News from the Member States

Croatia

Public Support for Sports: The Name of the Game – Football!

The Croatian Act on Sports must be brought in compliance with the EU State aid rules. The professional clubs perform an economic activity and as such may be considered aid beneficiaries. Therefore, those that are financed through national, regional or local resources must respect the EU State aid rules.

The national football club Dinamo Zagreb is currently being subjected to an investigation of the Croatian Competition Agency (CCA) following allegations that it received illegal State aid from the City of Zagreb and other aid providers.[1] While the proceedings in this case are still ongoing and the investigation into the exact amounts and the forms of aid the national football club presumably received are still under way, the CCA took this opportunity and, making use of its legal power in the area of competition and State aid advocacy, analysed the provisions of the existing Croatian Act on Sports.[2] This act, amongst other issues, provides for the financing of sports and sports activities, particularly covering the practices used by the regional and local administration units (municipalities, city councils etc.) in the financing of sports. The CCA aimed at establishing whether the existing rules in terms of the financing of sports, especially professional sports, and particularly football, comply with State aid rules. In short, the questions that needed a straightforward answer were (1) whether the existing public support regime on the basis of which the Croatian professional sports is financed constitutes State aid or not, and (2) whether this financing complies with State aid rules.

Pursuant to the provisions of the international agreements, the Stabilization and Association Agreement and the Accession Treaty,[3] under which Croatia committed itself to use in its assessments the criteria arising from the application of the competition rules applicable in the EU and interpretative instruments adopted by the EU institutions before the day of EU accession, the CCA analysed the White Paper on Sport,[4] the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Developing the European Dimension in Sport,[5] the Joint statement on UEFA's Financial Fair Play rules and EU State aid policy of 21 March 2012, made by the Vice-President Joaquín Almunia of the European Commission and UEFA President Michel Platini,[6] the case-law in the area of competition rules and sports,[7] the press release "State aid: Commission opens in-depth investigation into public funding of five Dutch professional football clubs" of 6 March 2013[8] and the Parliamentary question put by the Spanish representative Andrés Perelló Rodríguezon on the subject of State aid for football clubs in Valencia.[9]

The White Paper on Sport acknowledges the special position of sports and its sporting, societal, cultural, recreational but also economic dimension. It is clear that in amateur and mass sports equal opportunities and open access to sports activities may be achieved only on the basis of strong public involvement. However, and taking into account the economic dimension of professional sports which have different

1 Since 2003 and by entering into force of the Stabilization and Association Agreement between the Republic of Croatia and the European Communities and their Member States in 2005 (OG, International treaties, OG 14/2001, 14/2002, 7/2005, 11/2006) until the day of the accession of the Republic of Croatia to the European Union on 1 July 2013 responsible for granting, monitoring and recovery of State aid was the Croatian Competition Agency.

2 Act on Sports, OG 71/06, 150/08, 124/10, 124/11 and 86/12.

3 The Treaty between the European Union Member States and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union, Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, with the Annexes, Protocol and the Final Act (OJ L 112, Volume 55, 24 April 2012; hereafter: Accession Treaty) is available at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2012:112:SOM:EN:HTML.

4 COM(2007) 391, 11.7.2007.

5 COM (2011)12 final, Brussels, 18.1.2011.

6 Available at: http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf.

7 Available at: http://ec.europa.eu/competition/sectors/sports/overview_en.html.

8 Available at: http://europa.eu/rapid/press-release_IP-13-192_en.htm.

9 Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2013-002747&language=EN.

sources of income, including ticket sales, advertising and sponsorship, TV and media rights, merchandising, gambling and lottery, but usually also public support, it must be noted that the granting of any public resources must not be in contravention with EU State aid rules (Article 107 of TFEU[10]). In other words, public support is allowed if it does not have distortive effect on competition and trade within the EU by giving an advantage, on a selective basis, to a particular beneficiary. Hence, public financing of sports is allowed through subsidies, different tax advantages, soft loans, guarantees for loans, co-financing of sports infrastructure, lease of sports facilities under more favourable terms, public works on infrastructure etc. as long as it complies with competition and State aid rules. In addition, and its is even more often the case, public financing of sports may be carried out by supplying infrastructure to certain clubs, or by giving subsidies to particular clubs in the form of operating aid etc. Here, the case of Hungary set an example how the use of sport infrastructure (such as stadiums, multifunctional arenas etc.) by sport clubs, as one of the forms of public financing (in this particular case in the form of tax rate reduction), where it is open to public in non-discriminatory manner, i.e. if the infrastructure concerned may be used by all interested parties, for organisation of mass sports events, training of the young generation or reserving schedules for local citizens to use sports infrastructures, under the transparent criteria set in advance, may be in compliance with Article 107(3) TFEU and considered compatible aid.[11] What is more, the use of such infrastructure at the local level (such as local community swimming pools, ski lifts etc.) is not likely to affect competition and trade between the Member States and as such will be exempted from the application of the stringent State aid rules.

That said, a series of State aid cases have recently arisen in the football sector. The Commission opened an investigation into the public funding of five Dutch professional football clubs to find out if the measures implemented by five municipalities in the Netherlands in favour of local professional football clubs comply with EU State aid rules.[12] The measures seem to constitute State aid; they involve the use of public resources to professional football clubs facing financial difficulties. And they are not alone. As mentioned above, the Spanish representative put a parliamentary question to the Commission on the subject of State aid for football clubs in Valencia, all of which are privately owned sports companies, who have defaulted on loans in the amount of € 118 million which the Valencian Government will have to pay, including the interest. In addition, The Guardian reports on 21 March 2013 how EU prepares to blow the final whistle on Spain's debt-ridden football clubs burdened by unsustainable piles of debt of unpaid taxes and social security debts. On 3 April 2013 The Independent says that Real Madrid is the subject of a European Commission investigation following allegations they have received illegal State aid by Madrid city council through privileges in the real estate activities. Dinamo Zagreb is under the investigation of the CCA for yet unspecified amounts which may be found to contravene with the EU State aid rules and the Financial Fair Play regulations from the joint statement by Almunia and Platini, namely, from the part stating that the clubs should "live within their own means" or "break even".

At the very eve of joining the "EU club" the Croatian authority found it appropriate to be proactive. It reacted and warned the Croatian professional football clubs but also the aid providers (the government and the local administration units) about the above issues to make them aware of the rules they have to observe in the context of financing and managing their operations. Without prejudice to the tradition of public support to amateur sports, particularly at the local level, whose development must be enhanced for its health, social and cultural objectives, when the public resources are used for the financing of professional sports by the State and local administrative units, it may be presumed that the conditions for a measure to constitute State aid are fulfilled. It is beyond any doubt that the financing represents the expenditures of the State or local administration units and that the professional sports clubs may be qualified as aid recipients given that they perform an economic activity and are considered "undertakings" in the sense of competition and State aid rules, irrespective of their legal status (i.e. the fact if they have been registered as civic associations or companies is here irrelevant) so there is no reason they should be exempted from State aid rules, since they have many sources

10 Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

11 SA.31722 – Hungary – Supporting the Hungarian sport sector via tax benefit scheme, Brussels, 09/11/2011, C(2011)7287 final.

12 Press releases RAPID: State aid: Commission opens in-depth investigation into public funding of five Dutch professional football clubs, IP/13/192 of 06/03/2013, available at: http://europa.eu/rapid/press-release_IP-13-192_en.htm.

of income (transfer of players in the national and international market, ticket sales, sponsorships and advertising, TV and media rights, merchandising of sport souvenirs) but also from the State budget and the budgets of the local administration units.

Therefore, the provisions of the existing Act on Sports should be adequately adjusted to the Croatian State aid rules i. e. Article 107 TFEU. This is particularly important taking into account the fact that the national State aid rules, even though they have been brought in line with the relevant EU acquis, will remain in force only for a couple of months, until 1 July 2013 when in the area of State aid the direct application of the EU State aid rules starts and when the only responsible for authorisation of State aid will become the European Commission. This actually means the current regime on which public support to professional sports in Croatia is based may come under the scrutiny of the European Commission, and in the worst case scenario, the subject of aid recovery order which would mean the end of some professional football clubs, their bankruptcy or wind-up.

On the other hand, the CCA noted that professional sports clubs may still be granted public support under the relevant rules relating to particular aid categories (such as rescue and restructuring aid, de minimis aid, aid for education and training or regional aid). It also noted that since that it has been established in the EU practice that the construction, use and maintenance of the sports facilities and sports infrastructure supported by public resources is also subject to the EU State aid rules, it would be necessary to provide at least the principles and general terms under which sports facilities and infrastructure may be given for the use by professional sports clubs. In other words, it is clear that the local administration units (municipalities) and legal persons in charge of the administration and granting of State aid are allowed to finance also professional clubs, but in that case it must be taken into account that these clubs may at the same time be considered aid beneficiaries subject to application of State aid rules.

The opinion of the CCA started a new dialogue on sport. It has shaken the old mindset which shielded professional sports, based on its specificity, from the application of the EU law, especially in the area of competition and State aid. Considered the way the amateur, voluntary, non-profit sports has been jeopardized by the use of public funds to support privately owned and often mismanaged professional football clubs at the expense of the tax payers, one can only welcome the EU State aid rules coming into play.

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Denmark

Revision of the Danish State Aid Rules to Enhance the Efficiency of Recovery Orders

The Danish Parliament has amended the Danish Competition Act, introducing a more effective regime on recovery orders and giving the Competition Council more effective tools vis-à-vis "existing aid".

I. Background

Under section 11a of the Danish Competition Act (corresponding to Article 107 of the Treaty), the Danish Competition Council may issue orders for the termination or repayment of aid granted from public funds to support certain forms of economic activity.[1] Section 11a was introduced in the Competition Act by Act No 416 of 31 May 2000 and entered into force on 1 October 2000. According to the transitional provisions, it is not possible to issue orders for termination and repayment of aid granted before 1 October 2000.

The Danish Government has now, with effect from 1 March 2013, introduced two important amendments to section 11a. Both shall be explained below.

II. The Danish Competition Council may now order the termination of "existing aid"

The first amendment concerns the possibility for the Competition Council to order the termination of aid granted before 1 October 2000 when section 11a of the Competition Act entered into force. The preparatory works to the amendment state that it will have relevance especially in cases where aid is granted by means of a tenancy agreement

1 Consolidation Act No. 23 of 17 January 2013, available in English at www.kfst.dk.

signed before 1 October 2000. The Danish Council has in recent years been faced with such agreements but has been prevented from requiring their abolition.[2]

It is noted that the amendment only authorizes the Competition Council to order *termination* of aid granted before 1 October 2000, whilst such aid cannot be subject to a *recovery* order.

On this point, the amendment brings the Danish State aid regime in line with the EU State aid rules relating to existing aid, which may be subject to a termination order by the Commission but not subject to recovery orders.

III. Incompatible aid must be repaid to the State budget

A second significant feature is the insertion of a new section 11a, subsection 9, in the Competition Act.

The new provision stipulates that aid subject to a recovery order is to be repaid to the Danish State budget. This is so also when the granting authority is a de-central authority, e. g. a regional or municipal authority. It will also apply to aid granted by public undertakings.

Under the previous regime, incompatible aid was to be repaid *to the authority granting the aid*, e. g. the municipal authorities.

As stressed in the preparatory works to the amendment, the previous regime significantly reduced the incentive of the authorities to comply with State aid rules, as in a "worst case scenario" the aid would be repaid to the granting authority itself, including interest. Hence, the amendment aims at considerably increasing the authorities' financial inducement to comply with – and thereby enhancing the effectiveness of – the Danish State aid rules.

In our view, the amendment of the Competition Act is of relevance not only to repayment of aid granted in violation with the Danish Competition Act but also to aid granted in violation of TFEU articles 107 and 108.

It is recalled that EU State aid rules do not provide specific rules on recovery, but require that national procedural rules applying to claims under the Treaty must be effective (principle of effectiveness) and not less favorable than those governing claims under domestic law (principle of equivalence).[3]

As stated above, the obligation to repay aid to the State budget in stead of the granting authority seems to be a more effective remedy to ensure compliance with the State aid rules than an obligation to repay aid to the authority itself.

In the light thereof, the principle of equivalence might entail an obligation for the Danish authorities to recover aid examined under TFEU articles 107 and 108 in the same way as aid granted in violation of section 11a of the Competition Act. The amendment of section 11 a might therefore have the consequence that also aid subject to recovery under TFEU articles 107 and 108 must from now on also be reimbursed to the State budget.

This latter aspect has not been dealt with in the preparatory acts introducing the amendment to section 11a.

Interestingly, the Swedish Competition Authority has recently recommended that a similar approach be taken in Sweden.[4]

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2 On case law on aid by means of tenancy agreements, see e. g. The Farum Park Case and the Irma Case, both available at www.kfst.dk. The Farum Park Case was annotated in this law review (see Honoré, "The Danish Competition Council hold that an aid was unlawful but the Council could not order repayment or termination of the aid – the Farum Park Case", EStAL 4/2011, p. 583). The Irma Case was also annotated in this law review (see Honoré, "The Irma Case", EStAL 4/2012, p. 755).

3 See e. g. Commission notice on the enforcement of State aid law by national courts, OJ 2009, C 85, p. 1, section 70. See also Notice form the Commission Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ 2007, C 272, p. 4, section 52. In Case C-348/93, *Commission v. Italy*, the Court held that repaying incompatible aid to the granting authority is not as such incompatible with the EU State aid regime.

4 See *Eriksson* "The Proposal for a New Swedish Act on the Application of the EU State Aid Rules in Constitutional Trouble", European State Aid Law Quarterly 4/2012, p. 762-763.

Greece

"Special Solidarity Levy" Imposed on RES Producers: A Selective State Aid?

The adoption of Law 4093/2012, in November 2012, has introduced a new taxation framework for energy production from Renewable Energy Sources (RES) in Greece. More precisely, a tax levy has been introduced and imposed on RES producers' turnover for the period 2012-2014, thus leading to a *de facto* retroactive reduction of the feed-in-tariff applicable, according to the already concluded Power Purchase Agreements.

I. The contested measure

The tax is imposed on the revenues of energy production, taking place during the period 1 July 2012 to 30 June 2014 – with a possibility of one year extension until June 2015 – and is calculated according to the price of the purchase of electricity. The tax refers to both operating RES stations as well as those which will be connected in due time but not to those PV stations, for which the compensation for the energy produced is calculated based on a reference value (FIT) which corresponds to a date later than August 9, 2012. Exempted from tax are also PV stations included in the Special Program for Development of Photovoltaic Systems on Buildings. The so called "Special Solidarity Levy" is calculated as a percentage of the price for electricity injected to the Grid by the Producer, before taxes, and amounts to:

a) 25% for PV stations placed into trial operation or connected to the Grid by 31 December 2011.
b) 27% for PV stations placed into trial operation or connected to the Grid after 1 January 2012 and for which the compensation for the energy produced is calculated based on a FIT corresponding to the period between February 2012 and 9 August 2012, as provided for in Art. 27A of L. 3734/2009, as applicable.
c) 30% for PV stations placed into trial operation or connected to the Grid after 1 January 2012 and for which the compensation for the energy produced is calculated based on a Feed in Tariff (FIT) corresponding to a month prior to February 2012, as provided for in Art. 27A of Law 3734/2009, as applicable.
d) 10% for the remaining RES and Combined Heat and Power stations.

The adopted tax measure has a retroactive effect in the sense that it did not exist, nor was it known or forecasted at the time of the conclusion of the Power Purchase Agreements between the RES producers and the competent Operator. Consequently, the unprecedented change of the financing environment of investments already initiated or projects in operation has caused a significant overthrow of the investment climate, as incentives have been drastically reduced.

II. The RES tax constitutes State aid in the meaning of Article 107(1) TFEU

Article 107(1) TFEU prohibits, in principle, any public measure that constitutes State aid. The contested measure is, as already mentioned, a levy on producers of electricity generated by RES. Article 107(1) TFEU applies to any public measure, irrespective of form. Tax charges, as such, do not fall within the scope of Article 107(1) TFEU because they constitute an additional burden on taxable undertakings or activities. However, Article 107(1) TFEU does apply to tax exemptions, tax derogations, tax reductions and other forms of favourable tax treatment, irrespective of the aim of the tax.[1] The ostensible objective of the contested RES tax is "solidarity" and that is the framework in which it was adopted as part of the "Approval of the Medium Term Fiscal Strategy Framework 2013-2016 – Urgent Application Measures".

A public measure is classified as State aid when the following four effects are shown to hold: a) the measure transfers State resources, b) it confers an advantage, c) the advantage is selective, and d) it is capable of affecting trade between Member States and distorting competition.

a) Transfer of State resources: The revenue from the RES tax comes under the control of the State; it is collected by the Electricity Market Operator, LAGIE, and the Distribution Grid Operator, DEDDIE – both performing public services – and then credited to the RES Special Account which has been set up and regulated by Law no. 2773/1999 and is managed by LAGIE.
b) Economic Advantage: It is well established in the case law of EU Courts that exemption from tax or non-liability for tax confers an advantage to undertakings which would otherwise have to bear the tax in their budget.[2] Producers of electricity from fossil fuels are not burdened with the RES tax

1 C-487/06 P, *British Aggregates v Commission*; C-279/08 P, *Commission v Netherlands*.

2 C-6/97, *Italy v Commission*; C-487/06 P, *British Aggregates v Commission*.

and therefore obtain an advantage in relation to their competitors who are electricity producers from renewable energy sources.

c) Effect on trade and distortion of competition: There is a significant effect on trade in the domestic market, as electricity fossil sources producers are not subject to the special solidarity tax and therefore are in an advantageous situation compared to their competitors who are subject to the tax.[3]

d) Selective measure: In order to determine whether a measure is selective, it is necessary to prove within the context of a particular legal system, that the measure confers an advantage to certain undertakings in comparison with others which are in a comparable legal and factual situation.[4]

As indicated by case-law of the Court of Justice, in order to determine the existence of selectivity in tax measures, it is necessary to carry out a three-step test:[5]

1. Establish the scope and provisions of the "normal" tax system which applies to undertakings. This is the "reference" system.
2. Examine whether the reference system differentiates between undertakings in comparable legal or factual situation.
3. Determine whether the differentiation follows from the nature or the structure of the reference system.

In the specific solidarity levy case, the reference system is not well defined. The levy is an *ad-hoc* tax measure imposed by Law 4093/2012 for the purpose of "solidarity", while the beneficiaries of this solidarity are not specified, nor the need for it is explained. As the Court of Justice stressed in case C-106/09 P, *Commission v Gibraltar*, a public measure is classified as State aid in relation to its effects and irrespective of the "techniques used". This is especially pertinent to the case at hand where the Greek State has not justified the need, nor elaborated the solidarity aims of the RES tax.

In any case, since the scope of the reference system for the RES tax should extend to all electricity operators, then it must be inferred that the system differentiates between undertakings which are in the same legal or factual situation. This differentiation is arbitrary because it is not based on any objective distinction between electricity undertakings. The RES Special Account was established in the context of the Greek policy of encouraging production of electricity from renewable resources and reducing greenhouse gas emissions. Since producers of electricity from conventional fossil sources also contribute to greenhouse gas emissions, they are in a comparable legal or factual situation and should have also been subject to the RES tax, leaving no margin for their exclusion. Moreover, since the very purpose of the RES Special Account is to internalize the environmental costs of conventionally produced electricity, it would follow that it must be the producers of electricity from fossil fuels that should be making additional contributions to cover the deficit.

Lastly, the fact that the measure is imposed only to a certain category of energy producers, whereas the deficit in the RES Special Account can be equally attributed to all categories, renders it a selective tax measure, discriminating between legal entities in the same or comparable factual situation. Furthermore, the contested tax is found to be incompatible with the internal market, since it does not fall under any exception categories, justifying the scope of the measure. To conclude, taking into consideration that the contested measure fulfills all 4 criteria provided for in Art. 107(1) TFEU, it is found to constitute a State aid measure that has been implemented before being notified to the European Commission, as provided for in Art. 108(3) TFEU, and therefore constitutes an illegal State aid measure.

III. Incompatibility with the EU RES framework and Energy Policy goals

Apart from infringing EU State Aid Law provisions, though, this measure is also found to be incompatible with the EU normative framework on RES, as well as EU Energy Policy goals. The European Commission has repeatedly criticized the application of retroactive measures and has highlighted the negative effects that such measures have on promoting investment in RES in the context of reaching EU Energy and Environment Policy targets in 2020 and beyond. Moreover, the adoption of a measure that retroactively destabilizes the RES investing environment is moving in the opposite direction from the scope of the Directive 2009/28/EC. The Commission has also repeatedly stressed that retroactive changes suddenly imposed on support schemes, undermine the in-

3 For a similar analysis of indirect effect on trade see Commission Decision SA.21918 on electricity tariffs in France, OJ C 398, 22/12/12.

4 C-143/99, *Adria-Wien Pipeline*; C-409/00, *Spain v Commission*; C 88/03 *Portugal v Commission*; C-428/06, *UGT-Rioja*; C-487/06 P, *British Aggregates v Commission*.

5 C 487/06 P, *British Aggregates v Commission*; C- 279/08P, *Commission v Netherlands*; C-106/09 P, *Commission v Gibraltar*.

vestor confidence in the sector. Additionally, in its Communication of 6 June 2012 to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, the Commission expressly renounces policies that hinder investment in renewables and continue to subsidize fossil fuels, which should be phased out.

On the basis of the abovementioned argumentation and the respective substantiated legal evaluation of the contested national legislative provisions falling under the definition of State aid within the meaning of Art. 107(1) TFEU, complaints have already been lodged with the Commission both with DG Comp and with DG Energy. At the same time considerable legal actions take place in other Member States and in particular in Spain, Czech Republic, France, Belgium and Italy where similar retroactive measures have been implemented too in the RES sector.

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Portugal

The Journal of Madeira Case and the Apparent Inability of Public Financial Support in Outermost Regions to Affect Trade Between Member States

I. The Journal of Madeira Case

The Autonomous Region of Madeira, a region with large political and administrative autonomy from the Portuguese central government, financed Empresa Jornal da Madeira (EJM), namely through shareholder loans and subsidies, from 1993 to 1995 and from 2000 to 2012, around € 45,000,000. The EJM is a newspaper controlled by the Regional Government of Madeira. In 2009 through the public reports of the Madeira Regional Section of the National Court of Auditors, the Portuguese Competition Authority became aware of the financial flows from the Region's direct administrative authorities to the EJM and advised the Regional Government of Madeira to notify the European Commission as State aid measures could be involved. At the same time, the Portuguese Media Regulator assessed the financing of EJM in the light of pluralism values. Two years later, in 2011, one of the regional newspapers, direct competitor of EJM, the Diário de Notícias-Madeira, lodged a complaint with the European Commission invoking the same facts.

II. First Recommendation of the Portuguese Competition Authority in State Aid Matters

On 29 July 2009, the Portuguese Competition Authority (PCA) issued its first recommendation in State aid matters, advising the Autonomous Region of Madeira to notify the Commission of the financial support granted to EJM. In fact, under the Portuguese Competition Act, the PCA doesn't have decisional powers, it can only adopt recommendations.[1]

According to the PCA in the Journal of Madeira case, State resources may have been involved. In other words, 75 % of the financial flows from the Region's direct administrative authorities to media organizations was granted to EJM; with this support, EJM could distort competition, namely practicing predatory prices in sales of advertising space. In addition, the PCA pointed out that the beneficiary – EJM – carried out economic activities (and therefore was an undertaking); the funds provided constituted economic advantages (that EJM would not receive under normal market conditions); the beneficiary of the selective measure could compete with other newspapers, so the financing was likely to distort competition and might have had some effect on intra-community trade, since newspaper publishing was as an economic activity open to competition and trade between Member States. To support its conclusion, the PCA invoked the Vademecum Community Law on State Aid from 30 September 2008,[2] sustaining that it was enough that the aid had a potential effect on competition and trade between Member States. According to PCA it could be shown that the beneficiary was involved in an economic activity and that it operated in a market in which there was trade between Member States.

The Council of the PCA concluded advising the Regional Government of Madeira to notify the Commission of the measures concerning EJM and to follow a set of principles to avoid undue distortion of competition.

1 Recommendation 1/2009, available on the Internet at the website of the Portuguese Competition Authotity and via the following link: http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Recomendacoes_e_Pareceres/Documents/recomendacao2009_01.pdf.

2 Available via the following link: http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf.

III. The Portuguese Media Regulator Decision

On 15 September 2010, the Regulating Board of the Portuguese Media Regulator decided on the consequences of the financial support of EJM to the pluralism and independence of the media.[3] It considered that the support provided, instead of promoting pluralism as alleged by the Regional Government of Madeira, would compromise the survival of the two other regional newspapers, distorting the competition and posing a threat to pluralism. In fact, EJM would not survive without the financial support provided by the regional authorities and the fact that the EJM became a newspaper distributed for free allowed to reduce the price for advertising in that newspaper, affecting the other competitors regional newspapers. The Portuguese Media Regulator urged the Regional Government of Madeira to take the necessary measures to remove the adverse effects resulting from its actions.

IV. The Decision of the European Commission

The owner of the newspaper Diário de Notícias – Madeira submitted a complaint to the European Commission (Commission) on 27 June 2011 against the public funding provided to the Jornal da Madeira. A preliminary assessment made by the Commission, stating that the measure did not constitute a State aid, was issued on 19 August 2011. The complainant disagreed, but the Commission confirmed that assessment, deciding on 7 November 2012 not to raise any objections on the notified measures concerning the financial assistance granted by the Autonomous Region of Madeira to the Empresa do Jornal da Madeira Lda (EJM), through shareholder loans, transfers and direct subsidies. The Commission considered that even if the measure was liable to strengthen the position of its beneficiary on the local market, it was not liable to affect trade between Member States within the meaning of Article 107(1), and therefore the measure did not constitute State aid.[4] That was also the conclusion of the Portuguese authorities, which claimed that any advantage to EJM could not, in any event, affect trade between Member States. In fact, Jornal da Madeira was published only in Portuguese and was distributed free of charge and exclusively to the population resident in the Madeira archipelago. In addition, the Commission considered that the financial support provided to EJM, given the substantial losses suffered by the newspaper over the years, did not enhance the undertaking's ability to compete with other news media, and did not prevent other undertakings from other Member States to operate in that market. Therefore, it decided that the measure was not liable to affect trade between the Member States.

V. Conclusion

The Commission decision in the Journal of Madeira Case raises some interesting questions concerning financial support to undertakings by public entities in Outermost Regions (ORs). In fact, undertakings operating in Madeira find themselves in a territory of Portugal where State aid rules are hard to enforce. Even if the Court had stated that the situation of the ORs were not "objectively different from that of the rest of the community",[5] and were "integral part" of the internal market,[6] since the entry into force of theTFUE, Article 349 has required the Council to adopt measures that, without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies, consider the specificity of those regions, compounded namely by their remoteness, insularity and small size. On the other hand, these special characteristics and constraints of the ORs are also considered by the Commission when assessing the financial support provided by regional entities in the light of State aid rules. The issue is that the application of State aid rules requires that the inter-state trade could be affected and the remoteness and insularity of those overseas regions does not comply easily with that condition. In conclusion, Journal of Madeira Case makes us doubt whether State aid rules are applicable to Outermost Regions, since the remoteness of those overseas regions does not comply easily with the inter-state trade affection condition, necessary to the applicability of those rules.

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3 Decision 5PLU-I2010, available on the Internet at the website of the Portuguese Meida Regulator and via the following link: http://www.dnoticias.pt/sites/default/files/Deliberacao_5PLU-I2010.pdf

4 SA.33243 (12/NN) – Portugal- Jornal da Madeira, Commission Decision of 7.11.2012, JOCE 2013/C 16/01, 19.1.2013. See Letter to the Member State, paras 27, 43-44, available via the following link: *http://ec.europa.eu/competition/state_aid/cases/246068/246068_1382727_135_2.pdf* .

5 Case 58/86, Coopérative agricole d'approvisionnement des Avirons v Receveur des douanes de Saint-Denis and directeur régional des douanes, Réunion. [1987] ECR 1525, para 17.

6 Case 148/77, H. Hansen jun. & O.C. Balle GmbH & Co. v Hauptzollamt de Flensburg, [1978] ECR 1787**,** para. 11.