

## Where is State Aid Law heading to?

State aid law has become an all-purpose tool to camouflage policy-making.

Its application is neither limited to certain sectors, nor to harmonised or non-harmonised areas. The new Guidelines on State aid for environmental protection and energy 2014–2020<sup>1</sup> for example are guidelines in the true sense of the word and surely more than a transparent description of the Commission's State aid policy. They are pointing the way ahead for the EU's renewable energy regulation by the means of State aid control, thereby shaping the relevant markets of renewables.

Where non-harmonised taxation and the partly harmonised renewable energy sector are subject to extensive State aid control, State aid law has evolved to a regulatory and policy-making tool rather than a mere monitoring and law enforcement tool preventing isolated distortive State aid measures granted by Member States.

Of course, the Commission is very keen to deny any policy-making and regulatory intent or objective. Nevertheless, policy-making and regulation by virtue of State aid law is an undeniable fact experienced, at least, by Member States' governments. The renewable energy State aid saga provides painful evidence, not only from Berlin's perspective. Likewise, non-harmonised taxation has, as well, evolved to a laboratory of State aid policy-making and regulation.

Declaring the selective *effect* of a – by its very political nature – fragmented tax scheme to the decisive criterion of the aid assessment appears to be a self-fulfilling prophecy and raises serious doubts as to the conclusiveness of current State aid policy and case-law.<sup>2</sup>

In light of this, one has to wonder whether the current State aid law policies prevent or procure Type I and Type II errors.

On the one hand, we can detect an extensive interpretation of the notion of State aid which leads to a series of Type I errors, ie over-enforcement. On the other hand – due to the Commission's overload – highly distortive State aid measures remain undetected (Type II error, ie under-enforcement). These errors are counter-productive because inefficient State aid control may hurt rather than benefit the competitiveness of the internal market and of the EU and its Member States' jurisdictions. By focusing its efforts on non-harmonised taxation, the Commission might have bitten off more than it can chew. State aid control seems to be, overall, misplaced in non-harmonised taxation, except in cases of obvious burden sparings favouring the location of undertakings.

State aid law is better equipped to concentrate on highly selective measures masquerading as tax laws. That way, merely taxation laws that constitute a burden-relief with regard to a general scheme become subject to State aid control.

State aid control should target measures which are in substance selective renunciations or deferrals (without an obligation of the undertaking to pay interest) in the form of tax laws or tax rulings by the competent national authorities: cases in which, eg certain undertakings such as 'Starbucks' or 'Apple' enjoy 'significant tax reductions by way of "tax rulings" issued by na-

1 European Commission, 'Guidelines on State Aid for Environmental Protection and Energy 2014–2020' ('EEAG') [2014] OJ C200/1.

2 See in this regard, G Matsos, Systematic Misconceptions of State Aid Law in the Area of Taxation, (2014)13(4) EStAL 491, 491–493.

tional tax authorities<sup>3</sup> deviating from the general application of tax laws by virtue of wide discretion (or agreement).

Ineffective State aid control makes the public opportunity costs of either over-enforcement or under-enforcement increasingly hard to justify and – in the case of taxation – raises unnecessary and old fashioned competency issues. However, the competency discussion is not the core issue of efficient intervention in market allocations by virtue of any law enforcement. Competency issues merely scratch the surface and are rather a stepping stone for more fundamental questions such as the distribution of inclusive welfare by law.

What are the benchmarks for good EU State aid policy?

The prevention of Type I (over-enforcement) and Type II (under-enforcement) errors should be a benchmark for EU State aid policy.

The GBER<sup>4</sup> may be considered a step in that direction aiming at the reduction of Type I and Type II errors. According to Article 6 of the GBER, exempted State aid measures shall have an incentive effect. By forcing Member States to reflect *ex ante* upon the proportionality of a State aid measure with regard to an objective of common interest, distortive State aid measures may be prevented without the necessity of a full and lengthy investigation procedure. Furthermore, the transparency requirement of Article 5, monitoring provisions and notification thresholds of Article 4 assist to prevent under-enforcement (Type II errors) of Article 107(1) TFEU.

Outside the scope of GBER, these benchmarks are currently applied (or better: implied) in the Commission's decision making as well, but not in a systematic and sufficiently reflected manner. Considering the extensive interpretation of the notion of State aid, these benchmarks might be a *Leitmotiv* to re-involve the Member States in the State aid controlling process and maybe even re-decrease the centralised application of State aid law from the New Rome's perspective with all its information deficits on the functioning of domestic (tax) law in peripheral market environments. Instead of denying categorically – but quite politically correctly – the regulatory impact of State aid law, the crucial question should be: What are the good benchmarks for regulation by the means of State aid control?

So where is State aid law heading to, what is its object of protection?

The State aid policy in case of eg taxation focuses on both the competition between undertakings and competition between Member States' jurisdictions. However, the Guidelines on State aid for environmental protection and energy mainly address systemic competition between Member States. And there is also a more universal EU goal surfacing in the Guidelines on State aid for environmental protection and energy, which is the competitiveness of the internal market with regard to non-EU markets.

Thus, any good regulation by virtue of State aid law, thereby avoiding Type I and Type II errors, should as the first analytical step be sharply identifying its regulatory impact and direction, be it (1) the protection of undistorted systemic competition between Member States' jurisdictions, (2) the competitiveness of the internal market in regard to non EU markets or (3) the protection of undistorted competition between undertakings. This impact and direction may concern any combination of these elements.

3 European Commission, 'State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)' (Press Release), Brussels, 11.06.2014. <[http://europa.eu/rapid/press-release\\_IP-14-663\\_en.htm](http://europa.eu/rapid/press-release_IP-14-663_en.htm)> accessed 20.10.2014.

4 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance, [2014] OJ L 187/1–78.

EU State aid law should keep the different objectives of protection in mind and aim for a coherent approach. Different criteria might be necessary where the object of protection, its regulatory impact and direction differ, to strengthen rather than weaken the competitiveness of the European internal market. There is a challenge for the Commission to differentiate and to adjust its measures accordingly. It may sound academically arrogant, but in light of the nearly unlimited margin of appreciation and discretion, the Commission needs a more precise and coherent intellectual master plan ... let's face it, if we are honest, State aid law is more than an accumulated trend of past decisions, of so called objective interpretation or case law. It is both policy driven and regulatory enforcement in order to distribute inclusive welfare by law. Or, to put it in the trans-historical perspective of a former law student of the University of Bonn: If Karl Marx were among us, he would be a prominent State aid lawyer...and pursue the distribution of inclusive welfare more efficiently than he actually did!

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