THE BOUNDARIES OF EU STATE AID CONTROL RULES

Andrea Biondi [1]

Southampton Row, the stretch from Russell Square to the Thames banks at Waterloo is one of the busiest roads in Central London. The traffic is horrendous and the only chance to get through in a reasonable period of time is to get on a red double decked bus or catch a black cab, these two iconic London being the only vehicles allowed to use the specifically reserved road lanes. When you are stuck in traffic you would do anything to be able to ride on the traffic-free bus lanes, wouldn't you? Perhaps even relying on EU State aid law. This is exactly what Eventech one of the largest minicab operating company in London tried to do. Tired of paying the many fines that its drivers incurred into because they drove on forbidden bus lanes, it brought an action before the English courts. The company argued that restricting the bus lanes use to black cabs only constituted unlawful state aid as it conferred an undue advantage to the black cabs and thus had the effect of distorting competition and affected trade between member States. The case eventually ended up via preliminary reference with the European Court of Justice that had to decide certainly one of the most peculiar State aid cases in years. Peculiar, but equally indicative of the ever increasing importance of State aid rules in the context of the European legal system and at the same a visible (and for some, worrying) sign of an expansionary tendency of applying those rules in areas and to national measures unthinkable even few years ago.

More substantial evidence of such an expansion can however be drawn from two other specific examples: the measures adopted in the aftermath of the financial crises and the Courts judgements and Commission investigations into national fiscal aids. As for the former, the various packages and Commission communications on banks and the financial crises have been brilliantly discussed in the editorial of Professor Moavero Milanesi published in this review (n° 3/2014). In particular, he forcefully argued for a sort of synergy of the competition rules of the TFUE and the macroeconomic provisions of the EMU, as both should be essential instruments against the great variety of detrimental effects caused by the global financial crisis. I would dare to add just one comment. It is quite clear that the financial crises and the new acquired celebrity status of State aid rules have changed quite dramatically the way their goal is perceived. State aid provisions practically unchanged since their introduction in the Treaty of Rome of 1957 were devised first and foremost to avoid the conferral of any undue advantage created by the intervention of the state in the context of a progressive abolition of regulatory measures on the free circulation

[1] King's College London.

DOI: 10.12870/iar-11371

of goods, services capital and workers.[2] Traditionally, therefore, State aid control and the pursuit of good economic policies have been kept apart. In other words, and in a more simplistic fashion, whilst spending policy was left to be decided by Member States, State aid control was triggered only and in so far interventions of the state had an impact on the internal market. The financial crises-related measures are instead clearly aimed at ensuring that Member states are pursing more rational and efficient economic policies. Such an aim is also apparent from the European Commission modernization plan of State aid control[3] and its implementation. The Commission language is often revealing. It speaks of targeting its policies at making Europe 'a smart, sustainable and inclusive economy with the objective of enabling the EU and its Member States to deliver high levels of employment, productivity and social cohesion'. It advocates that public spending should become more efficient, effective and targeted at growth-promoting policies that fulfil common European objectives. By putting an emphasis on the quality and the efficiency of public support, State aid should therefore be conceived as an instrument able to help strengthen budgetary discipline and to improve the quality of public finances, thereby reconciling the role of targeted public spending in generating growth with the need to bring budgets under control. To the great credit of the Commission, such a rhetoric translated into practice as in relatively short period of time, the Commission has revised many of the areas of state intervention, from research, development and innovation, to risk capital, broadband, regional aid, aviation, and energy and environment. The Commission has also proposed the revision of the Enabling Regulation, approved by the Council in 2013, on the basis of which the Commission has adopted an enlarged GBER[4] whose scope now extends to block exemptions of certain categories of aid that are "good" a priori as they are considered conducive to achieve the aims listed above. For instance these categories include aid for innovation, culture, natural disasters, sport, certain broadband infrastructure, social aid for transport to remote regions and aid for certain agriculture, forestry and fisheries issues. Where one would agree or not with the ultimate aim of achieving a pan-EU good governance, I think it is important to remark that *State aid control* is then becoming more and more a *State aid policy,* arguably a fundamental constitutional shift in supranational regulatory competence allocation.

The other controversial area is the relationship between state aid and national fiscal policy, an even more controversial one since the so-called Lux leaks caused so much media attention.

2 Intergovernmental Committee on European Integration. The Brussels Report on the General Common Market (the Spaak Report), June 1956, Title II, Chapter 2.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2012) 209 Final, 8 May 2012.

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 TFEU, OJ L 187, 26.6.2014, p. 1–78.

DOI: 10.12870/iar-11371

Leaked documents revealed over five hundred private tax rulings – sometimes known as "comfort letters" – that Luxembourg and other Member states signed with corporations allegedly granting favourable tax treatment.[5] At the same time, most of the recent high profile cases in the area of State aid law have all been dealing with national fiscal measures. Leaving aside the political furore over these measures, the tax rulings (as well as the Courts decisions) legal conundrum is whether these measures can be classified as state aid. As it is well known one of the criteria required by Article 107(1) TFEU for a national measure to be qualified as unlawful aid is that measure should be selective, that is it should be devised as to favour 'certain undertakings or the production of certain goods'. In the case of taxation is crystal clear how delicate the question of drawing the correct boundaries as to avoid catching any kind of fiscal policy – *per se* and by definition a discriminatory exercise in regulatory competence, is. The relationship between state aid and tax is a actually very old one as one of the most celebrated cases dating back to 1974 dealt with the decision of the Italian Government to lower taxation for the textile industry. [6] In the ensuing proceeding, the Government tried to argue that State aid rules were inapplicable in an area of exclusive national competence such taxation. The Court consistently with its economic law *acqui*, simply replied that State aid is an objective legal notion and its interpretation cannot vary depending on the area of regulatory competence exercised by the state. Despite such a long history, a recent flurry of cases reopened the question of the impact of Sate aid control over taxation. For instance, the judgment concerning the corporation tax reform in Gibraltar attracted many criticisms. In that judgment the European Court of Justice held that Gibraltar's tax corporation system based on taxes levied on people and the size of business, excluded from the outset any taxation of offshore companies, since they had no employees and also did not occupy business property. Thus it had to be considered as a selective State aid measure.[7] Admittedly, the Court judgment is certainly sweeping, as the Court does not dwell at all on why companies established in Gibraltar and offshore companies might be in a comparable situation with resident companies. Likewise, although these measures are still under investigation, the Commission proceedings against national tax rulings raise the same problem: according to the Commission individual tax rulings may involve State aid as they provide selective advantages to a specific company or group of companies as they influence the allocation of taxable profit between subsidiaries of a group located in different countries.[8] Moreover, calculations

[5] See http://www.icij.org/project/luxembourg-leaks.

[6] C-173/73, *Italy v Commission* [1974] ECR 409.

[7] C-106/09 *Commission v UK*, CLI: EU: C: 2011:732. See also on tax rates applicable to cooperatives, C‑78/08 to C‑80/08, *Paint Graphos*, EU: C: 2011:550.

[8] Ireland for Apple Sales, International and of Apple Operations Europe; the Netherlands for manufacturing activities of Starbucks, Manufacturing EMEA BV; Luxembourg for the financing activities of Fiat Finance and Trade Luxembourg for the activities of Amazon, at

DOI: 10.12870/iar-11371

used to set the tax base allegedly rely on a remuneration of a subsidiary or a branch not on market terms therefore providing a more favourable treatment of the company compared to the treatment other taxpayers. The issue here is that one should try to split the question whether these comfort letters by tax authorities might not be the most transparent of fiscal policy as they can induce phenomena of tax shopping or even worse tax evasion from the question whether these should be nonetheless classified as general national regulatory measures and thus not 'selective'. To put it more bluntly there is a risk is to use State aid rules as a tool to remove possible pernicious effects caused by the different level of taxation and practice adopted in Member states. The Community Courts have themselves confirmed that different level of taxation existing between Member states cannot actually be fought by using state aid rules but eventual harmonization would require political consensus and a EU legislative intervention. Most recently the General Court held … *the TFEU makes a clear distinction between, on the hand, rules concerning State aid, as laid down in Articles 107 TFUE to 109 TFEU, and, on the other hand, rules concerning distortions resulting from disparities between legislative, regulatory and administrative provisions of the Member States, and in particular fiscal provisions, laid down in Articles 116 TFEU and 117 TFEU (…).*[9] These two articles require of course unanimity thus maybe politically unpractical but in this context the new Commission's tax package requiring at least Member states cooperation should be singled out. Under these proposals countries would need to share automatically tax rulings signed between the national tax authority and a corporation. If another country believes that its own tax base will be harmed or that the corporation is unfairly benefiting from the ruling, it can ask for more information. [10]

It should further be observed that actually fiscal differentiation is also allowed by State aid rules within a single Member state. It is now a settled principle that that in the context of tax regimes in non-unitary Member States, where local or regional authorities have sufficient autonomous powers to alter or vary tax rates in comparison to those applicable in the rest of the Member State, there is no selective application and thus no violation of state aid rules.[11] Sufficiently autonomous means according to the Court of Justice that first, the decision to lower taxes must have been taken by a regional or local authority that has, from a constitutional point of view, a political and administrative status separate from that of the central government. Second, the decision must have been adopted without the central government being able to directly intervene as regards its content. Finally, the financial consequences of a reduction of the national tax

http://europa.eu/rapid/press-release_IP-14-663_en.htm.

[9] T-151/11, *Telefonica*, ECLI: EU: T: 2014:631.

[10] Press release of the 18 March 2015 at http://europa.eu/rapid/press-release_IP-15-4610_en.htm.

[11] Case C-88/03, *Portugal v Commission*, [2006] ECR I-7115 (the "Azores "case).

DOI: 10.12870/iar-11371

rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government. The test have now been consistently applied in several cases and fully embraced by the Commission. Very recently and maybe slightly controversially, the Commission held that Bolzano had to be considered a 'sufficiently autonomous infra state entity and thus its decision to reduce IRAP – a tax on corporate income – to companies established in its territory could not be qualified a State aid.[12] Finally, there are signs of a judicial rethinking on how the selectivity test itself should apply. In the *Banco Santander/Autogrill* cases,[13] dealing with the tax amortization of the financial goodwill granted to Spanish companies that acquired some participation in undertakings established in another Member state, the General Court held that that the mere existence of a derogation from or an exception to a tax regime does not, by itself, establish that a measure favours 'certain undertakings or the production of certain goods' for the purposes of EU law, since that measure is available, a priori, to any undertaking. The Court also emphasised that a national tax regime that is not aimed at any particular category of undertakings or the production of goods, but a category of economic transactions cannot be considered as selective. Thus despite being a derogation, such a derogation can be so broad as to exclude its selectivity.

In conclusion, it is my view that state aid as is not at risk of being over used or badly used. However it is an area subject to several changes and continuous transformations in the market and in the economy of the European Union. Finally, for those tempted to use bus lanes, the Court of Justice in its judgment denied that allowing black cabs only could be classified a state aid. The Court held substantially that black cabs and minicabs are not in a comparable situation thus no selective advantage could be ascertained. Whispering sweet words to national governments ears, the Court also decided that where the State grants a privileged access to public infrastructure, which is not operated commercially by the public authorities to users of that infrastructure, the State does not necessarily confer an economic advantage for the purposes of Article 107(1) TFEU. [14] The judgment can be criticized under several profiles, but arguably the Court seemed somehow alert to the possible dangers of an overexpansion of State aid rules. Thus one is tempted to conclude that there are boundaries to the application of State aid rules and fines must definitively be paid.

[12] Commission Decision SA 34249 (2014).

[13] T-399/11 *Autogrill – Banco Santander*, ECLI:EU:T:2014:938.

[14] C-518/13 *The Queen, on the application of Eventech Ltd v The Parking Adjudicator,* CLI:EU:C:2015:9.

DOI: 10.12870/iar-11371