidy.[38] Nevertheless, the rules on State aid also have considerable flexibility. While Article 87(1) EC prohibits State aid, Articles 87(2) and (3) EC allow the Community to approve particular types of State aid that are generally considered beneficial.[39] As a result of the principle of equal treatment of private and public undertakings,

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[37] M Schütte, (n 4) 23-24.

[38] G Roberti, (n 6) 277; C Quigley, 'The Notion of State Aid in the EEC' (1988) 13 ELR 243; L von Buttlar, Z Wagner, S Medghoul, 'State aid issues in the privatisation of public undertakings – Some recent decisions' (2008) Competition Policy Newsletter 77.

[39] P Roth, V Rose, *Bellamy & Child: European Community Law of Competition* (6th edn OUP, Oxford 2008) paras 15.001, 15.008.

all measures in the relation between State and public undertakings must be checked against the requirements of Article 87 EC.

1) Aid Granted by the State or Through State Resources

According to Article 87(1) EC, only advantages granted by Member States or through State resources can constitute aid. In principle there are at least two possible interpretations. The first is a broad understanding, suggesting that State aid may be granted alternatively by a Member State or through State resources, supported by the assumption that either way, both are to a certain extent 'public' money.[40] Indeed, in none of the original versions of the EC Treaty does the phrase 'aid granted by Member States or through State resources in any form whatsoever', necessarily refer to a charge on the public account.[41] The second is that both State attribution and State resources are required. In *Preussen Elektra*, faced with the different possible interpretations, the Court made clear that only advantages granted directly or indirectly through State resources are to be recognised as State aid. Therefore, under the prevailing interpretation, a public measure could be regarded as aid only when it has an impact on the resources of the State.[42]

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[40] L Rubini, (n 24) 173.

[41] M Slotboom, 'State Aid in Community Law: a broad or narrow definition' (1995) 20 ELR 298.

[42] Case C-379/98 *Preussen Elektra v. Schleswag AG* [2001] ECR I-2099; M Schütte, (n 4) 39; C Koenig, J Kühling, 'EC Control of Aid granted through State Resources' (2002) 1 EStAL 7; P

However, references in Article 87 EC to a Member State and State resources include the resources of federal, state, regional and municipal authorities as well as public bodies set up by the State such as public undertakings.[43]

Imputability of the measure to the State

Nevertheless, the requirement that the State must be the ultimate source of funds is not sufficient for the aid to be categorised as State resources. It is further necessary that the measure be imputable to the State.[44] This question whether the action of a publicly owned body should be imputable to the State is a crucial one. Is the action of a publicly owned body imputable to the State solely arising from the fact that it is a public undertaking or is there moreover in each particular case a explicit directive of the State necessary for the measure in question to become imputable to the State?[45] Article 87 EC itself does not contain an imputability rule. In *Stardust Marine* the ECJ took an important step towards greater legal clarity with regard to

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Nicolaides, 'The New Frontier in State Aid Control' (2002) Intereconomics 191; J Winter, 'Redefining the Notion of State Aid in the Article 87(1) of the Treaty' (2004) CML Rev 475; Cases 72-73/91 Sloman Neptun Schiffahrts AC [1993] ECR I-887.

43 P. Roth, V Rose, (n 39) para 15.018; C Quigley, (n 38) 249; P Kirch, O d'Ormesson, JW Rodriguez Curiel, 'Tranfer of State Resources' in J Derenne, M Merola (eds), *Economic Analysis of State Aid Rules – Contributions and Limits* (Lexxion, Berlin 2007) 108.

44 J Faull, A. Nikpay, (n 18) para 16.09.

45 L Rubini, 'The 'Elusive Frontier': Regulation under EC State Aid Law' (2009) EStAL 277.

this question,[46] by rejecting the Commission's approach - that the only requirement for the imputability should be the question of ownership - and held:

> 'The mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures.'[47]

The Court considered that the imputability of a measure to the State could be inferred from a set of indicators 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 competition with private operators, the legal status of the undertaking or the intensity of the supervision by public authorities over the management of the undertaking.[48] In the context of the relationship between State and public undertakings this test of imputability is, especially in respect of the financial transactions of public undertakings, of crucial importance. A purely organic definition of the nature of the funds without a sophisticated imputability test would be suitable for public undertakings which are integrated in the administration of the public authority (as 'Eigenbetrieb' in Germany, as example) only, but would be far

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[46] T Lübbig, M von Merveldt, 'Stardust Marine: Introducing Imputability into State Aid Rules – Plain sailing into calm seas or rowing back into shallow waters?' (2003) 24 ECL Rev 629.

[47] Case C-482/99 *France v Commission ('Stardust Marine')* [2002] ECR I-4397.

[48] W Sauter, H Schepel, (n 11) 195-96; J Faull, A Nikpay (n 18) para 16.09.

to extensive in the case of public banks.[49] Without the sophisticated criterion of imputability any loan provided by public banks would potentially amount to State aid. This would clearly discriminate public banks (even if this might be corrected by considering the selectivity criterion later on).

2) Advantage

The question in each case is whether the recipient is receiving a benefit which it would not have received under normal market conditions and therefore improves its financial position or reduces the costs which it would otherwise have borne. It does not matter whether the advantage is permanent or of limited duration.[50] In other words any State resources transferred to public undertakings which are not commercially justifiable and not exchanged against the same value, in a different form, flowing back into the property of the State, are to be regarded as State aid if the other conditions in Art. 87(1) are fulfilled. The logic behind this, as it was conceived by the authors of the Treaty, is that State aid is any kind of State behaviour aiming at changing the normal market behaviour of the operators.[51] Generally

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[49] C Koenig, J Kühling, (n 42) 18; T Lübbig, M von Merveldt, (n 46), 630; L Hancher, 'Case C-482/99 – Stardust Marine – Case Comment' (2003) CML 742.

[50] R Streinz, *EUV/EGV – Vertrag über die EU und Vertrag zur Gründung der EG* (Beck, München 2003) Art. 87, no 27; Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547, para 60; Case C-241/94 *France v Commission* [1996] ECR I-4551, paras 34-40.

[51] R. Feltkamp, 'Some Reflections on the Structure of the State Aid Rules in the Treaty of Rome'

speaking, various forms of governmental action can produce an advantageous impact on undertakings. In the case of direct or indirect financial assistance this is normally particularly clear, because there are clear and virtually immediate transfers of financial resources.[52] Nevertheless one area of difficulty in the relationship between the state and public undertakings must be seen in cases where State intervention is claimed to equal that of a normal market investor or where the measure allegedly compensates an undertaking for a public service obligation.[53]

(a) SGEI as Market Equivalent

Some public undertakings are entrusted with SGEI provisions. In this context the question arises if and under what circumstances, the compensation for SGEI is a market equivalent. The Court concluded that this compensation is not covered by the definition of State aid in Article 87(1) EC, because compensation provided to an undertaking for its performance of a public service obligation does not, as a matter of principle, confer a true

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(2003) Competition Policy Newsletter 30; P Roth, V Rose, (n 39) para 15.010; AG Jacobs in Case C-278/92 *Spain v Commission ('Hytasa No 1')* [1994] ECR I-4103, para 28; Case T-98/00 *Linde v Commission* [2002] ECR II-3961.

[52] L Rubini, (n 45) 280.

[53] K Bacon, 'The Concept of State Aid: the Developing Jurisprudence in the European and UK courts' (2003) 24 ECL Rev 55.

'advantage' on that undertaking.[54] To avoid the possibility of Member States providing State aid to undertakings in the form of excessive compensation for the discharge of public service obligations, the ECJ held in Altmark that compensation is not covered by the definition of aid, if these four criteria are satisfied: (1) the undertaking must be entrusted with clearly defined public service obligations, (2) the compensation parameters must be established in advance and in a objective and transparent manner, (3) the compensation must not exceed what is necessary to cover the cost incurred in the discharge of the public service obligations and allowing for a reasonable profit, and (4) when there is no public tendering system to choose the undertaking, the level of compensation must be determined in relation to a typical and well-run undertaking.[55] Where these criteria are not satisfied, the compensation will constitute 'an advantage' and therefore fall within Article 87(1) EC. But may nevertheless be compatible with Community law pursuant to Article 86(2) EC.[56].

The establishment by the Court of the second of the Altmark criteria, that

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[54] Case C-53/00 *Ferring v ACOSS* [2001] ECR I-9067, paras 23-39; Case C-280/00 *Altmark Trans and Regierungspräsidum Magdeburg* [2003] ECR I-7747, paras 83-87; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti v Calafiori* [2006] ECR I-2941, paras 51-71; E Szyszczak, (n 34) 193; P Nicolaides, 'Compensation for Public Service Obligations: the Floodgates of State Aid?' (2003) 24 ECL Rev 561.

[55] Case C-380/00 (n 53) paras 89, 90, 92, 93.

[56] P. Roth, V Rose, (n 39) para 15.012; Community Framework for State aid in the form of public service compensation, OJ 2005 C297/4; Commission Decision 2005/842 on the application of Article 86(2) of the Treaty to State aid in the form of public service compensation granted to certain public service undertakings entrusted with the operation of SGEI, OJ 2005 L312/67.

the compensation must be established in advance and in a transparent manner, makes it difficult for the State to define SGEI in such a way that only its public undertakings would be able to provide the service. Moreover, compared to Article 86(2) EC the (4) Altmark condition introduces a new benchmark in requiring a public procurement or the comparison of a well-run undertaking.[57] This means that the State must 'auction' the right to provide the public service to the most efficient firm. In contrast, under Article 86(2) EC there is no need to show the most efficient provider has been selected, only that the firm offering the service is able to do so, not necessarily offered at the lowest cost. Therefore Article 86(2) broadens the scope for public undertakings, enabling them to escape State aid rules.[58] This seems to be even more questionable considering that States have a wide discretion to define new SGEI. Moreover, even when there is no identifiable revenue from the public service obligation, the public undertakings under the obligation may actually benefit from it, because it is misleading to consider only the extra costs without taking into account other benefits, because consumers perceive a product of different quality.[59]

Furthermore, from all above it is clear, that the compensation for SGEI provisions includes in every circumstance a reasonable profit. Public undertakings could use this cross-subsidisation by a profitable part the undertaking

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[57] E Szyszczak, (n 34) 234.

[58] G Monti, (n 12) 491.

[59] P Nicolaides, (n 54) 567.

to an unprofitable part. This is what a private operator would also to, at least to a certain extent. Therefore, public undertakings provided with SGEI and using the exemption of Article 86(2) could benefit from this in using the revenues from these fields for other parts of the undertaking.

(b) Market Economy Investor Principle

The cornerstone for the determination of whether measures adopted by public authorities constitute State aid within the meaning of Article 87(1) EC is the so-called Market Economy Investor Principle (MEIP). This principle aims to safeguard the principle of equal treatment between public and private undertakings and it strikes a balance between the Member States' interest in running a mixed economy, on the one side, and the safeguarding of the system of undistorted competition on the other. The key question relating to the MEIP is whether the recipient public undertaking receives an economic advantage which it would not have obtained under normal market conditions. In order to decide this, the situation at the time of the transaction must be considered so that it can be determined in each case whether the provision of public funds, whether by way of loan, capital injection or purchase of shares, acquisition of shares or equity, or through the purchase of specific products or services, does in fact constitute aid. It should be ascer-

tained whether the terms on which the funds are provided go beyond those that a private investor, operating under normal market economy conditions and having regard to the information available and foreseeable developments at that time, would find acceptable when providing funds to a comparable private undertaking; while also considering more globally the interaction between the various economic players.[60]

To cope with all the different situations mentioned above, there are a number of variations, such as the private creditor test, the private purchaser test, the private vendor test, or the hypothetical private investor test, covering

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[60] A Criscuolo, 'The State in a Liberal Market Economy: a Private Investor and Creditor or a Public Authority' (1999) 24 ELR 538; Y Simon, 'The Application of the Market Economy Investor Principle in the German Landesbanken Cases' (2007) 6 EStAL 499; J Bourgeois, 'EU Rules on State Aids and WTO Provisions on Subsidies Compared: The Case of State Owned Banks' in C Ehlermann, M Everson (eds), *European Competition Law Annual 1999: Selected Issues in the Field of State Aids* (Hart, Oxford 2001) 210; C Koenig, N Ritter, 'EG Beihilfenrechtliche Behandlung von Gesellschafterdarlehen' (2000) ZIP 770; B Slocock, 'The Market Economy Investor Principle' (2002) Competition Policy Newsletter 23; R D'Sa, *European Community Law of State Aid* (Sweet & Maxwell, London 1998) 67; E Grabitz, M Hilf, M. Nettesheim (eds), Das Recht der Europäischen Union (37th edn November 2007) Art. 87 no 33; C Calliess, M Ruffert, *EUV/EGV – Das Verfassungsrecht der Europäischen Union* (3rd edn Beck, München 2007) Art. 87 no 10; E Szyszczak, (n 34) 186-87; Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C71, 11.3.2000, 14;

Constant practice of the ECJ: Case 234/84 *Belgium v Commission ('Meura')* [1986] ECR I-2263, paras 14-15; Case 40/85 *Belgium v Commission (Boch II)* [1986] ECR 2321, para 13; Case C-301/87 *France v Commission ('Boussac')* [1990] ECR I-307, para 39; Case C-303/88 *Italy v Commission ('ENI-Lanerossi')* [1991] ECR I-1433, paras 21-24; Case C-305/89 *Italy v Commission ('Alfa Romeo I')* [1991] ECR I-1603, paras 19-23; Case C-42/93 *Spain v Commission ('Merco')* [1994] ECR I-4175, paras 13-9; Case T-25/07 *Iride SpA v Commission* [2009] ECR II-nyr, para 16.

nearly all the possible situations of relations between state and public undertakings. [61] But inherently they all do the same: Checking the States behaviour against the market benchmark.

(aa) Development of the Principle

From the 1980s onwards, the Commission developed the idea that State intervention should escape classification as State aid if it corresponds to the rationality of the market place. Although it was already used in some form to assess certain individual aid cases, it was not until 1981 that the Commission adopted a general formulation in this respect.[62] Subsequently in 1986, the ECJ employed the notion of the market economy investor.[63] From these beginnings, the concept of the market investor has been developed and refined by numerous Commission texts, decisions and court judgments. It has been expanded to become the major policy instrument used to draw the line between lawful and unlawful State participation in the market.

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[61] Case T-19/96 *Cityflyer Express Ltd v Commission* [1998] ECR II-757; Cases C-329/93, C-62/95, C-63/95 *Germany and Hanseatische Industrie Beteiligungen GmbH and Bremer Vulkan Verbund AG v Commission* [1996] ECR I-5151; Case 256/97 *DMT* [1999] ECR I-3913.

[62] Commission Decision (ECSC) 2320/81 [1981] OJ L228/14 (Steel Aid Code); Council Directive (EEC) 81/363 [1981] of 28 April 1981 OJ L137/39 (Shipbuilding Directive).

[63] Cases C-40/85 (n 60) para 13.

(bb) Problems of the MEIP

Although the MEIP seems to be highly accepted in the literature on State aid law and even unquestionable in the Commission's practice and the Courts' jurisprudence, this cannot hide the fact that there are a lot of problems and inadequacies connected with this test and the MEIP and its requirements are still subject to debate.

(i) Equal treatment in unequal circumstances – Comparable Investors?

First of all, it seems quite unclear why State investments which satisfy this test should not qualified as State aid. And further, to what degree is the comparison of the State investor with a market economy investor justified? The approach that State investments does not qualify as State aid if the MEIP is satisfied is caused to a certain extend by Article 295 EC, because the existence of a mixed economy and public undertakings requires that not every interaction between State and public undertakings could be considered to be State aid and therefore prohibited. If every interaction between public undertakings and States would be considered as State aid, this would amount to a prohibition of public undertakings through the back door. But the designation of the investor State as a 'private investor' has been much

criticised on the grounds that it oversimplifies the relationship between the State and the market.[64] This critique is twofold. First, it could be asked if it is right that public and private undertakings should be treated equally. In fact it could be observed that the Court and the Commission refer to the principle of neutrality or equal treatment of public and private ownership prescribed by Article 295 together with Article 86(2) EC as a kind of justification for the MEIP. At first sight this seems unproblematic. In its application, however, the MEIP may not always adequately safeguard such equality. 'Equality' is commonly understood to mean that equal situations should be treated in the same way but different situations differently, according to their differences. The identical treatment of two situations which are in fact different may lead to unequal results.[65] Herein lies one of the major problems of the MEIP: the State is, by definition, different from a market investor. It has more resources than a market operator and as a consequence, the State is not only capable of obtaining better financial conditions than a private investor, but more importantly, it has more power and contacts than any private investor.[66]

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64 J Bourgeois, (n 60) 211, 214.

65 A Santa Maria (ed), *Competition and State Aid – An Analysis of the EC Practice* (Kluwer, The Netherlands 2007) 23; A Verhoeven, 'Privatisation and EC Law: is the European Commission "neutral" with Respect to Public versus Private ownership of Companies?' (1996) 45 ICLQ 868; Case C-42/93 (n 60).

66 P Anestis, S Mavroghenis, (n 6) 124.

(ii) Public policy considerations and market behaviour

This inherent difference between State investor and private investor is well illustrated by a the second part of this critique, one of the most controversial questions in this debate: namely whether public policy arguments should be allowed to taken into account, or comparing the State with a private investor should deny the State the opportunity to take wider economic or social policy considerations into account in its investment decisions The Community case law seems to be clear on this point. Since 1961, the Court has consistently interpreted the concept of aid as an effect-based one, independent from the intentions of the granting authority.[67]

In some cases, States have tried to convince the Court by suggesting that a private holding company might provide money to undertakings for reasons other than profitability.[68] The Court has not completely accepted this, confirming in principle that capital provided by a public investor who is not interested in profitability, even in the long term, must be regarded as aid for the purpose of the EC rules.[69] Moreover, the Commission has argued that to allow economic, political or social policy considerations to come into play

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[67] P. Nicolaides, 'Distortive Effects of Compensatory Aid Measures: a Note on the Economics of the Ferring judgment' (2002) 23 ECL Rev 313; R Streinz, (n 50) Art. 87, no 29; C Koenig, 'Fremd- und Eigenkapitalzufuhr an Unternehmen durch die öffentliche Hand auf dem Prüfstand des EG-Beihilfenrechts' (2000) 21 ZIP 53; Case 173/73 *Italy v Commission ('Steenkolenmijnen')* [1974] ECR 709; Case T67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, para 52.

[68] E Grabitz, M Hilf, M Nettesheim, (n 60) Art. 87.

[69] Case T-358/94 *Air France v Commission* [1996] ECR II-2109.

would be tantamount 'to granting Member State the power to rescue companies in difficulties on the basis of pure national interests [and] … would amount to emptying the market-economy-private investor principle of its meaning.'[70]

If we look at the obligations arising from the cost of redundancies, payment of unemployment benefits and aid for the restructuring of the industrial infrastructure, this approach seems suitable, because these are typical interests of the State, and not of the private investor to whom the State is being compared. It is, however, suggested that the 'private investor' criterion be amended to a 'public investor' criterion, modelled on the public role of governments.[71] At least in view of the regional–economic side effects, in particular, this appears plausible - contrary to the Commission's ruling in Ryanair.[72] Because they could be considered as a kind of global structural policy, including positive economic side effects for the State as investor. However, the Court held that the concept of the private investor, while not limited to someone who places capital for a short- or medium-term profit, must at least relate to a private holding company or private group of undertakings carrying out a global structural policy, guided by the prospect of profit in the longer term. Moreover, where a measure is objectively justified

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[70] Commission Decision Hilaturas y Tejidos Andaluces [1992] OJ L 171/54; upheld by the Court: Case C-42/93 (n 60) para 26.

[71] L Rubini, (no 24) 252.

[72] Commission Decision Ryanair, 12.04.2004, OJ 2004 L 137/1.

on economic grounds, the fact that it also furthers a political aim does not necessarily mean that it constitutes aid.[73]

(iii) Appropriate return

One other central issue is the appropriate rate of return. The question is whether the likely return on investment be accepted by a private investor. The literature on financial theory provides a simplified principle governing when a private investor is likely to carry out an investment project. It is argued that an investment is rational if the expected return on this investment is higher than the opportunity cost of capital, or in other words if it equates to the return that the investor can expect to make with other investments at a similar level of risk in the capital markets.[74] In WestLB, a case concerning the transfer of the assets of a publicly owned institution (WfA) to a publicly owned bank (WestLB) in order to strengthen the latter's equity capital; the above mentioned question was the key question of the case.[75] This transfer had not resulted in an increase in the *Land's* (Federal State's) holding, and offered merely a return fixed at 0.6% per annum after tax. The Commission found that a private investor would have expected a rate of return of 9.3%. The Court considered that 'normally, a private investor is not content

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[73] Case C-308/88 (n 60); Case C-305/89 (n 60); A Arnull and others, (n 13) 1157; C Quigley, (n 8) 112.

[74] H Lesguillons, (n 5) 365; Case T-296/97 Alitalia v Commission [2000] ECR II-3871, paras 84, 96-99.

[75] Commission Decision (EC) 2000/392 [2000] OJ L150/1.

merely with the fact that an investment does not cause him a loss or that it produces only limited profits. He will seek to achieve the maximum reasonable return on his investment, according to the particular circumstances and the satisfaction of his short-, medium- and long-term interests, even when he is investing in an undertaking of which he is already a shareholder', and endorsed the use of the average return as a tool for the purpose of applying the private investor principle.[76] Similar in Neue Maxhütte the Court acknowledged that even in the private sector a parent company may, for a limited period, take over the losses of its subsidiary companies, in order to protect the image of the group or to redirect its activities.[77] However a private investor could not afford to inject private capital after years of continuous losses if this were more costly than winding up the company.[78]

(iv) Judicial review of business decisions

The application of the MEIP raises concerns that it would lead to a situation whereby the Commission's judgment replaces that of the State as investor. In a Communication of the Commission, which is intended to clarify the application of the MEIP to State funds made available to public undertakings in the manufacturing sector, the Commission held that it is not its aim

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[76] Cases T-228/99, T-233/99 Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission [2003] ECR II 435.

[77] Cases T-129/95, T-2/96, T-97/96 *Neue Maxhütte Stahlwerke v Commission* [1999] ECR II-17.

[78] H Lesguillons, (n 5) 373; P Roth, V Rose, (n 39) para 15.013; Case C-305/89 (n 60) para 20.

to replace the investor's judgment, nevertheless stating that any request by an undertaking for funds calls for an analysis on the part of public or private bodies of the risks and of the likely outcome of the project. Hence the Commission recognises a wide margin of judgment on the part of the State, and will conclude that there is State aid only when it considers that there are no objective or *bona fide* grounds, at the time of the investment or financing decision, to make an exception of an adequate rate of return that would be acceptable to a private investor in a comparable private undertaking.[79] The comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time. This *ex-ante* expected return can be very different from the *ex-post* achieved return.[80] It might be argued that this practice grants too broad a discretion to the State, but we must keep in mind that the premise behind this is that the commercial environment is dynamic and that success and failure of a measure in question may depend on circumstances which no one could have foreseen at the time when the decision was made.[81] Moreover, if the Commission were in fact to

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[79] Commission Communication on the application of Arts [87] and [88] EC and Art 5 of Dir 80/723 to public undertakings in the manufacturing sector, OJ 1993 C307/3, paras 27, 29-30.

[80] M Schütte, (n 4) 31; HW Friederiszick, M Tröge, 'Applying the Market Economy Investor Principle to State Owned Companies – Lessons Learned from the German Landesbanken Cases' (2006) Competition Policy Newsletter 106; Case T-16/96 (n 61) para 51.

[81] L Rubini, (n 24) 222.

go on to decide whether a investment decision was wrong or right, this would be contrary to Article 295 EC, because it would narrow down the States freedom to participate in the market with its public undertakings.

(v) 'Normal market conditions'

The words 'under normal market conditions' remind us that in reality the functioning of markets is far from perfect,[82] as well illustrated by the current crisis. Some scholars in legal writing insist, on the basis of this assumption, that the MEIP as whole is not working and could never be made to work. If all private investors could be assumed to behave in the same way, they argue, the MEIP would be a mechanical process of calculating what the behaviour would be. But if, as they assume, private investors do not reliably behave in the same way, the whole test should be condemned.[83] We do not agree with this assumption that the market paradigm is inherently fallacious. As other legal writers have pointed out, there is considerable empirical evidence supporting the assumption that there is a kind of rationality in the market participant's behaviour, not least because their common main motivator is to raise profits.[84] Hence it becomes clear why it is not totally wrong to compare the State's behaviour to private investor behaviour: public undertakings and the State would undoubtedly be those

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[82] K Hellingman, (n 2) 119.

[83] M Parish, 'On the Private Investor Principle' (2003) 28 ELR 70.

[84] L Rubini, (n 24) 248.

with the deepest pockets, and therefore would be likely to distort competition if they were allowed to do whatever they wanted.

Nevertheless, the 'normal market conditions' benchmark has its limits. The Court concluded that the pure use of the market as benchmark might not formal and restrictive.[85] Moreover 'normal market conditions' comparison will break down if the operation in question is a universal service network, for example, which would never have been created by a private undertaking. As the Court stated: 'Operating in a reserved sector, normal market conditions, which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available.'[86]

(vi) The Hypothetical Private Investor – owner effect – comparable investor

Cases such as *La Poste* indicate that there is the clear need for a hypothetical investor. Moreover, cases like *Neue Maxhütte*, where a real comparison is possible, might be the exception, because it is difficult to find a private investor which is comparable in financial power and size to the State. Nevertheless, in the application of the MEIP it is accepted that bigger companies can afford lavish long-term investments, and one has to consider whether in similar circumstances a private investor of a size comparable to that of the bodies administering the public sector might have provided such

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[85] Cases C-329/93, C-62/95, C-63/95 (n 61).

[86] Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547.

a large amount of capital.[87] Therefore, the hypothetical private investor is of considerable importance. It does not need to seek the most profitable investment, nor does it need to realise profits in the short term. It may moreover, for a limited period, bear the losses of one of its subsidiaries, motivated by a blend of the likelihood of indirect material profit and by other considerations, such as a desire to protect the group's image or to redirect its activities. However, his conduct must be guided by the prospect of profitability in the longer term.[88] The State can not claim that it is for its image necessary to save all public undertakings under all circumstances.

Hypothetical investors who increase an existing investment may not have the same incentives as new investors, because an existing investor may be more willing than a new one to tolerate temporary lower returns on investment when increasing an existing investment. This is particularly in the case if the additional investment is made to protect the existing investment, the so called 'owner effect'. According to this principle, existing shareholders with significant holdings may act differently from a new investor or one with a minority holding.[89] Therefore, the State will have a broader scope in relation to public undertakings, because as a matter of definition the State dominates them and therefore the long-term interest could be presumed.

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87 Case C-305/89 (n 60) para 19; Case C-482/99 (n 47) para 70; Case C-334/99 *Germany v Commission* [2003] ECR I-1139, para 133; W Sauter, H Schepel, (n 11) 205; C Koenig, (n 67) 57.

88 Case C-303/88 (n 60) para 21.

89 P Anestis, S Mavroghenis, (n 6) 112.

(cc) MEIP and Situations in the 'Life' of Public Undertakings

(i) Foundation of a new public undertaking

One fundamental question is whether the fact that public undertakings are financed from 'public money' matters.[90] According to the MEIP the funding of an undertaking should be unproblematic, because the State receives an appropriate return in the form of the shares or in other forms the value of the new fund undertaking. Moreover, the State should have a broader margin of appreciation, because this is surely a long-term investment.

(ii) Equity capital injection

The case of a capital injection in an already existing public undertaking may be from an economic point of view a very sensitive topic, since equity capital and the financial resources of undertakings in general are important to strengthen the undertaking against the competition. As mentioned above, both Commission and ECJ distinguish between short-term and long-term investment strategies. The latter one would be taken into account only if the type and extent of the public investor's interest are determined in view of long-term strategy. Only in the case of an equity interest may the public undertaking be treated as equivalent to a private undertaking, pursuing a structural, global or sectoral policy and guided by a more long-term view of

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[90] H Schwintowski, (no 1) 374.

profitability.[91] Therefore the long-term strategy seems to be applicable in particular where a public authority makes capital injections into its public undertaking.[92] Nevertheless, where a capital injection forms a part of a re-structuring and modernisation plan, but there is a limit to how far any investor will 'throw good money after bad'.[93] Therefore even in this cases, the State must at least in the long term have the chance to reach a appropriate return on its investment.

In *Hytasa* the Spanish government sought to justify a capital injection made to three loss-making companies which it owned on the grounds that the cost of rescuing the companies was preferable to the high cost of liquidation, including the payment of redundancy and employment benefits.[94] The ECJ stated that the payments involved State aid according to the MEIP because the capital contributions exceeded the State's debt liabilities in these limited companies, further ruling that a distinction must be drawn between the obligations which the State must assume as the owner of the share capital of a company and its obligation as a public authority. Costs arising from the liquidation, such as redundancy payments and unemployment benefit, were liabilities of the State – as public authority not as shareholder – and so

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[91] A Bartosch, C Koenig, (n 35) 382-83.

[92] R Plender, 'Defintion of Aid' in A Biondi, P Eeckhout, J Flynn (eds), *The Law of State Aid in the European Union* (OUP, Oxford 2004) 9.

[93] Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, paras 170-180; Case C-329/93 (n 61); Case C-142/87 *Belgium v Commission ('Tubemeuse')* [1990] ECR I-959.

[94] Case C-278/92 (n 51).

could not be taken into consideration as costs which would be borne by a comparable market economy investor.[95] If this would be allowed to taken into account, the State would be able to save nearly every of its public undertakings.

In *Alitalia* the CFI stated that a capital contribution from public funds normally satisfies the test of a private investor operating in the normal conditions of the market economy and does not imply a grant of State aid if, *inter alia*, it was made at the same time as a significant capital contribution on the part of a private investor made in comparable circumstances.[96] Contrary, in *Leeuwarder Papierwarenfabriek* the Court of Justice upheld the Commission's decision that the provision of capital constituted aid because, on the facts, it was very unlikely that Leeuwarder could have raised the necessary capital from private investors.[97] Capital injections of States to it publics undertakings therefore entail an element of aid when the structure and future prospects of the recipient company are such that a normal return - by way of dividend payment of capital appreciation - cannot be expected within a reasonable time. An equity injection without a corresponding increase in the share participation of the investor will therefore normally result in a presumption of the existence of a State aid measure pursuant to

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[95] P Roth, V Rose, (n 39) para 15.015; Case 234/84 (n 60) paras 14-15; AG Jacobs in Case C-39/94 (n 85) paras 61-62; XXVth Report on Competition Policy (1995), point 159.

[96] E Szyszczak, (n 34) 188; P Anestis, S Mavroghenis, (n 6) 113; Case T-296/97 (n 74).

[97] Cases 296 & 318/82 *Netherlands and Leeuwarder Papierwarenfabriek v Commission* [1985] ECR 809.

Article 87(1).[98] In *Intermills* concerning a public capital injections into companies that faced temporary difficulties but which, as a result of restructuring planned at the time of the investment, could be expected to become profitable again, the Court confirmed that, in such circumstances, fresh capital would also have been available on the market and therefore the investing State had acted as a reasonable investor would have done. [99] To take an example, an equity investment by the public sector in a sports and leisure park may be more likely to exhaust the scope of long-term profitability considerations by allowing for a more flexible inclusion of further-reaching reasons for investment.[100] Hence capital injections provide a greater freedom for the State in relation to its public undertakings than other measures.

(iii) Loans

The principles underlying the MEIP in the case of loans provided by the State were as Market Creditor Principle for the first time clearly specified in *Tubacex*.[101] Hence, loans provided by the State to its public undertakings are considered to be aid when the borrowing firm obtains conditions of credit that are not consistent with current market conditions, for example a loan at rate of interest below normal commercial rates,[102] or a loan backed

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[98] G Roberti, (n 6) 278; A Bartosch, C Koenig, (n 35) 386.

[99] Case C 323/82 *Intermills v Commission* [1984] ECR 3809; Case 142/87 (n 92).

[100] A Bartosch, C Koenig, (n 35) 383.

[101] B Slocock, (n 60) 25; Case C-342/96 *Spain v Commission* [1999] ECR I-2459.

[102] R Plender, (n 91) 10; Case 84/82 *Germany v Commission* [1984] ECR 1451, at 1501.

up by less than normal security.[103] The aid element amounts to the difference between the rates which the firm should have paid (in accordance with its financial standing) and the rate actually paid. In the extreme case where an unsecured loan is given to a public undertaking that is not creditworthy, the total amount of the loan is deemed to be an aid.[104] How the repayment of loans from public undertakings is checked by means of the 'private creditor test' involves comparing the conduct of the public authorities with that of a diligent private creditor in similar circumstances.[105] Regarding the repayment of investments already made, the investor's priority lies less in the appropriate rate of return, but on the maximisation of the likelihood of re-obtaining the funds already provided. The hypothetical private creditor, therefore, is a diligent and efficient market operator, capable of discerning and using the most appropriate means of achieving the recovery of its debts owed to it within a reasonable period.[106] Nevertheless, as already mentioned, there is a limit to how far any investor will 'throw good money after bad'; most investors will look more favourably at a follow-up investment than at the same opportunity in an undertaking with which they have no connection.[107]

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[103] A Bartosch, C Koenig, (n 35) 382.

[104] G Roberti, (n 6) 278.

[105] P Anestis, S Mavroghenis, (n 6) 115.

[106] Case C-342/96 (n 101); Case C-276/02 *Spain v Commission* [2004] ECR I-8091, Opinion, para 40; Commission Decision (EC) 2002/935 [2002] OJ L329/1.

[107] B Slocock, (n 60) 23.

(iv) State Guarantees

State guarantees enhance the borrower's credit position, enabling it to borrow more cheaply.[108] In 2000, the Commission reviewed its policy in respect of State aid in the form of guarantees and issued a Notice on the subject, providing detailed guidance on the Commission's approach. [109] State guarantees might distort competition, because other firms operating on the market have to pay a commercial borrowing rate. Nevertheless, State guarantees do not *per se* constitute State aid.[110] The benefit of a State guarantee is that the risk associated with the guarantee is incurred by the State. It can reasonably be assumed that a private sector guarantor would not be willing to issue a guarantee without being paid a fee commensurate with the risk involved. Therefore this incurring of a risk by the State should normally be remunerated by an appropriate premium. Thus, where the public undertaking has paid an arm's length fee, the State is acting no differently from a private sector guarantor.[111] Moreover, the Commission (rightly) takes the view that the distortion of competition caused by a State guarantee occurs at

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[108] M Friend, 'State Guarantees as State Aid: Some Practical Difficulties' in A Biondi, P Eeckhout, J Flynn (eds), *The Law of State Aid in the European Union* (OUP, Oxford 2004) 232.

[109] Notice on State Guarantees, OJ 2000 C71/14.

[110] A Winckler, 'State Guarantees for Financial Institutions: State Aid and Moral Hazard' in C Ehlermann, M Everson (eds), *European Competition Law Annual 1999: Selected Issues in the Field of State Aids* (Hart, Oxford 2001) 435.

[111] W Roth, 'Kreditsicherung und Beihilfenrecht' in C Koenig, W Roth, W Schön (eds), *Aktuelle Fragen des EG-Beihilfenrechts* (Verlag Recht und Wirtschaft, Heidelberg 2001) 137; J Faull, A Nikpay, (n 18) para 16.23; Cases T-204/97, 270/97 *EPAC v Commission* [2000] ECR II-2267.

the time when the guarantee is issued, even if it is never called, as both the Advocate General and the Court held in Stardust Marine that the presence of State recourses does not require the transfer of resources to an undertaking.[112] Furthermore, it could be argued that the creditor of a 100% State-owned undertaking will have higher security to receive full repayment in the event of liquidation. This allows a public undertaking, notwithstanding its increasing debts, to continue trading long after a comparable private undertaking would have been placed in liquidation.[113] After years of rigorous applied state aid law by the Commission to public undertakings this seems to be implausible. But it could be argued that this might well be the case for public banks, even after the Gewährträgerhaftung und Anstaltslasten are abolished. It is a simple fact that, in all recent crises, governments have chosen to absorb the losses and back the financial system rather than accept the risk of spreading market failure. Where the collapse of large financial institutions might result in a systemic crisis, the State can be expected to resort to emergency rescue operations. Thus, ironically, it is the capacity of a large public undertaking in the financial sector to give rise to a systemic crisis that enables it to benefit from an 'implicit State guarantee' vis-à-vis the institution's creditors, even where no statutory or contractual guarantees exists.[114]

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[112] Case C-482/99 (n 47), ECJ at para 36; AG at para 40; A Winckler, (n 110) 446..

[113] M Friend, (n 108) 234.

[114] A Winckler, (n 110) 449.

(v) Other measures in relation to public undertakings

Beside the foundation of new public undertakings, loans and State guarantees, there are various other situations which arise in the day-to-day business in the relations between public authorities and their public undertakings. We will mention three situations in particular: where the State or its public undertaking acts as a purchaser on the market; where it participates as a vendor in the market; and finally where the relationship between public authority and public undertaking ends – namely, in privatisation.

Both State and public undertakings operate on the market, as buyer and to a certain extent as seller of goods and services. The identification of a benefit or advantage constituting an aid presents particular difficulties when services are supplied by public undertakings to recipients who are alleged to have paid less than they are worth, or where an undertaking which has provided services to the State is alleged to have received a reward exceeding the value of those services.[115] Moreover, where public authorities purchase goods and services for a market price from their public undertakings when they do not have an actual need for these goods and services, the CFI and the Court of Justice have held that this is not a normal market transaction and is therefore prohibited by State aid rules.[116] Furthermore, the Commis-

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[115] R Plender, (n 91) 8.

[116] E Szyszczak, (n 34) 191; Cases T-116/01, T-118/01 *P&O European Ferries (Vizcaya) SA and Diputactión Foral de Vizcaya v Commission* [2003] ECR II-2957, para 117; on appeal Case C-442/03 [2006] ECR I-4845.

sion has issued a Communication on State aid elements in sales of land and buildings by public authorities.[117] Where there is a sale to the highest or only bidder in a sufficiently well-publicised, open and unconditional bidding procedure comparable to an auction, the sale will be treated as having taken place under normal market conditions and so not involve any aid. Other forms of sales will not be considered to constitute aid where an independent market valuation has been undertaken and the land has been sold at or above that value.[118]

The rise in privatisation across Europe during the 1980s brought about the question whether a State may be providing State aid when it sells off State assets at below market price.[119] The 'private vendor test' is applied in circumstances where the State acts as a seller in the market. The principal question asked is whether the sale was concluded at a market price and on market terms and conditions. The Commission will not assume State aid provided the following cumulative conditions are met:[120] there is a competitive tender; the company is sold to the highest bidder; and prospective bidders are given sufficient time and information.

A situation which has attracted particular attention in the Commission's

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[117] Communication on State aid elements in sales of land and buildings by public authorities, OJ 1997 C209/3.

[118] P Roth, V Rose, (n 39) para 15.036.

[119] E Szyszczak, (n 34) 191.

[120] XXXth Report on Competition Policy [2000], p. 94; Commission Decision of 30 January 2002, Gothaer Fahrzeugtechnik GmbH, OJ 2002 L314, para 30; Commission Decision of 23 June 1999, Crédit Foncier de France, OJ 2001 L34, para 104.

State aid practice is privatisation, i.e. the sale in whole or in part of State-owned undertakings.[121] The principles that the Commission applies to privatisation have been set out in its XXIIIrd Report on Competition Policy 1993.[122] In general, the Commission adopts a less than exhaustive approach to determination of whether privatisation meets the conditions for authorisation of the aid found to be involved in a privatisation. In their opinion, privatisation will lead to the reduction or elimination of aid to the undertaking concerned in the future. This practice reflects an apparent assumption that State aid control is essentially an instrument of competition policy.[123] When privatisation is effected by the sale of shares on the stock exchange, the presumption is that the sale is based on market conditions and no aid is involved. If the public company is privatised via a trade sale, there is no aid where (i) a competitive tender is held that is open to all comers, transparent and not conditional on the performance of other acts; (ii) the company is sold to the highest bidder; and (iii) bidders are given enough time and information to carry out a proper valuation of the assets as the basis for their bid.[124] For sales outside stock markets, the commission requires, if it is to be assumed that no aid is involved, a procedure that is largely similar to public procurement. Furthermore, privatisation often forms part of rescue

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[121] L von Buttlar, Z Wagner, S Medghoul, (n 38) 77.

[122] XXIIIrd Report on Competition Policy (1993) paras 402-403; see also XXVIth Report on Competition Policy (1996) paras 169-170.

[123] A Evans, 'Privatisation and State Aid Control in EC law' (1997) 18 ECL Rev 263.

[124] P Roth, V Rose, (n 39) para 15.035.

and restructuring programmes, in which cases the State may have to accept sales at no profit or even at loss.[125]

3) The Effect on Competition and on Trade Between Member States

Furthermore, to be regarded as aid a measure must, according to Article 87(1), affect competition and trade between Member States. The Commission must set out the circumstances which show that the aid is capable of distorting or threatening to distort competition, but these requirements are far from strict.[126] When the State confers even a limited advantage on an public undertaking which is active in a competitive sector, there is a distortion or a risk of distortion of competition, because, as the Court held, the financial aid granted by the State strengthens the position of the undertaking compared with other undertakings competing in intra-Community trade.[127] Also the concept of effect on trade is extremely broad in scope, as the Court stated: 'It is not impossible that a public subsidy granted to an undertaking which provides only local or regional services and does not provide any service outside its State of origin may none the less have an effect on trade

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[125] I Simonsson, 'Privatisation and State aid – Time for a new Policy' (2005) 26 ECL Rev 461-62.

[126] Cases C-296 & 318/82 (n 97) para 24; Cases C-329/93 (n 61) paras 49-55; Cases C-15/98 & 105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855, para 67; C-393/04, C-41/05 *Air Liquide Industries Belgium v Ville de Seraing* [2006] ECR I-5293, para 34.

[127] Case 703/79 *Philip Morris v Commission* [1980] ECR 2671.

between Member States.'[128] This seems as if even small, local public undertakings could not rely on this effect on trade criterion to escape the State aid regime. Hence in *Marina di Stabia*, the Court held that a marina on the southern Italian Tyrrhenian coastline might also attract limited demand from as far away as the southern French coast and thereby affect trade between Member States.[129] On the other hand, in *Dorsten swimming pool*, the Commission considered that the annual grant of € 2 million made to the operator of the swimming pool in Dorsten would not affect trade since it would be used essentially by the inhabitants of the town and its surrounding area.[130] And In *Brighton West Pier* the Commission considered that the aid granted to the owner of the West Pier in Brighton would not affect trade since the pier's international reputation was insufficient to attract tourists from other Member States.[131]

4) Favouring Certain Undertakings: Selectivity

Article 87(1) refers to aid which distorts or threatens to distort competition by favouring certain undertakings. It is therefore necessary to distinguish between an advantage that is granted to undertakings in general and one

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[128] Case C 102/87 *France v Commission* [1988] ECR 4067; Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio di Genova* [2005] ECR I-11137.

[129] State aid N-582/99, [2000] OJ C40/2.

[130] State aid N-258/2000 Germany; Commission press release IP/00/1509 of 21 December 2001.

[131] State aid N-560/01 and 17/02 [2002] OJ C239/3.

that is granted only to certain undertakings.[132] Only the latter falls within Article 87, for example where the advantage is granted only to one or more specified undertakings or only to undertakings in a particular region or industry, or of a particular age or size, and if this different treatment cannot be objectively justified by reference, for example, to the different regulatory conditions applicable to those activities or undertakings.[133] Facing the relation between public undertakings and State concerning, as shown above, mainly financial matters, that are most time doubtless selective.

Applying this selectivity test, the question of infrastructure funding is interesting. However, public funding of 'general infrastructure' is in principle not State aid according to Article 87(1). The reason for this is that this kind of public funding does not confer an advantage on any specific undertaking. By contrast, public funding of 'user-specific infrastructure' does confer an advantage on certain undertakings and is normally regarded as a form of State aid.[134] Aid at an infra-structural level may have a selective effect where some undertakings benefit more than others from that infrastructure.[135] State support granted to an infrastructure manager, private or public but independent of the State for maintenance, management, or provision of

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[132] K Bacon, (n 53) 58; L Rubini, (n 45) 281; Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paras 39-55.

[133] P Roth, V Rose, (n 39) paras 15.023-24; Case C-237/04 *Enirisorse v Sotocarbo* [2006] ECR I-2843, paras 40-51; Case T-475/04 *Bouygues v Commission* [2007] ECR II-2097.

[134] P Nicolaides, M Kleis, (n 67) 615.

[135] K Bacon, 'State Aids and General Measures' (1997) Yearbook of European Law 272.

infrastructure, is presumed to be compatible with the common market if that manager was chosen by an open and non-discriminatory tender, thereby ensuring that the amount of State support represents the market price necessary to achieve the desired result.[136]

[136] J Faull, A Nikpay, (n 18) para 16.27; P Roth, V Rose, (n 39) para 15.037.

E. Legitimacy of Aid

The general principle of prohibition of State aid in Article 87(1) is qualified by mandatory exceptions listed in Article 87(2) and discretionary exceptions listed in Article 87(3).[137]

1) Art. 87(2) Aid that is Compatible with the Common Market

If aid is found to be within one of the three categories of Article 87(2), it must, as a matter of law, be regarded as compatible with the Common Market. Hence, each of these categories is to be interpreted narrowly.[138] Therefore, generally speaking/as a whole, these exemptions do not play an important role in the Commission's Decisions Practice.

2) Art. 87(3) Aid that may be Compatible with the Common Market

Article 87(3)(a)-(d) specifies four types of aid which may be compatible with the common market. The compatibility of the measures in question within the categories in Article 87(3) is a discretionary matter requiring an assessment of the positive and negative effects of the aid from the point of

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[137] J Schwarze (ed), (n 30) Art. 87 no 1.

[138] Case C-156/98 *Germany v Commission ('new Länder')* [1999] ECR I-6857, para 49; Cases T-132, 143/96 *Freistaat Sachsen v Commission* [1999] ECR II-3663, para 132.

view of the Community as a whole. Hence this paragraph confers a broad discretion on the Commission to authorise aid on the basis of examination and appraisal of economic facts and circumstances which are often complex and liable to change rapidly.[139] Nevertheless, while Article 88(2) EC would have allowed the Member States to circumvent the Commission and go for political unanimity on crisis measures within the Council, the Commission has shown itself willing to put the limits of Article 87(3)(b) EC to the test.[140] So the Commission will able to maintain a collective deadline in order to bring an end to crisis-related aid, the Commission will, once the crisis is over, be able to return to normal rules in due time with relative ease.[141]

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[139] A Arnull and others, (n 13) 1148; C Kaupa**,** 'The More Economic Approach – a Reform based on Ideology? (2009) EStAL 318; Case C-301/87 (n 60) para 15; Case C-39/94 (n 50) para 36; Case T-67/94 (n 67) para 147.

[140] R Luja, 'State Aid and the Financial Crisis: Overview of the Crisis Framework' (2009) 8 EStAL 145/146.

[141] R Luja, (n 140) 159.

F. Aid for Rescuing and Restructuring Firms in Difficulty

State aid to individual undertakings in financial difficulties is assessed under the discretionary Treaty exemption in Article 87(3)(c) and according to the Community Guidelines.[142] Aid for rescue and restructuring operations has given rise to some of the most controversial State aid cases, because the distortion that might arise through this sort of aid has a particularly negative impact on competition. Maintaining less efficient firms on the market harms the most efficient producers and, thus in the long term, the consumer, who will have to pay for the inefficiencies. Furthermore, moral hazard is also a strong argument against this aid, because the belief that if the worst comes to the worst, 'government intervention will prevent it from happening', is surely not an incentive for firms to take the right decisions. From the start the Commission's policy has therefore been to allow rescue and restructuring aid only in exceptional circumstances.[143] The Commission regards a firm as being 'in difficulty' where it is unable, whether through its own re-

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[142] Communication from the Commission, Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ 2004 C244/2, Prolongation, OJ 2009 C 157/1.

[143] J Faull, A Nikpay, (n 18) para 16.148-51; A Houtman, 'EC State Aid Control: In Search for the Right Balance' in C Ehlermann, M Everson (eds), *European Competition Law Annual 1999: Selected Issues in the Field of State Aids* (Hart, Oxford 2001) 97; M Lienemeyer, 'State Aid to Companies in Difficulty – The Rescue and Restructuring Guidelines' in MS Rydelski (ed), *The EC State Aid Regime – Distortive Effects of State Aid on Competition and Trade* (Cameron May, London 2006) 183; C Quigley, (n 8) 295; W Kahl, 'Das öffentliche Unternehmen im Gegenwind des europäischen Beihilferegimes' (1996) NVwZ 1087.

sources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without State intervention, will almost certainly condemn it to go out of business in the short or medium term.[144]

1) Distinction between Rescue and Restructuring Aid

The Rescue Guidelines distinguish between 'rescue aid' and 'restructuring aid' 'Rescue aid' refers to temporary support for a period not longer than six months, provided to a firm which has experienced a marked deterioration in its financial position, reflected by an acute liquidity crisis or technical insolvency. The purpose of such aid is to keep the ailing firm afloat long enough to allow a restructuring or liquidation plan to be devised.[145]

'Restructuring aid' is intended to address the causes of the firm's difficulties, and must be based on a feasible, coherent and far-reaching plan to restore the firm's long-term viability. Restructuring aid can be compatible with the common market only if it is clear that any resulting distortion of competition will be offset by the benefits flowing from the firm's remaining on the market.[146] The amount of restructuring aid provided must be strictly limited to the minimum necessary and the firm must make a substantial contribution to the cost of its own restructuring. Further, according to the

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[144] Rescue Guidelines (n 142) para 9.

[145] J Faull, A Nikpay, (n 18) paras 16.170–71.

[146] P Roth, V Rose, (n 39) para 15.062.

'one time, last time' rule, rescue or restructuring aid will not be permitted to be paid to firms which have received any such aid in the past 10 years.[147] Restructuring aid can – in contrast to rescue aid – adopt any form, such as loans, capital injection, tax relief, or equity participation by the State. The restoration of long-term viability of the firm in difficulty is the final goal of the restructuring aid; hence the Commission will approve it only if there is a high probability that the company will move back into profit.[148]

2) Commission Forces States to Privatise their Public Undertakings

For social, regional and other reasons, governments tend to support public undertakings in financial difficulties. While liberalisation is a product of the EC Treaty and European institutions' decisions, privatisation decisions are, in accordance with Article 295 EC, essentially based on the Member State's own decisions. At a political level, the European Commission has openly encouraged privatisation as a means to establish a more competitive internal market. At a legal level, concerning public undertakings in difficulties, the Commission's control of privatisation should not, in principle, express such a preference. Nevertheless, rather than acting as a 'neutral' guardian of the EC Treaty and, moreover, in apparent contrast to the wording of Article 295

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[147] Rescue Guidelines (n 142) Section 3.3 (paras 72-73); E Valle, K van de Casteele, 'Revision of the State Aid Rescue and Restructuring Guidelines' (2004) Competition Policy Newsletter 61.

[148] J Faull, A Nikpay, (n 18) paras 16.175–77.

EC, the Commission tends to apply its supervisory powers concerning public undertakings in difficulties in a way that furthers an agenda of liberalisation of the Member States' economy.[149] In its Decisions Practice, the Commission combines the authorisation of restructuring aid *de facto* with the condition that the public undertaking in difficulty will be privatised as a whole or at least in part.[150] The Commission forces not only the Member States to a more (or better, less) spontaneous commitment to privatise. In some cases, such as the proceedings concerning the Bankengesellschaft Berlin,[151] the Commission has indicated clearly that only a promise of privatisation would enable the Commission to come to a speedy and positive decision. Claiming for privatisation is the most obvious and brutal form imaginable of restriction of the States' market participation. The Commission justifies its approach by stating that privatisation of public undertakings provides additional certainty that the public undertaking will return to profitability. But this is clearly contrary to Article 295 EC. First of all, the Commission has no capacity to enforce the privatisation of public undertakings in difficulties, because according to Article 295 EC this lies within the discretion of the Member States. Furthermore it could be argued that the

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[149] A Verhoeven, (n 65) 861-62.

[150] E Kruse, 'Privatisierungszwang für notleidende öffentliche Unternehmen?' (2005) EWS 66; W Kahl, (no 142) 1082; Commission Decision *Enirisorse SpA* 98/212/EC of 16 April 1997 OJ L 80 18.3.1998; Commission Decision *Società Italiana per Condotte d'Acqua SpA* 1999/514/EC of 23.7.1999 OJ L80 22.5.1999, 30 (41).

[151] Commission Decision in Case C28/2002 Bankengesellschaft Berlin OJ 2005 L116, 1.

privatisation could be avoided by non-privatisation. But this is an unfair argument. To sum up, it is submitted that the Commission does not entirely uphold the principle of neutrality towards privatisation.[152]

[152] W Devroe 'Privatizations and Community Law: Neutrality versus Policy' (1997) 34 CML Review 267.

G. Relationship between State and Public Undertakings and Secondary Legislations

1) De-Minimis: More Scope for Small Public Authorities

The Commission's position relating to small amounts of money given to undertakings has changed over time, because originally the Commission took the view that there could be no *De-minimis* rule.[153] Nevertheless, from 1992 onwards it applied a *De-minimis* rule in relation to small- and medium-sized undertakings, presuming that aid under a certain threshold granted to an undertaking fell outside the scope of Article 87(1). In 2001 the Commission set the *De-minimis* threshold at € 100,000 over a three-year period.[154] The new block exemption was adopted in 2006, when the threshold was raised to € 200,000.[155] In the face of the current financial crisis, the threshold was raised to € 500,000. For the relation between State and public undertakings, this rule is advantageous – even without the higher threshold because of the current crisis – especially for smaller public authorities, because if they do not exceed the *De-minimis* threshold, they are *de facto* free from State aid control.

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[153] P Papandropoulos and others, 'Selectivity, Ecnomic Advantage, Distortion of Competition and Effect on Trade' in J Derenne, M Merola (eds), *Economic Analysis of State Aid Rules – Contributions and Limits* (Lexxion, Berlin 2007) 133; Case C-142/87 (n 92).

[154] Reg 69/2001, OJ 2001 L10/30.

[155] Reg 1998/2006, OJ 2006 L379/5.

2) Transparency-Directive

The Transparency Directive [156] is of particular importance for the relationship between state and public undertakings. To find out whether aid has been granted to public undertakings requires transparency about the financial relations between the State and its public undertakings, because this relationship is complex and leads to a number of specific difficulties. It therefore requires a certain transparency to enable the effective enforcement of State aid rules on public undertakings.[157]

Article 1 outlines which financial relations must be revealed. In Article 3 the Commission cites some measures in the relationship between State and public undertaking that might come under the heading of State aid regime. However, formally excluded from the scope of the directive, according to Article 5(1)(a), are public undertakings that provide services that do not affect the trade between Member States. Also excluded are public undertakings with a annual turnover of less than € 40 million, and public banks with a balance sheet total of less than € 800 million. This means that *de facto* a great number of the public undertakings in Germany, for example, are ex-

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[156] Commission Directive 2006/116/EC, OJ 2006 L318/17.

[157] H Lesguillons, (n 5) 364; K Adamantopoulos, (n 31) 221; L Hancher, T Ottervanger, P Slot (eds), (n 3) para 8-013; Dir 80/723 on the transparency of financial relations between Member States and public undertakings, OJ 1980 L195/35, as amended by Dirs 85/413 (OJ 1985 L229/20), 93/84 (OJ 1993 L254/16), 2000/52 (OJ 2000 L193/75) and 2005/81 (OJ 2005 L312/47); OJ 2006 L318/17.

cluded from the State aid control of the Commission, because they belong to cities or small regional public authorities and their annual turnover is less than € 40 million per year.

H. Conclusion

Looking on the limits arising from EC State aid law to the relationship between the State and its public undertakings we have seen that more attention should be paid to the general 'rule of limitations' of the States behaviour as market participant than to the accurate boundary line that may be drawn in each particular situation, concerning the relation between public authority and public undertaking.

Article 295 EC plays an important role in this coherence: Article 295 limits, but not prevents, the application of the EC Treaty as a whole and the State aid rule in special, to relation between state and public undertakings. From this it follows that European law cannot be used to prevent or discourage State participation in the economy.

The Court tries to solve the obvious tension between the cardinal principle of the internal market and free and undistorted competition on the one hand and the State aid regime on the other by subjecting public intervention in the market to the 'normal' rules of the market.[158] As shown, the most important instrument in doing so, is the so-called Market Economy Investor Principle (MEIP), applied in its various forms to nearly every form of market participation to check for the presence of aid, and satisfied if there is a sufficient likelihood that the transaction will fall into scale of transactions

[158] W Sauter, H Schepel, (n 11) 204.

that would be 'acceptable' to a private investor.[159] Notwithstanding all the potential criticism that may be levelled at it, the MEIP is a 'reasonable principle to follow'. As with any principle, it is a general rule that the MEIP must be adapted to each particular case. Nevertheless, the Commission's practice is far from perfect. Especially in relation to public undertakings in difficulties, we would argue that the Commission has extended the EC Treaty's interpretation to follow political aims that are not found to any great extent in the Treaty itself.

Looking in more detail, especially at the secondary legislation of the Commission, we stumble upon another surprise: the enforcement practice of the Commission is obviously appropriate to catch the 'big fish' and especially the large public undertakings. But these are in a distinct minority in countries like Germany. In ingenious interaction between the *De-minimis* rule and Transparency Directive the majority of relationships between State and public undertakings are *de facto* not controlled, because they lie under the threshold and even if they do not, they can speculate that they are not 'caught' because they might be not big enough to fall into the scope the Transparency Directive, with the result that control of their behaviour would be almost impossible.

Nevertheless we can conclude that the relationship between the State and its public undertakings is broadly, and in various ways, limited by EC State aid

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[159] A Houtman, (n 143) 92.

law – in legal theory as in the practice of the Community institutions. If and to what extent the current global financial crisis – that influenced this system of State aid control in short term for the benefit of the State - will continue to influence it in the same way remains to be seen.

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