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Articoli e saggi

An overview of the main issues set forth in the *Notice* on the notion of State aid: a new "code of conduct" for the States

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1. *Introduction*

The EU regulation on State aid consists of a set of rules aimed at discouraging economic support in favour of public and private undertakings[1] and setting out the objectives for promoting competition[2].

Public aid has always assumed a negative value because it is considered to be a factor of distortion of competition and a «barrier to the construction of the common market»[3].

[1] D.M. Harrison, *The Organization of Europe. Developing a Continental Market Order*, London-New York, 1995, 76 ss.; E. Triggiani, *Aiuti di Stato (dir. Un. Eur.),* in *Enc. Dir.* – Annali, vol. VI, 2013, 19 ss.; G. Luchena, *Gli aiuti di Stato*, in A. Uricchio, V. Peragine, M. Aulenta, *Manuale di scienza delle finanze, diritto finanziario e contabilità pubblica,* Molfetta (Ba), 2017, 555 ss.

[2] E.G. Stuart, *Recent Developments in EU Law and Policy on State Aids*, in *Economic Law Review,* n. 4, 1996, 226; C. Buzzacchi, *Gli aiuti di Stato tra politica della concorrenza e politica sociale,* in *Dir. Econ.,* n. 3/4, 2004, 623; M. Dony, *Le controle des aides d'ètat. Soixante ans de montée en puissance,* in *Revue de l'Union Européenne*, n. 618, 2018, 267 ss.

[3] J.L. Da Cruz Villaça, T. Aragao Morais, *Competition Policy and State Aids to Undertakings*, in E.A. Raffaelli (ed.), *Antitrust between EC Law and National Law*, Treviso, 15/16 May 1997, Bruxelles-Milano, 1998, 325.

Nevertheless, assigning public aid to private undertakings (or even under public control) is not a prohibited practice *tout court,* because some forms of economic support to undertakings can be allowed under certain conditions. Eligible State aid must satisfy, *inter alia*, a common interest or fulfil the aim of correcting market failures, or enhancing the competitiveness of undertakings at a European level, or promoting economic and social cohesion[4], one of the principles which the EU system is based on.

And yet, the variety of forms constituting "aid"[5] calls for great caution from the Commission's control activities. By means of its action, the Commission is capable of directing State conduct, acting as an arbitrator amid the "Internal" policies and the "European" ones.

Arguments between the Member States and the Commission in this area of competition law may, therefore, often occur, because the instruments through which the aid policy is implemented include the quantitative reduction of support measures for undertakings and very rigorous forms of control, basically based on an economic approach[6].

The Commission's control, both preventive and succeeding, on the other hand, does not reduce in a definitive way the capacities of State intervention in the economy. Hence, the point is: defining the relationship/compatibility between the European interest in "protecting" competition and the public governance of the economy.

From this viewpoint, the Commission considers compatible with the EU law the "common objectives" or "interests" pursuing aid policies. On the one hand, the protection of competition, and, on the other, the typical State objectives, including the implementation of certain services of general economic interest[7], the strengthening of measures for economic, territorial and social cohesion[8] and the promotion of employment policies.

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[4] A. Evans, *Law, Policy and Equality in the European Union: the Example of State Aid Control,* in *Economic Law Review*, 1998, 435.

[5] G.M. Roberti, *Gli aiuti di Stato nel diritto comunitario*, Padova, 1997, 97 ss.; C. Pinotti, *Gli aiuti di Stato alle imprese nel diritto comunitario della concorrenza*, Padova, 2000, 27 ss.; F.G. Wishlade, *Regional State Aid and Competition Policy in the European Union*, The Hague, London, New York, 2003, 5 ss.; A. Palazzo, A. Sassi, R. Cippitani, *Diritto privato del mercato*, Padova, 2007, 429 ss.; B. Lubrano, *Le sovvenzioni nel diritto amministrativo. Profili teorici ed evoluzione storica nel contesto del diritto europeo*, Torino, 2008, 59 ss.; L. Hancher, *The General Framework*, in L. Hancher, T. Ottervanger, P.J. Slot, *Eu State Aids*, 4th edition, London, 2012, 50 ss.

[6] G. Luchena, *Le incentivazioni economiche alle imprese tra politiche statali e decisioni comunitarie,* Bari, 2012, 18.

[7] C. Buzzacchi, cit., 640.

[8] J. Batchtler, R. Michie, *Strengthening Economic and Social Cohesion? The Revision of the Structural Funds,* in *Regional Studies*, vol. 28, 1994, 789 ss.; A. Claroni, *Le politiche di coesione*, in S. Cassese (dir.), *Trattato di diritto amministrativo. Diritto amministrativo speciale,* IV, Milano, 2003, 3793 ss.; J.R. Cuadrado-Roura, R. Garrido-Iserte, M.A. Marcos, *Economic and Social Cohesion in the EU: a critical approach,* ERSA conference papers, European Regional Science Association, available online at: www-sre.wu.ac.at/ersa/ersaconfd/ersa04/

2. *Coordinating State aid policies*

The Commission, in its role of co-ordinating State aid policies, demands from governments the rationalization of their policies and will, therefore, urge them to eliminate, or reduce, those aid tools that may trigger a "greater distortion" of competition[9]. For example, strengthening economic analysis is one of the primary objectives for assessing aid compatibility[10] as clarified in the State Aid Action Plan (SAAP)[11]: the «refined economic approach» "authorizes" the Commission to carry out a very "penetrating" control over State aids so that, in a certain sense, it encroaches State prerogatives. This is a control, which, although carried out according to technical criteria, invariably includes political criteria: which, at least formally, does not fall within the Commission's tasks.

The action of the "European" coordination takes into account all the factors that, for example, can generate incentives for economic growth. Under this perspective, policies aimed at strengthening strategies to encourage research and development[12], technological innovation or the provision of efficient and high-quality services of general economic interest[13] are considered to be consistent with the open and competitive market principle.

Prohibition and waivers represent two sides of the same coin. The first side confirms the principle that, in order to protect the functioning of the market, it is necessary to carry out an incisive control over state financing to enterprises, in terms of co-ordination; the latter would give the chance to give back to the States certain intervention powers deriving from the *General Block Exemption*

PDF/657.pd; P. Maystadt, *The Economic, Social and Territorial Cohesion in the European Union,* in BIATEC, vol. XIII, 8/2005, 2 ss., avalibale online at: *www.nbs.sk*; JA. Di Stefano, *L'amministrazione della coesione economica e sociale e territoriale tra* legitimacy *e* legal accountability: *il ruolo del partenariato territoriale*, in *Riv. giur. Mezz.*, n. 3, 2014, 417 ss.; G. Luchena, *La selettività geografica nelle leggi di incentivazione economica alle imprese: il caso delle agevolazioni fiscali nelle zone franche urbane*, in *www.osservatorioaic.it*, 6 giugno 2016.

[9] M. Parish, *On the Private Investor Principle*, in *European Law Review*, 2003, 80.

[10] K. Mause, F. Gröteke, *An Economic Approach to European State Aid Control: A Politico-Economic Analysis,* in *Journal of Industry, Competition and Trade*, vol. 17, Issue 2, 2016, 185 ss.

[11] European Commission, *State Aid action plan – Less and better targeted State aid: a roadmap for State aid reform 2005-2009,* COM/2005/0107 final.

[12] European Commission, *Framework for State aid for research and development and innovation,* (2014/C 198/01).

[13] European Commission, *Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest,* 2012/C 8/02.

Regulation (GBER), concerning State aid exempted from prior notification (Reg. 651/2014[14] as amended by Reg. 1084/2017[15]) .

The State aid modernization project provides for an ambitious programme and contains guidelines concerning, *inter alia*, the reform of the *de minimis* regulation, the approval of the new norms supporting the exemption regulation, the drafting of a series of guidelines such as regional aids, environmental aids, risk capitals, research, development and innovation and broadband. The GBER has the objective of simplifying State aid procedures and expanding the category of aid exempted from prior notification to the Commission. With the new exemption regulation, the reduction in the percentage of aid subject to prior checking by the Commission should be accomplished. To achieve this aim it will be necessary to establish a closer cooperation between Community authorities and Member States, in accordance with the provisions of art. 4 TEU, which will require a new *method* based on the creation of a permanent network. With this approach, a smaller amount of aid should be allocated to a broader range of beneficiaries, in order to allow for a more extensive distribution of public resources – with special attention for the system of small and medium-sized enterprises and to certain forms of social interventions. Reg. n. 651/2014 has a very broad scope: regional aid, SMEs[16], environmental protection aids, research, innovation and development promotion, employment, territorial social assistance to communities affected by natural disasters, support for local, sporting and broadband infrastructures, culture and heritage preservation.

Despite the common *a-priori* critique to the excessive presence of the State in the economy, it appears obvious that economic booster state policies could contribute to the development of competition also through public aid policies, as these cannot always be considered as detrimental to the competitive dynamics.

Moreover, the long experience of the Commission and the jurisprudence of the Court of Justice enable Countries to prepare aid measures that potentially will not clash with the European Union law. It should be noted that aid to large enterprises will most likely attract Commission's attention, and in fact it is

[14] Commission Regulation (EU) no. 651/2014 of June 2014 *declaring certain categories of aid compatible with the internal market in application of Article 107 and 108 of the Treaty*, OJ L 187 26.6.2014. On this regard, see M. Berghofer, *The General Block Exemption Regulation: A Giant on Feet of Clay,* in *European State Aid Law Quarterly*, n. 3, 2009, 232 ss.; D. Ferri, *The New General Block Exemption Regulation and the Rights of Persons with Disabilities: Smoke without Fire?,* in *European State Aid Quarterly,* n. 1, 51 ss.; L. Tebano, *State Aid for Employment after the New General Block Exemption Regulation,* in *European State Aid Law Quarterly*, n. 2, 2015, 241 ss.

[15] Commission Regulation (EU) 2017/1084 of 14 June 2017 *amending Regulation (EU) no. 651/2014 as regards aids for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No. 702/2014 as regards the calculation of eligible costs*, OJ L 156, 20.6.2017.

[16] T. Rensmann, *Small and Medium-Sized Enterprises in International Economic Law*, Oxford, 2017.

becoming increasingly significant that small aid actions are more numerous today compared to the past.

3. *Correcting market failures only?*

Common interests of economic and social nature may lead the State to address its policies in the direction of economic growth, turning its action towards development policies both of the EU Countries and of Europe as a whole. In this specific context, therefore, despite some criticism on the elusive features of the EU discipline, State aid can be considered as necessary, if not essential, and in any case "compatible" in the EU in order to cope with the legitimate needs of implementing domestic economic policies, even if under a "European harmonization".

Some forms of state intervention can facilitate access to the market, promote technological development and implement policies to support employment (in terms of job creation); at the same time, social interventions and redistribution of wealth should not be seen as a threatening re-edition of economic planning models, but as the redefinition and reformulation of the state regulatory potential in the economy when social and economic needs compel the State, in compliance with constitutional provisions, to take non-neutral positions.

Under the terms established by Article 107 (3) of the Treaty on the Functioning of the European Union, the Commission may consider that the conditions for authorizing the incentive by the State, in particular in the field of social policies, are met. If it is true that a disproportionate system of aid could lead to distortions of competition, it is also true that the role of the State is necessary in reducing inequalities and in pursuing public policies focused on raising youth employment rates, investing in relational goods, eliminating or reducing the economic gaps between different European areas. The so-called horizontal objectives may help the States to better identify their interventions, for example by implementing policies to reduce inequalities or to protect the environment or to promote social policies.

The relationship between the principle of incompatibility pursuant to Article 107(1), of the TFEU and the norms that define the *de iure* compatibility[17] and the conditioned or *potential* aids[18] [Article 107 (2 and 3), TFEU] should not be considered as separate norms but structured as a whole, being both the prohibition and the derogations functional to the aims of the Treaty.

[17] C. Buzzacchi, cit., 626.

[18] G. Di Gaspare, *Aiuti pubblici*, in E. Picozza (ed.), *Dizionario di diritto pubblico dell'economia*, Sant'Arcangelo di Romagna, 1998, 24.

On the one hand, there is a need for market rules not to be distorted, but on the other, it would be difficult to deny the state relevance of policies aimed at eliminating, or at least diminishing, development gaps between different territories or economic sectors. These interconnected provisions basically ensure that the conditions for access, implementation and market regulation are equally guaranteed at the European level.

The European Union plays an increasingly significant role as a direct lender of certain sectors or geo-economic areas, for purposes related to internal economic and social cohesion through the Structural Funds[19] (which, however, does not exclude that the granting of public aid from the Funds must comply with the provisions on "aid").

By so doing, the Commission, on the one hand conditions or at least monitors the choices regarding the provision of incentive measures, and on the other, authorizes the provision of aid, assuming, in a certain sense, the role of "political" guide of economic development, which, to some extent, would leave many margins of appreciation to the state in relation to the lines of economic policies.

In addition, it should be borne in mind that public aid policy must not be separated from other "European" ones such as harmonious, sustainable and balanced economic development actions and the already mentioned economic and social cohesion.

Yet, one of the problems arising from the concrete application of the rules set by Article 107 (1) is the definition of state aid[20].

4. *A brief description of the Notice*

Recently, the *Notice on the notion of State aid*, adopted on 19 May 2016, provides information to Member States on the consolidated practice of the European Commission and the Court of Justice on the matter[21]. It is a fragment of the mod-

[19] A. Evans, *The E.U. Structural Funds*, Oxford, 1999, 14.

[20] M. Slotboom, *State Aid in Community Law: a Broad or Narrow Definition?,* in *European Law Review,* 1995, 290 ss.; M. Schutte, J.P. Hix, *The application of the EC State Aid Rules to Privatization: the East German Example,* in *Common Market Law Review*, 1995, 222 ss.; C. Pinotti, cit., 21 ss.

[21] European Commission, *Commission Notice on the Notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union*, OJ C 262, 19.7.2016. See, G.M. Galletti, A. Biondi, O. Stefan, J. Buendia Sierra, *"Comments on the Draft Commission Notice on the Notion of State Aid Pursuant to Article 107(1) TFEU"*, available online at*: http://ec.europa.eu/competition/consultations/2014_state_aid_notion/uk_cel_en.pdf;* G.S. Olykke, *The Notice on the Notion on State Aid and Public Procurement Law,* in *European State Aid Law Quarterly*, n. 4, 2016, 508 ss.; E. Erdos, B. Gergely, *State Aids Connection With Tax Competition Regarding The Principle Of Subsidiarity In The European Tax Law*, in *The Juridical Current*, Petru Maior University, Faculty of Economics Law and Administrative Sciences and Pro Iure Foundation, vol. 70, 2017, 107 ss., available online at: https://ssrn.com/abstract=2924954; A. Biondi, O. Stefan, *The Notice on the Notion of State*

ernization policy[22] adopted by the Commission in order to contribute to a more transparent and more consistent application of the notion of State aid across the Union. This *document* specifies that the Commission is self-bound in applying the *Notice* especially when complex economic assessments are concerned.

The Treaty does not define the notion of State aid[23] but it outlines its essential characteristics in order to reduce the field of application of the legal norms concerning State aids[24]. This grants the Commission a wide discretionary power[25] in determining what is meant by *State aid,* thus enforcing a broad notion of state aid[26]. The Court of Justice takes a rather minimalist approach to the decisions of the Commission[27]. This is not to minimize the role of the Court of Justice which, on the contrary, has contributed to define many of the constituent elements of State aids, as it is made clear by analysing the *Notice*. Every point of the *Communication* is enriched by the developments made by the Court of Justice with its creative approach to the decisions in this field of competition law.

The *Notice*, however, considers the notion of State aid as «an objective and legal concept defined directly by the Treaty» and clarifies the interpretations of Article 107 (1) TFEU by the Commission, as interpreted by the Court of justice and the General Court[28].

The *Notice* is a true *summa* of the variety of cases examined in an almost sixty years of practice by both the Commission and the Court of Justice. In other

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Aid: every light has its shadow, King's College London Dickson Poon School of Law, Legal Studies Research Paper Series, Paper no. 2017.18, available online at: http:/ssrn.com/abstract=2924954.

[22] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions UE State aid modernization (SAM),* COM/2012/0209 final. See, on this regard, C. Schepisi (ed.), *La "modernizzazione" della disciplina sugli aiuti di Stato. Il nuovo approccio della Commissione europea e i recenti sviluppi in materia di public e private enforcement*, Torino, 2011; C. Quigley, *The European Commission's Programme for State Aid Modernization,* in *Maastricht Journal of European and Comparative Law,* n. 1, 2013, 35 ss.; H. Jennings, *State Aid Modernization – Trying to Do More with Less*, in *CPI Antitrust Chronicle*, n. 2, 2014, 2 ss., available online at: *www.competitionpolicyinternational.com*; V. Di Bucci, *The modernization of State aid control and its objectives: clarity, relevance, effectiveness,* in *Italian Antitrust Review*, n. 3, 2014, 7 ss., available on line at: *www.iar.agcm.it*; A. Gjevori, *Modernization of EU State Aid procedures: are the third parties more protected?*, in *Juridical Tribune*, vol. 5, Issue 2, 2015, 54 ss.

[23] C. Quigley, *The Notion of State Aid in the EEC*, in *European Law Review*, 1988, 242 ss.; K. Bacon, *State Aids and General Measures,* in *Yearbook of European Law,* vol. 17, 1997, 269 ss.; T. Ballarino, L. Bellodi, *Gli aiuti di Stato nel diritto comunitario*, Napoli, 1997, 24; J.L. Da Cruz Villaça, T. Aragao Morais, cit., 326; C.E. Baldi, *La disciplina comunitaria degli aiuti di Stato. Manuale critico ad uso delle amministrazioni e delle imprese,* Sant'Arcangelo di Romagna, 2017, 21 ss.

[24] E. Triggiani, *Spunti e riflessioni sull'Europa*, Bari, 2015, 143.

[25] Judgment of the Court of Justice of 17 September 1979, Philip Morris Holland BV v. Commission, C-730/79; Judgment of the Court of Justice of 14 January 1997, Spain v. Commission, C-169/95; Judgment of the Court of Justice of 12 December 2002, C-456/00.

[26] A. Antonucci, *Gli "aiuti di Stato" al settore bancario: le regole d'azione della regia della Commissione*, in *Studi sull'integrazione europea*, n. 3, 2018, 3, 589.

[27] J.Y. Cherot, *Les aides d'État dans les Communautées européennes*, Paris, 1998, 64.

[28] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 3.

words, it is a sort of catalogue of all possible situations that may occur with reference to State aid. It is also worth mentioning that the *Communication* «is considered to be the definitive expression of the Commission's position on what constitutes State aid»[29]. That's the reason why it must be "read" and applied, for example, in the light of the previously cited GBER.

It must also be pointed out that the *Notice* formally replaces former Communications[30] concerning aids to public undertakings in the manufacturing sector[31], State aid elements in sales of land and buildings by public authorities[32], the application of the State aid rules to measures relating to direct business taxation[33] and «any opposing statements relating to the notion of State aid included in any existing Commission Communications and Frameworks, save for statements pertaining to specific sectors and justified by their particular features»[34].

5. *Some considerations about the practical effects of sotf law in the field of State aids*

Some considerations may be made concerning the soft law character of the *Notice*.

It must be pointed out that the EU Court of Justice has held that a Communication[35] cannot be regarded as devoid of legal effects, given that it expresses the way in which the Commission will exercise its discretionary power[36].

Moreover, the rules of soft law[37] are not assumed on the basis of a "normal" procedure established by the legal system and it is for this reason that one can doubt about its legal value. Soft law does not impose binding solutions, but

[29] P. Nicolaides, *State aid undercovered. Critical analysis of developments in State aid 2016*, Berlin, 2017, 13.

[30] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 229.

[31] European Commission, *Commission Communication to the Member States 93/C-307/03 on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector*, OJ C 307, 13.11.1993.

[32] European Commission, *Commission Communication on State aid elements in sales of land and buildings by public authorities*, OJ C 209, 10.7.1997.

[33] European Commission, *Commission Notice on the application of the State aid rules to measures relating to direct business taxation*, OJ C 384, 10.12.1998.

[34] European Commission, *Commission Notice on the Notion of State aid as,* cit., paragraph 230.

[35] F. Cherubini, *Le decisioni nel sistema delle fonti dell'ordinamento europeo*, Bari, 2018, 9 ss.

[36] Judgment of the Court of Justice of 17 September 1979, Philip Morris Holland BV v. Commission, C-730/79; Judgment of the Court of Justice of 21 November 1991, Fédération nationale du commerce extérieur des produits alimentaires et Syndacat national des négotiants et tranformateurs due saumon v. France, C-354/90; Judgment of the Court of Justice of 15 May 1997, Siemens SA v. Commission, C-278/95.

[37] F. Snyder, *Soft law and Institutional Practise in The European Community,* in S. Martin, *The Construction of Europe: Essays in honour of Emil Noël,* Dordrecht, 1994, 198 ss.; B. Boschetti, *Soft law e normatività: un'analisi comparata*, in *Rivista della regolazione dei mercati,* n. 2, 2016, 32 ss.; A. Algostino, *La soft law comunitaria e il diritto statale: conflitto fra ordinamenti o fine del conflitto democratico?*, in *www.costituzionalismo.it,* 3, 2016.

draws on the background possible solutions for possible conflicts, relying on the voluntary adhesion of the subjects that could possibly benefit from them. The action of the legislator is broadly restricted, thus giving the judges a broad regulatory power. In many cases, in fact, certain state aid regulations derive from the case law of the EU Court of Justice.

Ultimately, in the area of state aid, this mode of production of law is used too unevenly. Of course, Communications can cope with unexpected and particularly serious economic and social conditions, given that they are taken up quickly. Soft law can be considered adequate to manage the contemporary reality and it represents one of the possible manifestations of *ius publicum* considering that, even if in atypical forms, it is "controlled" and made effective by the Public bodies.

These considerations have a particular significance in the case of European Union law. Many interventions were necessary, for example, during the economic crisis, especially as far as bank aids is concerned[38]. The use of the Communications reflects a tendency that, in truth, has manifested itself for long years.

Indeed, the *Notice* was not approved in an emergency situation but as a stage of the process of "modernization" started a few years ago. The Communication assumes, therefore, a significant value for some potentially innovative content. There are, for example, parts of the *Notice* dealing with topics in which there is still no consolidated case law but an administrative practice in a sort of process of consolidation of the regarded discipline. It is as if there is a transitional regulation which States must comply with, pending further specifications coming from the Court of Justice.

We can say that soft law (and so the *Notice* itself) is not a (totally) non-law area and certainly it is rich of political and practical effects[39]: in a certain sense soft law has integrated and went over hard law because, above all, the identity of the producer of soft law and hard law overlaps; that's why they are perceived as binding[40].

In general, the Communications on State aids «tend to assume an authoritative interpretative function or even a regulatory role»[41], especially for reasons of legal certainty and protection of legitimate expectations. For these reasons, even the *Notice* can be placed amongst those soft law regulations that respond to the

[38] G. Lo Schiavio, *State Aids and Credit Institutions in Europe: What Way Forward?,* in *European Business Law Review,* vol. 25, n. 3, 2014, 447 ss.; A. Canepa, *Il difficile equilibrio fra concorrenza e aiuti di Stato nella crisi: ruolo e scelte della Commissione nel settore bancario*, in *www.amministrazioneincammino.luiss.it,* 15 July 2016.

[39] L. Senden, *Soft Law in European Community Law,* Oxford, 2004, 112.

[40] M. Barberis, *Europa del diritto. Sull'identità giuridica europea*, Bologna, 2008, 278.

[41] U. Villani, *Istituzioni di diritto dell'Unione europea,* Bari, 2016, 317. Since the *Grimaldi* ruling, the Court of Justice has held that national courts must take into account non-binding Community acts for the correct application of European Union law: see Judgment of the General Court of 13 December 1989, C-322/88, paragraph 18.

practical need to direct and constrain States and undertakings to a notion of aid defined as objective. Thus, over time, the Communication will increasingly be perceived as binding, in fact overlapping the hard law, and even surpassing it.

6. *The origin of the measure: a broad notion of State and the meaning of "State resource"*

Aid policies originating within the State have two separate and accumulative conditions, even if sometimes they are treated as a single whole.

First of all, the criterion of responsibility or subjectivity must be considered. «In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State, even if the authority in question enjoys legal autonomy from other public authorities. The same applies if a public authority designates a private or public body to administer a measure conferring an advantage»[42].

Any aid whose nature appears to be originally as *public* (central, regional or local governments, public authorities or private bodies established by the State to administer the aid[43]) determines its status as State aid. Part of the "public sector" will be any institution established by the law of a Member State falling under the supervision and guarantee of the legislative authority[44]. For example, the presence of the State in the economy, in its capacity of owner or controller of enterprises operating in the market, is one of the most sensitive factors monitored by the Commission.

Many more difficulties may arise when «an advantage to a beneficiary is granted through public undertakings»[45]. Since relations between the State and the undertakings are necessarily close, the risk of a non-transparent activity is quite real. Some indicators may help the Commission to check the imputability criterion: the body in question could not take the contested decision without taking into account the requirements of the public authority; there must be an organic link between the public undertaking and the State; the public undertaking follows the directives issued by the governmental bodies; the integration of the public undertaking into the structures of the public administration; the

[42] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 39. This statement is basically based on the Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, paragraph 62.

[43] C. Blumann, *Régime des aides d'État: jurisprudence récente de la Cour de Justice,* in *Revue du Marché Unique et de l'Union Européen,* 1992, 725; J.L. Da Cruz Villaça, T. Aragao Morais, cit., 329.

[44] A. Saggio, *L'attività del Tribunale di primo grado nel 1996,* in *Riv. Dir. Eur.,* 1997, 302.

[45] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 40.

nature of the public undertaking's activities and their exercise on the market in normal conditions of competition with private operators; the legal status of the undertaking cannot be regarded as sufficient reason to exclude imputability; the degree of supervision exercised by the public authority; any other indicator that shows the involvement of the public administration in participation at the decision[46]. Hence, the criterion of imputability to the State must be intended in a broader sense, being the legal nature of the body irrelevant[47].

The notion of "State resource"[48] refers to any resource deriving directly or indirectly from the public sector[49]. «A government measure [always] represent[s] a charge on the public account»[50]: this viewpoint enlarges the spectre of the "resource", thus «including resources of intra-State entities (decentralised, federated, regional or other) and, under certain circumstances, resources of private bodies, for example any voluntary private contribution because the relevant factor, in this case, «is not the origin of the resources but the degree of intervention of the public authority within the definition of the measure and its method of financing»[51]. This specifies that the Commission will most likely take into account the relevance/incidence of the effects of the measure as a potential distorting element of the market[52].

A State resource may take on many forms: a direct grant, loans, guarantee, direct investments in the capital of companies and benefits in kind. «Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources»[53]. The notion, moreover, covers measures ordained by the State «because land is sold below its market value or a loan is given at a rate of interest that falls below the market rate»[54]. A shortfall in tax and social security revenue due to the exemption or reduction in taxes and social security contributions granted by the State or exemption from the obligation to pay fines or other penalties is considered to be a State aid. See, for example, the *Ecotrade* and *Piaggio* cases, in which the Court of Justice points out that when there are derogations

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[46] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 43.

[47] M. Orlandi, *Gli aiuti di Stato nel diritto comunitario*, Napoli, 1995, 237 ss.

[48] G. Carullo, *State resources in the case law: imputability under an organizational perspective*, in *European State Aid Law Quarterly*, n. 3, 2013, 453 ss.; S. Klinkmüller, *Of Surcharges and Supervision: German Renewable Energy Act is State Aid,* in *European Papers,* Vol. 1, 2016, n. 3, 1055 ss.

[49] Judgment of the Court of Justice of 10 December 2013, *Commission* v *Ireland and Others*, C-272/12 P, paragraphs 45 to 53.

[50] M. Slotboom, *State Aid in Community Law: a Broad or Narrow Definition?,* in *European Law Review*, 1995, 291.

[51] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 58. See Judgment of the Court of Justice of 17 July 2008, *Essent Netwerk Noord*, C-206/06, paragraphs 58 to 74.

[52] M. Slotboom, cit., 296.

[53] European Commission, *Commission Notice on the Notion of State aid,* cit.*,* paragraph 51.

[54] P. Nicolaides, cit., 15.

concerning the insolvency rules, there can be an additional burden for the State[55]. The case of the derogation from employment law provisions can also be cited, as stated in some decisions made by the Court of Justice such as *Viscido* and *Kirshammer-Hack*: in both cases the derogation is not considered to be a transfer of state resources[56].

In short, the substantial aversion of the Commission towards any presence of the State in economic activities is highlighted. The broad notion of State indicates that any suspicion of public interference may result in a negative assessment. It is known that the principle of social market economy accepted in the European treaties presupposes the state neutrality in the economic field: the discipline of State aids is a faithful fulfilment of that. In this sense, the *Notice* seems not to add anything new to these issues, given that the position of the State is increasingly marginal.

The State, however, is invoked every time there are situations of crises. The aid measure is easily found and hopefully requested: in the case of aid to the banks, in fact, few doubts have been raised as to their necessity. The State that saves from market failures is still an auspice and sometimes the only life anchor of situations that can cause social crises[57].

7. *Taking advantage: the market economy investor principle*

An economic advantage granted to enterprises by any public authority is another element of the notion of State aid[58], considering that they have obtained support not under normal market conditions.

According to the objectives of the Treaty, neither the cause nor the objective of the State is relevant, but the effect provoked by the measure. It is also important to underline that «not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage»: this «covers all situations in which economic operators are relieved of the inherent costs of their economic activities»[59]. «The exis-

[55] Judgements of the Court of Justice of 17 June 1999, *Piaggio* C-295/97 and 1 December 1998, *Ecotrade*, C-200/97. See G. Luchena, *Aiuti pubblici e vincoli comunitari*, Bari, 2006, 52 ss.

[56] Judgment of the Court of Justice of 7 May 1998, *Viscido et al.*, Joined Cases C-52/97, C-53/97 and C-54/97; Judgment of the Court of Justice of 30 November 1993, *Kirshammer-Hack*, C-189/91.

[57] G.M. Polito, *Prove generali di bail-in: il caso delle banche italiane,* in *www.eurojus.it,* 13.2.2016.

[58] R. Plender, *Definition of Aid*, in A. Biondi, P. Eeckhout, J. Flynn (ed.), *The Law of State Aid in the European Union,* Oxford, 2004, 5.

[59] European Commission, *Commission Notice on the Notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union*, paragraph 68.

tence of advantage is established by comparing the situation of an undertaking before and after state intervention in the context of a single Member State»[60].

It is worth mentioning that, in the light of the *market economy investor principle*[61], it is assumed that there is a suspected State aid in the event that no rational justifications give good reason for the allocation of public funds, which implies, consequently, that the control must be conducted on the basis of the same parameters used, in fact, by a private investor or a market economy agent[62].

To identify the State aid, the *market economy operation test* is employed, which includes both the private creditor and the vendor test.

These tests are basically based on the fact that the aim of a market operator is to obtain profits or to maximize returns from any investments or to reduce losses from a past investment[63]. The role of the State is irrelevant when it acts as a public authority.

The *ex ante* examination is the first step to evaluate if the State intervention is in line with market conditions. «In fact, any prudent market economy operator would normally carry out its own *ex-ante* assessment of the strategy and financial prospects of a project», for example through a business plan[64].

The State will need to prove that the decision was taken on the basis of an economic evaluation comparable to that of a private actor, in determining the profitability or the economic advantage of the operation.

The evaluation of the operation is made through a series of indicators.

A) Market information directly concerning the operation itself, so that the market conditions may easily be determined.

1) The *pari passu* transactions aim at considering if a transaction is made under the same terms and conditions by public bodies and private stakeholders. To focus on this kind of transaction, it is necessary to assess four criteria: «whether the intervention of the public bodies and private actors is decided and carried out at the same time or whether there has been a time lapse and a change of economic circumstances between those interventions; whether the terms and conditions of the transaction are the same for the public bodies and all private players involved, also taking into account the possibility of increasing or decreasing the

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[60] P. Nicolaides, cit., 17.

[61] H.J. Niemeyer, *State Aids and European Community Law*, in *Michigan Journal of International Law,* vol. 15, issue 1, 1993, 193 ss.

[62] A. Sanchez Graells, *Bringing the "Market Economy Agent" Principle to Full Power,* in *European Competition Law Review,* 2012, 470 ss.

[63] P. Nicolaides, cit., 17.

[64] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 78; Judgement of the Court of Justice of 5 June 2012, Commission v EDF, C-124/10 P, paragraphs 82, 105; P. De Luca, *Il criterio dell'investitore privato in economia di mercato. Il caso Commissione c. Élecricité de France (EDF),* in *Mercato concorrenza regole*, n. 3, 2012, 518 ss.

level of risk over time; whether the intervention of the private operators has real economic significance and is not merely symbolic or marginal; whether the starting position of the public bodies and the private operators involved is comparable with regard to the transaction, taking into account, for instance, their prior economic exposure *vis-à-vis* the enterprises, bearing in mind the possible synergies which can be achieved, the extent to which the different investors will bear similar transaction costs, or any other circumstance specific to the public body or private stakeholder which could distort the comparison»[65].

2) If the operation of sale and purchase of assets, goods and services is made through a transparent and non discriminatory procedure, it is considered to be in line with market conditions and above all in line with the principles of public procurement.

B) Another method of assessment is the benchmarking. It seldom gives accurate reference values, but it can establish a range of possible values by assessing a set of comparable transactions[66].

Finally, the notion of indirect advantage should be considered, when «present if the measure is designed in such a way as to channel its secondary effects towards identifiable undertakings or groups of undertakings»[67].

8. *Selectivity: reducing the policies of the States*

State aid intervention can be classified as irregular if it results from the application of derogation from a general provision. Here, a major element in recognizing a State aid takes on great significance, namely selectivity[68].

Partial exemption from the payment of certain social security contributions for undertakings in a given industrial sector is considered "aid" because this mea-

[65] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 87.

[66] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 100.

[67] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 116.

[68] J.L. Da Cruz Villaça, T. Aragao Morais, cit., 331; C. Pinotti, cit., 43 ss.; W. Sauter, H. Vedder, *State Aid and Selectivity in the Context of Emissions Trading: Comment on the NOX Case,* in *European Law Review*, 2012, 327 ss.; M. Prek, S. Lefévre, *The Requirement of Selectivity in the Recent Case-law of the Court of Justice,* in *European State Aid Law Quarterly,* 2012, 337 ss.; A. Biondi, *State Aid is Falling Down, Falling Down: an Analysis of the Case Law in the Notion of Aid,* in *Common Market Law Review*, 2013, 1732 ss.; F.L. Pace, *Gli aiuti di Stato in materia fiscale e le conseguenze della violazione dell'art. 108, § 3 TFUE (Diritto UE),* in F.L. Pace (ed.), *Dizionario sistematico del diritto della concorrenza*, Napoli, 2013, 616-619; A. Giraud, S. Petit, *Tax Rulings and State Aid Qualification: Should Reality Matter?,* in *European State Aid Quarterly*, vol. 16, Issue 2, 2017, 233 ss.; A. Biondi, *Per una teoria della gravità selettiva: evoluzioni della giurisprudenza della Corte europea di giustizia in materia di aiuti fiscali*, in *Liber Amicorum in onore di Antonio Tizzano – De la Cour CECA à la Cour de l'Union: le long parcours del la justice européenne*, Torino, 2018, 126 ss.

sure allows beneficiaries to derogate from a general rule. The measure is aimed at favouring a given economic sector or an undertaking.

Ultimately, it is the derogation from a general rule that integrates the selectivity of the aid, which is precisely because it is abnormally granted by the public authority. The Commission has, moreover, mitigated the narrow scope of application of this rule by specifying how such a derogation could possibly be admitted, particularly in tax matters, if it is justified by "economic rationality" so as to make it necessary or functional with respect to the effectiveness of the system as a whole.

As already made clear by the Court of Justice[69], however, the aid must have a "horizontal" nature and be based on objective elements, such as, for example, the unlimited duration and the wide scope of implementation. This conclusion also appears to be consistent with the principle of equality, according to which measures derogating from the formal equality criterion may be admitted, proving that the derogation is justified by the general objectives of the legal system and does not conflict with the system where it is applied (for example, taxation).

A behaviour that can be considered incompatible with the Treaty is the one caused by the intervention actions of the State operating as a seller on the market. The criterion of the abnormality of the measure is verifiable when the granting party provides substantial assistance in the preparation of goods or services in favour of undertakings so that they can be considered outside the rules of the market.

An emblematic case is that concerning the sale of land at a price that can also be considered abnormally low. This practice has often been used to favour the localization of undertakings in certain areas for the implementation of economic development, especially in geographically marked out areas.

The *Notice* makes a clear distinction between material selectivity and regional selectivity.

The material selectivity can be de established through the *de jure* or the *de facto* criterion. The former may result directly when certain legal criteria are formally reserved to certain undertakings: for instance, those having a certain size, active in certain sectors or having a certain legal form (companies incorporated or newly listed on a regulated market during a given period; companies belonging to a group having certain characteristics or entrusted with certain functions within a group; ailing companies; or export undertakings or undertakings performing export-related activities). The latter, instead, deals with the deduction of the effect determined by the structure of the measure, even if it is formally correct in terms of general and objective details[70] (a tax credit or a measure granting advantages even for a brief period of time).

[69] Judgements of the Court of Justice of 2 July 1974, *Italy v Commission*, C-173/73.

[70] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 121.

The various "forms" of selectivity have made this notion quite fluid and sometimes even variable to the point of becoming a true/autonomous element of control over state aids, especially tax aids[71]. For example, the option in favour of the criterion of the *ex post* identification of the beneficiary of the fiscal measure can be considered as a very broad one for the definition of selectivity.

In short, tax aid is particularly "observed" by the Commission because it can "hide" a selective measure behind the screen of a general one. It should be noted, however, that the extent of the definition of selectivity is likely to compromise more and more the fiscal autonomy of the member States. This trend is also confirmed in recent cases such as the *World Duty Free Group SA* judgement[72] in which the further extension of the scope of the regulation on State aid in "fiscal matters" seems to be noticed, in particular by focusing attention on the discriminatory nature of the measure[73]. The Commission and the Court of Justice agree on an idea of selectivity that seems to go beyond the borders of the notion of State aid: and, in fact, the fight against tax dumping and tax evasion transcends the discipline on State aid to the point of being able to foresee hypotheses of contrast with the legislation of the TFEU concerning the harmonization of national laws.

Privileging the *ex post* evaluation assigns an almost unlimited power to the UE authorities: although the member States tend to expand their sphere of intervention in the economy through the tax leverage, this should not extend the Control in such an invasive way as to avoid the adoption of promotional tax measures as a means of economic development[74]. The *Notice*, then, seems to "certify" a tendency to the enlargement, not always acceptable or satisfactory, of the notion of State aid through the use of selectivity as criterion, if not exclusive at least prevailing, for the purpose of checking the incompatibility.

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[71] J.H.J. Bourgeois, *State Aids, Taxation measures and specifity*, in *Mélange en honneur à Michel Waelbroek,* I, Bruxelles, 1999, 765 ss.; K. Bacon, *Differential taxes, State Aids and the Lunn Poly Case*, in *European Competition Law Review,* 1999, 348 ss.; W. Schön, *Taxation and State Aid in the European Law*, in *Common Market Law Review,* 1999, 911 ss.; P. Nicolaides, *Fiscal Aid in the EC. A Critical Review of Current Practise,* in *World Competition*, 2001, 319 ss.; L. Salvini (a cura di), *Gli aiuti di Stato in materia fiscale*, Padova, 2007; R. Grappiolo, *La valutazione delle misure fiscali di vantaggio: il ruolo della Commissione e degli organi giurisdizionali nazionali*, in A. Di Pietro, A. Mondini (a cura di), *Aiuti di Stato fiscali e giurisdizioni nazionali: problemi attuali. Atti e documenti del progetto di formazione e ricerca National Tax Judges and Fiscal State Aids,* Bari, 2015, 21 ss.

[72] Judgment of the Court of Justice of 21 december 2016, European Commission v. World Duty Free Group, formerly Autogrill Espana SA, Banco Santander SA, Santusa Holding SL, Joinde cases, C-20/15 P and C-21/15 P.

[73] G. Perotto, *La selettività negli aiuti fiscali: estensione della nozione e limiti alla discrezionalità fiscale nazionale,* in *European Papers*, vol. 2, 2017, n. 3, 1017 ss.

[74] A. Uricchio, M. Aulenta, G. Selicato (eds.), *La dimensione promozionale del fisco*, Bari, 2015.

9. *Effect on trade and competition or "the sensitive effect"*

An additional indicative criterion of the presence of public aid in contrast with the internal market rules is then identified in the impact of the measure on trade and competition.

In order to be able to ascertain the impact on trade it is necessary to verify whether the incentives have, first of all, national relevance (thus being able to exclude incompatibility) and, subsequently, if there are undertakings in the aided sector already operating under competition. Both the conditions mentioned above must be satisfied, that is the effects produced on a community basis and the existence of a competitive market in the sector in which the aided enterprise is located.

The Court of Justice, in fact, considers aid to be a financial intervention granted by the State to the undertaking, which strengthens its position in the market at the expense of other competitors of the latter in intra-Community trade. It is not, however, excluded that a measure to encourage exports to third countries can concretely threaten competition within the internal market[75].

If public aid were granted to support business ventures abroad, the assessment of the impact on trade should therefore be carried out by assessing the sustainability of the reference market, in particular taking into account the situation at the time the benefit is granted. This means that subsidized goods, which are not subject to import or export flows within the European Union, do not constitute aid.

The deduced criterion can therefore be defined as the *sensitive effect*. It is, indeed, to consider this rule as a reference point for all those situations, legally determined, which operate *ad excludendum* with respect to the prohibition of granting State aid. For example, the *de minimis non curat praetor* principle[76] (which allows for the granting of a small amount of financial benefit) is mainly aimed at supporting small and medium-sized enterprises: it allows both the exclusion from the quantitative compatibility check, as the effects of economic assistance do not threaten (at least *prima facie*) distorting competition, and the removal from the obligation of prior notification to the Commission, which admits, in this case, a presumption of compatibility with the internal market, although the Community case law has not totally ruled out that aid deemed to be of a negligible amount is capable of distorting, even potentially, intra-Community competition. This new approach follows the logic of a «more relaxed» control made by the Commission permitting the implementation of those measures

[75] Judgements of the Court of Justice of 21 March 1990, *Belgium v Commission,* C-142/87.
[76] E.G. Stuart, cit., 229.

at a national level because they «do not require any refined economic approach in its application»[77].

The minimum or quantitatively irrelevant amount would serve to return to the State certain forms of intervention, to be considered legitimate, in fact, connected to the exercise of economic policy. On the other hand, the equalizing function of the State with respect to serious situations of economic and social disadvantage remains an evaluation parameter left to the Community bodies, because it is better not to leave self-regulatory tasks to the States in a sector such as public aid "naturally" exposed to interference by political bodies. Consequently, even setting the minimum parameters for granting the aid, while appearing as a sort of political guarantee aimed at the individual States for the recovery of its reference values, should instead be regarded as a mere attribution of residual powers in favour of institutions providing public subsidies to businesses.

Hence, even a small amount of aid may affect trade between Member States. «A public subsidy granted to a firm which provides only local or regional services and does not provide any services outside its State of origin may nonetheless have an effect on trade between Member States where undertakings from other Member States could provide such services (also through the right of establishment) and that possibility is not merely hypothetical. For example, where a Member State grants a public subsidy to an undertaking for supplying transport services, the supply of those services may, by virtue of the subsidy, be maintained or increased with the result that undertakings established in other Member States have less of a chance of providing their transport services in the market in that Member State»[78].

The *Notice* also considers some of the cases in which the local impact has no effect on trade, in particular when the beneficiary supplies goods or services to a limited area and is unlikely to be a potential factor of attraction of other customers from the Member States[79].

The Commission has established that trade between Member States is not affected in the following cases: sports and leisure facilities serving predominantly a local audience; cultural events and entities performing economic activities; hospitals and other health care facilities providing the usual range of medical services aimed at a local population and unlikely to attract customers or investment from other Member States; news media and/or cultural products which, for linguistic and geographical reasons, have a locally restricted audience; a conference centre, where its location and the potential effect of the aid on prices is genuinely unlike-

[77] J.L. Buendìa Sierra, *"Small on Small": Towards a Two-Speed State Aid Control?*, in *European State Aid Law Quarterly,* n. 4, 2016, 501.

[78] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 192. Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, paragraphs 77, 78

[79] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 196.

ly to divert users from other centres in other Member States; an information and networking platform to directly address problems of unemployment and social conflicts in a predefined and very small local area; small airports or ports that predominately serve local users, thereby limiting competition for the services offered to a local level, and for which the impact on cross-border investment is genuinely no more than marginal; the financing of certain cable ways (and in particular ski lifts) in areas with few facilities and limited tourism capability[80].

10. *Infrastructures: the promoter/owner, the operators and the end-users*

The *Notice* also addresses the issue of infrastructures financed by public authorities, which can have an economic use. This is a novelty in the Commission's State aid framework: it is the first time that specific account is taken of public financial infrastructure activities, given the relevance it is assuming, especially in relation to growth-oriented interventions.

Indeed, even in the infrastructure sector there have been, in the past, assessments by the Commission concerning the characteristics of the single infrastructure, especially considering its economic management[81]. Furthermore, it should be said that the first possible indications of the presence of State aids for infrastructures can be found in the context of projects financed by the Structural Funds[82]. And, in fact, after 2012, some regulations concerning some infrastructures were, for the first time, regulated by the GBER[83] or by specific Communications.

It should be added that, perhaps, even the economic crises has played a non-secondary role in pushing the Commission to monitor a sector sensitive to State interventions motivated by the necessary support of the economic. In any case, the risk of a possible widening of the Commission's control should also be pointed out in areas where the presence of the State can not be considered neutral but, on the contrary, fundamental for the maintenance of a non-marginal role in its traditional and indispensable tasks. The development of mobility, for example, cannot be separated from State policies aimed at this goal.

The issue of the possible involvement of numerous subjects and of different forms of aid, in the context of an infrastructure project that can bring benefits to the construction, management or use of the infrastructure, is appropriately

[80] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 197.

[81] C.E. Baldi, cit., 475.

[82] European Commission, Commission Staff Working Document, *Guidance on State Aid in European Structural and Investment (ESI) Funds – Financial instruments in the 2014-2020 programming period,* 2.5.2017, SWD(2017) 156 final.

[83] See article 55 and following of the GBER.

addressed. In this regard, a distinction is made between the promoter/owner of a facility, the players and the end-users (the last two cases may overlap).

Infrastructures have been subtracted from the State aid framework as they are considered measures of public policy and not an economic activity. Consider, for example, military infrastructures, air traffic control facilities, lighthouses, navigation facilities, police, customs and so on that, by their nature, are not economic. However, in recent times, infrastructures have been allowed for commercial exploitation in the light of the processes of privatization and liberalization and, above all, technological progress. The Court of Justice has recognized that an infrastructure can be a form of economic activity, especially in the *Leipzig/Halle* judgement[84], which shows that the construction of a runway at a commercial airport is an economic activity. The above-mentioned judgement is also applicable to other activities, thus widening its scope.

Some measures are considered to be compatible with the provisions set by the Treaty because they do not affect trade between Member States, particularly local and municipal infrastructures, even if they are commercially exploited. Some of those cases are connected with the local catchment areas or the fact that cross-border investment is unlikely to affect trade more than marginally. The case can be cited of construction of local leisure installations, health care facilities, small airports or ports serving local users. The evidence is made, for example, by data showing that there is only limited use of the infrastructure from outside the Member State[85].

Moreover, «the Commission considers that an effect on trade between Member States or a distortion of competition is normally excluded as regards the construction of the infrastructure in cases where at the same time (i) an infrastructure typically faces no direct competition, (ii) private financing is insignificant in the sector and Member State concerned and (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large»[86].

With regard to aid to the promoter/owner (this notion includes any entity exercising the effective ownership rights over the infrastructure and enjoying the economic benefits thereof), a number of cases emerge in which infrastructure financing must be examined in the light of state aid legislation such as, for exam-

[84] Judgment of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others* v *Commission*, Joined Cases T-443/08 and T-455/08, paragraphs 93 and 94, upheld on appeal in Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* v *Commission*, C-288/11 paragraphs 40 to 43, 47; C.E. Baldi, cit., 332 ss.

[85] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 210.

[86] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 211.

ple, infrastructure for airport services[87] and port infrastructures (based on the decision-making practice from the Commission)[88].

Broadband infrastructures (with the exception of «closed networks» funding[89]) and energy infrastructure[90] are often built by private stakeholders, which demonstrates the existence of funding by the market and it is therefore normal that they are to be subjected to the rules on State aid. Public funding of research infrastructures is not subjected to State aid if it is intended for the performance of economic activities, but independent research for increasing knowledge and better understanding[91].

The stakeholders (undertakings who make direct use of the infrastructure to provide services to end-users, including undertakings which acquire the infrastructure from the developer/owner to exploit it economically or which obtain a concession or lease for its use and operation) «who make use of the aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions»[92].

If the end-users are granting an advantage to the users of the infrastructures, they will not be subjected to State aid rules, unless the terms of use comply with the market economic operator test that is making the infrastructure available to the users on market terms.

11. *Conclusions*

The notion of State aid, therefore, finds a precise and complete definition – but perhaps not ultimate, considering the possible evolution of other situations that may occur because of the fantasy of the States inventing new "forms" of aids

[87] Activities that are part of the State's tasks or activities such as air traffic control, rescue and fire services, customs services and activities necessary for the protection of civil aviation from illicit attacks are excluded (paragraph 214). See European Commission, *Communication from the Commission. Guidelines on State aid to airports and airlines,* OJ C 99, 4.4.2014.

[88] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 215.

[89] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 216.

[90] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 217.

[91] European Commission, *Communication from the Commission. Framework for State aid for research and development and innovation*, OJ C 198, 27.6.2014, recitals 17 et seq.; K. Rutkiewicz, *State aid for research, development and innovation in the European Union competition policy,* in *Economia i Prawo*, vol. 14 (1), 2015, 19 ss., available online at: https://ideas.repec.org; A.A. Ambroziak, *Recent Changes and Developments in State Aid for Research, Development and Innovation in the European Union,* in *The Central European Journal of Social Sciences and Humanities*, n. 4, 2016, 73 ss., available online at: http://www.ce.uw.edu.pl/program-wydawniczy/kwartlnik/.

[92] European Commission, *Commission Notice on the Notion of State aid,* cit., paragraph 223.

– in the light of the Commission's practice and of the often creative case law or precedent of the Court of Justice.

The cases examined by the Community bodies during seventy years of control activities have made it possible to evaluate the various forms of aid prepared by the States for the most various reasons: rescue of companies in financial distress, environmental protection, employment policies, support for small and medium-sized enterprises, and other instances.

Ultimately, this is the never-ending contrast[93] between the preservation of State prerogatives and the enforcement of the European Union law. In some situations, especially those deriving from the test of selectivity in the field of tax aids, it seems that State sovereignty is being expropriated.

The framework outlined above contained in the Commission *Communication* offers a broad and detailed overview of the ways in which States may more easily find their way.

Sounding out of situations that may give rise to problems of compatibility with the EU legal framework may develop into a real code of conduct, in order to prevent situations that do not comply with the law of intra-Community competition.

The Notice is, therefore, a sort of a user manual on State aids that will enable States, or other stakeholders, and even UE candidate Countries[94] (negotiations will start in a short span of time[95]) to prepare better (compatible) measures for economic interventions within a consolidated and predictable regulatory framework. The Notice, therefore, represents a snapshot of the legal support in terms of State aid, a sort of lighthouse for Member States to which they will have to look at in order not to dissolve further portions of power, as well as of public resources.

Examining the constituent elements of the notion of aid, the evaluation criteria used by the Commission will easily appear.

Hence, the possible strategies of State intervention in the economy, certainly circumscribed by the general principle of the open and competitive market, may be more expeditiously adopted. Obviously, the reference point is not only the cited *Notice* but also the whole legal framework regarding State aid.

For example, the recent proposal by the Commission regarding the amendment of Council Regulation 2015/1588 aims at expanding the categories of aids exempted from prior notification adding to the list previously published two important "categories" of aid: «financing channelled through or supported by the EU centrally-managed financial instruments or budgetary guarantees, where the aid

[93] D. Siclari, *La legge sotto condizione sospensiva di efficacia nel costituzionalismo europeo multilivello*, *www.forumcostituzionale.it*, 26 aprile 2013, 31.

[94] See, for example, the case of Albania pointed out by A. Gjevori, *State Aid Control in Albania*, in *European State Aid Law Quarterly,* n. 4, 2015, 1 ss.

[95] For Albania and Republic of North Macedonia, June 2019.

consists in the form of additional funding provided through state resources» and «projects supported by the EU European Territorial Cooperation programme»[96].

The mentioned proposal looks at the future of the political choices both of the European Union and of the member States. It has the fundamental purpose of improving the possible interactions between the funds directly provided by the European Union and the State aid rules. Following the presentation of the multiannual financial framework[97], the Commission considers that there are margins to give greater flexibility and fluidity in the use of these instruments. There are funds provided by the European Union not subject to State aid rules. Any additional resources provided by the member States must be granted in compliance with article 107 TFUE.

The same reasoning can take place with regard to the Structural Funds for the part financed by the States, which is also subject to State aid rules. This new proposal for exemption from prior notification will encourage the development of significant projects in fields that are very important for the whole Union. Just think of research and development (probably the most effective instrument form implementing a common European policy), territorial cooperation (one of the most important objectives for achieving social cohesion at European level) and the implementation of the InvestEU fund (the ambitious programme that will try to bring together European funding in terms of loans and guarantees in a single project, considered a flywheel for social innovation).

[96] European Commission, *Proposal for a Council Regulation amending Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aids*, 6.6.2018, COM(2018) 398 final.

[97] European Commission, Communication from the Commission. *A Modern Budget for a Union that Protects, Empowers and Defends. The Multiannual Financial Framework for 2021-2027*, 2.5.2018, COM(2018), 321 final.

An overview of the main issues set forth in the Notice on the notion of State aid: a new "code of conduct" for the States

The essay reconstructs the main content of the Communication on State aid, analyzed in the light of the Commission's experience and the case-law of the European Court of Justice. Both the continuity and the innovative profiles are highlighted, also considering the whole legal framework.

Uno sguardo sulle principali questioni trattate dalla Comunicazione sulla nozione di aiuto di Stato: un nuovo "codice di condotta" per gli Stati

L'articolo si propone di ricostruire gli aspetti più significativi della Comunicazione europea sugli aiuti di Stato, esaminata alla luce degli orientamenti della Commissione e della giurisprudenza della Corte di Giustizia. Tenuto conto del complessivo quadro giuridico di riferimento, ne sono stati evidenziati i profili sia di continuità che di innovazione.