

“Decentralisation in EC State Aid Law: a Greater Role for National Courts”

By Christopher Vajda Q.C.
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Traditionally the operation and administration of state aid has been very centralised. There is an obligation on Member States to pre-notify proposed new state aid to the European Commission under Article 88(3) of the EC Treaty and an obligation not to put into effect such new aid until cleared by the Commission. The Commission has exclusive jurisdiction under Article 87(3) of the EC Treaty to determine whether an aid is compatible with the common market. The role of the national courts has been essentially limited to enforcing the prohibition in Article 88(3) EC on putting new aid into effect until cleared by the Commission¹. While this involves consideration of whether a measure is an aid under Article 87(1) EC, Article 87(1) traditionally involved looking solely at the *effect* of the measure and examination of the purpose and justification of the measure was solely for the Commission in considering the question of compatibility of the aid with the common market under Article 87(3) EC.

Recent developments point, however, to a growing role for the national courts.

The first development – which has been noticeable over a number of recent years – is that the purpose of the measure may well be relevant in determining whether a measure is an aid within the meaning of Article 87(1). It is now clear that not all measures which involve the use of state resources and have the effect of favouring particular undertakings are automatically to be considered as aid within the meaning of Article 87(1). Thus in *Tiercé Ladbroke*² the European Court of Justice (“ECJ”) held that the different fiscal treatment of totalizator bets in France on Belgian and French horse races which favoured bets on Belgian races was not state aid because it was justified by the different regulatory and economic conditions in those countries, including the different fiscal treatment of bets and by the logic of the totalizator betting system whereby the share of the stakes paid out to the winners could not vary according to

Monckton Chambers
4 Raymond Buildings
Gray’s Inn
London WC1R 5BP

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

¹ See Case C-354/90 *FNCEPA v. Commission* [1991] ECR I-5505
² [1997] ECR I-7007

the State in which the bets were placed. While not equivalent to the so-called “rule of reason” under Article 81(1) EC, that case shows that the ECJ has introduced an element of objective justification in determining whether certain measures are aid within Article 87(1). Thus where the difference in fiscal treatment is justified by what is termed “the nature or general scheme of the system”³ there is no aid. It is far from obvious when a particular measure is “justified by the nature or general scheme of the system” but that is a matter to be determined by the national court, subject always to the possibility of making a reference to the ECJ under Article 234 of the EC Treaty.

The second development arises from the applicability of Article 86(2) of the EC Treaty to state aid measures. It is now established that Article 86(2) permits Member States to aid an undertaking which is entrusted with the operation of services of general economic interest when the aid compensates the undertaking for the cost of providing the service of general economic interest.⁴ If the conditions of Article 86(2) are fulfilled, there is no need to rely on Article 87(3). Unlike Article 87(3), Article 86(2) is of direct effect⁵ which means that it can be applied by a national court (as well as the Commission). However the inter-relationship between the power of the national court to apply Article 86(2) to a state aid measure and the pre-notification and standstill obligation under Article 88(3) is unfortunately not yet fully resolved. In a case involving aid granted to the export of French books⁶ the ECJ rejected the argument advanced by the French Government that an aid that fell within Article 86(2) was not subject to the pre-notification and suspension obligation in Article 88(3). The reasoning of that decision is open to question since if it fails to take account of the fact that Article 86(2) has been held to have direct effect and so can be applied directly by the national judge without the need for any notification. The pre-notification and suspension obligations really only make sense in a case where, as under Article 87(3) EC, the Commission has exclusive jurisdiction to determine whether an aid is compatible with the common market and until the Commission has verified whether the aid is compatible with the common market the aid should not be put into effect.

This tension between the direct effect of Article 86(2) and the pre-notification and suspension obligations in Article 88(3) surfaced more recently in *Ferring v. ACOSS*⁷. *Ferring*, a pharmaceutical company, challenged a tax on the direct sales on medicines in France as being a new aid granted in breach of Article 88(3). Because such a tax was not levied on competing sales of medicines through wholesalers, *Ferring* alleged that the differential fiscal treatment between competing distribution channels equated to a tax exemption in favour of wholesalers which amounted to aid.

Although wholesalers were exempt from this sales tax, they were subject to various public service obligations as regards the delivery of medicines. The French authorities argued that the tax on direct distribution by companies such as *Ferring* counterbalanced the cost of the public service obligations imposed on the wholesalers and hence the tax exemption did not favour the wholesalers and there was no aid at all. Alternatively if there was aid, it was justified under Article 86(2).

³ *Tiercé Ladbroke* and see also Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ 1998 C384/3. For a recent application of this principle in the English courts, see *R (BT3G) v. Secretary of State for Trade and Industry* [2001] EWCA Civ 1448.

⁴ See Case T-106/95 *FFSA v. Commission* [1997] ECR II-229, upheld on appeal in Case C- 174/978 *FFSA v. Commission* [1998] ECR I-1303.

⁵ See Case C-393/92 *Almelo* [1994] ECR I-1477.

⁶ Case C-332/98 *France v. Commission* [2000] ECR I-4833.

⁷ Case C-53/00, judgment of 22 November 2001.

Both the Advocate General and the ECJ held that there was no aid (see below). The Advocate General went on to say that if there was aid and it was justified by Article 86(2) – a matter that was within the jurisdiction of the national court to determine - the failure to pre-notify such aid under Article 88(3) did not render the aid unlawful. The Advocate General pointed out that it would be illogical and over-formalistic for the aid to be unlawful when the national judge has determined that the aid falls within Article 86(2) and is therefore compatible with the common market. He stated that, in such a situation, that obligation to pre-notify under Article 88(3) operates solely at the institutional level between the Member State and the Commission. In other words, breach of such an obligation is still a breach of Community law that could be the subject of infraction proceedings under Article 226 EC but it could not give rights to individuals to obtain an injunction in the national court to stop the aid until it had been notified and approved by the Commission. Although the Advocate General was careful not to question the decision in the *French books case*, there is little doubt that his approach and that of the ECJ in the *French books case* on the effect of Article 86(2) on Article 88(3) are difficult to reconcile. In my view the Opinion of the Advocate General is to be preferred since he, unlike the Court in *French books*, took account of the direct effect of Article 86(2) in reaching his conclusion on the scope of Article 88(3).

The Court in *Ferring* did not need to confront this issue because it held that the tax exemption would not involve aid at all, if the value of that exemption corresponded to the additional costs actually incurred by the wholesalers in discharging their public service obligations – a matter to be determined by the national court. The approach of the Court was therefore to consider that the tax exemption was not an advantage granted to the wholesalers but rather compensation for the additional costs they had to incur. This case represents a significant departure from previous case law (and the practice of the Commission) which had held that payments to compensate undertakings for public service obligations were aid within the meaning of Article 87(1)⁸ – which could be justified under Article 86(2).

The practical effect of *Ferring* is therefore to increase the role of the national courts in considering questions of justification of aid under Article 87(1), this time in order to determine whether a measure which is said to compensate undertakings for a public service obligation, is aid at all. In many cases this will involve detailed fact finding by a national court which will need to determine whether the assistance is a true reflection of the extra cost of the public service obligation (in which case it is not aid) or is over-compensation (in which case it is aid).

One of the consequences of the ECJ widening the ambit of Article 87(1) as it did in *Ferring* would appear to be to reduce the scope of, and need for, Article 86(2) in state aid cases. In *Ferring* itself the ECJ gave identical answers to the questions referred by the national court on the scope of Article 87(1) and 86(2). Thus if the measure truly compensates an undertaking for the extra cost of the public service obligation, it is not aid at all and there is no need to apply Article 86(2). On the other hand if the measures over-compensates the undertaking, it is aid and Article 86(2) cannot be relied on. It is difficult therefore to see what role is left for Article 86(2) in state aid law.

⁸ See Case T-46/97 *SIC v. Commission* [2000] ECR II-2125 and also the Commission's Communication on the application of State aid rules, to public service broadcasting.

Whatever the answer to that precise question, it is clear that recent case law, including *Ferring*, has increased the role of the national courts in state aid law by requiring them in many cases to consider issues of justification that had, in the past, been considered the sole prerogative of the Commission.

CHRISTOPHER VAJDA Q.C.
Monckton Chambers
4 Raymond Buildings
Gray's Inn
London
WC1R 5BP

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