

XXVIII FIDE CONGRESS

Topic II: Taxation, State aid and distortions of competition

PARALLEL WORKING SESSION ON FISCAL STATE AID AND RECOVERY DECISIONS

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OPENING STATEMENT¹

Introduction

Good afternoon ladies and gentlemen. Welcome to one of the most exciting panels of the Fide Congress of 2018: fiscal State aid and recovery decisions!

Thank you to the FIDE organisers for the kind invitation to moderate this session. I am very happy to be here. To help me in this mission as co-chairs we have the pleasure of having with us Ms. Julia Rapp and Mr. Raymond Luja, whom you probably already know, because they have been enduring a long continuous State aid marathon for the past couple of days, as institutional and general rapporteurs, respectively, for Topic 2 of this Congress. Ms. Rapp is case Manager of the State Aid Coordination Unit at the European Commission's DG COMP. Mr. Luja is Professor of Comparative Tax Law at Maastricht University and Counsel to Loyens & Loeff N.V., Amsterdam.

This is how we have decided to structure this session: in order to set the scene for the debate, Ms. Rapp and Mr. Luja will briefly cover the main findings of the reports they have prepared for the Congress that are related to recovery. Afterwards, we will open the floor to questions from the audience.

But before we dwell into the specific issues of the recovery process, allow me to make an introductory reflection to help to put the discussion into context.

¹¹ The views expressed here are the author's own.

Goals of State aid control

In order to better understand the increased importance of State aid control, it is useful to take a step back and remind ourselves, from a public policy perspective, why we should be concerned about State aid at all. In other words, which goals is State aid law designed to achieve or which type of harm it is striving to avoid. It is noteworthy that unlike antitrust enforcement which has been adopted in more than 120 jurisdictions worldwide, State aid control is much rarer. So, why are we using our resources to do this? Are we on the right track here? The answer in my view includes three underlying reasons.

First, there is an interest in avoiding so-called “subsidy races” between regions or between states, a concern more likely to be found in free trade zones: inasmuch as subsidies granted in one jurisdiction – to attract foreign investment and “create jobs” for example – can lead to “retaliation” measures in another country, for the exact same reasons. However, when such aid merely shifts economic activity from a region to another, not really adding value or creating new activities, it can be globally wasteful. Therefore, there is a political rationale here, I would argue, inasmuch as State aid control may be regarded as a tool to ensure a more sensible use of public resources.

Second, there is the related market integration goal: ensuring a level playing field between all market players, public or private, throughout the EU has underpinned competition policy since its inception.

Finally, State aid control is justified for efficiency reasons. As competition enforcer I particularly enjoy this type of rationale, which is often forgotten. In effect, subsidies may lessen incentives to innovate, raise quality or cut production costs, both for efficient and inefficient firms. Just by way of example: the incentives of the former are likely to be reduced if they expect their competitive advantage to be offset by the granting of an aid to their rivals, whereas the latter may be less inclined, as a result of the aid received, to address the source of their inefficiencies, at the expense of society, which can be self-perpetuating.

Therefore, State aid control and competition policy are driven to a large extent by the same concern, including the vision that markets that are free from anticompetitive or distortive state favours, where businesses, public or private, compete on equal footing, are more likely to deliver the benefits of competition on the merits to society.

The AdC's agenda with regard to state-induced restraints

These concerns – allow me also to add this point – have similarly driven the AdC's agenda with respect to State aid and other forms of state restraints. Let's not forget that State aid is part of a wider discussion, which is why Topic 2 of this Congress is entitled "Taxation, State aid and distortions of competition".

State restraints, even if involuntary, may be just as pernicious to market conditions and economic performance as classic hardcore antitrust infringements perpetrated by firms. Therefore, the AdC has been increasingly active in using its advocacy powers to tackle state-induced restraints, including by raising awareness on the importance of carrying out competition impact assessments of public measures (either legislative or administrative in nature, and even tax-related) and by addressing recommendations to the government and other public entities in this regard.

The AdC's intervention has also sought to identify alternative ways in which the State can pursue its social and economic goals without unnecessarily distorting markets or, when this is impossible to reconcile (which is rare), at least to assist in identifying the costs of interventions to enable a more informed policy choice.

Just by way of example, within this framework, we have been carrying out for the past couple of years a wide ranging competition impact assessment project together with the OECD, whereby we have reviewed thousands of legal and administrative provisions, including all the existing legal and regulatory framework in a number of relevant sectors of the Portuguese economy, namely transports and 12 self-regulated professions. A year ago we recommended that the government should suppress certain forms of discriminatory tax treatment (VAT treatment) between competing service providers (specifically in the field of acupuncture therapy, regardless of whether these services are provided by doctors or other licensed professionals in non-conventional therapies).

We have also been building capacity within the administration to carry out this type of competition impact assessment exercise for the future.

The ultimate goal here is to assist in shaping the design of the country's legal and economic landscape, in a way that will, in time, improve Portugal's overall competitiveness and therefore the well-being of our citizens.

Fiscal State aid and recovery

Likewise, at EU level, for all the reasons I have been mentioning, it is no wonder that State aid control gain momentum in the Union's agenda, particularly in the aftermath of the 2008 financial crisis. This brings us to fiscal State aid control. The financial and sovereign debt crisis, which had left many people in Europe in a very difficult situation, also drew attention to aggressive corporate tax planning practices, in particular via the so-called tax rulings and other fiscal arrangements that are available within certain Member States to the benefit of multinational corporations and to the detriment of their rivals and other tax payers.

In response, the European Commission built some of the most high-profile State aid cases in recent years.

One of the most attractive aspects of this course of action, I find, is that it brings competition down to earth. It helps to engage even the common citizen on the importance of competition because it signals a simple but strong message: the idea that someone is looking out for them in the marketplace, so that the economy works for everyone.

Let's not forget that well-functioning markets and competition in Europe have never been goals in themselves: they are instrumental – but key instruments – in ensuring peace, prosperity and welfare for society. When it comes to fiscal State aid, Margrethe Vestager encapsulated this vision in a simple but clear-cut sentence: she said that Europe is open for business – but not for tax evasion.

That being said, some aspects of the tax rulings decisions have been quite controversial. For example: (i) the extent to which the Commission may have stepped into quicksand and perhaps exceeded its jurisdiction when it decided to address direct taxation, historically, a Member States' sovereign domain; or (ii) that in light of taxpayers' legitimate expectations and the novelty elements allegedly included in these recent decisions, there might actually be a case for refraining from asking for recovery.

In fact the recovery process – which is ultimately what gives teeth to State aid control, even though it is not a sanction – may prove to be a long and winding road (to borrow from The Beatles song), in particular in the case of the tax ruling decisions. In effect, it is up for the Member States to implement recovery decisions, in a process which is governed by national procedural law and thus may be prone to further delays and blockages, even if unintentional.

The Apple tax ruling case may provide a good illustration of this type of embarrassment.²

I will stop here. Anyway, we appear to be in an exciting new era for State aid law, particularly in the field of taxation, and I am glad we have some of the protagonists with us today to tell us all about the thrilling issues of the recovery process.

² The standard deadline for the implementation of the recovery by the Member State is four months as of the notification of the European Commission decision. The Commission's decision concluding that Ireland's tax benefits to Apple were illegal under EU State aid rules dated from August 2016. However, according to the Commission, Ireland was planning to conclude the recovery by March 2018 at the earliest, which lead the Commission to bring Ireland to Court for failure to recover the illegal tax benefits given to Apple in October 2017.