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De werking van algemene belangenafwegingen in het Europese staatssteunrecht: tussen verbod en verenigbaarheid?

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Summary

The balancing of general interests in EU State Aid Law: blurred lines between the prohibition and the compatibility of aid.

I. THE STATE AID PROHIBITION OF ARTICLE 107(1) TFEU AND THE NOTIFICATION- AND STANDSTILL- OBLIGATIONS

The provision of EU state aid law is laid down in articles 106 to 109 of the Treaty on the Functioning of the EU (TFEU). National policies aimed at stimulating the economic activity of certain undertakings or certain economic sectors are bound by the application of the EU state aid rules. The notion of State aid was developed by the European Court of Justice (ECJ) as an objective legal concept. The ECJ has the exclusive competence to explain the concept of state aid, as laid down in article 107(1) TFEU.

According to the ECJ's settled case-law any measure constitutes 'state aid' within the meaning of Article 107(1). TFEU when it is imputable to the State and confers an economic advantage to one or more undertakings, provided that the aid is liable to affect trade between Member States and (threatens) to distort competition.

Accordingly, Article 107(1) TFEU prohibits State aid to undertakings or productions if the following cumulative conditions are fulfilled;

- 1) the aid measure is imputable to the State or granted through State resources;
- 2) the aid confers an advantage which deviates from normal market conditions;
- 3) the aid must be selective, favouring an undertaking or a specific group of undertakings;
- 4) the aid must be liable to affect trade between the Member States and;
- 5) the aid must distort or threaten to distort competition.

If all above-mentioned conditions are fulfilled Article 107(1) TFEU applies and the measures qualify as 'state aid' according to EU law. As a result, a new aid measure must be notified for approval to the European Commission (Commission) in accordance with Article 108(3) TFEU (save for the possibility that an exemption applies). Although state aid is in principle prohibited according to Article 107(1) TFEU, the Commission has the competence to assess the notified aid measure and can determine that the aid is compatible with the internal market. During the Commission's investigation in accordance with article 108(2) TFEU, Member States must refrain

from implementing the aid without approval from the Commission (in line with the notification- and standstill-obligations).

II. THE PROHIBITION PHASE AND THE COMPATIBILITY PHASE CONCERNING STATE AID

Granting authorities are bound to the state aid prohibition of Article 107(1) TFEU and must apply the notion of state aid in their assessment whether state aid must be notified or whether state aid can be (block-) exempted. The phase in which state is prohibited is referred to as the “prohibition phase”. Within the framework of private enforcement of the article 108(3) TFEU, interested parties, such as competitors of the aid recipient, may seek judicial protection before the national courts. The competent national court can assess whether state aid was implemented in breach of article 108(3) TFEU (for instance because the aid was implemented in breach with the standstill-obligation or in breach of a decision of the Commission). However, national courts have no competence to determine whether the aid was compatible with the internal market.

The Commission is exclusively competent to investigate the compatibility of notified aid and may decide to declare such aid compatible with the internal market in accordance with the provisions of respectively Article 107(2) TFEU and/or Article 107(3) TFEU (concerning horizontal and sectoral Union objectives), Article 106(2) TFEU (concerning SGEI) and Article 93 TFEU (concerning transport). In its compatibility assessment the Commission weighs the effects of new aid measures on the internal market against the necessity to realise general interests by means of state aid. This balancing act, which the Commission conducts in its decisional practice, will be referred to as the “compatibility phase”.

The compatibility phase is in 2024 no longer solely reserved for the Commission. Article 109 TFEU, in addition to the Articles 106(3) TFEU and 108(2) TFEU, provides the institutions of the EU with the possibility to adopt a legal compatibility framework for substantive assessment by the Member States. Accordingly, the Member States need to verify whether certain pursued general interest objectives can be deemed compatible with the applicable conditions that were set out by the Commission. In accordance with the Enabling regulation (Regulation 2015/1588/EU) the Council attributes the Commission with the powers to adopt block exemptions which provide the conditions to declare certain horizontal EU objectives exempted from notification under Article 108(3) TFEU. Examples of horizontal aid are for instance innovation and environmental and climate protection and examples of sectoral objectives. Examples of sectoral objectives are for instance transport, culture and sports. Aid which falls within the scope of a block exemption is exempted from notification on the condition that

the relevant procedural and substantive conditions are met. Consequently, Member States may implement block exempted aid measures in deviation from the notification and standstill duties of Article 108(3) TFEU, as long as they inform the Commission of the application of a block exemption and report on the implementation of the exempted aid.

In practice, the assessment of aid measures in the prohibition phase and the application of the pre-conditioned compatibility assessments for exempted aid categories were decentralised to the national level of the Member States. This can be explained by the extension of two of the block exemptions (*ergo* the GBER and the SGEI-Exemption Decision) which were adopted by the Commission to enlarge Member States' responsibilities in applying Articles 107(3) and 106(2) TFEU and to share in the enforcement of Article 108(3) TFEU. The abovementioned decentralisation was not construed in a legal framework by the Commission, and does not qualify as an attribution of enforcement powers, but can be seen as a general obligation for the Member States to comply with the state aid rules as set out in the Articles 106 to 109 TFEU. This development can be illustrated by the fact that currently 93% of new aid measures in the Union are block-exempted by the GBER.

In the field of State Aid law several national and supranational actors play a role in its application. The Commission, Council and Court are supranational actors, and the national authorities and national courts are active on the national level of state aid enforcement. When it concerns the legal review of general interests there is a division of competences between the Union and its Member States. Accordingly, the powers of these different actors vary when it comes to the act of determining whether measures constitute as state aid (in the prohibition phase) and the assessments of general interests (in the compatibility phase). An important distinction is that the Member States may not invoke general interests in the prohibition phase so that they can circumvent the state aid prohibition. In principle these interests (and their effects on the internal market) must be assessed by the Commission in the compatibility phase.

III. BALANCING OF INTERESTS EXERCISED BY THE MEMBER STATES IN THE PROHIBITION PHASE

This dissertation investigates a *capita selecta* of three circumstances in the prohibition phase in which a balancing of interests takes place. This investigation involves a balancing of interests in the application of Article 107(1) TFEU concerning:

- 1) objective justifications in case of unequal treatment of undertakings;
- 2) services of general economic interests (SGEI) and;
- 3) an explicitly recognised sports interest.

1) Objective justifications in case of unequal treatment of undertakings

The material selectivity test applies in case Member States invoke objective justifications for unequal treatment of undertakings. This test is relevant since the equal treatment of undertakings in equal circumstances constitutes an important foundation of the state aid prohibition. The ECJ developed the material selectivity test to protect undertakings from disturbances of the functioning of the internal market. In line with the principle of equal treatment, relevant actors in state aid enforcement, can apply the material selectivity test to determine whether a general measure of economic policy pursues a legitimate interest without discriminating between undertakings in a comparable situation. Furthermore, this test provides a yardstick for assessing objective justifications for unequal treatment. However, this balancing of interests within the application of Article 107(1) TFEU may result in the circumstance that a Member State conducts a balancing act between overriding national objectives and the objectives of the internal market. Such a balancing of interests may lead to an interfacial tension between the different assessment phases, namely the assessment of the concept of aid in the prohibition phase opposite to the assessment of compatibility reserved for the compatibility phase.

2) Services of general economic interest (SGEI)

Article 106(2) TFEU allows Member States to determine the policies for organising, financing and providing services of general economic interest as long as the state aid rules are abided. In its *Altmark*-judgment (ECJ 24 July 2003, C-280/00, *Altmark Trans*) the ECJ created an application to reconcile the objectives of Article 106(2) TFEU and 107(1) TFEU. This application provides a test which deviates from the regular test to determine whether an undertaking receives an advantage. In contrast to the market investor test, the *Altmark*-test contains four cumulative criteria to ascertain whether a measure constitutes a compensation for a SGEI under market conditions (the so-called “compensation approach”).

On the basis of the case law analysed in Chapter 2, this thesis argues that the application of the *Altmark*-judgment remains complicated and somewhat cumbersome for national actors, including national courts. The reason for the complicated nature of the *Altmark*-conditions can be found in the diversity of SGEI descriptions on the national level and the lack of limitations on the descriptions at the EU law level. Consequently, the SGEI descriptions constitute a general interest category which, according to its nature, does not fit well within the objective legal concept of state aid. Since the application of Article 107(1) TFEU does not provide a discretion to invoke general interests in the prohibition phase, it would be better to assess SGEI in the compatibility phase. According to the current compensation approach of

the *Altmark*-judgment a national court will have to determine if the compensation would in fact constitute state aid. However, according to Article 106(2) TFEU the same national court will also have to take into consideration that EU law attributes a special nature to SGEI.

3) An explicitly recognised sports interest

Comparable to the SGEI and objective justifications it is reasoned that an explicitly recognised sports interest, as mentioned in Article 165 TFEU, also has the characteristics of a broad general interest category (for instance in the field of education, culture, sports and public health). An interest which can also be invoked in the prohibition phase and the compatibility phase. Moreover, this category has parity with the concept of mandatory requirements which allow for objective justifications in internal market law.

Indeed, in the assessment of aid measures in professional sports the Commission has applied the objectives mentioned in Article 165 TFEU. The Commission takes the social objectives of this provision into consideration for determining the compatibility, but also the concept of aid. The Commission incorporates these objectives in the application of Article 107(1) TFEU concerning sub-assessments:

- 1) The assessment of a purely sportive non-economic interest;
- 2) The assessment whether transactions were conducted under normal market conditions;
- 3) The assessment whether there was a measurable effect on competition;
- 4) The assessment whether there was a significant effect on trade between Member States.

The balancing exercises concerning explicitly recognised sports interests (according to Article 165 TFEU) constitute a substantive connection with the concepts of SGEI and legitimate expectations. In all the *capita selecta* categories EU law allows the Member States to balance an overriding public interest against the functioning of certain concepts of Article 107(1) TFEU and the (potential) effects on the internal market.

IV BALANCING OF INTERESTS BY MEMBER STATES IN THE COMPATIBILITY PHASE

The Commission faces a growing workload and, therefore, a prioritising policy of public state aid enforcement is both necessary and practically. To that end the Commission has repeatedly stated that, due to the limitations of its capacity, it needs the support of national mechanisms for public state aid enforcement. Accordingly, the Commission wishes to reserve its investigation capacity for those economic sectors in which state aid has the biggest

impact on the internal market (big-on-big-policy). With the extension of the scope of the GBER and with the SGEI Exemption Decision, the Commission has been steering towards *ex ante* enforcement mechanisms for exempted aid. The Member States must contribute to the state aid supervision on these exempted frameworks and by doing so ease the burden of cases for the Commission services.

The balancing of interests concerning the application of the block exemptions takes shape in the prior assessment of Article 107(1) TFEU, followed by an assessment of the substantive pre-conditions for exempted aid, without the need to notify under Article 108(3) TFEU. This pivotal effect of Article 107(1) TFEU has placed the prime focus of State aid enforcement on the loyal cooperation between Member States and the Commission in applying, maintaining, and complying with the block exemptions. Both the assessments in the prohibition phases and the phase for assessing the block exempted aid (aimed at compatibility) require that national authorities apply a thorough decision-making framework. That framework must lead to decisions which can withstand a public enforcement action by the Commission, but also can be defended on their legality before third parties in a judicial review case before a national court.

V IDENTIFIED PROBLEMS CONCERNING THE BALANCING OF GENERAL INTERESTS BY MEMBER STATES

1) Problems concerning the objective justifications for unequal treatment.

The analysed cases in Chapter 1 make clear that both the Commission and the ECJ are confronted with certain converging or conflicting internal market exceptions in the application of the material selectivity test. The Commission and the ECJ are inclined to give precedence to mandatory requirements and inherent restrictions when invoked by the Member States. This inclination gives the impression that the ECJ allows certain deviations, which normally can only be invoked in the compatibility phase, to be also invoked in the prohibition phase. Naturally, the ECJ does create rules of law *erga omnes* and therefore its case law does not actively obligate national courts to conduct an extensive substantive review of possible conflicts between objectives of Article 107(1) TFEU and certain internal market exceptions, such as mandatory requirements. However, Chapter 1 concludes that such an evolution cannot be fully ruled out. It is argued that the discretion the ECJ adheres to mandatory requirements and inherent restrictions as objective justifications, may very well lead to the unintended effect that national courts conduct a balancing act *strictu sensu*, in breach of Article 107(1) TFEU *jo.* 108(3) TFEU. In addition, an unrestricted application of the internal market exceptions would seriously hinder the national courts

in providing judicial protection to third parties by the application of Article 107(1) TFEU jo. 108(3) TFEU. Therefore, a refining of the ECJ's doctrine of objective justifications applied to the material selectivity test is proposed. From an EU law perspective this would safeguard the precarious balance between the state aid prohibition and the compatibility test, and therefore also avoid any conflicts of competence between the national courts and the Commission.

2) Identified problems concerning the compensations for SGEI.

Chapter 2 contains a guidance for national courts with the aim of improving the practical application of the *Altmark*-conditions, allowing for a framework for judicial review within the division of competences in state aid law. This guidance is based on the conditions set out in EU law regarding SGEI. Those conditions are based on the principles of direct effect, transparency, equal treatment and proportionality. Nevertheless, this guidance is only a partial solution for the practical application of the *Altmark*-conditions. Chapter 3 therefore explains, on the basis of five different interpretations of the *Altmark*-judgment in the case law of the ECJ (the flexible interpretation, the teleological interpretation, the sector-specific approach, the strict approach and the coherent approach), that the application of the *Altmark*-judgment gives rise to fundamental application problems. These application problems can be described as follows. Firstly, the *Altmark*-application is a deviation from the concept of benefit in Article 107.1 TFEU that is proving unsuitable for objectively assessing normal market conditions. Secondly, the *Altmark*-application pursues conflicting objectives, since a compensation must exclude an advantage, but at the same time must also neutralise a competitive disadvantage. Such an interpretation is not a suitable yardstick for objectively determining an advantage. The *Altmark*-application thus blurs the distinction between prohibition and justification. Thirdly, the *Altmark*-application limits the role and functioning of Article 106(2) TFEU (and hence the related criterion of "economically acceptable conditions"). As a result, the judicial review the national court can provide on the basis of primary Treaty law (on the request of parties and within the scope of the dispute) is limited.

3) Identified problems concerning the explicitly recognized sports interests.

Chapter 4 provides an analysis of the decisional practice of the Commission with regard to explicitly recognized sports interests. For these interests the Commission created application guidelines which deviate from the state aid concepts of "economic activity", "advantage" and the concepts of "the effect on trade" and the "limitation of competition". The Commission's

approach allows for the exclusion of “pre-dominant social objectives” from the scope of Article 107(1) TFEU. Although the Commission’s guidance is intended to provide practical standards for the application of Article 107(1) TFEU, the Commission may not have realised that this interpretation of the European dimension of sport could also have implications for the uniform application of concepts such as “economic activity” and “effects on trade” in other branches of the internal market (in particular with regard to the four freedoms and competition law). This identified problem is similar to those identified in Chapter 1 (with regard to objective justifications in the material selectivity test) and Chapter 3 (with regard to the compensation approach for SGEI). In addition, the current Commission interpretation of Article 165 TFEU sidelines the economic approach of Article 107 TFEU. This approach, which gives greater weight to the legitimate interests of Article 165 TFEU, may in some cases *de facto* legitimise state aid in the prohibition phase. This leads to blurred lines between the prohibition phase and the compatibility phase.

4) Identified problems in the balancing of interests in the application of the block exemptions.

Chapter 5 explains that the power of Member States to carry out substantive assessments under the block exemptions concerns a form of *ex ante* enforcement which requires a substantive weighing of interests. This balancing of interests can be seen as a *de facto* equivalent to a compatibility assessment. Nevertheless, the ECJ has provisionally taken the position that Member States can only make a conditional compatibility application, which can only be finalised by the Commission as the ultimately responsible enforcement actor. This position also means that decisions by Member States cannot raise any legitimate expectations. Furthermore, national courts may verify the applicable conditions of block-exempted aid (within the scope of the dispute), but they may only attach negative legal consequences (a recovery order) and no positive legal consequences (a declaration of compatibility) to judicial review. As a result, the aid granting authorities cannot provide legal certainty to aid recipients on the basis of the block exemptions.

In the cases studied in Chapter 5, aid recipients have brought direct actions before the ECJ against national aid policy, while in essence they wanted to challenge national decisions based on the GBER. The ECJ has cited that the decisions of national authorities on the basis of the GBER cannot inspire any confidence, given the final responsibility of the Commission. This premise is based on the possible need for a final decision by the Commission; while the standard procedure of the GBER explicitly does not involve the Commission to make a substantive assessment, like for instance in a notification procedure under Article 108(3) TFEU. To obtain legal certainty, the remaining option for the aid recipient is to request the Commission to examine the

compatibility of the aid measure. Such a procedural step would actually go against the objectives of the block exemptions to provide simplified and accelerated aid.

Chapter 5 concludes that when granting authorities (threaten to) incorrectly apply the block exemptions (in particular the GBER) the current decentralised supervision of the block exemptions does not provide for effective remedies at the national nor the Union level. In the *ex-post* phase of block exempted aid, the national court (if requested by the parties to review the assessment of granting authorities) cannot effectively verify the balancing of interests on the basis of these exemptions.

VI CONCLUSION

The balancing of interests conducted by the Member States with regard to the concept of state aid in the prohibition phase, added by their responsibilities according to the block exemptions in the compatibility phase, creates three legal problems in the application and enforcement of state aid law. Firstly, they blur the distinction between the prohibition and the compatibility of state aid. National authorities do not have the competence to weigh general interests in their assessment whether a measure constitutes state aid according to Article 107(1) TFEU. However, the identified *capita selecta* general interests do enable such a balancing exercise. The balancing of interests with regard to objective justifications for unequal treatment, compensations for SGEI and the explicitly recognized sports interests are at odds with the legal distinction between the prohibition phase and the compatibility phase of state aid.

Second, the legal framework for balancing of interests by the Member States in the prohibition phase lacks legal certainty. The guidelines for application that were established by the Commission for the cumulative conditions of Article 107(1) TFEU cannot replace the case law of the ECJ and can indeed collide with the ECJ's interpretations. Consequently, in the prohibition phase national authorities may find themselves in a potential conflict with two types of interpretation. This may lead to legal uncertainty: should they assess an aid measure in accordance with the compliance standards set out by the Commission, or by the standards of the ECJ and can they successfully defend their assessments in case of a judicial review by a national court?

Finally, the guidelines for the balancing exercises for the three identified general interests and the guidance for the application of block exempted aid do not provide effective legal protection in the *ex-post* phase of aid granting. The Member States have new responsibilities for enforcing the block exemptions, but in the event of the legal review of these balancing exercises, national judges cannot do much other than refer interested parties to the Commission to provide legal certainty, since the Commission remains

the ultimately responsible actor for the compatibility applications of the Member States.

Against the background of the abovementioned context, the following research question was investigated:

- *How can the identified problems concerning effective judicial protection, legal certainty and the division of competences between the European Union and its Member States be addressed in accordance with EU law with regard to the balancing exercises of general interests by the Member States?*

This question is answered as follows. The identified deviations from the objective notion of state aid prevent an effective judicial protection. The balancing exercises of general interests should remain reserved for the compatibility phase. Accordingly, based on three possible scenarios for enforcement in the future, the concluding chapter consists of recommendations to attribute a clearly defined discretion for Member States to apply the block exemptions. A new evaluation by the ECJ on these balancing exercises (and a restructuring and refining of these exercises for block exemptions) would contribute to more clarity, transparency, and legal certainty for granting authorities, aid recipients and third parties.

By preventing the application of the balancing exercises in the prohibition phase, the ECJ can also attribute a direct effect to the requirement of equal treatment of undertakings according to Article 107(1) TFEU. In addition to the direct effect of Article 108(3) TFEU, this act would enhance the effectiveness and equivalence of enforcement mechanisms at the national level. Moreover, the direct effect of Article 107(1) TFEU would do justice to the existing legal practice, which is aimed at the application of the block-exemptions as exemption to the standstill- and notification duty of Article 108(3) TFEU. It is important to note that, according to the ECJ, balancing exercises that were conducted by the national authorities on the basis of the block exemptions, are not equivalent to a compatibility assessment. Nor does the ECJ consider an *ex-post* verification by the national court of those balancing exercises to be equal to a compatibility assessment. Given the reality that the application of the block exemptions takes place in a decentralised enforcement system, this thesis concludes that a rearrangement of the current decentralised enforcement is necessary, in which the Commission can attribute new possibilities for Member States to conduct balancing exercises in the compatibility phase for block-exempted aid. To that end the concluding chapter consists of three scenarios for further decentralised enforcement and contains several recommendations.