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Abstract

In this Article the author givesPart I of this Article goes through a brief overview of the contours of state aid in the European Union. Part II is devoted to a specific aspect of the acquis communitaire. As it is well known, Article 87 [of the European Community Treaty] identifies the five preconditions for a State measure to be defined as aid: Transfer of State resources, advantage, selectivity, distortion of competition, and effect on intra-Community trade. The reflections in this Part is confined to the first of those conditions.

ARTICLES

SOME REFLECTIONS ON THE NOTION OF "STATE RESOURCES" IN EUROPEAN COMMUNITY STATE AID LAW

*Andrea Biondi**

INTRODUCTION

Within the ever-growing family of European law, the area of State aid has been for many years considered the cadet son with respect to antitrust regulation. Nothing could be further from the truth, however, both from a practical and constitutional perspective. The first aspect is easily disposed of: While the amount of aid granted is still running high—the total amount in 2005 being €64,000,000,000[1]—the last few years have witnessed a flurry of (legal) activity. First, the number of cases dealt with every year by the European courts is constantly in double figures; in 2005, the European Court of Justice ("ECJ" or "Court") handed down twenty-one judgments while the Court of First Instance ("CFI") disposed of fifty-three cases (including both judgments and orders). One should also add to this the robust action undertaken by the European Commission in the exercise of its supervisory powers over national measures and its active policy-making activities—consisting of guidelines, communications, bloc exemptions, a code of procedural rules, etc.[2]

As for the constitutional importance of State aid law, it is easy to forget that the basic idea of the common market, upon which the European integration process has largely been based, is borne out of a series of checks imposed on national economic policies, to ensure the free flow of trade. Central to this aim is

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1. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, STATE AID SCOREBOARD: AUTUMN 2006 UPDATE, COM (2006) 761 Final, at 7, *available at* http://ec.europa.eu/comm/competition/state_aid/studies_reports/2006_autumn_en.pdf (last visited May 17, 2007).

2. For an overview of the regulatory reach of the Commission, see generally COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON COMPETITION POLICY 2005, *available at* http://ec.europa.eu/comm/competition/annual_reports/2005/en.pdf.

the prohibition imposed upon Member States to directly influence and affect the market. Thus, the free movement provisions prohibiting any kind of regulatory measures that could create an obstacle to the free movement of goods, capital, workers, and services, and the provisions subjecting State intervention in the economy to direct limitations, such as the prohibition on monopolies over goods, the principle of non-discrimination on indirect taxes, controls on public undertakings and, most notably, Articles 87 and 88. These immaculately drafted provisions lay down both the substantive and procedural conditions that Member States have to respect in their financial support of undertakings. As the ECJ has repeatedly held, the European Community Treaty ("EC Treaty" or "Treaty") provisions refer "to the decisions of Member States by which, in pursuit of their own economic and social objectives, they give, by unilateral and autonomous decisions, resources to undertakings or other persons or procure for them advantages intended to encourage the attainment of the economic or social objectives sought."[3] State aid is thus defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities. Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by Article 87 of the EC Treaty and do not constitute State aid.

As argued elsewhere, the model of State aid control bears much more resemblance to the principles of the economic freedoms than to pure antitrust regulations.[4] The ECJ itself has often remarked that "the provisions relating to the free movement of goods, the repeal of discriminatory tax provisions and aid have a common objective, namely to ensure the free movement of goods under normal conditions of competition."[5] The first-born son is thus State aid and regulation of State public bodies control, and not the competition law provisions contained in

3. Amministrazione delle finanze dello Stato v. Denkavit italiana, Case 61/79, [1980] E.C.R. 1205, ¶ 31.

4. *See* Andrea Biondi & Piet Eeckhout, *State Aids and Barriers to Trade*, *in* THE LAW OF EC STATE AIDS 103 (2003).

5. Commission v. France, Case 18/84, [1985] E.C.R. 1339, ¶ 13; *see also* Compagnie Commerciale de l'Ouest v. Receveur Principal des Douanes de La Pallice Port, Joined Cases C-78-83/90, [1992] E.C.R. I-1847; Lornoy v. Belgium, Case C-17/91, [1992] E.C.R. I-6523; Commission v. Italy, Case 103/84, [1986] E.C.R. 1759; Commission v. Ireland, Case 17/84, [1985] E.C.R. 2375; Pabst & Richarz v. Hauptzollamt Oldenburg, Case 17/81, [1982] E.C.R. 1331.

the EC Treaty, which only serve to reinforce the creation of a level playing field between states, by imposing constraints on companies' behavior. The nature of State aid control is thus "not just about micro-economic competition between undertakings in the relevant market but mainly about macro-economic competition between Member states."[6] The celebrated case law on the application of Article 81(3) on acts of public authorities where they have an effect on competition is certainly intellectually and jurisprudentially fascinating, but its importance should not be overstated.[7] As has often been remarked, the system of control on State economic intervention, sketched in the EC Treaty, is one of the purest jewels in the European legal system crown. Although the World Trade Organization ("WTO") rules on subsidies are more detailed and seemingly more comprehensive, the European regulatory framework has certainly proven to be more effective and significant.[8] It is also well known that in other loosely free trade related systems, there is perhaps a lamentable lack of any specific regulation of financial intervention by the State. For instance, despite the wide application given by the U.S. Supreme Court to the interstate commerce clause, this has never been stretched so as to cover subsidies granted by the State.[9] The shine of the State aid jewel has been preserved by the massive effort made by the European Commission, both in its policy-making activities and in the exercise of its power of supervision over Members States' conduct. The contribution of both European Community ("EC") courts has proven, however, to be essential.

This Article will thus be devoted to a specific aspect of the *acquis communitaire.* As it is well known, Article 87 identifies the five preconditions for a State measure to be defined as aid: Transfer of State resources, advantage, selectivity, distortion of

6. José Buendia Sierra, *Not Like This: Some Sceptical Remarks on the "Refined Economic Approach" in State Aid, in* Conference Material "The Law of EC State Aid," EUR. STATE AID L.Q. (2006).

7. *See* Consorzio Industrie Fiammiferi v. Autorita Garante della Concorrenza e del Mercato, Case C-198/01, [2003] E.C.R. I-8055; Van Eycke v. Aspa, Case 267/86, [1988] E.C.R. 4769.

8. *See generally* GUSTAVO LUENGO HERNANDEZ DE MADRID, REGULATION OF SUBSIDIES AND STATE AID IN WTO AND EC LAW: CONFLICTS IN INTERNATIONAL TRADE LAW (2007).

9. *See* Diane P. Wood, Cuno v. Daimler Chrysler Inc.*: State Aid from an American Perspective,* 1 EUR. STATE AID L.Q. 3 (2007).

competition, and effect on intra-Community trade. The reflections that follow will be confined to the first of those conditions.

I. *THE CONTOURS OF STATE AID LAW*

Any analysis of State aid law usually begins with a couple of citations from two "classic" examples of the ECJ case law. The first is from the 1961 *Steenkolenmijnen* case,[10] where the Court held that:

> [T]he concept of aid is . . . wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.[11]

The second comes from a 1974 decision on whether a reduction in social charges pertaining to family allowances should not have been considered aid as it was a measure of internal taxation, which is reserved to the sovereignty of Member States and a measure of social nature, which falls outside the scope of Article 87. The Court held instead that:

> [T]he aim of Article [87] is to prevent trade between Member States from being affected by benefits granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, Article [87] does not distinguish between the measures of State intervention concerned by reference to their causes or aims but define them in relation to their effects. Consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article [87].[12]

These two dicta fundamentally ensure that many forms of gov-

10. The case concerned the interpretation of the concept of "subsidy or aid" under Article 4(c) of the European Steel and Coal Community Treaty ("ECSC"), which reads as follows: "The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: (c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever." Treaty establishing the European Coal and Steel Community, art. 4(c), Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

11. Steenkolenmijnen v. High Authority, Case 30/59, [1961] E.C.R. 1, ¶ 19.

12. Italy v. Commission, Case 173/73, [1974] E.C.R. 709, ¶ 13.

ernmental financial assistance fall within the scope of the Treaty provisions by clarifying that the notion of aid should not be restricted to that of a subsidy, and that the aim of particular measures should not be considered relevant, since it is only the effects on the market that are taken into account when considering whether a measure constitutes State aid. The year 1974 is of particular importance as the year of the *Dassonville* decision where the Court held that all national provisions capable of hindering, directly or indirectly, actually or potentially, intra-Community trade were to be considered as a violation of the Treaty.[13] By universal agreement the novelty of that case has been identified as the shift in emphasis from the *aim* of the measure to its *effect*. This is certainly true; however, as has been well-explained by Weiler, the true revolution was that the Court extended the realm of EC law to cover not just any national rules that effectively denied access to the market, but also any regulatory measure which could produce an effect on trade.[14] The same reasoning should be applicable to State aid law. *Steenkolenmijnen* and *Italy v. Commission* are very strong judicial warnings that a Member State cannot simply circumvent Treaty rules by "labelling" a measure as either not directly emanating from the State, or not pertaining to a particular non-trade related policy. Thus, the Court was able to qualify as aid many measures which do not "physically" require the direct financing of undertakings, or measures that the State has tried to qualify as a general policy.[15] Nonetheless, the ECJ case law has never meant that virtually every State action should be classified as aid. The parallel with *Dassonville* can and might be stretched a bit further. Immediately after the famous dictum, the Court acknowledged that, especially in the absence of Community rules in a specific area, the

13. *See* Roi v. Dassonville, Case 8/74, [1974] E.C.R. 837.

14. *See* Joseph H.H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, *in* THE EVOLUTION OF EU LAW 360-64 (1999).

15. For example, direct subsidies, loans, guarantees, exemption from the ordinary rules concerning taxes and social contributions, under-price sales, capital injections, provision of market research and advertising activities or logistical and commercial assistance, payment of outstanding wages or redundancy costs, or exemption from the normal application of insolvency rules. *See, e.g.*, France v. Commission, Case C-251/97, [1999] E.C.R. I-6639; Demenagements-Manutention Transport SA, Case C-256/97, [1999] E.C.R. I-3913; France v. Commission, Case C-241/94, [1996] E.C.R. I-4551; Banco Exterior de Espana v. Ayuntamiento de Valencia, Case C-387/92, [1994] E.C.R. I-877.

regulatory powers of member states should be preserved, if necessary, for the attainment of certain public policies. The same balancing model is applicable to the regulation of aid. The objective of the Treaty provisions is not to deprive Member States of any kind of powers in delineating economic and social polices, it is to prevent the conferral by the State of an unduly and anticompetitive advantage in a specific undertaking. Thus, the Treaty provides in Article 87, paragraphs 2 and 3, a list of derogations that the European Commission can take into account when considering whether a certain type of aid is compatible with EC law. Further, from its very beginning the case law has been incredibly respectful of the Treaty provisions; the Court clarified that in order to be considered as aid, a State measure would still have to satisfy all of the cumulative requirements listed by Article 87(1): advantage, selectivity, transfer of State resources, distortion of competition, and effect on intra-Community trade.[16] The notion of aid has therefore always been confined by the applicability of these five preconditions, which have been continuously redefined and revisited by the Community courts.

II. *AIDS "GRANTED BY THE MEMBER STATE OR THROUGH STATE RESOURCES"—THE CASE LAW RECONSTRUCTION*

The first precondition for the applicability of Article 87(1) is that the aid should be granted by the Member State or through State resources. As proposed by Judge Bo Vesterdorf,[17] a mental flow chart on this criterion should comprise four questions:

(1) Where does the money come from?
(2) Does the state directly or indirectly control the resources in question?
(3) If yes, is the transfer of the resources imputable to the state?
(4) Are there any exceptions applicable?[18]

16. *See* Belgium v. Commission, Case C-142/87, [1990] E.C.R. I-959.

17. *See* Bo Vesterdorf, *A Further Comment on the New State Aid Concept as This Concept Continues to Be Reshaped*, 3 EUR. STATE AID L.Q. 393, 398 (2005).

18. This question deals mainly with compensation for the performance of a service of general economic interest. *See* Altmark Trans GmbH v. Nahverkehrsgesellschaft Altmark GmbH, Case C-280/00, [2003] E.C.R. I-7747.

These questions seem rather straightforward, yet they keep on coming back before the European judicature. One of the longest disputes in the area of State aid law has always been between two reconstructions of the first sentence of Article 87(1), the so-called "alternative" or "cumulative" test. For years, the European Commission tended to consider the two conditions as "alternatives"; that is to say, any measures financed through State resources or in any way attributable to the State, granted by Member States, has to be considered aid.[19] This extensive interpretation tends to read Article 87(1) in terms of the *lex generalis* being that any measure which confers an economic advantage on a specific undertaking, and which is the result of conduct attributable to the State, constitutes State aid regardless of whether there is a "tangible" transfer of resources. Such a transfer, then, becomes a residual category—the *lex specialis*. In the words of Advocate General Darmon, Article 87(1) relates to the public nature of aid, namely "to the authority which adopted the measure—the State and its agencies—thereby disrupting normal market conditions, [rather] than to the body or the person financing it."[20] The other thesis, the so-called "cumulative" reconstruction, reads the two expressions together and signifies that aid must be financed through State resources and that the distinction between aid granted by a State and aid granted through State resources serves to bring within the definition of "aid" not just aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State. In short, the money has to come definitively from the State. As early as 1978, the Court indicated that the burden on the State finances had to be considered as a prerequisite for the application of Article 87.[21] In the *Van Tiggele* case, the Court held that a national measure, which fixed the minimum retail price for spirits, did not amount to a burden on State finance—the only burden eventually being shouldered by consumers. As elucidated by Advocate General Capotorti, the possible disadvantages to im-

19. *See generally* Kelyn Bacon, *State Aids and General Measures*, 17 Y.B EUR. L. 269 (1997); Marco M. Slotboom, *State Aid in Community Law: A Broad or Narrow Definition?*, 20 EUR. L. REV. 289 (1995). For more on this interpretation, see Ian Winter, *Redefining the Notion of State Aid in Article 87(1) of the EC Treaty*, [2004] C.M.L.R. 475.

20. Sloman Neptun Schiffaharts v. Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts, Joined Cases C-72 & C-73/91, [1993] E.C.R. I-887, ¶ 40 [hereinafter Sloman Neptun].

21. *See* Netherlands v. Van Tiggele, Case 82/77, [1978] E.C.R. 25.

ported spirits should have been assessed under the free movement of goods provisions rather than over-stretching the definition of State aid. Although it could be argued that the Court of Justice has, at times, been tempted to embrace the alternative approach,[22] the now well-established case law clearly indicates that the measure must always involve a burden on the State. In the much-criticized *triade* of labor law cases *Sloman Neptun*, *Viscido*, and *Kirshammer-Hack*, the Court clearly upheld the cumulative thesis. In *Sloman Neptun*, the ECJ held that the partial non-application of German employment legislation to foreign crews of vessels flying the German flag did not constitute a grant of aid to the ship owners.[23] This is because:

> [T]he system at issue does not seek, through its object and general structure, to create an advantage which would constitute an additional burden for the State or the above-mentioned bodies, but only to alter in favour of shipping undertakings the framework within which contractual relations are formed between those undertakings and their employees.[24]

Similarly, in *Kirshammer-Hack*, the Court concluded that the exclusion of small businesses from a legal regime requiring payment of compensation in the event of unfair dismissals did not amount to the grant of aid to the businesses concerned, reasoning that it "does not entail any direct or indirect transfer of State resources to those businesses but derives solely from the legislature's intention to provide a specific legislative framework for working relationships between employers and employees and to avoid imposing on those businesses financial constraints which might hinder their development."[25] Lastly, in the *Viscido* case, the measure at issue allowed only one undertaking, *Ente Poste Italiane*, to derogate from the general rules under Italian law that the employment contracts should be of indeterminate duration and that the recruitment of staff under fixed-term contracts should be permitted.[26] Contrary to the previous two cases, the

22. *See, e.g.*, Commission v. France, Case 290/83, [1985] E.C.R. 439; Norddeutsches Vieh-und Fleischkontor Herbert Will v. Bundesanstalt Fur Landwirtschaftliche Marktordnung, Joined Cases 213-215/81, [1982] E.C.R. 3583.

23. *See Sloman Neptun*, [1993] E.C.R. I-887, ¶ 29.

24. *Id.* ¶ 21.

25. Kirshammer-Hack v. Sidal, Case C-189/91, [1993] E.C.R. I-6185, ¶ 17.

26. *See* Viscido v. Ente Poste Italiane, Joined Cases C-52-54/97, [1998] E.C.R. I-2629.

Court did not refer to the regulatory aim of the legislation but merely concluded that "the non-application of generally applicable legislation concerning fixed-term employment contracts to a single undertaking does not involve any direct or indirect transfer of State resources to that undertaking."[27]

The question between the alternative and cumulative interpretations was definitively closed in the *Preussen Elektra* case.[28]

In this case, the Court held that an obligation imposed on private electricity suppliers to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of State resources to undertakings which produced this type of electricity. In a rather terse paragraph, the Court held that:

> [O]nly advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1). The distinction made in that provision between aid granted by a Member State and aid granted through State resources does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State . . . ."[29]

The Court also roundly rejected an argument presented by the Commission that in order to preserve the effectiveness of State aid supervision, the duty of loyal co-operation under Article 10 made it necessary for the concept of State aid to be interpreted in such a way as to include support measures which are mandated by the State, but financed by private undertakings. The Court firmly replied that the EC Treaty provision, in contrast with other areas of EC law,[30] cannot be used to extend the scope of Article 87 to State conduct that does not fall within it.

These decisions have been extensively criticized.[31] There are generally two strands of criticism: First, it is the accusation that the Court has in reality taken into account the specific aim

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27. *Id.* ¶ 14.

28. *See* PreussenElektra v. Schleswag, Case C-379/98, [2001] E.C.R. I-2099.

29. *Id.* ¶ 58.

30. *See supra* note 7 and accompanying text.

31. *See* Bacon, *supra* note 19, at 313-17; Malcolm Ross, *State Aids: Maturing into a Constitutional Problem*, 15 Y.B EUR. L. 79, 82 (1996); Slotboom, *supra* note 19, at 294-98.

of the national measures in question—labor law/environmental law—thus performing a transplant of a justificatory element into the definition of aid. Secondly, because State aid control is essentially there to ensure fairness of competition law, the primary concern is that of preventing any distortions of competition. The only issue should be, then, whether a certain measure can have the effect of favoring a certain undertaking. Whether the advantage is conferred through private and not public resources is thus irrelevant. *Preussen Elektra* is one case in point. As has been argued by the European Commission, the measure in question had an anticompetitive effect in two ways. First, as far as electricity competitors were concerned, the German legislation had the effect of granting a considerable amount of aid to producers of electricity from renewable sources. As the amount of that aid was determined on the basis of the amount of electricity produced and of average sales prices of the previous year, producers of electricity from renewable sources could unilaterally increase the aid to which they were entitled by increasing production and by reducing production costs. The mechanism also sheltered them from any risk of overcapacity or price fluctuations. Secondly, the producers of electricity from conventional sources themselves would end up subsidising the aid measure in question. Paradoxically, the distortion of competition might be greater where the cost of the measure is borne by competitors of the aided undertakings and not by the general public.

A. *Aids "Granted by the Member State or Through State Resources"—The Constitutional Motive*

The two main criticisms above are in reality a single one based on the assumption that an extensive interpretation of State aid provisions is preferable as such an interpretation will guarantee a more effective economic and objective assessment of the effect of the measure on the competitive market. Any kind of possible justifications for the State action should only be assessed through the mechanism provided by Article 87, paragraphs (2) and (3), or through block exemptions for certain wide categories of aid.

While these arguments have considerable weight—perhaps the Court itself could have tried to be equally straightforward in its analysis (particularly with reference to the labor law

cases)[32]—it is argued that the approach taken by the ECJ and later followed by the CFI is substantially correct.

The most convincing rationale for such an approach was developed by Advocate General Jacobs in several of his opinions—in particular in *Viscido* and *Preussen Elektra*—which were perhaps later influenced by academic writings. The most notable of these writings is perhaps the article by Professor Paul Davies entitled, *Market Integration and Social Policy in the Court of Justice.*[33] Both Jacobs and Davis have argued that adopting a cumulative test would increase legal certainty and would have ensured the preservation of a certain necessary degree of regulatory power for Member States.

Advocate General Jacobs and Professor Davies's views are not iconoclastic, but are very firmly based on the kind of regulatory model sketched out by the EC Treaty. Far from being an ultra deregulatory system, the European single market has always been structured on a series of checks and balances between the effective application of trade rules and the preservation of public values—preservations which are allocated both to supranational institutions and to Member State authorities.[34] On the one hand, it is in fact up to the European institutions in their task of legislative harmonization to take into account several public aims, such as environmental law, a high level of public health, and even the protection of human rights.[35] In State aid law, the system sketched by Article 87 allows the European Commission to take into account a series of aims and values that would cause a measure, which would ordinarily qualify as an aid, to fall outside the scope of the Treaty. On the other hand, the Treaty allows Member States an ample margin for pursuing their legiti-

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32. *See, e.g.*, Andrea Biondi & Luca Rubini, *State Aid Law: Between Social Objectives and Public Services*, *in* SOCIAL WELFARE AND EU LAW 79 (2005); Barry J. Rodger, *State Aid—A Fully Level Playing Field?*, 20 EUR. COMPETITION L. REV. 251, 254 (1999); Malcolm Ross, *State Aids and National Courts: Definitions and Other Problems—A Case of Premature Emancipation?*, 37 COMMON MKT. L. REV. 401, 413 (2000); Slotboom, *supra* note 19, at 292-95.

33. *See* Paul Davies, *Market Integration and Social Policy in the Court of Justice*, 24 INDUS. L.J. 49, 58-62 (1995).

34. *See* Miguel Poiares Maduro, *Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights*, 3 EUR. L.J. 55, 61-65 (1997).

35. For judicial approval, see The Queen v. Sec'y of State for Health, *ex parte* British American Tobacco (Investments) Ltd. & Imperial Tobacco Ltd., Case C-491/01, [2002] E.C.R. I-11453, ¶ 62; Arnold Andre GmbH & Co. KG v. Landrat des Kreises Herford, Case C-434/02, [2004] E.C.R. I-11825, ¶ 33.

mate policies. All economic freedoms are coupled with a long list of derogations, and competition rules are subject to the general justification for services of general economic interests found in Article 86. Moreover, apart from allowing Member States to rely on certain public aims to derogate from the Treaty prohibitions, the *acquis communitaire* has always acknowledged that there are indeed certain areas of economic regulation where, due to their being neither subject nor partially subject to supranational harmonization, States not only can, but should, preserve their powers. In one of the more criticized, but in our view constitutionally compelling, paragraphs of its case law history, the ECJ, faced with an over extensive application of the notion of a measure having equivalent effect on the basis of Article 28, reaffirmed that the European model of economic integration is not based on an entirely deregulatory policy.

In the *Keck*[36] decision, the Court held that national provisions restricting or prohibiting certain selling arrangements are not likely to hinder intra-Community trade, so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The Court further pointed out that the EC rules could not be abused by traders wishing to challenge "any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States."[37] This is a recurrent story. After an initial period of expansion, usually aimed at dismantling the most obvious trade barriers, comes the acknowledgment of the necessity of an outer limit. Once the "all out-rallying cry against the ethos of protectionism" has been exhausted, there is an eventual return to normality.[38] Article 28 and the *Keck* case law exemplify this trend but other decisions can be mentioned. Recently, the Court signaled that the *Keck* test could be transposed to the freedom to provide services.[39] In two decisions—both concerning whether the im-

36. *See* Keck & Mithouard, Joined Cases C-267-268/91, [1993] E.C.R. I-06097.

37. *Id.* ¶ 14.

38. Weiler, *supra* note 14, at 362.

39. This is the author's opinion. *Contra* Alpine Investments v. Minister van Financiën, Case C-384/93, [1995] E.C.R. I-1141, ¶ 33-39; Konsumentombudsmannen v. Gourmet International Products, Case C-405/98, [2001] E.C.R. I-1795, ¶ 36-39 (raising the question of whether the *Keck* test could be applied to the freedom to provide ser-

position of a municipal tax could be considered as an obstacle to the free movement of services—the Court held Article 49 to be inapplicable. The Court found that measures, the only effect of which was to create additional costs with respect to the service in question, and which affect in the same way the provision of services between Member States and those within one Member State, did not fall within the scope of the Treaty. Even in the field of competition law, the Court has carefully redesigned the boundaries of antitrust applicability. In cases such as *Albany*, regarding collective agreements between management and labor on sectorial pension schemes, and *Cisal*, which dealt with a compulsory insurance scheme, the Court held, despite acknowledging that certain restrictions of competition were inherent in the agreements between organizations representing employers and workers, that these agreements did not, by reason of their nature and purpose, fall within the scope of Article 85(1) of the Treaty.[40]

The connection between this long list of cases is the acknowledgment of the need to ensure that EC law is not excessively overstretched. The courts have done this by adopting a very practical approach to the problem. They seek to assess the economic and legal context in which the State measure was adopted, the objective to be attained by the measure, its effects, and at the same time, the structure of the market concerned, and the actual conditions in which the measure functions.

As concerns State aid law, interpreting the expression "granted by the State or through State resources" under the cumulative interpretation serves the same purpose of balancing legitimate State policies against the needs of the single market. This was explicitly and candidly affirmed by Advocate General Jacobs in his opinion in *Viscido*, where he argued that an extensive interpretation of the notion of State resources would have meant an investigation into all national labor law regimes, which, in turn, would have entailed "an inquiry on the basis of

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vices); *see also* J.L. Da Cruz Vilaça, *On the Application of* Keck *in the Field of Free Provision of Services*, *in* SERVICES AND FREE MOVEMENT IN EU LAW 25 (2002).

40. *See* Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie, Case C-67/96 [1999] E.C.R. I-5751; Cisal v. INAIL, Case C-218/00 [2002] E.C.R. I-691, ¶ 22; *see also* FENIN v. Commission, Case T-319/99, [2003] E.C.R. II-357. *See generally* Alexander Winterstein, *Nailing the Jellyfish: Social Security and Competition Law*, 6 E.C.L.R. 324 (1999).

the Treaty alone into the entire social and economic life of a Member State."[41] In the same vein, in *Preussen Elektra,* the fundamental reason for adopting the cumulative approach is contained in paragraph 107 of Advocate Jacobs Opinion:

> [T]he more extensive interpretation would oblige the Member States, affected undertakings, the Commission, the national courts and ultimately the Community Courts to decide in respect of all legislation regulating the relationship between enterprises whether it does confer selective advantages on certain undertakings within the meaning of Article 87(1). Since such an assessment is a difficult exercise with an uncertain outcome, it seems preferable that legislation regulating the relationship between private actors is as a matter of principle excluded from the scope of the State aid rules.

As for Davis, he makes a very explicit comparison between the judgment in *Keck* and the *Sloman Neptun* line of case law. He argues that in both situations the question is whether or not the decisions should have further expanded Article 28 and Article 87. In both cases, the Court opted for the exclusion *in limine* of the national measures at stake.[42] This kind of argument is also embraced by Advocate General Poiares Maduro. In a recent opinion, he argues that not every national measure that has the effect of giving an economic advantage to undertakings and that affects the competitive environment in the single market should be treated as State aid. He proposes to reconstruct the case law of the ECJ on the notion of State resources by implying a distinction between, on the one hand, distortions resulting from the adoption of measures to regulate economic activities and, on the other, distortions caused by a transfer of public resources to certain undertakings:

> Only the latter are such as to affect the competitive environment. The former must be accepted in as much as their only purpose is to establish the parameters within which business is carried on and goods and services produced. The reason for the distinction is clear to see. The Court is seeking to

41. Viscido v. Ente Poste Italiane, Joined Cases C-52-54/97, [1998] E.C.R. 2629, ¶ 16.

42. There is a difference between the two decisions. As for Article 28 EC, the question is on the meaning of "restrictions"; as for Article 87 EC, the question is whether there is a sufficiently close connection with the State. *See* Ross, *supra* note 31, at 83. This is indeed true; however, it does not make the "constitutional" argument less compelling.

> guard against the scope of the Community rules being broadened to cover distortions of competition that are simply the result of differences in legislative policy between Member States. That caution stems from a concern not to encroach on powers reserved to the Member States. There is a danger that over-extension of the State aid rules might result in all economic policy decisions of Member States being brought under the scrutiny of the Community authorities, without any distinction being made between direct interventions in the market and general measures to regulate economic activities. Clearly, the Community's State aid rules are not intended to be used to vet all legislative decisions of Member States for their impact on competition in the internal market. Their purpose is to identify only those distortions of competition brought about by a Member State seeking to give a particular advantage to certain undertakings by measures that depart from its overall policy approach.[43]

Although it is not good practice to second-guess judges' intentions, it is still possible to discern a clear approval of such an approach in the extra-judicial writings of the President of the CFI. Apart from citing large passages of Advocate General Jacobs opinion, Judge Vesterdorf described cases, such as *Preussen Elektra*, as fundamental in ensuring a further degree of legal certainty in the area of State aid law.[44]

In conclusion, the case law requires a direct involvement on the part of the State in favoring a certain undertaking. Such a reconstruction does not mean that the Courts would not be alerted to possible schemes that Member States could concoct to escape the Treaty provisions. Take, for instance, the question of tax exemptions as State aid. The Community courts have repeatedly held that the direct intervention of the State should not be excluded even when the aid is granted not directly, but through third parties. Thus it is not necessary, in order to find the existence of intervention by means of State resources in favour of an undertaking, that the undertaking must be the direct recipient.[45]

When a direct intervention cannot be established, however,

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43. Enirsorse v. Sotocarbo, Case C-237/04, [2006] E.C.R. I-2843, ¶ 44-46.

44. *See* Bo Vesterdorf, *A Further Comment on the New State Aid Concept as This Concept Continues to Be Reshaped*, 3 EUR. STATE AID L.Q. 393.

45. *See* Germany v. Commission, Case C-156/98, [2000] E.C.R. I-6857; Confédération nationale du Crédit mutuel v. Commission, Case T-93/02, [2005] E.C.R. II-143.

it might be possible to speak of State aid law in terms of a European-style rule of reason.[46] As has been made well known by a series of cases, the ECJ has acknowledged that not every agreement between undertakings, or every decision of an association of undertakings, which restricts the freedom of action of the parties, is a breach of the Treaty provisions. The Court admitted that in taking into account the overall context in which a decision was taken or in which it produces its effects and, more specifically, its objectives, one should consider whether the consequential effects which restrict competition are inherent in the pursuit of those objectives and are proportionate to them.[47] For instance in *Deliège* the question was whether selection rules for sporting events could be regarded as an obstacle to the freedom to provide a service. In this judgment, the Court held that although the measure in question had some restrictive effects on free movement and, although selection rules inevitably have the effect of limiting the number of participants in a tournament, "such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted." Therefore, the measure did not constitute a restriction on the freedom to provide services prohibited by Article 49 of the Treaty.[48] In *Wouters*, the ECJ, applying the same test to competition and free movement of services, found that rules on multi-disciplinary practices, "despite the effects restrictive of competition that are inherent in it," were deemed necessary for the proper practice of the legal profession, as organized in the Member State concerned.[49] More recently, in a case dealing with anti-doping rules, the Court established that, although the rules might have the effect of limiting athletes' freedom of action, "such a limitation is inherent in the organization and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes."[50]

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46. *See* Giorgio Monti, *Article 81 and Public Policy*, 39 COMMON MKT. L. REV. 1057, 1086 (2002).

47. *See* Wouters v. Raad van de Nederlandse Orde van Advocaten, Case C-309/99, [2002] ECR I-1577.

48. *See* Deliege v. Ligue Francophone de Judo et Disciplines Associees ASBL, Joined Cases C-51/96 & C-191/97, [2000] E.C.R. I-2549, ¶ 64.

49. *Wouters*, [2002] E.C.R. I-1577, ¶ 3.

50. Meca-Medina v. Commission, Case C-519/04, [2006] E.C.R. I-0699, ¶ 45.

As for Article 87(1), the inherent restriction approach can be seen as a possible further dimension to the State aid test;[51] whereby, even if the measure is loosely attributable to the State and might still produce certain anticompetitive effects on the market, it has to be recognized that in the absence of an effective burden on the State the effects produced are merely inherent in the organization and the proper conduct of national economic policies; therefore, such a measure cannot constitute aid. This seems to be the approach that is emerging from the courts' case law. For instance, in a series of cases dealing with the Italian special administration procedure for large companies in difficulties, the ECJ refused to classify as aid the possible loss of tax revenue for the State resulting from legislation on court-supervised recovery schemes and insolvency. The Court held that:

> [Such a] consequence is an inherent feature of any statutory system laying down a framework for relations between an insolvent undertaking and the general body of creditors, and the existence of an additional financial burden borne directly or indirectly by the public authorities as a means of granting a particular advantage to the undertakings concerned may not automatically be inferred therefrom.[52]

The Court, therefore, recognized that the effect of the State's policies was merely to establish the *parameters within which business is carried on and goods and services produced.*

B. *Aids "Granted by the Member State or Through State Resources"—The Practical Application*

Once the general principle has been established, that is to say, that the distinction between aid granted by a State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State, the Courts have to still face questions: Does the State directly or indirectly control the resources in questions? If yes, is the transfer of the resources imputable to the State? Once

51. This is also the reconstruction albeit in the context of social security laws. *See* Erika Szyszcak, *State Intervention and the Internal Market, in* EUROPEAN UNION LAW FOR THE TWENTY-FIRST CENTURY 235 (2004).

52. Ecotrade Srl v. Altiforni e Ferriere di Servola SpA, Case C-200/97, [1998] E.C.R. I-7907, ¶ 36; *see* Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v. Int'l Factors Italia SpA, Case C-295/97, [1999] E.C.R. I-3735.

again the Community Courts have provided a series of guidelines and criteria to determine the imputability of the measure to the State. Before embarking on a discussion of those criteria, however, it is significant to note that there is a clear link on this point between the case law on imputability and the definition of "granted by the State and through State resources." The ECJ has, in fact, firmly established that the imputability of certain measures to the State should never be presumed, but always proven. In the case of *Stardust Maritime*, the Commission considered that various financing measures and bank guarantees granted by two subsidiaries of Crédit Lyonnais and then by the Consortium de Réalisation, to the French pleasure boat chartering firm Stardust Marine, had to be considered as aid. It should be noted that, at the time, Crédit Lyonnais and its subsidiaries were owned and controlled by the French State. The Court in its judgment severely criticized the Commission for inferring the imputability of the financial assistance to the State from the mere fact that the banks were controlled by the State. The fact that the decision had been taken by a public undertaking cannot automatically signify that the public authorities [were] involved, in one way or another, in the adoption of those measures. Thus, the public character of a certain measure is not *per se* sufficient to subject a regulatory act to EU law. It must be demonstrated that there was an actual exercise of such a special public power. As in the case law on fundamental freedoms,[53] what the Court requires is a concrete assessment of State involvement and whether it can have an impact on the internal market. Such a functional test is also clearly consistent with that developed by the Court on the notion of "undertaking" within the meaning of the Community competition rules. The now established case law is firmly based on a functional test, as the Court focuses on the type of activity performed rather than on the characteristics of the actors who perform it, the social objectives associated with it, or the regulatory or funding arrangements to which it is subject in a particular Member State.[54] The emphasis is not merely placed on the criteria of the offer of goods and services, but on

53. *See generally* Apple & Pear Dev. Council v. Comm'ns of Customs and Excise, Case 102/86, [1988] E.C.R. 1443.

54. *See* AOK Bundesverband v. Ichthyol-Gesellschaft, Joined Cases C-264, C-354-55/01, [2004] E.C.R. I-2493, ¶ 46-49; Hofner v. Macrotron GmbH, Case C-41/90, [1991] E.C.R. I-1979.

the effective participation in the market of a specific entity.[55] Likewise, the functional test in the area of State aid requires then, evidence that public powers have been concretely exercised in the market place.

The ECJ in *Stardust Maritime* further proceeded towards a systematization of its previous case law and provided a non-exhaustive list of possible indicators that may have to be used to satisfy the functional test: the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;[56] or the fact that, apart from factors of an organic nature, which linked the public undertakings to the State, those undertakings, through the intermediary to which aid had been granted, had to take account of directives issued by the State;[57] its integration into the structures of the public administration; the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators; the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law); the intensity of the supervision exercised by the public authorities over the management of the undertaking; or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved; having regard also to the compass of the measure, its content, or the conditions which it contains.

Such a long list might not be pleasant to read, and such a flexible approach can of course run the risk of being too flexible, but it is evident that the Court has made a conscious effort to provide some form of benchmark that can be used by all the interested parties: Member States, the Commission, and private undertakings. The recent case law seems also to stick rather closely to the ECJ indications. An interesting example is *Deutsche*

55. *See* Firma Ambulanz Glockner v. Landkreis Sudwestpfalz, Case C-475/99, [2001] E.C.R. I-8089; Pavlov v. Stichting Pensioenfonds Medische Specialisten, Joined Cases C-180-84/98, [2000] E.C.R. I-6451; *see also* Aeroports de Paris v. Commission, Case C-82/01, [2002] E.C.R. I-9297. *See generally* Victoria Louri, *"Undertaking" as a Jurisdictional Element for the Application of EC Competition Rules*, 29(2) LEGAL ISSUES ECON. INTEGRATION 143 (2002).

56. *See* van der Kooy BV v. Commission, Joined Cases 67-68, 70/85, [1988] E.C.R. 219, ¶ 37.

57. *See* Italy v. Commission, Case C-303/88, [1991] E.C.R. I-1433, ¶ 12; Italy v. Commission, Case C-305/89, [1991] E.C.R. I-1603, ¶ 14.

Bahn v. Commission.[58] In this case the German national railway undertaking challenged a decision of the European Commission not to consider a tax exemption provided by German law with respect to aviation fuel. Deutsche Bahn asserted, of course, that such a measure had the effect of favoring air transport against rail transport (in particular high-speed trains). The German tax measure was, however, clearly implementing a Directive on the harmonization of the structures of excise duties on mineral oils. Thus, according to the CFI, as the German measure had to be considered a proper transposition of EC law, it did not satisfy the imputability test, as the Member State was only implementing Community law in accordance with its obligations stemming from the Treaty. Therefore, the provision at issue was not imputable to the German State, but derived from an act of the Community legislature. Such a decision should not, for obvious constitutional reasons, be considered as meaning that a State measure implementing Community legislation will never fall within the scope of Article 87(1). In the *Deutsche Bahn* judgment, the CFI reiterated several times that this particular instance dealt with a directive that imposed on Member States a clear and precise obligation not to levy the harmonized excise duty on fuel used for the purpose of commercial air navigation, as found by the ECJ in a previous case.[59] Conversely, in other less straightforward cases, it might be possible to imagine that a Member State might attempt to play with much looser EC drafting. The *Stardust Maritime* test would still apply, however, and it would be for the interested parties to indicate the real imputability of the measure on the State.

A slightly more complicated case is the *Pearle* judgment.[60] The case dealt with an action for a declaration that the imposition of a levy to launch a collective advertising campaign to promote the services of opticians, required by the Dutch trade association of opticians, had to be considered as invalid, as such an imposition would constitute State aid. It should be noted that Dutch law merely conferred on the trade associations the powers relevant to the performance of the tasks entrusted to them, including those allowing the associations to impose levies on their

58. *See* Deutsche Bahn v. Commission, Case T-351/02, [2006] E.C.R. II-1047.

59. *See* Braathens Sverige v. Riksskatteverket, Case C-346/97, [1999] E.C.R. I-3419.

60. *See* Pearle v. Hoofdbedrijfschap Ambachten, Case C-345/02, [2004] E.C.R. I-7139.

members to meet their costs and to finance the operation of the organization. The Court first reaffirmed that, even if the trade association were to be considered a public body, the funding for the advertising campaign was collected from its members and did not constitute an additional burden for the State or that body. The Court also placed a lot of emphasis on the fact that, in reality, the initiative for the organization and operation of that advertising campaign came from a private association of opticians, and not from the Trade Association. Thus, the Board of the Trade Association "served merely as a vehicle for the levying and allocating of resources collected for a purely commercial purpose previously determined by the trade and which had nothing to do with a policy determined by the Netherlands authorities."[61]

As correctly observed by Judge Vesterdorf, although the judgment seems to suggest that the relevant criteria for excluding State imputability had to be considered, the fact that the measure had been taken at the initiative of a private association, should, in reality, be irrelevant. Otherwise the Court's findings in *Preussen Elektra*—a case dealing with a measure introduced by legislation—would be called into question. The *Pearle* case should, therefore, be understood in terms of imputability. The initiative of the measure (public or private) does of course have to be taken into consideration, but only insofar as it is one of the factors to be taken into account when deciding whether or not the measure is imputable on the State.[62]

III. *SOME BRIEF CONCLUSIONS*

The recent case law of the EC courts, especially on the definition of "State" and "State resources" can certainly be considered as rather restrained. However, this restraint, far from being a retreat, is a necessary refinement of the concept of aid, which will lead to a more balanced approach and further legal certainty. There are still problems with this approach. Most notably, such a reconstruction could inspire Member States to come up with very creative forms of mechanisms, which compel private

61. *Id.* ¶ 37.

62. See the positive assessment in Leigh Hancher, *A Pearl of Wisdom*, 4 EUR. STATE AID L.Q. 363 (2004).

sector enterprises to alleviate the costs of certain undertakings.[63] The author still believes that those dangers do not outweigh the beneficial effects on legal certainty and on a possible excessive deregulation that the courts' case law brings about.

In a rather recent and ambitious consultation paper entitled *The State Aid Action Plan*, the European Commission has adopted as a motto for any future policies the "less and better targeted aid." The slogan identifies the need for a more "refined economic approach" in order to improve the level of certainty and effectiveness for the notion of aid.[64] In particular, in appraising the compatibility of State aid with European law, the economic assessments, both potential and actual, should be taken into account. One key element in that respect is the analysis of market failures, such as externalities, imperfect information, or coordination problems, which may be the reasons why a market does not achieve the desired objectives of common interest. This is particularly true if the failures are of an economic nature. In those cases, identifying the market failure at stake will help to better evaluate whether State aid could be justified and is acceptable, whether it represents the most appropriate solution, and how it should be implemented to achieve the desired objective without distorting competition and trade to an extent contrary to the common interest.

Without even questioning the importance of an economic approach, it is argued that the case law on State aid and, in particular, on the notion of State and State resources, has been constantly characterized by a very practical but flexible approach. Constantly refining and improving the definition of aid has somehow better achieved the same kind of results that the Commission attributes to economics. Such case law—together with its inaccuracies, uncertainties, and plainly confused decisions—is thus best understood with reference to the counterpart developments in the field of internal market law, equally characterized

63. See the arguments developed by Advocate General Poiares Maduro in his Opinion in the *Enirisorse* case where he reaffirms the importance of coupling the analysis on the notion of State resources with a careful application of the other requirements of the notion of aid, most notably that of selectivity. *See* Enirisorse SpA v. Sotacarbo SpA, Case C-237/04, [2006] E.C.R. I-2843, ¶ 44-53.

64. COMMISSION OF THE EUROPEAN COMMUNITIES, STATE AID ACTION PLAN—LESS AND BETTER TARGETED STATE AID: A ROADMAP FOR STATE AID REFORM 2005-2009, COM (2005) 107 Final, ¶ 18; *see also* Philip Lowe, *Some Reflections on the European Commission's State Aid Policy*, 2 COMPETITION POL'Y INT'L 57 (2006).

by a practical and flexible approach and intimately clear and respectful interpretation of the EC Treaty provisions. As Judge Vesterdorf has argued extra-judicially, the recent case law on State aid law identifies a trend which tends to narrow the scope of Article 87(1). In his view, such a trend should be welcomed, as it contributes to more legal certainty and would help all players involved—undertakings, national authorities, and national courts as well as the Commission and the Community Courts. In short, a trend which means "less and better targeted aid."